

IC-351263-J6M8

Disclosure

foi@bbc.co.uk

[Date]

**Freedom of Information Act 2000 (FOIA)**

**Complaint from:**

**Our case reference:**

**Your reference:**

Dear BBC

The Information Commissioner has received a complaint from the above individual about how the BBC handled their request for information dated [Date].

The request was worded as follows:

"xxxx"

The BBC confirmed that it felt that the information was held for derogated purposes and fell outside of FOIA. The issues were referred to the Commissioner.

The Commissioner invited the complainant to withdraw their case on xx 2021 as it was his opinion that the requested information was held for the purposes of journalism, art and literature and that the BBC was correct in its refusal to disclose this information.

However, the complainant declined to withdraw their case and wrote to the Commissioner on xx 2021 to reiterate the fact that they did not believe that the information they have requested was held for the purposes listed in Schedule 1.

They argued that their request

"xxxx"

The purpose of this correspondence is to give you the opportunity to provide your more detailed arguments about why you believe that the information requested falls within the derogation.

There are two options available to the BBC in this case:

1. *Informal resolution*

The BBC may now be prepared to disclose the relevant recorded information that it holds to the complainant under FOIA. If you choose this option, I would appreciate that you tell me and provide me with a copy of the response provided to the complainant.

The Commissioner will then invite the complainant to withdraw his complaint or alternatively will issue a decision notice solely about delays that will require no further input from you. If you choose this option, you will not be required to answer the following enquiries.

## *2. Information required*

The Commissioner must consider whether the information is held for the derogated purposes. The test that the Commissioner applies for information to be derogated is that it must be held and used by the BBC in order to create journalistic, artistic or literary output, in performing one of the activities covered by journalism, art or literature.

**[1]** Please confirm where the information about the *[state issue]* is held.

**[2]** The Supreme Court<sup>1</sup> explained that “journalism” primarily means the BBC’s “output on news and current affairs”, including sport, and that “journalism, art or literature” covers the whole of the BBC’s output to the public (Lord Walker at paragraph 70). Therefore, in order for the information to be derogated and so fall outside FOIA, there should be a sufficiently direct link between the purpose(s) for which the information is held and the production of the BBC’s output and/or the BBC’s journalistic (art or literature) or creative activities involved in producing such output.

Please explain in detail

- (i) Who uses this information to create output; and
- (ii) How it uses this information to create output.

**[3]** The Supreme Court accepted the Information Tribunal’s definition of journalism as comprising three elements:

- The first is the collecting or gathering, writing and verifying of materials for publication.
- The second is editorial. This involves the exercise of

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<sup>1</sup> <https://www.supremecourt.uk/cases/docs/uksc-2010-0145-judgment.pdf>

judgement on issues such as:

- \* the selection, prioritisation and timing of matters for broadcast or publication;
  - \* the analysis of, and review of individual programmes; and
  - \* the provision of context and background to such programmes.
- The third element is the maintenance and enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness). This may involve the training and development of individual journalists, the mentoring of less experienced journalists by more experienced colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making.”

In determining whether the information is held for the purposes of journalism, the Commissioner wishes to consider the following factors:

- (i) The purpose(s) for which the information was held at the time of the request;
- (ii) The relationship between the purposes for which the information was held and the BBC’s output on news and current affairs, including sport, and/or its journalistic activities relating to such output.

Please explain in detail the purpose for which this information is held and how the information requested is used to directly influence journalistic content.

**[4]** Finally, please feel free to provide any further supporting arguments about why the BBC considers this information is derogated.

### **Action required**

Please take one of the above actions, as soon as possible, and within twenty working days **by xx 2021**.

Thank you in anticipation of your co-operation in this matter. Please do not hesitate to contact me on the number below.

Yours sincerely

FOI Derogation (BBC, Channel 4, S4C)  
Doctors and Surgery Practices  
Cambridge and Oxford Universities &  
Colleges

Anjum Iqbal  
Case Officer  
April 2022

# What is derogation?

The Freedom of Information Act does not apply to the BBC in the way it does to almost all public authorities in one significant respect. The Act recognises the different position of the BBC, as well as the other public service broadcasters covered by FOIA (Channel 4, S4C) by providing that it covers information **"held for purposes other than those of journalism, art or literature"**.

# Supreme Court (UK)

Sugar (Deceased) v British Broadcasting Corporation and another  
[2012] UKSC 4 (15/02/2012)

Clear definition of ‘journalism, art or literature’



The Supreme Court found that, “...the composite expression ‘journalism, art or literature’ seems to be intended to cover the whole of the BBC’s output in its mission (under article 5 of its Royal Charter) to inform, educate and entertain the public....

