Record of Determinations
Medical Practitioners Tribunal

PUBLIC RECORD

Dates: 29/09/2020 – 01/10/2020

Medical Practitioner’s name: Dr Sarah MYHILL

GMC reference number: 2734668

Primary medical qualification: MB BS 1981 University of London

Type of case
New - Non-compliance with a request to provide information

Outcome on non-compliance
Non-compliance not found

Summary of outcome
No action taken

Tribunal:

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<tr>
<td>Legally Qualified Chair</td>
<td>Mr Damian Cooper</td>
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<td>Lay Tribunal Member:</td>
<td>Ms Alison Fisher</td>
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<td>Medical Tribunal Member:</td>
<td>Dr Farhan Munawar</td>
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<td>Tribunal Clerk:</td>
<td>Mr Stuart Peachey</td>
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Attendance and Representation:

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<td>Medical Practitioner:</td>
<td>Present and represented</td>
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<td>Medical Practitioner’s Representative:</td>
<td>Mr Charles Taylor QC, of Fountain Court Chambers</td>
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<td>GMC Representative:</td>
<td>Ms Eleanor Grey QC</td>
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Attendance of press / public

In accordance with Rule 41 of the General Medical Council (Fitness to Practise) Rules 2004 the hearing was held in public.
Overarching Objective

Throughout the decision making process the tribunal has borne in mind the statutory overarching objective as set out in s1 Medical Act 1983 (the 1983 Act) to protect, promote and maintain the health, safety and well-being of the public, to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of that profession.

Determination on consideration of non-compliance 01/10/2020

Background

1. The Tribunal did not intend to rehearse the full background to this case. The following is a brief summary:

2. On 18 May 2018, the General Medical Council (‘GMC’) received a complaint from Dr A, a General Practitioner (‘GP’), regarding the care and treatment provided from Dr Myhill to Patient B. The concerns raised about Dr Myhill were as follows:
   - She was prescribing, supplying or recommending the use of medications/supplements when not clinically indicated, that are not evidence based and have the potential to cause harm;
   - She misdiagnosed hypothyroidism
   - She misinterpreted test results; and
   - She provided inappropriate advice to Patient B.

3. On 4 September 2018, the GMC formally opened an investigation into the fitness to practise (‘FTP’) of Dr Myhill.

4. On 17 September 2018, the GMC contacted Patient B and enquired whether she had any concerns or specific requests on how her information would be used. Within its letter, the GMC stated ‘we will consider what you say, but may still have to go ahead and use your information in the interests of protecting the public. If that happens we will tell you about our decision’.

5. Patient B responded to the GMC and stated that she did not support the GMC’s investigation and she did not give consent for her Medical Records or any of her personal information to be used or shared with a third party.

6. On 18 September 2018, the GMC emailed Patient B stating that they would be referring the matter to an Assistant Registrar (‘AR’) to determine the next steps, explaining that the GMC may still go ahead and use Patient B’s information.
7. On 27 September 2018, an AR determined that it was both necessary and proportionate to use Patient B’s personal data and for the GMC’s investigation into Dr Myhill to proceed. The AR stated that, whilst Patient B refused consent, it did not see any potential for harm should it be disclosed for the purposes of the GMC investigation. The AR stated that the allegations raised against Dr Myhill were serious.

8. On 5 November 2018, Dr Myhill emailed the GMC with her response to the GMC’s letter of 22 October 2018. Within that email, Dr Myhill outlined:

- Her history with the GMC and the previous investigations that had been made against her;
- No patient complaints had been made against her;
- That the GMC investigation had invariably had a political agenda;
- That the GMC were not being impartial;
- That she is a leading authority in the biomedical treatment of Chronic Fatigue Syndrome (‘CFS’) and ME;
- That Dr A was no expert in treating CFS, ME or the use of thyroid hormones;
- That Patient B had refused the GMC’s permission to use her Medical Records;
- That Dr A’s email of complaint to the GMC contained Patient B’s Medical Records and was sent without Patient B’s knowledge, permission or consent. She stated: ‘have a comprehensive set of clinical notes dating back to 2013. There are 16 A4 pages of notes, letters and tests, up to 2014. At that point my practice converted to electronic notes. I now hold 24 files of medical questionnaire updates, treatment and GP letters together with a further 14 files of test results and over 60 email exchanges’;
- The questions she had for the GMC regarding Dr A’s concerns; and
- The fact that she was not the only person with concerns with Dr A’s practice.

Further, in relation to releasing Patient B’s Medical Records, she proposed one of the following routes:

‘EITHER I am happy to allow a qualified GMC doctor to have sight of the patient medical records that I hold, but I am not prepared to release them to GMC all and sundry.

