DISCLOSURE OF MEDICAL RECORDS TO THE POLICE

In this case Chris Gillespie, instructed by Ian Barker of the MDU, persuaded the CPS and Court to withdraw a warrant requiring a GP to deliver medical records to the police on the basis that such a warrant was unlawful. It appears that the police are seeking and obtaining such orders from the court on a regular basis. The short article below sets out the basis on which to challenge such orders.

The GMC's Confidentiality Guidance (2009) states:

"21. You must disclose information if ordered to do so by a judge or presiding officer of a court. You should object to the judge or the presiding officer if attempts are made to compel you to disclose what appears to you to be irrelevant information, such as information about a patient's relative who is not involved in the proceedings

22. You must not disclose personal information to a third party such as a solicitor, police officer or officer of a court without the patient's express consent, unless it is required by law or can be justified in the public interest."

Other medical regulators have published similar guidance.

In this case the Crown Court, purportedly acting pursuant to paragraph 4 to Schedule 1 of the Police and Criminal Evidence Act 1984 (PACE), granted a Production Order addressed to a General Practitioner, which authorised a constable to take away, or have access to, the medical records of a named patient suspected of a crime.

As is normal the application was made ex parte. Failure to comply with such an order is a contempt of court punishable by a fine and/or imprisonment.

A court order is valid unless and until it is complied with or set aside. However, how many GPs or medical professionals would query the power the Court has to make such an order?

In this case the GP contacted the Medical Defence Union. The case was listed in order to discharge the order on the basis that medical records were excluded material under section 11 of the Police and Criminal Evidence Act 1984 ("PACE") and the access conditions for the production of excluded material under Schedule 1 paragraph 3 of PACE were not met.

In the event the CPS agreed with the submission and the order was discharged. It transpired at the hearing that orders such as this were being made frequently. GPs following the GMC's Confidentiality Guidance may not appreciate that an order under PACE requiring the production of medical records is itself unlawful.

The combined effect of PACE sections 11 (personal records acquired or created in the course of a profession and held in confidence) and 12 (records concerning an individual relating to his physical or mental health) is that medical records are excluded material.

Schedule 1 paragraph 1 of PACE provides that a circuit judge may make an order under paragraph 4 if one of the access conditions is met.

Excluded material is covered by paragraph 3, which provides, inter alia, that the access conditions are fulfilled if but for section 9(2) of PACE a search of such premises for that material could have been authorised by the issue of a warrant to a constable under an enactment other than this Schedule.

Section 9(2) of PACE provides that any Act passed before PACE

under which a search of premises for the purposes of a criminal investigation could be authorised by the issue of a warrant to a constable shall cease to have effect so far as it relates to the authorisation of searches for excluded material.

There is a dearth of authority on the point. In R v Central Criminal Court ex parte Brown The Times September 7th 1992 the police applied for the Applicant's medical records from the hospital where he was being treated for injuries received in a fight during which another died.

The case is misreported both in the Times itself and at Archbold 15-65 to the extent that the full transcript (1992 WL 896456) makes it clear that the original application was for the applicant's medical records and not just a medical report from the hospital's administrator.

It was submitted, correctly in the view of the Court, and conceded by the CPS that prior to PACE there was no enactment that would have authorised the issue of a warrant to a constable to seize medical records. Therefore there had been no power to issue the warrant.

The full effect of this was underlined in R v Cardiff Crown Court ex parte Kellam 1993 WL 990633.

In considering the definition of "excluded material" Morland J held that the words had to be given their ordinary and natural meaning even if the result may seriously impede police investigations and allow a very dangerous man to remain at large and a real risk to others.

Parliament had defined "excluded material" in the way that it had because it considered that the confidentiality of records of identifiable individuals relating to their health should have paramountcy over the prevention and investigation of serious crime.

The records of discharge sought in this case: concerned an identifiable patient, in his capacity as a patient; were related to his mental health; were “excluded material”; therefore could not be the subject of a PACE warrant.

Medical professionals should understand the limits of a court’s powers to compel disclosure of a patient’s records. At a later point in a case a court may issue a witness summons to a GP requiring the GP to produce a patient’s medical records. The records will be produced to the court, not the police, and the judge will have to conduct a balancing exercise.

However, there is no power to compel disclosure to the police under PACE and medical practitioners faced with such a demand should seek immediate legal advice.