...On that comprehensive approach the purposes of journalism, art or literature would be, quite simply, the purposes of the BBC’s entire **output** to the public.”  
(Lord Walker at para 70).



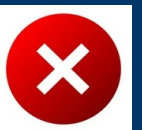
# Supreme Court accepted the Information Tribunal's definition of journalism as comprising three elements:

- The first is the collecting or gathering, writing and verifying of materials for publication.
- The second is editorial. This involves the exercise of judgement on issues such as:
  - \* the selection, prioritisation and timing of matters for broadcast or publication;
  - \* the analysis of, and review of individual programmes; and
  - \* the provision of context and background to such programmes.
- The third element is the maintenance and enhancement of the standards and quality of journalism



# Scenarios: covered by FOIA?

- Viewing figures of European Championship final
- The cost of Virtual Local Radio technology for local radio
- The number of complaints received about a Question Time programme
- TV licence fee rises over last 5 years
- Communications and minutes relating to the decision by Channel 4 to move parts of its functions outside London
- Written representations from the BBC to Facebook objecting to disclosure of confidential user information to Cambridge Analytica



# Scenarios (cont'd)

- How much the BBC spent in defending an equal pay claim brought by the journalist Samira Ahmed
- Selection of guests and audience members for the Question Time and Andrew Marr programmes.
- The cost of the review of over 75 TV licence funding
- Number of complaints the BBC received about the daily broadcast of Scotland's First Minister's COVID-19 briefings



# GPs & Surgery Practices under FOIA



Surgery or  
Practice



Doctors

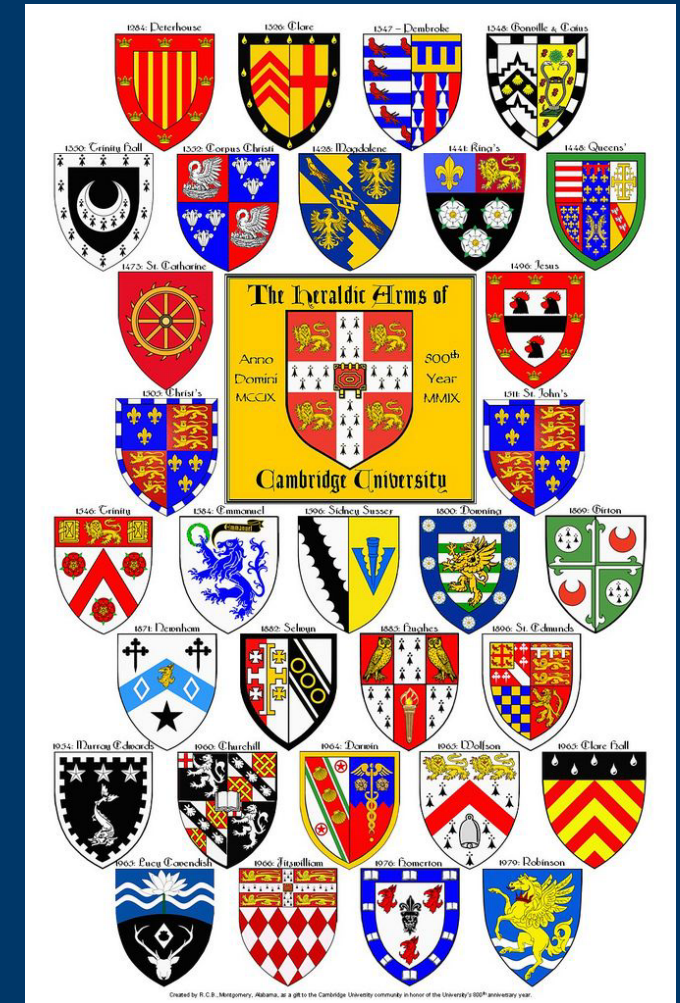




# University of Oxford colleges and University of Cambridge colleges



- Oxford University is made up of more than 30 different colleges.
- Cambridge University also has more than 30 different colleges



- The Colleges are governed by their own statutes and regulations
- Each College is a separate public authority under the FOIA.
- Each University is also a public authority in its own right
- Accounts should be set up for each college or university
- Decision Notices should be served on the Council or Governing Body of the public authorities i.e. university or college

Q&A

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# Public authorities under the Freedom of Information Act

## Freedom of Information Act

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The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.

An overview of the main provisions of FOIA can be found in [The Guide to Freedom of Information](#). This is part of a series of guidance, which goes into more detail than the Guide to FOIA, to help public authorities to fully understand their obligations and to promote good practice.

This guidance explains which organisations are public authorities under FOIA.