OR in response to specific questions I can release the relevant sections of notes in an anonymised form. BUT for each and every section that I release I shall require the patient’s full consent’.

9. On 14 December 2018, The GMC sent a letter to Dr Myhill stating that an AR had directed a request for information under Section 35A(1A) of the Act. The GMC requested complete Medical Records for Patient B between the period of 1 January 2013 and 18 May 2013. The GMC requested the following documentation:
• copies of the 16 A4 pages of notes
• copies of all letters and tests up to 2014
• copies of all patient notes you subsequently hold electronically
• copies of the 24 files of medical questionnaire updates, treatment and GP letters, copies of the further 14 files of test results
• copies of all email exchanges indicated to be in the region of over 60

The GMC requested a response from Dr Myhill by 28 December 2018.

10. On 17 December 2018, Dr Myhill emailed the GMC stating that she was legally exempt as she was the practitioner under investigation. She stated that the GMC and Dr A had breached data protection legislation. Dr Myhill stated that the GMC were attempting to intimidate her. She stated that ‘the bottom line is that the GP notes have not been properly anonymised by the complaining GP and that has been perpetuated by the GMC. So anything that I can possible do to anonymise the patient records that I hold has been invalidated’.

11. On 17 January 2020, the GMC emailed a letter to Dr Myhill requesting information from her under Section 35A(1A) of the Act, giving her until 24 January 2020 to provide the information, otherwise the matter could be referred to Medical Practitioners non-compliance hearing. On 18 January 2020, Dr Myhill emailed the GMC where she stated that she was unable to respond within the timeframe requested.

12. On 23 January 2020, the GMC emailed Dr Myhill where it stated it had extended the disclosure deadline by a further two weeks to 9 February 2020.

13. On 11 March 2020, The GMC emailed a letter to Dr Myhill that the request for the information that she held was still being pursued. Within the letter, the GMC provided Dr Myhill with additional information stating that it considered that the GDPR and DPA did not prevent Dr Myhill’s compliance with the request for information made under Section 35A(1A) of the Act. The GMC asked Dr Myhill to consider the information and provide the requested Medical Records by 25 March 2020.

14. On 3 April 2020, the GMC emailed a letter to Dr Myhill informing her that an AR had referred her case to a MPT non-compliance hearing. The GMC stated that Dr Myhill’s actions impeded its investigation and its ability to fulfil its purpose to protect the public.

The Outcome of Applications Made During the Non-compliance Stage

Fit and Proper Representation

15. The Tribunal granted Dr Myhill’s request for Mr Charles Taylor, a retired barrister, acting pro-bono, to represent her during the course of these proceedings. Ms Eleanor Grey, QC, on behalf of the GMC, did not oppose Dr Myhill’s application.
16. The Tribunal was of the view that, given his practising history and credentials, there was nothing before it to suggest that Mr Taylor is not a ‘fit and proper person’ to represent Dr Myhill at this hearing. Bearing in mind the need for this hearing to proceed expeditiously and in fairness to the practitioner, the Tribunal exercised its discretion and determined to grant Dr Myhill’s application for Mr Taylor to be her representative.

Lawfulness of the GMC’s Request for Information

17. As part of preliminary matters, the Tribunal invited submissions from the GMC and Mr Taylor on whether or not it needed to make any determination on whether the GMC’s request for Dr Myhill to provide Patient B’s Medical Records was lawful. The Tribunal’s determination is set out in Annex A.

The Evidence

18. The Tribunal took account of all the evidence adduced during the course of these proceedings from the GMC and Dr Myhill, which included, but was not limited to:

- Dr Myhill’s witness statement, dated 30 September 2020;
- Numerous correspondence between Dr Myhill and the GMC between September 2018 and September 2020;
- Witness statement of Mr C, GMC Head of Regional Investigation Team, dated 28 August 2020;
- A GMC bundle of authorities which included:
  - The Medical Act 1983 (as amended) (‘the Act’);
  - General Data Protection Regulation (GDPR: Regulation 2016/679) (‘GDPR’), Articles 1 – 9;
  - The Data Protection Act 2018 (‘DPA’);
  - Various Caselaw;
  - Non-compliance Guidance for Medical Practitioners Tribunals (2 September 2019 edition) (‘the Guidance’) (‘MPT’);
  - The GMC Redactions Guidance;
  - The GMC Confidentiality Guidance;
  - The GMC/PSA, ‘proposed changes to modernise and reform the adjudication of fitness to practise cases’, Consultation Response Report (January 2015); and
  - Various Legal Commentaries, including De Smith’s Judicial Review.
- A bundle produced on behalf of Dr Myhill which included, but was not limited to:
  - Various correspondence between Dr Myhill, Dr A, the GMC, including two letters of 15 November 2019;
A defence bundle of ‘Respondent’s Authorities’, which contained the following:

