

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 September 2023

Public Authority: General Medical Council (GMC)
Address: 3 Hardman Street
Manchester
M3 3AW

Complainant: Patrick Kelly
Address: [REDACTED]

Decision (including any steps ordered)

1. The complainant has requested the number of complaints made against Dr Sam Eljamel. The GMC refused to provide the requested information under section 40(2) (personal information) of FOIA.
2. The Commissioner's decision is that the GMC isn't entitled to withhold the requested information under section 40(2).
3. The Commissioner requires the GMC to take the following steps to ensure compliance with the legislation:
 - Disclose the requested information.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 26 June 2023, the complainant wrote to the GMC and requested:
 - “1. How many letter/email/ telephone complaints were received from former patients/family members/ to include all categories of persons against surgeon Mutah Salem Eljamel from 1995 - 2023?
 2. How many letter/email/telephone complaints were received from former patients/family members/ to include all categories of persons against surgeon Mutah Salem Eljamel from 1995 – 2007?”
6. The GMC responded on 24 July 2023. It explained the information was exempt from disclosure under section 40(2), by virtue of section 40(3A)(a) (personal information).
7. The complainant requested an internal review on 24 July 2023.
8. Following an internal review the GMC wrote to the complainant on 15 August 2023. It upheld its previous position.

Background information

9. Dr Eljamel¹ was the former head of neurosurgery at Tayside NHS Trust. A number of Dr Eljamel's former patients have accused him of medical negligence. Dr Eljamel removed himself from the GMC register in 2013, meaning he can no longer practice medicine in the UK.
10. On 31 August 2023, NHS Tayside presented its own due diligence report² into Dr Eljamel. One of the conclusions of the review was that '111 patients were potentially exposed to possible harm' due to inadequate supervision of Dr Eljamel, during a time where there was 'a known concern over some aspects of his clinical practice.'
11. After years of campaigning from former patients, NHS Scotland has announced a full public inquiry into Dr Eljamel. The complainant is one of these patients.

¹ [Independent review of NHS Tayside over disgraced surgeon Sam Dr Eljamel - BBC News](#)

² [NHS Tayside \(scot.nhs.uk\)](#)

Reasons for decision

Section 40(2) – personal information

12. Section 40(5B)(a)(i) of FOIA states that a public authority doesn't have to confirm or deny whether information is held if to do so would contravene any data protection principles. The GMC has explained that: 'there is sufficient information in the public domain³ to indicate that Dr Eljamel was subject to at least one GMC investigation and so clear we will hold some information in respect of the request.'
13. The GMC has rightly pointed out that it can't refuse to confirm or deny information that is already in the public domain. Therefore, it's confirmed it holds information in response to the request but is refusing to disclose the figures requested under section 40(2) of FOIA.
14. Section 40(2) states that information is exempt from disclosure if it's the personal data of an individual (other than the requester) and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
15. In this case the relevant condition is contained in section 40(3A)(a).⁴ This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
16. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA18'). If it isn't, then section 40 cannot be used as a basis for refusing to disclose the information.
17. Secondly, and only if the Commissioner is satisfied that the requested information constitutes personal data, he must establish whether disclosure of that information would breach any of the data protection principles.

³ [Surgeon avoids tribunal over 'botched op' claims by leaving medical register | The National](#); [Surgeon allowed to leave medical register without being investigated | The BMJ](#)

⁴ As amended by Schedule 19 Paragraph 58(3) DPA.

Is the requested information personal data?

18. Part 1, Section 3(2) of the DPA18⁵ defines personal data as:

“any information relating to an identified or identifiable living individual.”

19. The two main elements of personal data are that the information must relate to a living person and that person must be identifiable from the information.

20. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions them or has them as its main focus.

21. The requested information is Dr Eljamel’s personal data - it would confirm how many complaints were made against him and, since he’s named in the request, he’s directly identifiable from this information.

22. The fact that information constitutes personal data doesn’t automatically exclude it from disclosure under FOIA. The Commissioner must now consider whether disclosure of the requested information would contravene any of the data protection principles.

23. The most relevant data protection principle in this case is principle (a) which states that “Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”⁶.

Would disclosure contravene principle (a)?

24. Personal data is processed when it is disclosed in response to the request. This means that a public authority can only disclose personal data in response to an FOI request if to do so would be lawful, fair and transparent.

⁵ [Data Protection Act 2018 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2018/12/section/3)

⁶ [Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC \(General Data Protection Regulation\) \(Text with EEA relevance\) \(legislation.gov.uk\)](https://www.legislation.gov.uk/eur-2016/679/section/1)

25. In order to be lawful, one of the lawful bases listed in Article 6(1)⁷ of the UK General Data Protection Regulation (UK GDPR) must apply to the processing.

Lawful processing: Article 6(1)(f) of the UK GDPR

26. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.”

27. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information made under FOIA, it's necessary to consider the following three-part test:

- i) Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interest test

28. The Commissioner must first consider the legitimate interest in disclosing the personal data to the public and what purpose this serves. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may represent legitimate interests; they can be

⁷ [Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC \(General Data Protection Regulation\) \(Text with EEA relevance\) \(legislation.gov.uk\)](https://legislation.gov.uk/eur/2016/679)

the requester's own interests as well as wider societal benefits. These interests can include the broad principles of accountability and transparency that underpin FOIA, or may represent the private concerns of the requestor.

29. The complainant is a former patient of Dr Eljamel's and part of the campaign calling for a public inquiry. There's a valid, private legitimate interest to know how many complaints had been made against Dr Eljamel at the time the complainant was operated on and how many complaints had been made before Dr Eljamel was removed from the GMC register.