## Overview

- The definition of a public authority is found in section 3 of FOIA.
- Schedule 1 is the detailed list of categories of public authorities and named public authorities.
- The Chancellor of the Duchy of Lancaster<sup>1</sup> can amend Schedule 1 by adding to or removing entries from the list of public authorities.
- Publicly-owned companies are public authorities if they meet the definition of section 6 of FOIA.
- Some public authorities may only be subject to FOIA for certain information.

## What FOIA says

### **3 Public authorities.**

(1) In this Act “public authority” means—

(a) subject to section 4(4), any body which, any other person who, or the holder of any office which—

(i) is listed in Schedule 1, or

(ii) is designated by order under section 5, or

(b) a publicly-owned company as defined by section 6.

## Schedule 1

1. Schedule 1 sets out the bodies or holders of office that are public authorities under FOIA in the following broad categories:

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<sup>1</sup> Formerly the Secretary of State  
Public authorities under FOIA  
20160901  
Version: 2.2

- Government departments, legislative bodies, and the armed forces
  - Local government
  - National Health Service
  - Maintained schools and further and higher education institutions
  - Police
  - Other public bodies (this includes a list of individually named non-departmental public bodies)
2. These broad categories mean that, for example, a government department includes all of its Executive Agencies. Further detail regarding the categories is provided within the Schedule. For example, for local government the Schedule lists a wide range of bodies including principal councils, parish councils, various joint authorities, as well as named bodies such as Transport for London. Public authorities in the National Health Service (NHS) range from trusts to individual practitioners who provide services under contract to the NHS. Within the education sector, it is the governing body of a school, further education institution or university that is the public authority.

### **Adding to and removing from the Schedule**

3. The Schedule is updated in a number of ways:
- by order under section 4, whereby the Chancellor of the Duchy of Lancaster can add bodies or holders of office that meet the necessary two conditions:
    1. the body or office is established by HM prerogative or by legislation, or in any other way by a Minister of the Crown, government department or the National Assembly for Wales;
    2. the body or office is appointed by the Crown, a Minister of the Crown, a government department or the National Assembly for Wales);
  - additions, as a result of provisions in other legislation; and
  - removals, where either of the two necessary conditions for inclusion is no longer satisfied or as a result of the body or office ceasing to exist (Sections 4(4) and 5).

### **Designation as public authorities**

4. Under section 5 of FOIA the Chancellor of the Duchy of Lancaster can, by order, designate bodies as public authorities. These are bodies that appear to be exercising functions of a public nature or who are providing, under contract with a public authority, any service whose provision is a function of that authority. This is the means by which bodies that are not listed in Schedule 1, and cannot be added to that Schedule by order under section 4, are brought under the provisions of FOIA. The first order under section 5 (in November 2011) designated the Universities and Colleges Admissions Service (UCAS), the Association of Chief Police Officers (ACPO) – now known as the National Police Chiefs’ Council (NPCC) - and the Financial Ombudsman Service (FOS) as public authorities for the purposes of FOIA, in respect of specified functions.
5. The Cabinet Office is responsible for updating Schedule 1 and any queries regarding the Schedule should be directed to it. However, the Information Commissioner can investigate whether or not a body is a public authority for FOIA. An updated Schedule 1 is available at [www.legislation.gov.uk](http://www.legislation.gov.uk), although the latest amendments may not be reflected.

## Publicly-owned companies

6. Section 3(1)(b) of FOIA includes a publicly-owned company within the meaning of a public authority.
7. This guidance now reflects amendments made to section 6 of FOIA by the Protections of Freedoms Act 2012.
8. Section 6(1) states:

**6.—(1)** A company is a “publicly-owned company” for the purposes of section 3(1)(b) if—

- (a) it is wholly owned by the Crown,
- (b) it is wholly owned by the wider public sector, or
- (c) it is wholly owned by the Crown and the wider public sector.

This is the only category of public authority that is made subject to FOIA without any specific reference in Schedule 1 or a subsequent ministerial order introducing additions to the Schedule or designating new public authorities.

## **Companies wholly-owned by the Crown**

9. Section 6(2)(a) states:

**6.—(2)** For the purposes of this section—

(a) a company is wholly owned by the Crown if, and only if, every member is a person falling within sub-paragraph (i) or (ii)—

(i) a Minister of the Crown, government department or company wholly owned by the Crown, or

(ii) a person acting on behalf of a Minister of the Crown, government department or company wholly owned by the Crown.

10. This means that any company that is wholly owned by a single government department qualifies as a company wholly owned by the Crown, and therefore as a publicly owned company. It also means that two or more government departments may share the ownership of a company without affecting its status as a company wholly-owned by the Crown.

