PsychRights | Law Project for Psychiatric Rights

July 6, 2016

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

Hand Delivered

Re: Administration Rule 37.7 Research Request

Dear Presiding Judge Morse:

This is in response to the objection by the Alaska Psychiatric Institute (API) to Dr. Gøtzsche's research request for copies of 30 consecutive case files where a Petition for Court Approval of Administration of Psychotropic Medication, under AS 47.30.839 was filed, starting on January 1, 2016 (Request).

(1) The Request is From Dr. Gøtzsche

The first thing I should clear up is that the Request is being made by Dr. Gøtzsche for his research project (Research Protocol), not me. I am just assisting him in attempting to obtain the records. Thus, API's objection based on my so-called interests are not relevant. They are also wrong, but I won't address them because they are irrelevant.

(2) Confidentiality Will Be Preserved

The main complaint that API made is that respondent names and other identifying information will not be kept confidential.[1] To address this issue, the request set forth three options. One is for court staff to redact the documents. The second, recognizing the burden on court staff, particularly in light of the current fiscal pressure, is for me to redact them. The third alternative was that Dr. Gøtzsche will simply not report the results in a way that allows identification of any of the respondents. Another possibility is for API to redact them. Or a third party could be paid to redact them. I imagine Dr. Gøtzsche would be able to pay up to $1,000 to accomplish this. It is respectfully suggested, that preserving confidentiality is not API's real objection.

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[1] API cites to the Zyprexa Papers case to suggest I will turn around and release the documents to the public in spite of their confidentiality restrictions. This is not the place to re-litigate that case, but will certainly not release any confidential information that is provided pursuant to the Request.

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(3) There Is No Potential Harm to Respondents

There is no potential harm to the respondents because their confidentiality will be preserved.

(4) Dr. Gøtzsche Has A Strong Interest In the Information

API also objects to the Request because Dr. Gøtzsche believes the forced drugging of respondents is not in their best interests and there are feasible less intrusive alternatives, and therefore he doesn't need to conduct the research. However, this is not what the Research Protocol addresses. The Research Protocol includes whether:

1. The petitions comply with the requirements of *Bigley* in Alaska and Danish requirements in Denmark.
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. The arguments for using force are reasonable and documented.
7. The patients' rights have been respected.

Based on Dr. Gøtzsche's experience in reviewing petitions in advance of his testimony, the Research Protocol also comments that "there are striking similarities from case to case considering that patients are different." The Research Protocol then states that the judge's ruling will be noted. As is apparent, the Research Protocol is focused on the contents of the petitions, not the ultimate decision, although that will be noted. The Research Protocol is focused on the process, not the results.

(5) Dr. Gøtzsche Has No Objection to Serving All Individuals or Entities That Could be Affected by the Request

API makes the argument that the Request should be denied because not all individuals that could be affected by the Request have been served. Administration Rule 37.7(b) provides in pertinent part:

> **(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.

The first sentence requiring service on all parties has been satisfied by service on the Public Defender Agency, which presumably represented all of the respondents involved.

If someone else represented any other respondent, Dr. Gøtzsche will be pleased to serve them with the Request. With respect to the second sentence, Dr. Gøtzsche will certainly also serve any other individuals or entities that could be affected by disclosure that the court shall require.

(6) United States Constitutional and Common Law

There is also a constitutional dimension to the Request. In *Nixon v. Warner Communications*, 435 U.S. 589, 597, 98 S.Ct. 1306, 1312 (1978), citing to *Sloan Filter Co. v. El Paso Reduction Co.*, 117 F. 504 (CC Colo.1902); *In re Sackett*, 30 C.C.P.A. 1214 (Pat.), 136 F.2d 248 (1943); *C. v. C.*, 320 A.2d 717, 724-727 (Del.1974); *State ex rel. Williston Herald, Inc. v. O'Connell*, 151 N.W.2d 758, 762-763 (N.D.1967); *Ex parte Uppercu*, 239 U.S. 435, 36 S.Ct. 140, 60 L.Ed. 368 (1915); *Ex parte Drawbaugh*, 2 App.D.C. 404 (1894); and *United States v. Burka*, 289 A.2d 376 (D.C.App.1972), the United States Supreme Court stated.

> It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.

