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

LAW PROJECT FOR PSYCHIATRIC)
RIGHTS, an Alaskan non-profit corporation,)

Plaintiff,)

vs.)

STATE OF ALASKA, SARAH PALIN,)
Governor of the State of Alaska,)

ALASKA DEPARTMENT OF HEALTH AND)
SOCIAL SERVICES, WILLIAM HOGAN,)

Commissioner, Department of Health and)
Social Services, TAMMY SANDOVAL,)

Director of the Office of Children's)
Services, STEVE McCOMB, Director of the)

Division of Juvenile Justice, MELISSA)
WITZLER STONE, Director of the Division of)

Behavioral Health, RON ADLER,)
Director/CEO of the Alaska Psychiatric)

Institute, WILLIAM STREUER, Deputy)
Commissioner and Director of the Division of)

Health Care Services,)

Defendants)

REC'D FEB 06 2009

Case No. 3AN-08-10115 CI

**OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF
HIPAA QUALIFIED PROTECTIVE ORDER AS PREMATURE**

The State of Alaska and the remaining above-named defendants
(hereinafter the "Department") oppose plaintiff's Motion for Entry of HIPAA Qualified
Protective Order, filed January 30, 2009 in the above-captioned matter, on the ground
that the motion is premature.

ATTORNEY GENERAL, STATE OF ALASKA
DIMOND COURTHOUSE
P.O. BOX 110300, JUNEAU, ALASKA 99811
PHONE: 465-3600

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Plaintiff asserts that “Discovery in this case ... will necessarily include relevant records ... covered by HIPAA,” and that “PsychRights sought agreement from the defendants ... to present a Qualified Protective Order to this court ... but they declined, thus necessitating this motion.”¹ Plaintiff somewhat misrepresents the Department’s position. The Department does not oppose the entry of the type of order proposed, in theory. But the problem is exactly that: any such order entered at this time would be purely theoretical.

To date, plaintiff has propounded no formal discovery requests under the Civil Rules. The Department therefore has no idea whether plaintiff seeks information that “necessarily include[s] relevant records covered by HIPAA.” To cite just one example, plaintiff’s discovery requests might be satisfied by aggregate data not necessarily covered by HIPAA. Also, HIPAA is not the only possible legal basis on which discovery might warrant a protective order. Many other provisions of state law, including the Public Records Act, public assistance statutes, child in need of aid statutes, and juvenile justice statutes, make confidential particular types of records and limit their disclosure.

The Department declined to agree to entry of the proposed HIPAA Qualified Protective Order simply because the Department had no idea what precise information plaintiff sought protected—and under what legal bases—and therefore had

¹ Plaintiff’s Motion for Entry of HIPAA Qualified Protective Order at p. 2, 4.

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3 no basis whatsoever for evaluating the propriety or impropriety of plaintiff's proposal.
4 Even the case plaintiff cites and attaches as Exhibit A to the Motion contemplates the
5 entry of a protective order only after the defendant knows exactly what is being sought.
6 In the course of discovery in that case, plaintiff sought specific documents including "a
7 letter written by plaintiff regarding a specific patient and a patient termination letter."²
8
9 The court called for briefing on "HIPAA's effect on the discoverability of the *documents*
10 *at issue*."³ Again, as of this filing, there are no documents "at issue" in this case. And
11 while HIPAA might not "condition production on the discovering litigant's inability to
12 identify the patient whose records are to be released,"⁴ plaintiff has not asked for any
13 HIPAA-covered "records to be released" in the first place.

14
15 The Department truly is not trying to be obstructionist or coy. But plaintiff
16 is putting the proverbial cart before the horse. Until the Department and the court have
17 more than a theoretical idea of the scope of plaintiff's discovery, entry of a protective
18 order is premature. Once plaintiff propounds specific discovery requests, the Department
19 intends to work diligently and cooperatively with plaintiff to meet those requests in a
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24 ² 2007 WL 895140 at *1 (Plaintiff's Exhibit A).

25 ³ *Id.* (Emphasis added).

26 ⁴ *Id.*

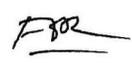
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timely, legal, and procedurally appropriate manner, including collaborating on any proposed protective orders as appropriate.

DATED this 4th day of February, 2009, at Juneau, Alaska.

TALIS J. COLBERG
ATTORNEY GENERAL

By: 
Elizabeth M. Bakalar
Assistant Attorney General
Alaska Bar No. 0606036

By:  
Stacie L. Kraly
Chief Assistant Attorney General
Alaska Bar No. 9406040

Certificate of Service

I hereby certify that on this day of February 4, 2009, a true and correct copy of the foregoing OPPOSITION (w/proposed ORDER) was served via U.S. mail, first class, postage prepaid, to the following attorney of record:

James B. Gottstein, Esq.
Law Project for Psychiatric Rights, Inc.
406 G Street, Suite 206
Anchorage, AK 99501



H. Raven Haffner, Law Office Assistant II

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