

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS

SUPERIOR COURT

Docket No. 219-2014-CV-00386

NEW HAMPSHIRE RIGHT TO LIFE

&

JACKIE PELLETIER

v.

NEW HAMPSHIRE DIRECTOR OF CHARITABLE TRUSTS OFFICE

&

NEW HAMPSHIRE ATTORNEY GENERAL'S OFFICE

&

NEW HAMPSHIRE STATE BOARD OF PHARMACY

&

NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES

**RESPONDENTS' RESPONSE TO PETITIONERS' MOTION FOR CLARIFICATION
OF COURT'S MAY 15, 2015 ORDER REGARDING PRODUCTION OF
PHARMACEUTICAL PROTOCOLS**

The Respondents, the New Hampshire Director of Charitable Trusts Office (“DCT”); the New Hampshire Attorney General’s Office (“AGO”); the New Hampshire State Board of Pharmacy (“BOP”); and the New Hampshire Department of Health and Human Services (“DHHS”), by and through counsel, the Office of the Attorney General, file this Response to the Petitioners’ Motion for Clarification of the Court’s May 15, 2015 Order Regarding Production of Pharmaceutical Protocols.

1. The Petitioners, New Hampshire Right to Life (“NHRTL”) and Jackie Pelletier, have brought a Right to Know action, pursuant to RSA 91-A, against the Respondents. Throughout this litigation, the Petitioners have argued that they submitted certain Right to Know requests to the Respondents and that the Respondents’ responses were inadequate, were impermissibly redacted, or otherwise failed to comply with the Right to Know law. The Respondents have argued that they provided all required information and documentation in compliance with the Right to Know law, and that any information that was withheld or redacted is privileged or exempt from disclosure.

2. Subsequent to the filing of the Petition, the Court requested that the Respondents submit various documents and materials for *in camera* review. See Court’s Orders (Mangones, J.) dated 3/1/15, pg. 3 and 3/27/15, pg. 2. To comply with the Court’s Orders, the Respondents submitted the requested materials.

3. In an Order dated May 15, 2015, the Court (Mangones, J.) upheld most of the Respondents’ redactions and withholdings. However, the Court did find that certain documents were to be disclosed in fully or partially unredacted form. See Court’s Order (Mangones, J.) dated 5/15/15, pg. 35. As such, on June 3, 2015, the Respondents complied with the Court’s Order and produced all documents referenced in the Order to the Petitioners. See Attachment A. Specific to the pending Motion, the Respondents produced “[c]opies of the clinics’ pharmaceutical protocols approved by BOP in accord with RSA 318:42, VII” in unredacted form (P3-7, P10-11, P13-14, P19, P21-22, P24, P28-29, P65). See id.

4. After receiving the documents, the Petitioners’ counsel contacted the Respondents’ counsel inquiring as to the whereabouts of other pharmaceutical protocols, as they had not been included in the packet of documents. Specifically, the Petitioners’ counsel sought

the unredacted version of Planned Parenthood of Northern New England's ("PPNNE") September 14, 2012 pharmaceutical protocols ("2012 protocols").

5. In subsequent emails and conversations between counsel on June 3-4, 2015, the Respondents' counsel stated that PPNNE's 2012 protocols had not been produced because they were not included in the Petitioners' original October 11, 2014 RSA 91-A request and thus, were not part of this litigation. See Attachment B (October 11, 2014 Right to Know Request Email from Attorney Tierney to DHHS requesting "a copy of Planned Parenthood's most recently approved written protocol required by RSA 318:42(VII)(a)"). Additionally, the Court had not reviewed the 2012 protocols *in camera*, nor had it ordered that they be produced. See Court's Order (Mangones, J.), dated 5/15/15, pg. 35.

6. The Petitioners now contend that the 2012 protocols should be disclosed and have filed this Motion for Clarification requesting that the Court clarify its May 15, 2015 Order to include the 2012 protocols. The Petitioners argue that since redacted versions of the 2012 protocols have been submitted to the Court as attachments to pleadings, that the Court can and should order that they now be disclosed.