- Section 35 of the Act;
- The GMC’s ‘Ethical and legal duties of confidentiality’;
- ‘Clerk & Lindsell on Torts’;
- Section 251 of the National Health Service Act 2006;
- Health Service (Control of Patient Information) Regulations 2002’
- Bennion ‘Statutory Interpretation’, various extracts;
- The Human Rights Act 1998;
- Google Inc. v. Vidal-Hall and Others [2015] EWCA Civ. 311;
- Dr DB v GMC [2016] EWHC 2331 (QB);

19. The Tribunal also heard oral evidence from Dr Myhill and Mr C.

Submissions

20. The following is a non-exhaustive synopsis of submissions made during the non-compliance stage.

Submissions on behalf of the GMC

21. Ms Grey QC, on behalf of the GMC, submitted that Dr Myhill had received the request from the GMC to disclose Patient B’s Medical Records and had expressly refused to do so. She reminded the Tribunal of Annex A in which it determined that the GMC’s request was assumed to be valid and lawful. Ms Grey also reminded the Tribunal that the question of whether Dr Myhill had complied with the request did not remain in dispute. Therefore, Ms Grey invited the Tribunal to move onto the question of whether there was a good reason for Dr Myhill’s failure to comply with the GMC’s request.

22. Ms Grey submitted that she did not accept Dr Myhill’s belief and concerns were reasonable. She noted Dr Myhill’s reasons why she could not comply included the fact that the patient’s identity was not necessary for the GMC to investigate its concerns. However, Ms Grey submitted that this was not the case, a number of valid reasons had been given by the GMC as to why it needed the information.

23. Ms Grey submitted that Dr Myhill had not paid any attention throughout this process to the legal justifications set out in the March 2020 letter, to the reason why the GMC would require the information from her. By way of example, Ms Grey said that the GMC needed to engage experts and to be able to check for any conflicts. In this light, Ms Grey submitted that Dr Myhill’s concerns were not reasonable. However, she acknowledged that they were Dr
Myhill’s genuinely held belief. She submitted that there are safeguards for a patient in this situation in the GMC’s anonymisation guidance.

24. Ms Grey submitted that Dr Myhill had a duty when faced with a request by her regulator to seek independent legal advice and the GMC had reminded her of the option to do so. She acknowledged that Dr Myhill had difficulties obtaining legal advice in that she could not get professional representation for these GMC investigations. However, she said that Dr Myhill had relied upon informal advice and correspondence with the GMC. She questioned whether the GMC was Dr Myhill’s ‘professional association’, and noted the general obligation on professionals to seek proper support when needed.

25. Whilst acknowledging Dr Myhill’s genuinely held belief, Ms Grey submitted that it did not prevent following the law and that it was not a reasonable excuse for a failure to comply with her regulator, rather the right way forward would be to seek proper legal advice and find way to resolve this issue, for example before a court. She submitted that only a legal ruling would have been capable of cutting through assertion and counter assertion. However, Ms Grey submitted that today, Dr Myhill’s position is yet more stark in that this Tribunal had to determine whether her continuing failure to comply was unreasonable.

26. Ms Grey noted Dr Myhill’s assertion that Patient B’s Medical Records were not necessary to proceed with the GMC’s investigation. She submitted that that is a ‘non-starter’ from the GMC’s perspective because the GMC’s reasoning had been explained to Dr Myhill, in that the experts were of the view that they needed Patient B’s Medical Records to reach a conclusion on the matters referred to them by the GMC. Ms Grey pointed out that were this matter to be referred to a FTP proceeding Dr Myhill had said that she would put the necessary parts of the Medical Records to that Tribunal as part of her defence. Dr Myhill had acknowledged that a future FTP hearing would be likely to need to see the Medical Records.

27. Ms Grey submitted that Dr Myhill’s suggestion that the GMC did not need Patient B’s Medical Records is one that could not be a sensible conclusion to the matters of this case. She submitted that however firmly held Dr Myhill’s belief was in her position, it was not reasonable for her to maintain that position in the face of the GMC’s request.

28. In all the circumstances of this case, Ms Grey submitted that there was in fact no good reason for Dr Myhill not to have complied with the GMC’s request.

Submissions on Dr Myhill’s behalf

29. Mr Taylor, on behalf of Dr Myhill, submitted that when faced with the request to disclose confidential information, the recipient must determine, and be satisfied, that the request was lawful and compliant, and must be satisfied that it is effective to give them protection from unlawful disclosure. He submitted that a person who receives such a request, using the guidelines of the GMC, is obliged to satisfy themselves that the request is proper.
30. Mr Taylor directed the Tribunal’s attention to the ‘Respondent’s Authorities’ bundle when making its determination.