This right is not absolute, however, and at that time, the United States Supreme Court said:

> It is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate.[2]

One of the cases cited with approval by the United States Supreme Court in *Nixon*, as cited above, is *State ex rel Williston Herald*, in which the court made clear that the right to have the "hearing" open to the public necessarily includes access to the court file, subject to reasonable regulation. In rejecting the contention that any information the seeker of the information wanted could be obtained by going to the public hearing, the court held:

> We have carefully considered this entire question. We believe that it is the right of the public to inspect the records of judicial proceedings after such proceedings are completed and entered in the docket of the court.[3]

In *Baby Doe v. Methacton School District*, 878 F.Supp.40 (E.D.Pa. 1995), the question was whether documents filed in connection with a child sexual molestation case should be open for public inspection. The court there first discussed the general principles involved, including recognizing there is a constitutional right of public access:

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[2] 435 U.S. at 598-9, 98 S.Ct. at 1312

[3] 151 N.W. 2d at 763.

> In the United States, there is a strong tradition of public access to both criminal and civil trials and the resulting judicial records. This tradition is based on both the common law right to access doctrine as well as the First Amendment. *Pansy*, 23 F.3d at 780-81; *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066, 1070 (3d Cir.1984). . . .
>
> Courts should take the least restrictive course when ruling on these matters.

In ordering the file open to the public, the court weighed Baby Doe and her family's interest in keeping the records secret, against the public's right to access as follows:

> We turn now to our decision to seal the entire file in the action. PNI asserts that the public has an interest in this action because defendants are two public school districts and its officials, and because it involves the sexual molestation of a child by her school teacher. It alleges that the public has an interest in learning what knowledge the school districts had when they hired and fired the school teacher, whether any other children were molested by the teacher, whether any decision-makers are still in decision-making positions with the schools, and whether any school employees were disciplined as a result of the events. . . .
>
> Plaintiffs argue that, in contrast to the public interest, the interest of the Plaintiffs, especially Baby Doe, is of overwhelming significance. They assert that Baby Doe is still a student at the school where she was molested and where the facts of the case are well known. They argue that:
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> > [w]ere Baby Doe to be identified, or were facts disclosed that might lead to her identification, this minor child could sustain emotional upset, psychological damage, teasing by fellow students, different treatment by her teacher(s), etc. She could become a social outcast among her peers.
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> * * *
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> Given the effective arguments on both sides of this issue, we turn now to the balancing of the Plaintiffs' and the public's interests. Plaintiffs undoubtedly have a compelling interest in maintaining the seal. This Court agrees that Baby Doe was the victim of a heinous crime and should not be put at risk of suffering any additional harm. Potential embarrassment to her and her family is certainly an issue in this situation. *Pansy*, 23 F.3d at 787. . . .
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> However, the case does involve public entities, and other parents have an interest in learning how their school districts address the issue of sexual

molestation by teachers and whether the threat of abuse is taken seriously enough.[4]

Most recently, in *Delaware Coalition for Open Government, Inc. v. Strine*, 733 F.3d 510, 513-514, (3rd Cir. 2013), the United States Court of Appeals for the Third Circuit noted,

> "The First Amendment, in conjunction with the Fourteenth, prohibits governments from 'abridging the freedom of speech, or of the press....' " *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (quoting U.S. CONST. amend. I). This protection of speech includes a right of public access to trials . . .
>
> We have found a right of public access to civil trials, as has every other federal court of appeals to consider the issue.

I could not find any Alaska cases on this issue, but presumably Alaska's constitutional protections are as great as, if not greater than, under the United States Constitution.

Here, the respondents' interests in keeping the records from Dr. Gøtzsche for the Research Protocol are non-existent to tenuous at best. In fact, it very well may be that some, most, or all of the as yet unidentified respondents would support disclosure for the purposes of the Research Protocol if asked. In any event, if the records are redacted before I or Dr. Gøtzsche receive them, it is hard to see respondents' having any interest at all. If the records are given to Dr. Gøtzsche without being redacted, no identifying information will be reported. Under these circumstances, the balance in favor of providing the records is far greater than in the *Baby Doe* case.

(7) Conclusion

For the foregoing reasons, it is respectfully suggested the Court grant Dr. Gøtzsche's request for copies of 30 consecutive case files where a Petition for Court Approval of Administration of Psychotropic Medication, under AS 47.30.839 was filed, starting on January 1, 2016

Yours truly,

James B. Gottstein, Esq.

cc: Peter C. Gøtzsche, MD (*via* e-mail)
Steve Bookman (*via* e-mail)
Linda Beecher (*via* e-mail)

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[4] 878 F.Supp at 42-3.