7. It is the Respondents' position that the 2012 protocols were not part of this litigation, nor were they part of the Court's Order. While the Petitioners attached the 2012 protocols, in redacted form, as Exhibit G to their Verified Petition, it was the Respondents' understanding that the 2012 protocols were attached in error—given that the documents were not part of the Respondents' response to the Petitioners' October 11, 2014 RSA 91-A request. See Attachment C (Email and Attachments from Attorney General's Office to Attorney Tierney in response to October 11, 2014 Right to Know Request). In fact, the Respondents noted this error in their Answer, see Respondents' Answer, ¶ 51, and counsel for the Petitioners noted this in a

subsequent email. See Petitioners’ Motion for Clarification, Exhibit A (noting that the Petitioners provided the Respondents’ response to the Petitioners’ most recent request (the 2013 protocols) at the January 15, 2015 hearing and the parties agreed that there was no need to amend the Verified Petition).

8. In addition, while it is true that the Respondents referenced the 2012 protocols in their Trial Brief—and attached the 2012 protocols, in redacted form, as Exhibit I to their Trial Brief—when they did so, they were simply explaining what had been done before, for purposes of background information, when a similar Right to Know request had been made. The Respondents were not referencing the 2012 protocols as something that had been properly withheld or redacted in this litigation, as they had never been requested or produced.

9. Subsequently, when the Court, in its March 1, 2015 Order, ordered that the “State shall provide the Court with complete and unredacted versions of the materials that have been previously furnished to the Court,” see Court’s Order (Mangones, J.), dated 3/1/15, pg. 3, the Respondents did not include the 2012 protocols in their March 13, 2015 submission. This was because the 2012 protocols had not previously been produced (in redacted form) to the Petitioners as part of their most recent Right to Know request and were not the subject of this litigation. Essentially, even though the 2012 protocols had been submitted to the Court as attachments to pleadings, the Respondents do not believe the 2012 protocols are a part of the instant litigation.

10. Additionally, in the Respondents’ April 17, 2015 response to the Court’s March 27, 2015 Interim Order requesting further documents for *in camera* review, the Respondents did not include the 2012 protocols, as again, the Respondents believed they were not part of this

litigation because they had never previously been produced to the Petitioners in this Right to Know request.

11. While the Court's most recent Order states that "[c]opies of the clinics' pharmaceutical protocols approved by BOP in accord with RSA 318:42, VII must be produced unredacted," the Order only references those protocols that it reviewed *in camera*, which does not include the 2012 protocols, for the reasons described above.

12. In sum, the Petitioners are seeking documents that were not part of this litigation, and therefore, their request for the 2012 protocols should be denied.

13. To the extent that the Court finds that the 2012 protocols are part of the instant litigation, the Respondents contend that further review by the Court is necessary prior to any disclosure. In fact, because the 2012 protocols are not duplicate documents to the 2013 protocols (which the Court reviewed *in camera* and ordered to be disclosed), the Court, upon further review, may determine that they are not disclosable or that certain information should be redacted. As such, the Respondents respectfully request that the Court conduct an *in camera* review of the 2012 protocols prior to clarifying its Order or ordering their production.

WHEREFORE, the Respondents respectfully request that this Honorable Court:

- (A) Deny the Petitioners' Motion to Clarify; or, in the alternative,
- (B) Conduct an *in camera* review of the 2012 protocols; and
- (C) Grant such further relief as may be deemed just and proper.

Respectfully Submitted,

NEW HAMPSHIRE ATTORNEY GENERAL'S
OFFICE

NEW HAMPSHIRE STATE BOARD OF
PHARMACY

NEW HAMPSHIRE DEPARTMENT OF
HEALTH AND HUMAN SERVICES

NEW HAMPSHIRE DIRECTOR OF
CHARITABLE TRUSTS OFFICE

By their attorney,

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June 12, 2015

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response was mailed this day, postage prepaid, to Michael J. Tierney, Esquire, counsel of record.

Megan A. Yaple