31. Mr Taylor noted the GMC’s references to legal advice, stating that the assertion that Dr Myhill should obtain legal advice is extraordinary. He submitted that the GMC assumed that such advice if given Dr Myhill would have been to ‘knuckle down’ and agree with the GMC. Mr Taylor questioned whether the burden was on Dr Myhill, when faced with this disagreement with the GMC, to go to the High Court at every stage. He submitted ‘clearly not’.

32. Mr Taylor invited the Tribunal to take into account the Guidance, the Act, the DPA and other relevant legislation when making its determination.

33. In summary, Mr Taylor submitted that the following 7 points of challenge rendered Dr Myhill’s refusal as reasonable:

1. The GMC’s requests were not made by the Registrar. There was no evidence before the Tribunal or before Dr Myhill that the people making the requests had powers delegated by the Registrar.

2. There is no evidence before the Tribunal that the signatories turned their mind to whether disclosure of Patient B’s Medical Records were necessary. Early on, the decision to continue the investigation was made by an unnamed AR who determined, on very weak and unpersuasive grounds, that it was necessary for Dr Myhill to disclose the information. The person who made the second and third requests may not have been that AR. There is no evidence that whoever made the request turned their minds to whether the Medical Records were necessary. The experts said that it would have been ‘helpful’ to have the Medical Records, which falls a long way short of saying ‘necessary’.

3. The second request gave insufficient notice to comply with the statute, namely that it gave Dr Myhill only 7 days (as opposed to 14 days as outlined in the Act) to provide Patient B’s Medical Records.

4. Dr Myhill was reasonable in her belief that Section 35A(1A) of the Act does not override a patient’s right to confidentiality and the GMC had failed to carry out the appropriate balancing act between the patient’s rights and the public interest.

5. On the objective evidence in this case that there had been 36 ‘outrageous’ investigations against Dr Myhill, there was a demonstration of the GMC’s bias and bad faith.
6. The GMC clearly did not (or appeared not to have) complied with its own guidelines on confidentiality and Mr Taylor took the Tribunal through the specific provisions on which he asserted the GMC had not complied.

7. The GMC did not give legal advice to Dr Myhill even though it was promised to her. She had made specific repeated requests for an explanation of the basis for the GMC’s request, including specifically in relation to the Human Rights Act and common-law, not simply the GDPR and DPA. Dr Myhill said in her evidence that it was obvious from her evidence that personally ‘she would love nothing more’ than to give Patient B’s Medical Records over as they are vitally important to her own defence. Dr Myhill had no fear concerning what is contained within those records and offered a sensible compromise if the GMC were not so ‘high-handed’. It was more about prosecuting Dr Myhill than in the interests of Patient B.

**The Tribunal’s Determination on Non-compliance**

34. The Tribunal was aware that the burden of proof rests on the GMC and that it was for the GMC to prove non-compliance. The Tribunal was also aware that the standard of proof is that applicable to civil proceedings, which is the balance of probabilities.

35. The Tribunal adopted the approach set out in the Guidance in determining whether to make a finding of non-compliance, namely:

- Is there sufficient evidence to show that the doctor has failed to comply with the direction?

- Is there evidence to suggest that there was good reason for the doctor’s failure to comply (i.e. was it unavoidable or otherwise excusable)?

36. The Tribunal considered the non-compliance allegation referred to it in respect of Dr Myhill, as follows:

1. On 18 May 2018 the GMC was notified by Dr A, GP, of concerns about your private treatment of one of their NHS patients, Patient B. On 22 October 2018 the GMC notified you of the concerns raised and the decision taken that these concerns met the threshold for an investigation of your fitness to practise.

2. On 6 November 2018 you emailed the GMC and said that you hold medical records for Patient B, to include:

   a. ‘a comprehensive set of clinical notes dating back to 2013. There are 16 A4 pages of notes, letters and tests, up to 2014. At that point my practice converted to electronic notes. I now hold 24 files of medical
3. On 14 December 2018 you were directed under Section 35A (1A) of the Medical Act 1983 to provide the GMC with copies of the medical records for Patient B including:

a. 16 A4 pages of notes

b. all letters and tests up to 2014

c. all patient notes you subsequently hold electronically

d. 24 files of medical questionnaires, updates, treatment and GP letters

e. 14 files of test results

f. all email exchanges, indicated to be in the region of over 60

4. On 17 December 2018 you replied by email and declined to provide the records and notes that the GMC had requested for Patient B.

