



THE STATE
of **ALASKA**
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June 30, 2016

Presiding Judge Morse
Nesbett Courthouse
825 W 4th Ave., Rm 601
Anchorage, Alaska 99501



Re: Response to Alaska Administrative Rule 37.7 Research Request

Dear Presiding Judge Morse:

The court should deny James B. Gottstein's request for access to 30 consecutive non-public court files, beginning January 1, 2016, in which a petition for court approval of administration of psychotropic medication was filed. Mr. Gottstein requests these files so that he can hand them over to Dr. Peter C. Gøtzsche, who wishes to independently assess the court's findings in the 30 case files requested and compare and contrast those findings with analogous cases on court ordered medication in Denmark. The court should deny Mr. Gottstein's request because his interest in disclosure does not outweigh the potential harm to the persons or interests protected by keeping the files undisclosed.

First, the court should deny Mr. Gottstein's request for access because allowing him access to 30 consecutive court files **is not in Mr. Gottstein's own interest**. Second, the court should deny Mr. Gottstein's request because **Mr. Gottstein has a propensity to illegally disseminate confidential information**. Allowing Mr. Gottstein access to the files would potentially harm 30 people by violating their right to privacy. Third, the court should deny Mr. Gottstein's request because his interest in disclosure does not outweigh the State of Alaska's interest in avoiding excessive administrative burden on its court system. Fourth, the court should deny Mr. Gottstein's request because **Dr. Gøtzsche does not need the files to answer his research questions**. Fifth, the court should deny his request because he **did not serve his request on all the parties who must be served under Alaska Administrative Rule 37.7(b)**.

Discussion

By order, the court may allow access to non-public information in a case or administrative record if it finds that the requestor's interest in disclosure outweighs the potential harm to the person or interests being protected, including but not limited to:

- (1) risk of injury to individuals;
- (2) individual privacy rights and interests;
- (3) proprietary business information;
- (4) the deliberative process; or
- (5) public safety.¹

Non-public information includes information designated as confidential or sealed by statute or court rule and public information to which Administrative Rule 37.6 limits access.² Any person may make a request to allow access or the court may move itself to allow access.³

Procedurally, any request to allow access must be made in writing to the court and served on all parties to the case unless otherwise ordered.⁴ The court also requires service on other individuals or entities that could be affected by disclosure of the information.⁵

The court files that Mr. Gottstein requests contain confidential records. Information and records obtained in the course of a screening investigation, evaluation, examination, or treatment are confidential and are not public records, except as the requirements of a hearing under AS 47.30.660 – 47.30.915 may necessitate a different procedure.⁶ Court files for medication hearings contain information and records obtained in the course of screening, evaluation, examination and treatment, such as patients' names and addresses, their medical and psychiatric diagnoses, and their treatment histories. Psychiatrist testimony regularly concerns the medicines that respondents have taken and the treatments they have received. Moreover, the court files usually describe any relevant diseases and symptoms from which respondents suffer. Some of this

¹ Alaska R. of Admin. 37.7(a).

² *Id.*

³ *Id.*

⁴ Alaska R. of Admin. 37.7(b).

⁵ *Id.*

⁶ Alaska Statute 47.30.845

information originates in the petitions for the administration of medication, but **much of it derives from confidential, non-public medical records.** Thus, the information and records to which Mr. Gottstein requests access are confidential. The court will not disclose that information to Mr. Gottstein if it finds that his interest in the information's disclosure does not outweigh the potential harm to a person or interests protected by keeping the information undisclosed.⁷

- 1. Mr. Gottstein's interest in disclosure of the information does not outweigh the persons or interests being protected because he has no interest in disclosure of the information.**

Alaska Administrative Rule 37.7(a) requires the court to balance the interest in disclosure against the potential harm to a protected person or interests. The relevant interest in disclosure is the interest of the requestor. In this case, **the requestor is Mr. Gottstein** and the protected persons are the respondents in the hearings for the court ordered administration of psychotropic medication.

