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IN THE SUPREME COURT OF THE STATE OF ALASKA

IN THE MATTER OF )  
A REQUEST FOR INFORMATION )

RECEIVED SEP 21 2017

) Supreme Court No. S-16812  
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)

Trial Court No. 3AN-16-00695DN

RESPONSE TO ORIGINAL APPLICATION REQUESTING ACCESS TO  
CONFIDENTIAL COURT FILES

The authorizing statute for the Public Defender Agency (“Agency”), AS 18.85.100, does not authorize the Agency to provide representation regarding Dr. Gøtzsche’s request for disclosure of confidential court files. The Agency cannot take a formal position regarding disclosure because the Agency does not know whether it currently represents any of the respondents and does not know their position regarding disclosure. The Agency provides this limited response regarding process and the Agency’s role in this controversy.

PROCEDURAL HISTORY

In June 2016, Mr. Gottstein requested that Dr. Gøtzsche be afforded access to confidential civil commitment court files.<sup>1</sup> The Alaska Psychiatric Institute (API) objected.<sup>2</sup> At the time, the Agency did not provide a response but was aware of the request and the government’s objections. The trial court did not appoint the Agency to address the issue on behalf of the affected respondents.

<sup>1</sup> Letter from James Gottstein to Presiding Judge Morse (June 20, 2016) (Attachment A to Original Application, S-16812).

<sup>2</sup> Letter from Steven Bookman to Presiding Judge Morse (June 30, 2016) (Attachment B to Original Application, S-16812).

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2 ARGUMENT

3 I. Service on the Public Defender Agency does not constitute service on  
4 respondents.

5 Mr. Gottstein asserts in his July 6, 2017 letter that service of the request for  
6 files on the Public Defender Agency would suffice to meet the requirements of  
7 Administrative Rule 37.7.<sup>3</sup> This is incorrect. The respondents affected by the  
8 request for confidential court files are unidentified and unknown to the Agency. The  
9 rule provides that a party is entitled to service of the request for a confidential court  
10 file.<sup>4</sup> Service on the Agency does not constitute service on the respondents. Notice  
11 must be provided to each affected respondent. If the respondent has a legal  
12 guardian, that individual is also entitled to notice.<sup>5</sup>

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14 The Agency also does not know if any of the affected respondents are  
15 current or prior clients of the Agency. When the court grants an ex parte order for  
16 hospitalization for evaluation, the Agency is automatically appointed to represent  
17 the respondent.<sup>6</sup> However, the Agency must still ascertain whether a conflict

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20 <sup>3</sup> Letter from James Gottstein to Presiding Judge Morse at 2-3 (July 6, 2017)  
21 (Attachment C to Original Application, S-16812).

22 <sup>4</sup> Alaska R. Admin. P. 37.7(b):

23 **(b) Procedure.** Any request to allow access must be made in writing  
24 to the court and served on all parties to the case unless otherwise  
25 ordered. The court shall also require service on other individuals or  
26 entities that could be affected by disclosure of the information. A  
27 request to allow access, the response to such a request, and the  
28 order ruling on such a request must be written in a manner that does  
not disclose non-public information, are public records, and shall not  
themselves be sealed or made confidential.

<sup>5</sup> See *id.*

<sup>6</sup> Paragraph 9 of the court's standard order for hospitalization states: "The  
Public Defender Agency is appointed counsel for the respondent in this

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necessitates that counsel be provided by the Office of Public Advocacy. Although initially appointed, the Agency might not have represented a respondent at a hearing addressing involuntary medication. When a respondent is either released or agrees to voluntary treatment, the case is automatically considered dismissed.<sup>7</sup> The Agency treats its appointment as ended when the case is dismissed.

It is possible, though unlikely, that some of the affected respondents have open cases at the Agency. The Alaska Psychiatric Institute is an acute care facility and respondents are generally admitted for short stays. For example, in fiscal year 2015 the average adult length of stay was 13 days.<sup>8</sup> Given the passage of time, most of the respondents affected by the request for files are likely to have been discharged and are therefore are no longer represented by counsel. For this reason as well, service on the Agency cannot constitute notice to respondents.

II. The Public Defender Agency is not authorized to provide representation for respondents in closed cases regarding the disclosure of civil commitment files and representation may be precluded by rules of professional conduct.

Representation of respondents in a controversy involving access to their closed files does not fall within the scope of statutorily required representation for

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proceeding. Counsel is authorized access to medical or psychological records maintained on the respondent at the evaluation facility.” Order Authorizing Hospitalization for Evaluation, MC-305 (5/16).

<sup>7</sup> Order, Establishing Procedures for Mental Commitment Cases at 4 (December 2012) (First District, Order No. 12-03; Second District Order No. 12-02; Third District, Order No. 12-19; Fourth District, Order No. 12-26) (“Upon receipt of either [notice of release or notice of voluntary admission], the case is automatically considered dismissed and the regional probate court shall close its case file.”).

<sup>8</sup> Public Consulting Group, Inc., Feasibility Study of the Privatization of the Alaska Psychiatric Institute at 33 (February 23, 2017), *available at* [http://dhss.alaska.gov/HealthyAlaska/Documents/Initiatives/API%20Privatization%20Feasibility%20Report\\_Jan%2026%202017.pdf](http://dhss.alaska.gov/HealthyAlaska/Documents/Initiatives/API%20Privatization%20Feasibility%20Report_Jan%2026%202017.pdf) (last accessed Sept. 20, 2017).

