

# Decision Notice

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## **Decision 182/2015: Patrick Kelly and the Scottish Ministers**

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### **Information relating to Professor Muftah Salem Eljamel**

Reference No: 201501094

Decision Date: 17 November 2015



Scottish Information  
Commissioner

## Summary

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On 24 March 2015, Mr Kelly asked the Ministers for information relating to Professor Muftah Salem Eljamel, a former surgeon at Ninewells Hospital, Dundee. The Ministers provided some information to Mr Kelly, but withheld the remainder under a number of different exemptions in FOISA.

Following a review, Mr Kelly remained dissatisfied and applied to the Commissioner for a decision. The Commissioner investigated and found that all of the information which the Ministers had withheld was personal data, and that disclosure of the personal data would breach the Data Protection Act.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) General entitlement); 2(1) and (2)(e)(ii) (Effect of exemptions); 38(1)(b), (2)(a)(i), (2)(b) and (5) (definitions of "the data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions) (definition of "personal data"); Schedule 1 (The data protection principles) (the first data protection principle) and Schedule 2 (Conditions relevant for the purpose of the first principle: processing of any personal data) (condition 6)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. Professor Eljamel worked as a surgeon at Ninewells Hospital in Dundee, but was suspended due to concerns about his surgical practices. A General Medical Council (GMC) investigation was abandoned because Professor Eljamel relinquished his licence to practice (the GMC can only investigate practising doctors).
2. On 24 March 2015, Mr Kelly made a request for information to the Ministers. He asked for all correspondence held by the Scottish Government relating to Professor Muftah Salem Eljamel. Mr Kelly specified that this included information the Scottish Government had received from NHS Tayside.
3. The Ministers responded on 21 April 2015. They provided some information to Mr Kelly, but withheld the remainder under a number of different exemptions in FOISA .
4. On 22 April 2015, Mr Kelly wrote to the Ministers, requiring a review of their decision. He believed the exemptions had been wrongly applied and that, in any event, there was a strong public interest in disclosure.
5. The Ministers notified Mr Kelly of the outcome of their review on 10 June 2015. They provided some further information, but withheld the remainder of the information on the basis that it was personal data (and exempt under section 38(1)(b) of FOISA) and that disclosure would prejudice substantially the effective conduct of public affairs (section 30(b) of FOISA).

6. On 11 June 2015, Mr Kelly wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He stated he was dissatisfied with the outcome of the Ministers' review, because he disagreed that the information was exempt from disclosure. He also believed there was a public interest in transparency and accountability which would be served by disclosure of the withheld information.

## **Investigation**

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7. The application was accepted as valid. The Commissioner confirmed that Mr Kelly made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
8. On 29 June 2015, the Ministers were notified in writing that Mr Kelly had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr Kelly. The Ministers provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application, with specific reference to the exemptions they had applied in responding to Mr Kelly.
10. The Ministers provided submissions in response. Mr Kelly also provided submissions during the investigation.

## **Commissioner's analysis and findings**

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11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Kelly and the Ministers. She is satisfied that no matter of relevance has been overlooked.

### **Section 38(1)(b) of FOISA – Personal data**

12. The Ministers applied section 38(1)(b) to all of the information withheld from Mr Kelly.

*Is the information personal data?*

13. "Personal data" are defined in section 1(1) of the DPA as data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in Appendix 1).
14. Having considered the terms of this information request, which defines the information sought by reference to Professor Eljamel and seeks information relating to him, the Commissioner is satisfied that any information captured by the request and held by the Ministers must, by definition, be Professor Eljamel's personal data.

*Would disclosure contravene the first data protection principle?*

15. The Ministers argued that disclosure of the information would contravene the first data protection principle.
16. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in

Schedule 2 to the DPA is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the DPA is also met. The Ministers were not of the view that the withheld information fell into any of the categories of sensitive personal data in section 2 of the DPA. The Commissioner, having reviewed the information, concurs with this view.

17. The processing under consideration in this case would be the disclosure of the personal data into the public domain, in response to Mr Kelly's information request.
18. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. These three aspects are interlinked. For example, if there is a specific condition in Schedule 2 which permits disclosure, it is likely that disclosure will also be fair and lawful.
19. The Commissioner will now consider whether there are any conditions in Schedule 2 which would permit the requested information to be disclosed. If any of these conditions can be met, she must then consider whether such disclosure would be fair and lawful.

*Can any of the conditions in Schedule 2 be met?*

20. The Commissioner's view is that condition 6 in Schedule 2 is the only one which might permit disclosure to Mr Kelly. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject (the individual(s) to whom the data relate).
21. There are a number of different tests which must be satisfied before condition 6 can be met. These are:
  - (i) Does Mr Kelly have a legitimate interest or interests?
  - (ii) If yes, is the processing involved necessary for the purposes of those interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these interests be achieved by means which interfere less with the privacy of Professor Eljamel?
  - (iii) Even if the processing is necessary for Mr Kelly's legitimate interests, is the processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of Professor Eljamel?

22. There is no presumption in favour of disclosure of personal data under the general obligation laid down by section 1(1) of FOISA. Accordingly, the legitimate interests of Mr Kelly must outweigh the rights and freedoms or legitimate interests of Professor Eljamel before condition 6 will permit disclosure. If the two are evenly balanced, the Commissioner must find that the Ministers would be able to refuse to disclose the information to Mr Kelly.

