

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of  
a Request for Information,

CASE NO. 3AN-16-00695 DN

**ORDER**

*Proposed Procedures*

On 4 November 2019 the Court issued the following Order:

On 11 March 2019 Dr. Peter C. Gotzsche moved to amend his request for certain information in pursuit of research. The State of Alaska does not oppose the amendment of the request, but continues to oppose the request. The Motion to Amend is GRANTED.

Gotzsche seeks access to redacted copies of the 30 most recent court files in which there has been a Petition of Court Approval of Administration of Psychotropic Medication pursuant to AS 47.30.939. Gotzsche proposes that the court system provide his counsel, James Gottstein, with complete unredacted files and that Gottstein be tasked with redacting the files to remove all information that would identify the subject of the petition.

Gotzsche wants to compare the 30 cases with 30 cases from Denmark. He wants to determine if

1. the petitions comply with the requirements of *Bigley [v. Alaska Psychiatric Institute]*<sup>1</sup> in Alaska and Danish requirements in Denmark;

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<sup>1</sup> 208 P.3d 168 (Alaska 2009).

2. information is provided that documents that the patient cannot provide informed consent;

3. information about the psychiatric drugs the patient takes or will be forced to take is accurate;

4. a less intrusive alternative is available;

5. the combination of drugs the patient takes is safe;

6. arguments for using force are reasonable and documented;

7. the patients' rights have been respected; and

8. there are striking similarities from case to case considering that patients are different.<sup>2</sup>

Information and records generated in the course of a petition for court-ordered administration of medication are "confidential and are not public records."<sup>3</sup> However, the records may be copied and disclosed to

(3) a person authorized by a court order;

(4) a person doing research or maintaining health statistics if the anonymity of the patient is assured and the facility recognizes the project as a bona fide research or statistical undertaking....<sup>4</sup>

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<sup>2</sup> Motion to Amend Information Request and for a Decision (11 March 2019) at 4 (the Court has slightly revised the punctuation of Gotzsche's list of his research purposes).

<sup>3</sup> AS 47.30.845.

<sup>4</sup> *Id.*

Gotzsche makes his request pursuant to Administrative Rule 37.7. It provides:

**(a) Allowing Access to Non-Public Records.** The court may, by order, allow access to non-public information in a case or administrative record if the court 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.

Non-public information includes information designated as confidential or sealed by statute or court rule and public information to which access has been limited under Administrative Rule 37.6. A request to allow access may be made by any person or on the court's own motion as provided in paragraph (b).

**(b) Procedure.** 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. A request to allow access, the response to such a request, and the 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.

The Court must balance the privacy rights of respondents subject to the medication petitions with the interests of Gotzsche in obtaining the records. Gotzsche generally wants to compare the quality of care of Alaskan respondents with those in

Denmark. He also wants to measure the compliance with the standards set forth in *Bigley* and its progeny. While a comparison of treatments in two countries is likely to be interesting, helpful, and provocative, it is not of much use to the subjects of the study. Compliance with *Bigley* and other legal standards is important, but each respondent has the ability and incentive to enforce that compliance through motion practice in the superior court when a petition is filed and on appeal to the Alaska Supreme Court if the petition is granted.

Rule 37.7(b) requires notice to the respondent in each of the 30 cases before the disclosure can be made. Disclosure should be more difficult, if not prohibited, if a respondent objects. It is entirely possible that a subset of respondents would readily consent. To protect privacy, it would be preferable to disclose only the records of those who consent to disclosure.

Gotzsche argues that he may fulfill the notice requirement by serving the Public Defender Agency since that Agency is appointed to represent most, if not all, respondents when petitions are filed.<sup>5</sup> The State objects, arguing that the Agency's representation ends when the petition is denied or the respondent is no longer subject to a medication order.<sup>6</sup>

Gotzsche argues that if he were required to send a request to recent respondents to enquire of them whether they would consent to the disclosure of the records, that request would itself be an intrusion of privacy and might inadvertently disclose the existence of the petition to others. But his suggestion that the Public Defender Agency reach out to its clients (whether former or current) does little to minimize the very same risk.