5. The GMC gave due consideration to your refusal and attempted to progress the investigation using the available information. The GMC instructed four experts in different specialities to comment on the concerns raised about the care you provided to Patient B. Over the course of 2019 these expert reports were disclosed to you.

6. After obtaining the four expert reports, the GMC decided that it should continue to request the contemporaneous records you hold for Patient B.

7. On 17 January 2020 you were sent a reminder by letter attached to email that you were required to provide the information detailed above.

8. On 23 January 2020 you were sent a further email asking you to provide the information requested.

9. On 11 March 2020 you were sent a further reminder by email. A letter was attached reiterating the request for information and explaining the basis behind it and stating that providing this information was not contrary to data protection legislation, namely that the GDPR and Data Protection Act did not prohibit compliance with the request made under s35A(1A) of the Medical Act’.

37. The Tribunal had regard to Section 35A(1A) of the Act, which states:
‘35A. General Council’s power to require disclosure of information

[...]

(1A) The Registrar may by notice in writing require a practitioner, within such period as is specified in the notice, to supply such information or produce such documents as the Registrar considers necessary—

a. for the purpose of assisting the General Council or any of their committees or the Registrar in carrying out functions in respect of the practitioner’s fitness to practise [...]’.

Has the doctor failed to comply with the request?

38. The Tribunal first considered whether there was sufficient evidence to show that Dr Myhill had failed to comply with the direction. It had specific regard to paragraph A18 of the Guidance which states:

A18 ‘A doctor may have failed to comply with a GMC direction or request to provide information where they have:

a. explicitly refused to submit to a direction to undergo an assessment or provide the information requested from them’.

39. In light of its reasoning set out in Annex A, the Tribunal was mindful of the fact that it was not making any determination on the lawfulness or validity of the GMC’s request. The Tribunal therefore proceeded on the assumption that the GMC’s request was lawful.

40. The Tribunal had sight of clear evidence which demonstrated Dr Myhill’s refusal to comply with the GMC’s request. Further, she stated in her most recent communication that she would not be changing her position. During her oral evidence, Dr Myhill acknowledged that it would require a court order for her to provide the GMC with the requested information. However, she said she would be prepared to take the information physically to a FTP hearing and share those sections of it as were necessary.

41. In the circumstances of this case, with paragraph A18 of the Guidance in mind, the Tribunal concluded that Dr Myhill had failed to comply with the GMC’s request for information under Section 35A(1A) of the Act, for her to provide Patient B’s Medical Records. Her refusal to comply, on multiple occasions, had been explicit and unambiguous.

Did the doctor have good reason for not complying?
42. Having found that Dr Myhill had failed to comply with the request, the Tribunal then went on to consider whether there was evidence that there was good reason for her failure to comply.

43. The Tribunal noted Dr Myhill’s evidence that she there had been 36 previous GMC investigations undertaken which did not result in any substantive FTP hearings.

44. In the particular circumstances of this case, the Tribunal noted that Dr Myhill had been investigated numerous times. It recognised that this was likely to have made Dr Myhill wary of future dealings with the GMC and suspicious of it investigating her again.

45. In his oral evidence Mr C, when challenged about the timing of this investigation in relation to a complaint Dr Myhill had brought on another matter, indicated that he could see how Dr Myhill might have been suspicious, although he asserted there was no link and she was in fact, wrong to be suspicious. The Tribunal considered that Dr Myhill was concerned about how the GMC dealt with its investigation. This was compounded by a clear statement from Patient B who did not want any of her data used. The Tribunal was of the view that it was an unambiguous communication from a patient. The Tribunal was in no doubt that Dr Myhill had Patient B’s interests, particularly her privacy and confidentiality, foremost in her mind.

46. The Tribunal had regard to the circumstances of the GMC’s request. It noted that Dr Myhill asked the GMC numerous times for clarification of the GMC’s request to divulge this information. Although the GMC advised her to seek independent legal advice on a number of occasions, the Tribunal was of the view that the GMC had failed properly to address Dr Myhill’s detailed questions on the basis for the GMC’s position. Dr Myhill had made the reasons for her own concerns very clear. Dr Myhill gave the Tribunal an indication that, because of a number of previous investigations against her, she was no longer covered by indemnity insurance. In light of this, the Tribunal considered that Dr Myhill may have been in a different position than some other doctors getting independent legal advice.