*Is Mr Kelly pursuing a legitimate interest or interests?*

23. Mr Kelly submitted that disclosure of the information was in the public interest, for reasons of transparency and accountability, to promote public understanding and to safeguard democratic processes. He also highlighted a public interest in good decision-making by public bodies, in upholding standards of integrity, in ensuring justice and in fair treatment for all. Given his personal circumstances, as a former patient of Professor Eljamel concerned about his treatment, the Ministers acknowledged that he had a legitimate interest.

24. In all the circumstances, the Commissioner accepts that Mr Kelly is pursuing a legitimate interest in seeking the withheld information.

*Is the processing necessary for the purposes of these interests?*

25. The Ministers questioned the value of the withheld information to Mr Kelly in pursuing his legitimate interests. The Commissioner is prepared to accept, however, that it would have some value for these purposes and she can identify no other viable means of meeting Mr Kelly's legitimate interests which would interfere less with the privacy of Professor Eljamel than providing the information requested. For this reason, she is satisfied that disclosure of the information is necessary for the purposes of Mr Kelly's legitimate interests.

26. The Commissioner would also note, however, that the withheld information would appear to add little of substance to the pursuit of Mr Kelly's legitimate interests. She will take that into account in carrying out the balancing exercise with which she must conclude her consideration of condition 6.

*Would disclosure be unwarranted by reason of prejudice to the legitimate interests of Professor Eljamel?*

27. As the Commissioner is satisfied that disclosure of the withheld personal data would be necessary to fulfil Mr Kelly's legitimate interests, she must now consider whether disclosure would nevertheless cause unwarranted prejudice to the rights and freedoms or legitimate interests of Professor Eljamel. As noted above, this involves a balancing exercise between the legitimate interests of Mr Kelly and those of Professor Eljamel. Only if the legitimate interests of Mr Kelly outweigh those of Professor Eljamel can the information be disclosed without breaching the first data protection principle.

28. In the Commissioner's briefing on personal information<sup>1</sup>, she notes a number of factors which should be taken into account in carrying out the balancing exercise. These include:

- (i) whether the information relates to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life or finances)
- (ii) the potential harm or distress that may be caused by disclosure
- (iii) whether the individual objected to the disclosure
- (iv) the reasonable expectations of the individual as to whether the information should be disclosed.

29. The Ministers explained that some of Professor Eljamel's personal data had been disclosed by them, because Mr Kelly had already put it in the public domain. However, they were of the view that it would be unfair to release information beyond what was already public. They submitted that, at the time of Mr Kelly's information request, Professor Eljamel was under investigation by the GMC. At the time of the request (and review requirement) it was therefore considered unfair to disclose specific details about him, or NHS Tayside's specific concerns about him, particularly while the investigation was still ongoing. It still considered the matters under consideration to be personal between him and his former employer.

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<http://www.itspublicknowledge.info/nmsruntime/logLink.aspx?linkURL=http%3a%2f%2fwww.itspublicknowledge.info%2fLaw%2fFOISA-EIRsGuidance%2fsection38%2fSection38.asp>

30. The view of the Commissioner is that the withheld personal data relate as much to Professor Eljamel's private life as to his public life. Information relating more directly to his professional surgical practices might be considered to relate to his public life, but there is nothing of that nature in the withheld personal data.
31. The Commissioner has also borne in mind the close proximity of the information request and review requirement to the GMC's investigation of Professor Eljamel. She does not consider Professor Eljamel would have had a reasonable expectation of the information being disclosed at that time.
32. Having considered these competing interests, the Commissioner must balance them. As noted above, the withheld information would appear to add little of substance to the pursuit of Mr Kelly's legitimate interests; this is relevant to the balancing exercise. Having considered the competing interests in this particular case, the Commissioner finds that Mr Kelly's legitimate interests are outweighed by the prejudice to the rights and freedoms of Professor Eljamel that would result from disclosure. On balance, therefore, she must find that the requirements of condition 6 cannot be met here.
33. Given this conclusion, the Commissioner finds that there is no condition in Schedule 2 which would permit disclosure of the information. In the absence of a condition permitting disclosure, that disclosure would be unlawful. Consequently the Commissioner finds that disclosure of the information would breach the first data protection principle and that the information is therefore exempt from disclosure (and properly withheld) under section 38(1)(b) of FOISA.
34. Having reached this conclusion, the Commissioner is not required to consider the application of any other exemption claimed by the Ministers.

## Decision

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The Commissioner finds that the Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Kelly.

## Appeal

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Should either Mr Kelly or the Scottish Ministers wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

**Margaret Keyse**  
**Head of Enforcement**

**17 November 2015**

### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

#### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that -

- (a) the provision does not confer absolute exemption; and

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption -

...

- (e) in subsection (1) of section 38 -

...

- (ii) paragraph (b) where the first condition referred to in that paragraph is satisfied by virtue of subsection (2)(a)(i) or (b) of that section.

#### 38 Personal information

- (1) Information is exempt information if it constitutes-

...

- (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

...

- (2) The first condition is-
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
    - (i) any of the data protection principles; or
    - ...
  - (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

...

- (5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...

## **Data Protection Act 1998**

### **1 Basic interpretative provisions**

- (1) In this Act, unless the context otherwise requires -

...

"personal data" means data which relate to a living individual who can be identified -

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...



## **Schedule 1 - The data protection principles**

### **Part I - The principles**

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -
  - (a) at least one of the conditions in Schedule 2 is met, and
  - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

### **Schedule 2 - Conditions relevant for purposes of the first principle: processing of any personal data**

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

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