If the Court were to permit disclosure of records, but also require redaction, then it must determine who is to do the redacting. The Court is more than a little hesitant to force the Alaska

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<sup>5</sup> AS 47.30.839(c).

<sup>6</sup> See AS 18.85.100(a) (“An indigent person...against whom commitment proceedings for mental illness have been initiated, is entitled (1) to be represented, in connection with the crime or proceeding, by an attorney to the same extent as a person retaining an attorney is entitled[.]”).

Psychiatric Institute to take on this chore in light of its current staffing and capacity crisis. Nor does the Court see that it has the authority to order the court system, the State, or the Public Defender Agency to redact files. The State raises concerns about having counsel for Gotzsche do the redaction. Setting aside any concerns that are specific to Gottstein, the Court is troubled by any disclosure of records that contain the very information that is to be kept confidential.

The Court believes the better way to handle the logistical difficulties of redaction is to avoid it all together. **This can be accomplished by only disclosing records of persons who consent to the disclosure of the entire, unredacted files.** Rather than looking backwards to the most recent 30 files, the Court prefers to look forward and ask a future respondent if he or she would consent to participation in this research project. The superior court judge handling the petition could ask the respondent directly or have the respondent's attorney Public Defender Agency explain the request to the respondent and report back to the superior court.

The Court will give the parties and the Agency an opportunity to comment upon the practicality of the Court's proposal. Those comments are due by **25 November 2019**. Responses to the comments may be filed by **9 December 2019**.

The parties responded to the Court's suggestion with surprising unanimity: What a lousy idea! The Court will try a different tack. The Court proposes the following:

1. Court staff will pull files that meet the criteria that Gotzsche has set.

2. **Court staff will select 45 cases that contain a contact address for the respondent.**

3. Court staff will send a notice to those 45 respondents explaining the research project and the proposal to send to Gotzsche a copy of the

paper file (and possibly the audio recording) from which identifying information has been redacted. The notice will seek their permission to send the redacted information to Gotzsche.

4. The Court will bill at \$30 per hour<sup>7</sup> Gotzsche for the time staff works to pull the files, to inspect them for contact addresses, to redact identifying information, and to send the notices.

5. The Court will send to Gotzsche up to 30 files from those persons who give consent or who do not respond to the notice. If the first set of 45 files does not produce 30 files, then staff will pull additional files, sending additional notices until 30 files are identified.

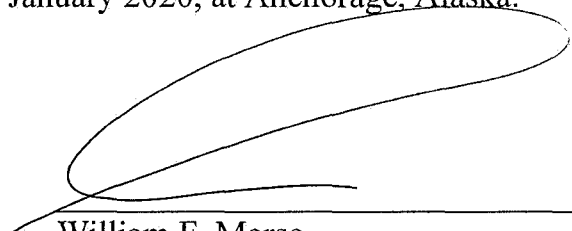
There remains the problem of the audio recordings of hearings. The most secure and expensive option is for the Court to have the hearings transcribed and to redact names and other identifiers. Gotzsche would bear the cost. A less expensive option is to delete the beginning and end of each hearing where it is most likely that the judicial officer referred to the patient's name. That would likely mean that there would be references to the patient's name in the body of testimony. Perhaps the court staff could provide only redacted log notes.

The Court invites the parties' responses to the new proposal and their suggestions about how to handle the audio recordings.

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<sup>7</sup> See Admin. Rule 9(e)(5).

**DONE** this 30th day of January 2020, at Anchorage, Alaska.



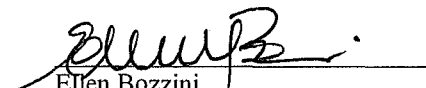
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William F. Morse  
Superior Court Judge

CERTIFICATE OF SERVICE

I certify that on 30 January 2020  
a copy of the above was mailed/emailed to each of the  
following at their addresses of record:

J. Gottstein  
AGO: S. Bookman  
PDA: L. Beecher



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Ellen Bozzini  
Judicial Assistant