Mr. Gottstein's interest in disclosure of the information cannot possibly outweigh the potential harm to the persons and interests being protected because Mr. Gottstein has no interest in disclosure of the information. Although Mr. Gottstein states that "the requestor's interest" in disclosure of the records "is quite compelling," **he never explains what his own interest in disclosure is or how disclosure could advance his interests.**⁸ Despite stating that "[t]he opportunity to have such an internationally recognized researcher [as Dr. Gøtzsche] analyze the extent to which petitions under AS 47.30.839 comply with the requirements set forth in *Myers* and *Bigley*, and compare them with Danish analogues will be extremely valuable," Mr. Gottstein never explains how his interests could be served by this extremely valuable research. In fact, Mr. Gottstein has no individual interest in the research and his request for access to non-public information should be denied.

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⁷ Alaska R. of Admin 37.7(a).

⁸ Gottstein, Alaska Administrative Rule 37.7 Research Request, June 20, page 2.

2. The Court should deny Mr. Gottstein’s request because his interest in disclosure of the information does not outweigh the potential harm to persons protected.

The court should deny Mr. Gottstein’s request because his interest in disclosure does not outweigh the potential harm to the persons protected. In 2006, Mr. Gottstein carried out a scheme for obtaining and disseminating confidential documents sealed by a protective order in a case in the United States Court for the Eastern District of New York.⁹ The documents originated with Elly Lilly & Co. and concerned the psychotropic medicine Zyprexa, which the company manufactures. Mr. Gottstein learned about the documents from a plaintiff’s witness and **conspired with the witness to subpoena them from the witness and disseminate them widely.**¹⁰ The United States District Court found that Mr. Gottstein knew the documents were confidential and under protective order, and **that they had no relevance to Mr. Gottstein’s Alaska case.**¹¹ The United States District Court found that Mr. Gottstein had deliberately kept the defendant in the dark about the subpoena (to prevent a reply to it) and had immediately sent the confidential documents to a *New York Time*’s reporter and to contacts who immediately published the documents to the internet.¹² In light of these findings, the United States District Court permanently enjoined Mr. Gottstein from disseminating the documents and demanded their return.¹³ On appeal, the Second Circuit affirmed the permanent injunction and held that Mr. Gottstein’s acquiring and disseminating the documents involved his aiding and abetting a violation of the court’s protective order through the use of sham subpoenas.¹⁴

The court should deny Mr. Gottstein’s request because Mr. Gottstein may make confidential information from non-public court files for court ordered administration of psychotropic medicine known to the public. In his appeal, Mr. Gottstein asserted that one of his purposes in disseminating the confidential documents was to “make evidence of suppressed hazards or illegal marketing or other evidence of Zyprexa hazards and Lilly [sic] misconduct known to the public.”¹⁵ This assertion displays Mr. Gottstein’s propensity to make confidential information known to the public.

⁹ *Zyprexa Litig.*, 474 F. Supp. 2d 385, 392 (E.D.N.Y. 2007)

¹⁰ *Id.*

¹¹ *Id.*

¹² *Zyprexa Litig.*, 474 Supp. 2d 385 at 392-93.

¹³ *Zyprexa Litig.*, 474 Supp. 2d 385 at 428.

¹⁴ *Eli Lilly & Co. v. Gottstein.*, 617 F.3d 186, 191 (2d Cir. 2010)

¹⁵ *Eli Lilly & Co. v. Gottstein.*, 617 F.3d at 193.

Mr. Gottstein has said he will redact identifying information from any court files he receives, or that he will instruct Dr. Gøtzsche to do so,¹⁶ but his past behavior shows his predisposition to reveal confidential information. Thus, he is not to be trusted to keep the respondents' personal medical information from reaching third parties. The court should deny his request and protect the privacy rights of the 30 respondents in hearings for the court ordered administration of psychotropic medications.

3. The Court should deny Mr. Gottstein's request because his interest in disclosure does not outweigh the Alaska court system's interest in the efficient administration of its records.

