

IN THE SUPREME COURT OF THE STATE OF ALASKA

In the Matter of
a Request for Information,

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Supreme Court No. S-16812

Trial Court No. 3AN-16-00695 DN

STATE OF ALASKA’S RESPONSE TO ORIGINAL
APPLICATION FOR RELIEF

The State of Alaska Department of Health and Social Services, Division of Behavioral Health opposes Dr. Peter Gotszche’s original application for relief. Dr. Gotszche requests access to the case records from 30 consecutive cases in which a petition for court approval of administration of psychotropic medication was filed. But Dr. Gotszche is not entitled to access these records because he has not followed the proper procedure to obtain access to non-public court records: he has not served the individuals who were parties in these cases, nor has he sought a court order waiving the service requirement.¹ It should be up to the parties to these cases—whose sensitive personal information is described in these case records—to decide whether they wish to allow Mr. Gottstein and Dr. Gotszche access to their confidential information.

Even if Dr. Gotszche does serve the individual parties to these cases, he should not be allowed access to records from a psychotropic medication case unless he obtains the

¹ Alaska Court System Admin. R. 37.7(b) (“Any request to allow access must be made in writing to the court and served on all parties to the case unless otherwise ordered. The court shall also require service on other individuals or entities that could be affected by disclosure of the information.”).

consent of the individual party to that case.² The party's interest in preventing dissemination of his or her personal medical information, even to a small group of people, outweighs Dr. Gotzsche's interest in performing social science research using people's personal information without their consent. Presumably there are some people who were parties to psychotropic medication cases who would consent to the use of their confidential medical information for research purposes; for that reason, there is little justification to allow researchers access to the confidential information of people who do not consent or who have not even been asked.

I. Dr. Gotzsche may not access non-public case records unless he serves the parties to those cases.

The records created in the course of adjudicating mental commitments and administration of psychotropic medication are confidential,³ and thus are not accessible to the public.⁴ Although access to non-public court records may be authorized upon request, “[a]ny request to allow access must be made in writing to the court and served on all parties to the case unless otherwise ordered.”⁵ Dr. Gotzsche has served only the Public Defender Agency, which may not currently represent any of these individuals.

Although the confidentiality rules for these cases make it impossible for Dr. Gotzsche to personally identify the individuals he must serve, there probably is a way

² The Division of Behavioral Health consents to Dr. Gotzsche's access to the records from a given case only if the individual party respondent in that case consents.

³ AS 47.30.845.

⁴ Alaska Court System Admin. R. 37.5(e)(1)(C).

⁵ Alaska Court System Admin. R. 37.7(b).

to ensure that these individuals are made aware of this records request and have an opportunity to respond. The Court System might arrange for service of Dr. Gotzsche's request on these individuals or order the attorneys who represented these individuals in mental commitment proceedings to arrange for service. But unless and until they are served with Dr. Gotzsche's request, and allowed the opportunity to decide whether they wish Dr. Gotzsche to have access to their confidential case records, the Court should not allow access.

II. Dr. Gotzsche should not be given access to confidential case records unless he obtains the parties' consent.

The Court should not allow Dr. Gotzsche access to confidential case records from a psychotropic medication case unless the individual party to that case consents. The Court may allow access to non-public case records only if it "finds that the requestor's interest in disclosure outweighs the potential harm to the person or interests being protected."⁶ Among the factors the Court must consider are the "risk of injury to individuals" and "individual privacy rights and interests."⁷

An individual has a strong interest in protecting sensitive personal information from disclosure.⁸ Case files for medication hearings contain information about patients' medical histories, symptoms, psychological diagnoses, and treatment regimes. The illnesses that these patients suffer from sometimes generate public stigma, and the evidence in commitment and medication proceedings often includes details that people

⁶ Alaska Court System Admin. R. 37.7(a).

⁷ *Id.*

⁸ *Falcon v. Alaska Public Offices Commission*, 670 P.2d 469, 480 (Alaska 1977).

would not want others to know about. For these reasons, case records from mental commitment and medication cases are entitled to the highest protection.

Although these privacy concerns can be reduced somewhat by redacting names from the records, as a practical matter it is difficult to redact names from audio files, which Dr. Gotzsche has requested and which contain the bulk of the information presented in these cases. And even if names are redacted, some case records may contain other information that could be used to identify particular individuals. Thus the risk of disclosing individuals' sensitive medical information cannot be easily eliminated. And although Dr. Gotzsche proposes that the information be distributed to only a handful of people, the attorney who has made the request on his behalf has previously publicly disclosed confidential information subject to a court's protective order.⁹ Because the Court cannot grant Dr. Gotzsche's request to access these case records without completely eliminating the risk of disclosing the parties' sensitive personal information, the Court should allow access to these case records only if the individual party consents.

The burden on Dr. Gotzsche of having to obtain consent to access the records of medication cases is not great. Presumably some individuals will consent if they find the research proposal worthwhile and are satisfied by Dr. Gotzsche's promise to report the results in a way that protects confidentiality. Because Dr. Gotzsche has not indicated that any particular case is valuable to him, his research will not suffer from being limited to those cases in which a party consents to the use of their information. For these reasons,

⁹ *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 392-93 (E.D.N.Y. 2007).

Dr. Gotzsche's interest in accessing and using confidential court records containing individuals' sensitive medical information—without their consent—does not outweigh those individuals' privacy interest in keeping that information private.

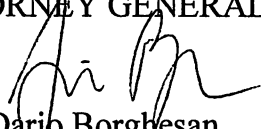
III. Conclusion.

For these reasons, this Court should not grant Dr. Gotzsche's request for access to the requested records. Instead, the Court should instruct Dr. Gotzsche on how he may serve the individual parties whose case records he has requested.

Dated September 20, 2017.

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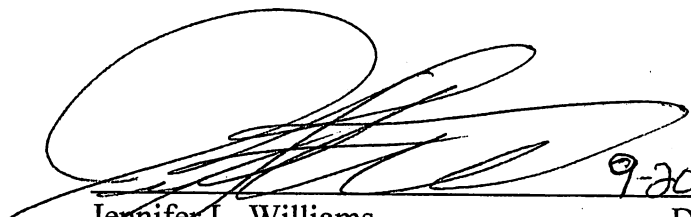
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CERTIFICATE OF SERVICE

I hereby certify that on this date, I served, by first class mail, a true and correct copy of the *State of Alaska's Response to Original Application for Relief, Superseding Entry of Appearance*, and this *Certificate of Service* in this proceeding on the following

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