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indigent persons. Alaska Statute 18.85.100 provides authority for the Agency to represent clients in specified case types.<sup>9</sup> In regard to mental health matters, public counsel is provided for indigent persons “against whom commitment proceedings for mental illness have been initiated...”<sup>10</sup> The court can appoint counsel only when it is “clearly authorized by law or rule” and the individual is “financially eligible for an appointment at public expense.”<sup>11</sup>

Dr. Gøtzsche has requested access to court files with an existing judicial decision regarding an involuntary medication petition. Representation of respondents regarding this controversy is beyond the scope of representation in commitment matters authorized by AS 18.85.100. Representation in commitment matters involves representing the respondent regarding petitions for involuntary commitment and for court-ordered administration of psychotropic medication.<sup>12</sup> Although related, the separate case filed on behalf of Dr. Gøtzsche is not part of the underlying commitment proceedings. If the court determines that indigent

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<sup>9</sup> The Agency provides representation in the following types of cases: 1) criminal (including parole, probation and post-conviction matters), 2) delinquency, 3) child in need of aid, 4) commitment, 5) certain public health cases. Representation is also authorized for witnesses who assert or may assert a right to refuse to testify based on a privilege against self-incrimination. Representation in the absence of appointment can be provided at public expense for parents, adoptive parents and guardians at a temporary custody hearing in a child in need of aid case.

<sup>10</sup> AS 18.85.100(a).

<sup>11</sup> Alaska R. Admin. P. 12(a).

<sup>12</sup> Statutes governing commitment and court-ordered administration of medication are found at AS 47.30.700 *et seq.*

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2 respondents are entitled to counsel in this controversy, appointment should be  
3 made pursuant to Administrative Rule 12(e).<sup>13</sup>

4 Conflicts pose another possible barrier to representation by the Agency. If  
5 the Agency were to be re-appointed, the Agency would need to undertake a new  
6 conflict analysis for each client. If some clients favored release of the court file and  
7 others did not, adversity would preclude concurrent representation.<sup>14</sup> In addition,  
8 because this controversy is substantially related to the underlying commitment  
9 matters the Agency would also be precluded from representing anyone unless all  
10 respondents took the same position regarding disclosure.<sup>15</sup> Finally, the research  
11 project would necessarily entail an examination of the advocacy afforded  
12 respondents in the medication hearings. Although the Agency has no objection to  
13 an independent review of cases, a respondent might reasonably be concerned that  
14 the Agency would be unable to provide unbiased advice about the pros and cons of  
15 allowing access to the court file.<sup>16</sup>

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21 <sup>13</sup> Appointment at public expense for indigent persons required but not  
22 otherwise authorized by AS 18.85.100 or AS 44.21.410 (Office of Public Advocacy)  
23 are governed by Alaska R. Admin. P. 12(e).

24 <sup>14</sup> Alaska R. Prof. Conduct 1.7(a)(1) (lawyer shall not represent clients who are  
25 directly adverse).

26 <sup>15</sup> See Alaska R. Prof. Conduct 1.9(a) (unless the lawyer obtains consent from  
27 the former client in writing, a lawyer shall not represent a person in the same or  
28 substantially related matter if that person's interests are materially adverse to the  
interests of the former client).

<sup>16</sup> Alaska R. Prof. Conduct 1.7(a)(2) precludes representation when the  
attorney's representation is impacted by a personal interest. The commentary  
notes the potential for conflict when "the probity of the lawyer's own conduct in a  
transaction is in serious question, it may be difficult or impossible for the lawyer to  
give a client detached advice." The research project arguably encompasses the

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CONCLUSION

Respondents are entitled to notice of Dr. Gøtzsche's request to review confidential commitment files. The Agency takes no position on the merits of the request to access these files for the purpose of research. The Agency will advise existing clients if identified. However, if files are requested in closed matters where the Agency appointment has ended, AS 18.85.100 does not authorize the appointment of the Agency to provide representation in this controversy.

DATED at Anchorage, Alaska this 26 day of September, 2017.

PUBLIC DEFENDER AGENCY

By:   
LINDA R. BEECHER (8606041)  
ASSISTANT PUBLIC DEFENDER

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question of whether respondents received adequate representation from Agency attorneys in involuntary medication hearings.

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CERTIFICATE OF SERVICE

VRA AND APP. R. 513.5 CERTIFICATION  
I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513, that the font used in this document is Arial 12.5 point.

Ross T. Klein certifies that: I am a Paralegal employed by the Alaska Public Defender Agency, 900 West 5<sup>th</sup> Avenue, Suite 200, Anchorage, Alaska 99501. On **September 20, 2017**, I mailed a copy of the **Response to Original Application Requesting Access to Confidential Court Files** to:

James B. Gottstein  
Law Offices of James B. Gottstein  
406 G St. Ste. 206  
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Steven Bookman  
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I further certify, pursuant to Appellate Rule 513.5 that the font used in the attached document is Arial 12.5 point.

  
\_\_\_\_\_  
Ross T. Klein  
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