

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Case Type: Criminal

State of Minnesota,

Plaintiff,

vs.

**STATE'S RESPONSE TO
DEFENDANT THAO'S MOTION TO
COMPEL DISCOVERY AND
IN CAMERA REVIEW**

Derek Michael Chauvin,

Court File No.: 27-CR-20-12646

J. Alexander Kueng,

Court File No.: 27-CR-20-12953

Thomas Kiernan Lane,

Court File No.: 27-CR-20-12951

Tou Thao,

Court File No.: 27-CR-20-12949

Defendants.

TO: The Honorable Peter A. Cahill, Judge of District Court, and counsel for Defendants, Eric J. Nelson, Halberg Criminal Defense, 7900 Xerxes Avenue South, Suite 1700, Bloomington, MN 55431; Robert Paule, 920 Second Avenue South, Suite 975, Minneapolis, MN 55402; Earl Gray, 1st Bank Building, 332 Minnesota Street, Suite W1610, St. Paul, MN 55101; Thomas Plunkett, U.S. Bank Center, 101 East Fifth Street, Suite 1500, St. Paul, MN 55101.

INTRODUCTION

The State of Minnesota submits this memorandum in response to Defendant Thao's motion for the Court to conduct in camera review of employment records of Hennepin Healthcare employees who were disciplined for looking at a patient's medical records without authorization. The Court can dismiss the motion based on the Affidavit of the Hennepin Healthcare Health Information Management Operations Manager which establishes that none of the employees made any changes to the patient's medical records.

STATEMENT OF FACTS

Defendant Thao and his three co-defendants are charged with one count of felony murder and one count of manslaughter for the death of George Floyd while in police custody on May 25, 2020. An ambulance transported Mr. Floyd to Hennepin County Medical Center where he was formally pronounced dead. As part of the investigation of this matter, the Bureau of Criminal Apprehension (BCA) obtained a copy of Mr. Floyd's medical records on May 29, 2020. To be sure all the records had made it to the file, the BCA again requested a complete set of Mr. Floyd's medical records, which were produced by Hennepin Healthcare on November 13, 2020.

Defendant Thao has now filed a motion to compel the State to disclose records related to the discipline of Hennepin Healthcare employees who inappropriately accessed a patient's medical records. Notice of Motion And Motion To Compel Discovery and Requesting An In-Camera Review 1-2. The motion is based on two news articles regarding the discipline of five Hennepin Healthcare employees for looking at a patient's medical file without authorization. One article indicates the news organization obtained the letters to the employees notifying them of their termination through a public records request.¹ There is also information in the articles suggesting that George Floyd is the patient whose records were improperly accessed by the employees.

Thao's motion asks the court to compel the State to produce five categories of records:

1. A list of all Hennepin County employees who accessed Mr. Floyd's medical records from the date of his death to present.
2. A list of all Hennepin County Employees who were informally reprimanded, formally reprimanded, or fired for accessing Mr. Floyd's medical records.

¹ The names of the employees may not be public information at this time. *See* Minn. Stat. § 13.43, subds. 2(a)(5), 2(b).

3. An electronic log of all access times and edits to Mr. Floyd's medical records from his date of death to present.
4. Electronic copies of what edits and changes – if any – were made to Mr. Floyd's medical records from the date of his death to present.
5. Any and all other information in the possession of the Hennepin County Attorney's Office and the Attorney General's office that relates to the internal investigation of the tampering of Mr. Floyd's medical records.

Motion to Compel 2. Thao asks that the Court first conduct an in camera review of the records.

In response to this motion, the Health Information Management Operations Manager (HIM Operations Manager) at Hennepin Healthcare System obtained from their legal team the names of the individuals known to have improperly accessed Mr. Floyd's medical records between June 25, 2020 and January 25, 2021. *See* Affidavit, ¶ 1, 6, submitted with this memorandum. The HIM Operations Manager then performed an audit of Mr. Floyd's medical records and was able to determine that none of those individuals made any changes to Mr. Floyd's medical records. Affidavit, ¶ 4, 5, 7.

ARGUMENT

Defendant Has Not Made A Plausible Showing That The Requested Discovery Would Be Material And Favorable To His Defense.

The State appreciates Thao's concern about any improper changes to Mr. Floyd's medical records through unauthorized access. In response to Thao's motion, the HIM Operations Manager of Hennepin Healthcare has attested that through an audit of the records system they have determined that none of the disciplined employees made changes to Mr. Floyd's medical records. Accordingly, there is no plausible showing that the requested in camera review would produce material evidence and therefore there is an insufficient basis for this Court to conduct an in camera review of the employment records.

Having a district court review confidential records, like medical and employment records, is not a right. *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992) (medical records); *State v. Brandrup*, No. A12-1255, 2013 WL 3779165, *5 (Minn. Ct. App. July 22, 2013 (employment records)). Rather, to have a court conduct in camera review of confidential records, a defendant must make a plausible showing that the records are reasonably likely to contain information that is both material and favorable to his defense. *Hummel*, 483 N.W.2d at 72. Here, Defendant Thao has not made such a showing.

Defendant Thao asserts that his motion is necessary to confirm that Mr. Floyd's "medical records are accurate and have not been tampered, altered, or looked at by any Hennepin County employees or witnesses." Motion to Compel 1-2. Thao's motion raises an understandable concern about improper access to Mr. Floyd's medical records by those employees. Fortunately, the HIM Operations Manager's affidavit establishes that those employees did not make any changes or alterations to Mr. Floyd's medical records.²

In addition, strictly speaking, Thao has not made a showing that there is reason to question the accuracy of the records provided by Hennepin Healthcare. The articles only indicate that the employees looked at the records improperly. Thao is in possession of copies of the medical records obtained in May and November of 2020 and has not pointed to any anomalies in the records suggesting improper alteration.

Further, a list of Hennepin County employees who accessed the medical records is not likely to produce admissible evidence. There would be many Hennepin County employees who

² Thao has not demonstrated how the fact that the employees improperly accessed, but did not change, the records would be admissible at trial if one of the employees were to be a witness at trial. To the extent the Court is concerned about that, the Court could order in camera review of the employees' names and compare them against the witness lists to be filed by the parties.

would have entirely legitimate reasons for accessing the medical records. Providing their names and the times they accessed the records would not provide this Court with information about whether they did so for legitimate reasons. It would be quite burdensome for this Court to have to look through a list of access times and additions or changes to the medical records without knowing whether they are legitimate.

Finally, for these same reasons the Court should deny the request for in camera review of any information in the possession of the Attorney General's Office or the Hennepin County Attorney's Office regarding an "internal investigation of the tampering of Mr. Floyd's medical records." Motion to Compel, 2. There is no evidence of tampering.

CONCLUSION

For all the foregoing reasons, the Sate respectfully requests that the Court deny Defendant Thao's Motion to Compel Discovery And In Camera Review in all respects.

Dated: January 29, 2021

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

/s/ Matthew Frank
MATTHEW FRANK
Assistant Attorney General
Atty. Reg. No. 021940X

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1448 (Voice)
(651) 297-4348 (Fax)
matthew.frank@ag.state.mn.us

ATTORNEYS FOR PLAINTIFF