47. In Ms Grey’s submission, she stated that Dr Myhill had been wilfully unreasonable by not complying with the GMC’s request and obtaining independent legal advice. Dr Myhill was persistent in her emails to the GMC requesting further advice and clarification regarding its request. The Tribunal noted that within the GMC’s Confidentiality Guidance, it states that the practitioner should ask the source of the request, in this case the GMC, where there was no obvious legal basis for the disclosure of confidential information. In light of that guidance, the Tribunal considered that it was not unreasonable for Dr Myhill to ask the GMC for its explanation of its position in response to her questions and concerns. However, the Tribunal noted that whilst the GMC did provide some clarification within its letters to Dr Myhill, it was limited and did not address her full concerns. Several of Dr Myhill’s clarification questions directed at the GMC had gone unanswered on numerous occasions and when answered, the GMC’s response was minimal. However, The Tribunal considered that it was reasonable for the GMC to state that Dr Myhill should obtain independent legal advice.
48. The Tribunal had regard to the GMC’s letter to Dr Myhill, dated 15 November 2019, which stated:

‘We have completed our investigation into the concerns that have been raised over your fitness to practise in relation to your care of the [Patient B].

We have finished collecting information, but we have not made a decision about the outcome of the investigation yet. Before we do so, I am sharing copies of what we have collected and the allegations being put forward for decision. The next stage is for you to review the information, and decide whether you want to provide comments for consideration by our decision-makers.

[...]

What happens next?

Following receipt of your response or, once the period for comments has expired, Mr John Graves will refer the matter to the case examiners.

The case examiners, one a registered doctor and the other a lay person, need to decide whether your fitness to practise may be impaired because of misconduct.

They will review the facts and evidence, alongside any comments you give to us. They can:

- Conclude the case with no further action or with a letter of advice
- Issue a warning
- Agree undertakings, usually to support remediation
- In the most serious cases, refer the case to a medical practitioner’s tribunal of the Medical Practitioners Tribunal Service (MPTS)’.

Based on the letter above, the Tribunal considered that Dr Myhill was entitled to reasonably believe that the GMC could proceed without Patient B’s Medical Records. Whilst the Tribunal had heard evidence that the GMC sometimes continues an investigation, in the context of this contested case, it considered that Dr Myhill could have believed that the investigation process and collection of information was over. Continuation of the investigation was not one of the four possible outcomes set out in the GMC letter of 15 November 2019. When the requests for new information were resumed in January 2020, no explanation was given to Dr Myhill as to what had now changed since November 2019. The Tribunal was of the view that Dr Myhill was entitled to such explanation.

49. The Tribunal had regard to the GMC’s letter dated 3 April 2020. This was the first time Dr Myhill was given an explanation that the reason for the continuance of the request arose from the comments of the experts in their reports. The experts had commented that it would have been ‘helpful’ to have seen the Medical Records. The Tribunal accepted Mr Taylor’s
submission that there is a clear distinction between ‘helpful’ and ‘necessary’ for the investigation.

50. The Tribunal considered that Dr Myhill did not disclose the information requested by the GMC in an attempt to maintain the relationship between doctor and patient. It was of the view that Dr Myhill, as the data controller, put Patient B at the heart of her decision not to disclose Patient B’s information to the GMC. It considered that Dr Myhill’s actions reflected well on how a doctor approaches their responsibility to their patients.

51. The Tribunal had regard to A46 and A47 of the Guidance, which states:

**A46** ‘There is a clear risk to public protection where a concern about a doctor’s fitness to practise has been raised but cannot be investigated other than by means of an assessment, or by requiring a doctor to provide information, and the doctor does not comply. The absence of such evidence may interfere with the GMC’s ability to take forward a case on the grounds of impairment.

**A47** ‘The outcome of the assessment, or the information requested from the doctor, should be material to the GMC’s investigation. If, without it, the GMC is unable to proceed with the investigation in a proportionate way and take action in response to the concern, the failure to comply will create a risk to public protection.

In relation to A46 of the Guidance, the Tribunal considered that Dr Myhill’s genuine concerns in respect of Patient B’s privacy, confidentiality and duties as a doctor was at the heart of her reasoning for not providing the confidential Medical Records. The letter of 19 November 2019 led her to believe the GMC had concluded its investigation.

In relation to A47 of the Guidance, the letter of 19 November 2019 had contained draft allegations which the GMC proposed to put before a Case Examiner. It was the Tribunal’s view that at that point and following the receipt of the Expert Reports, the GMC was sufficiently confident of its position to be able to prepare detailed draft allegations.

52. The Tribunal was in no doubt that the GMC had the power to require disclosure of medical Records including when a patient had not consented to that disclosure. However, in the very specific, and somewhat unusual circumstances of this case, to date, the GMC had not shown that Dr Myhill had no good reason for her non-compliance with its request.

53. The Tribunal determined that there was insufficient evidence for it to conclude that Dr Myhill had no good reason for her non-compliance. Therefore, in the circumstances of this case, the Tribunal did not find that there had been non-compliance.