30. The GMC has also acknowledged:

'We accept that there is a legitimate interest in understanding more about Dr Eljamel's regulatory history with the GMC especially given that he is to be the subject of a statutory public inquiry. The fact that this longstanding request from patients has been acceded to indicates the wider interest in him.

We can also see that there is a legitimate interest in understanding what the GMC knew about Dr Eljamel's practice and whether substantive action could or should have been taken against his registration and whether he should have been permitted to voluntarily remove himself from the register. The underpinning theme of this interest is openness and transparency to allow such enquiries to be considered. The interests are therefore dually focussed on both the conduct of Dr Eljamel and the GMC.'

31. The Commissioner considers there is both a private and wider legitimate interest being pursued here. Therefore, the Commissioner must consider if disclosure is necessary for the purpose that this legitimate interest represents or if there is an alternative method of fulfilling this interest.

Necessity test

32. 'Necessary' means more than desirable but less than indispensable or absolute necessity. The necessity test is a means of considering whether disclosure under FOIA is necessary to meet the legitimate interest identified, or whether there is another way to do so that would interfere less with the privacy of individuals.

33. The GMC has stated:

'By itself, providing the number of complaints does not particularly advance any interest identified. It would include complaints which the GMC judged were without merit and wouldn't explain what the complaints were about or the outcomes so doesn't provide a valuable insight into the concerns about Dr Eljamel's practice... there is no way to use the data requested to meaningfully consider whether the GMC addressed the complaints raised adequately and appropriately.'

34. The Commissioner disagrees. Given the severity of the allegations made against Dr Eljamel, it's reasonable that any former patient would wish to scrutinise the GMC's involvement, with a view to understanding how many complaints had been made against Dr Eljamel whilst he was practising.

35. Furthermore, the request is specifically asking for a breakdown of complaints pre and post 2007. Clearly, there was a significant event in 2007, even in relation to the complainant's individual treatment or the campaign more generally, that has prompted this request.

36. Given the severity of the allegations made against Dr Eljamel, the Commissioner understands why the complainant wants to understand the total number of complaints received, regardless of whether they were deemed 'without merit' by the GMC at the time.

37. The Commissioner is satisfied that the specific information requested in this case has not otherwise been made available to the public and therefore disclosure is necessary to fulfil the legitimate interests identified at stage (i).

Balancing test

38. The Commissioner will now go onto consider whether the identified interests in disclosure outweigh the interests or fundamental rights and freedoms of the data subject, Dr Eljamel.

39. The GMC has explained that Dr Eljamel hasn't consented to disclosure of this information. According to the BBC⁸, Dr Eljamel is now living and working in Libya. The GMC has indicated it's not in a position to seek consent.

⁸ [Surgeon who harmed Scots is now working in Libya - BBC News](#)

40. It's also stated:

'providing the information would amount to a breach of the GMC's publication and disclosure policy and therefore breach the Doctor's reasonable and fair expectations as to how his data would be processed. In light of the GMC's policy, Dr Eljamel could reasonably expect that the fact that they had been subject to complaints not publicly referenced at any time would remain private and confidential. This is a weighty factor in considering the balancing exercise. Recital 47 to the GDPR specifically indicates that if the individual does not reasonably expect the processing, their rights may override legitimate interests. Furthermore, in circumstances where disclosing the fact that a complaint was made against them would be a breach of the GMC's policy (and breach the expectations that may have arisen from the Commissioner's and the Tribunal's consistent approach in upholding this position- see below), it is reasonable to infer that the doctor may suffer distress in the event of disclosure.'

41. The GMC is correct that the reasonable expectations of the data subject must be taken into account when considering the disclosure of personal data under FOIA. It's also important to consider would cause the data subject any distress or harm.
42. The GMC has consistently referenced a decision the Commissioner made in 2015, involving the same complainant and substantially similar information. In 2015, the Commissioner upheld the GMC's position. However, that was almost ten years ago and each request must be considered on a case by case basis. Furthermore, the Commissioner isn't bound by any of his previous decisions.
43. Likewise, the GMC has referenced multiple Tribunal decisions upholding the use of section 40(2) and section 40(5). However, these rulings don't replicate the specific circumstances of this case.
44. The Commissioner must consider the circumstances of the request at the time that it was made. Whilst NHS Tayside's report had not yet been published, and the inquiry had not yet been announced, the full scale of Dr Eljamel's negligence, which has resulted in life-changing injuries for some, had become clear.
45. In the Commissioner's opinion, this case represents exceptional circumstances in which a deviation from the GMC's own disclosure policy is justified. This request represents the legitimate interests of a significant number of vulnerable individuals, and the need for transparency and accountability in general. These factors override any

expectations of Dr Eljamel or any distress or harm disclosure may cause him.

46. Dr Eljamel has expectations in relation to his own privacy and the way that the GMC would process his personal data. However, the complainant, and other patients, also had expectations regarding the standard of care they would receive and the need for transparency, given the alleged systemic failings in addressing, and investigating, Dr Eljamel's conduct.
47. In this case, the need for transparency overrides the privacy rights of Dr Eljamel and the Commissioner considers it relevant that Dr Eljamel is believed to be still practicing medicine in Libya.
48. Since disclosure would be compliant with principle (a), section 40(2) of FOIA is not engaged and the Commissioner requires the GMC to take the steps outlined in paragraph 3.

Right of appeal

49. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

50. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
51. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed *A Gradwell*

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