If the court granted Mr. Gottstein's request, it would have to redact the documents before it allowed Mr. Gottstein access to them. Mr. Gottstein cannot be trusted with confidential documents containing the identifying and medical information of respondents. Removing names, addresses, and other identifying information from 30 court files would place a substantial administrative burden on the Alaska court system. Given the court system's recent reduction in court hours and its conscientious use of limited resources, the court should not devote its energies to redacting documents for a research program that can neither benefit it, the State of Alaska, the parties to the cases, nor the requestor of the documents in any way.

4. Mr. Gottstein's interest in disclosure of the information does not outweigh the potential harm to persons or interests protected because Dr. Gøtzsche does not need the 30 court files to answer his research questions.

Dr. Gøtzsche does not need the court files to come to conclusions about the courts' compliance with *Myers* and *Bigley*. In *Myers*, the Supreme Court held that the court can order psychotropic medication only if it finds, by clear and convincing evidence, that the medications are in the respondent's best interest and that no less intrusive treatment is available.¹⁷ In a sworn affidavit, Dr. Gøtzsche states that "administering a psychotropic medication or medications to a patient against his or her will is not in his or her best interest," that this conclusion is "solidly based on scientific facts," and that "there are feasible less intrusive alternatives to administering a psychotropic medication or medications against a patient's will."¹⁸ These statements can be true only if court ordered administration of psychotropic medication is never in a person's best interest and a less

¹⁶ Gottstein, Alaska Administrative Rule 37.7 Research Request, June 20.

¹⁷ *Myers v. Alaska Psychiatric Inst.*, 138 P.3d 238, 239 (Alaska 2006).

¹⁸ Gøtzsche, Affidavit, page 9.

intrusive alternative to court ordered psychotropic medication is always available. Thus, Dr. Gøtzsche has already concluded, with respect to *any* case of court ordered psychotropic medication, that the medications are not in the respondent's best interests and that a less intrusive alternative is available. He has no need for the 30 court files because he has already made up his mind without them.

Dr. Gøtzsche's sworn statements show he already has his answers to the questions posed in his Research Protocol. He has no need of the court files to answer his questions. Mr. Gottstein's interest in the information's disclosure cannot outweigh the potential harm to persons or interests protected by not disclosing the information because Dr. Gøtzsche has no need of the files to answer his questions.

5. The Court should deny Mr. Gottstein's request because he has not served all individuals that could be affected by disclosure of the information with his request for the non-public records.

The court should deny Mr. Gottstein's request for access to non-public information because he has not served his request on all the individuals that could be affected by disclosure of the information. Under Alaska Administrative Rule 37.7(b), the court shall require service on individuals or entities that could be affected by disclosure of the information.¹⁹ In this case, the respondents could be affected by disclosure of this information because the court files Mr. Gottstein requests contain confidential medical information about the respondents that Mr. Gottstein could reveal to third parties. Thus, because he has not served the respondents in the medication hearings, the court should deny his request.

Conclusion

The court should deny Mr. Gottstein's request for access to the 30 consecutive non-public court files because his interest in disclosure does not outweigh the potential harm to the persons or interests being protected. His interest in disclosure does not outweigh the potential harm to the persons or interests being protected because (1) Mr. Gottstein has no interest in disclosure of the documents, (2) Mr. Gottstein's propensity to reveal confidential documents to third parties makes him likely to violate the privacy rights of the respondents in the 30 cases he requests, (3) Mr. Gottstein's interest in the disclosure of the information does not outweigh the Alaska court system's interest in the efficient administration of its records, and (4) Dr. Gøtzsche does not need

¹⁹ Alaska R. of Admin. 37.7(b)

the files to answer his research questions. Finally, (5) Mr. Gottstein's request violates Alaska Administrative Rule 37.7(b) because individuals that could be affected by disclosure of the court files have not been served with Mr. Gottstein's request.

Sincerely,


Douglas Ryan
Legal Intern


Steven Bookman
Assistant Attorney General

cc: James B. Gottstein
Linda Beecher

Enclosures: *Zyprexa Litig.*, 474 F. Supp. 2d 385 (E.D.N.Y. 2007)
Eli Lilly & Co. v. Gottstein., 617 F.3d 186, 191 (2d Cir. 2010)
Affidavit of Peter C. Gotzsche