54. Case Concluded.

**Confirmed**
**Date** 01 October 2020

Mr Damian Cooper, Chair
Annex A

Lawfulness of the GMC’s Request – 29/09/2020

1. At the outset, as part of preliminary matters, the Tribunal invited submissions from the General Medical Council (‘GMC’) and Mr Charles Taylor, on behalf of Dr Myhill, on whether or not it needed to make any determination on whether the GMC’s request for Dr Myhill to provide Patient B’s Medical Records was lawful.

The Evidence

2. The Tribunal had been provided with a number of written preliminary skeleton arguments which had been disclosed by both the GMC and Mr Taylor.

3. The Tribunal had regard to a bundle of authorities, submitted by the GMC, which included, but was not limited to:
   - The Medical Act 1983 (as amended) (‘the Act’);
   - General Data Protection Regulation (GDPR: Regulation 2016/679) (‘GDPR’), Articles 1 – 9;
   - The Data Protection Act 2018 (‘DPA’);
   - Various Caselaw;
   - Non-compliance Guidance for Medical Practitioners Tribunals (‘the Guidance’);
   - The GMC Redactions Guidance;
   - The GMC Confidentiality Guidance;
   - The GMC/PSA, ‘proposed changes to modernise and reform the adjudication of fitness to practise cases’, Consultation Response Report (January 2015); and
   - Various Legal Commentaries, including De Smith’s Judicial Review.

Submissions

4. The following is a non-exhaustive synopsis of submissions:

Submissions on behalf of the GMC

5. Ms Eleanor Grey, QC, on behalf of the GMC, submitted that it is not for this Tribunal to determine whether the GMC’s request for information from Dr Myhill was lawful.

6. Ms Grey submitted that the general observation on Dr Myhill’s submissions is that they wrongly invite the Tribunal to rule upon the legality of the GMC’s request for information. She submitted that is something that can only be done by the High Court.
7. Ms Grey submitted that the questions for the Medical Practitioners Tribunal (‘MPT’) are set out in the Guidance:
   a. Whether the doctor has failed to comply with the GMC’s request for information (A9a); and
   b. Whether there was a good reason for the doctor’s failure to comply (A9b).

8. Ms Grey drew the Tribunal’s attention to Section 35(A) of the Act. She submitted that it was clear that the discretion to make a request for information lay with the Registrar. The Registrar could request such information as they considered necessary.

9. Considering the various provisions of Section 35(A) of the Act, Ms Grey submitted that there is no suggestion that Medical Records cannot be requested. Indeed, she submitted, the provisions addressing anonymisation when necessary suggested the opposite. She also submitted that this was supported by the legislative history. There were safeguards drafted into the legislation.

10. Ms Grey directed the Tribunal’s attention to A37 and A38 of the Guidance. She submitted that this was a consequence of the usual rule that it is for the High Court to rule on the lawfulness of actions by the Registrar (for example R(Lee) v GMC [2016] EWHC 135 (Admin)). She submitted that the proper way of challenging an instruction to produce documents is to issue an application for Judicial Review of the instruction. This would have led promptly to an appropriate court ruling. Paragraphs A37 and A38 of the Guidance are clear that it was not for the Tribunal to make any finding as to the lawfulness of the GMC request.

11. Ms Grey submitted that in these proceedings, the MPTS does have to consider whether there was a ‘good reason’ for any failure to comply with the instruction. Further, she directed the Tribunal’s attention to the principle set out in Boddington v British Transport Police [1999] 2 A.C. 143, that in criminal proceedings at least, a defendant may raise the ‘public law unlawfulness’ or vires of the legal instrument upon which a charge is based, as a defence to those proceedings. She submitted that this was a ‘collateral challenge’ defence. Its boundaries have not been tested in the context of civil tribunal proceedings such as these and are contestable. De Smith’s Judicial Review, specifically Part 1, Chapter 3: Public Law Arguments in Civil Claims, Tribunals and Criminal Proceedings supported the proposition that the GMC’s instructions should have been challenged by the doctor by an application for Judicial Review when they were issued, and are not to be reviewed by this Tribunal.

12. Ms Grey drew the Tribunal’s attention to De Smith’s Judicial Review, specifically paragraph 3 – 129 onwards and accompanying footnotes. She asserted that it was relevant whether a collateral challenge was aimed at an instrument directed specifically at the person making it or whether it was one of general applicability. In this case, the request was directed at Dr Myhill specifically and she had had opportunity to challenge it earlier than at this hearing.
13. In addition, Ms Grey submitted that there are some cases such as this, where the proceedings are inappropriate to determine a public law question. She submitted, with respect, that whilst the Tribunal was experienced and equipped to consider matters of Fitness to Practise (‘FTP’), it was not the competent jurisdiction to determine matters concerning the balance between public disclosure and protection of an individual’s privacy in the context of GDPR, DPA and other relevant law.

14. In summary Ms Grey submitted that it was to be assumed that the GMC request was lawful for the purposes of these non-compliance proceedings.

Submissions on behalf of Dr Myhill

15. Mr Charles Taylor submitted that he wished to make it clear that Dr Myhill made no challenge to the validity of Section 35(1A) of the Act itself. Dr Myhill challenged the validity of the GMC request made under that provision. He pointed out that the GMC had chosen this Tribunal for this hearing and Dr Myhill had been told by the GMC that she would be able to air the issues she had corresponded with the GMC about in this hearing. In addition, he submitted that the GMC cannot curtail the Tribunal’s jurisdiction.

16. Mr Taylor submitted that in relation to A9 of the Guidance the GMC must show that it had made a valid request. He submitted that it was implicit in the provision that the request must be a valid one. He also submitted that it was for this Tribunal to determine whether the GMC’s request was valid as well as the issue of whether it had been complied with.

17. Mr Taylor submitted that he relied upon the following paragraphs of the Guidance:

‘A37. A doctor may say that, given all the circumstances known at the time the GMC made its direction or request to provide information, it was not reasonable for them to comply.

‘A38 Where this is raised, the tribunal should consider the full circumstances of the case to decide whether it was reasonable for the doctor to comply. However, the tribunal should not make a finding on whether the direction or request to provide information was lawful’.

Emphasised by Mr Taylor

18. Mr Taylor submitted that the issue of lawfulness in this context applied only to the Tribunal’s deliberations under paragraph A9b and not A9a of the Guidance. The statement in A9b was included simply because the Tribunal would already have determined the issue of validity under paragraph A9a. It was necessary for the Tribunal to satisfy itself that the request made by the GMC was valid before proceeding to determine non-compliance and whether there was good reason for that non-compliance.
19. Mr Taylor took the Tribunal to the case of Boddington and addressed it on the matter of collateral challenge. He submitted that this was the appropriate forum for Dr Myhill to challenge the validity of the request by the GMC. She was at risk of severe consequences if found to be non-compliant and it was only fair that she should have a right to challenge the request in the manner as has been permitted in a criminal context and applied in a civil context. He submitted that, in line with the case law, it was not appropriate to expect someone in Dr Myhill’s position to rely on separate Judicial Review or an appeal from this Tribunal’s decision. This was particularly the case as there was a risk that any appeal court may then decide not to adjudicate on the point of validity.

20. He submitted that this Tribunal was equipped to make the necessary assessment of the validity of the GMC request in light of the applicable legislation and common-law and it ought to do so.

**The Tribunal’s Decision**

21. The Tribunal first of all had regard to the Act, the GMC’s Fitness to Practice Rules (as amended) (‘the Rules’), and the Guidance. It was also mindful of the principles set out in Boddington v British Transport Police and the authorities referred to in De Smith’s Judicial Review. It considered all the detailed submissions made on behalf of the parties.

22. The Tribunal noted that the Guidance at paragraph A9 required it to consider whether or not Dr Myhill had failed to comply with the GMC’s request to provide information. There was no express requirement in the Act or the Guidance for the Tribunal to make an assessment of the validity of the request. The nature and extent of the request made was a matter for the Registrar.

23. The Tribunal was not persuaded by submissions on Dr Myhill’s behalf that it was to be implied that the Tribunal had a duty to satisfy itself of the lawfulness or validity of the request as part of its role in determining non-compliance. Given that the nature and extent of the request was for the Registrar, the role of the Tribunal was then to assess Dr Myhill’s compliance with that request.

24. Neither the Act nor the Guidance requires the GMC to provide evidence of the validity of its request puts before a non-compliance hearing, although the Guidance does specify that the GMC provides proof of service of the request.

25. In considering the issue of collateral challenge, the Tribunal acknowledged the difficulties that can be faced by a practitioner in these circumstances. However, given the restricted nature of the Tribunal’s responsibilities in a non-compliance hearing, i.e. the determination solely on whether the request had been complied with and, if not, whether there was good reason for that non-compliance, it considered that it did not have jurisdiction to consider the validity of the GMC request. Such an analysis would involve the balancing of public law principles governing the disclosure of otherwise confidential information with the protection of an individual’s interests in maintaining confidentiality under, for example, the
GDPR, DPA and common-law. It believed that a non-compliance Medical Practitioners Tribunal was not appropriately qualified to adjudicate on this point.

26. The Tribunal determined that for the purposes of these non-compliance proceedings it was to be assumed that the GMC had made a lawful valid request. This Tribunal will not make any determination in regard to the validity of the request.