11. Examples of companies that are wholly-owned by the Crown include:

- Northern Ireland Water (sole shareholder the Department for Regional Development)
- UK Financial Investments Limited (sole shareholder HM Treasury)
- the Commonwealth Development Corporation (sole shareholder the Department for International Development)

## **Companies wholly-owned by the wider public sector**

12. Section 6(2)(b) states:

(b) a company is wholly owned by the wider public sector if, and only if, every member is a person falling within sub-paragraph (i) or (ii)—

(i) a relevant public authority or a company wholly owned by the wider public sector, or

(ii) a person acting on behalf of a relevant public authority or of a company wholly owned by the wider public sector.

13. Although the Protection of Freedoms Act 2012 introduces the term “the wider public sector” it is clear from the explanatory notes to that Act that this just means one or more relevant public authorities.

A “relevant public authority” is defined in section 6(3) as any public authority listed in Schedule 1 other than—

(a) a government department, or

(b) any authority which is listed only in relation to particular information.

14. This means that a company such as Manchester Airports Group plc is no longer a publicly-owned company under FOIA. The majority of the shares are owned by the ten local authorities of Greater Manchester, but the remainder is owned by IFM Investors, an investment company owned by a number of Australian pension funds<sup>2</sup>.
15. However, it also means that if any one of the shareholders of a company is listed in schedule 1 of FOIA only in relation to particular information, then that shareholder will not be a relevant public authority, and because of this the company will not qualify as a publicly owned company.

### **Example**

The BBC is listed in Schedule 1 of the FOIA as a public authority “in respect of information held for purposes other than those of journalism, art or literature.”

This means that any company that is partly owned by the BBC is not a public authority for FOIA.

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<sup>2</sup> Manchester Airports Group About us and our airports. MAG website  
<http://www.manchesterairport.co.uk/manweb.nsf/Content/AboutUsAndOurGroup>  
Public authorities under FOIA  
20160901  
Version: 2.2

## **Companies wholly-owned by the Crown and the wider public sector**

16. New sections 6(2)(c) and 6(2A) state as follows:

(c) a company is wholly owned by the Crown and the wider public sector if, and only if, condition A, B or C is met.

(2A) In subsection (2)(c)—

(a) condition A is met if—

(i) at least one member is a person falling within subsection (2)(a)(i) or (ii),

(ii) at least one member is a person falling within subsection (2)(b)(i) or (ii), and

(iii) every member is a person falling within subsection (2)(a)(i) or (ii) or (b)(i) or (ii),

(b) condition B is met if—

(i) at least one member is a person falling within subsection (2)(a)(i) or (ii) or (b)(i) or (ii),

(ii) at least one member is a company wholly owned by the Crown and the wider public sector, and

(iii) every member is a person falling within subsection (2)(a)(i) or (ii) or (b)(i) or (ii) or a company wholly owned by the Crown and the wider public sector, and

(c) condition C is met if every member is a company wholly owned by the Crown and the wider public sector.

This means that a company's ownership can be 'shared' between government departments and other relevant public authorities, and still meet the definition of a publicly owned company.

### **Examples of publicly-owned companies**

17. Whilst there are relatively few Crown-owned companies, there is potentially a wide range of companies that fall within section

6(2)(b) and (c). For example, in the local government and higher education sectors, public authorities may set up companies for a variety of purposes:

- **Higher education**

It is very common for universities to establish companies, usually in order to benefit commercially from their intellectual property, technological expertise and research. Cambridge Enterprise Limited, where the University of Cambridge is the sole shareholder, and University of Manchester Intellectual Property Limited, where the University of Manchester is the sole shareholder, are two examples.

- **Local government**

Public authorities may set up companies in the local government sector, usually as a means of providing specific services.

Transport for London (TfL) is an example, which also shows how section 6 brings subsidiary companies within the definition of a publicly-owned company:

- TfL itself is listed as a public authority in the local government section of schedule 1.
- TfL has three subsidiary companies, which, as they are wholly-owned by TfL, are themselves public authorities.
- One of these subsidiaries, Transport Trading Limited (TTL), is a holding company which wholly owns all the operating transport companies, for example London Underground Limited and Docklands Light Railway Limited. In view of the definition of section 6(2)(b)(ii), this means that these subsidiaries of TTL are also public authorities.

Local authorities will sometimes set up companies in the area of facilities management and economic development. For example:

- Wigan Metropolitan Development Company Limited is wholly-owned by Wigan Council and was established in order to promote economic development and investment within the council's area; and
- Solutions SK Limited is wholly-owned by Stockport Council and provides a range of services including



building and grounds maintenance, environmental services and catering.

An Arm's Length Management Organisation (ALMO) set up by a local authority to manage its housing stock is probably the most common example of a publicly-owned company in the local government sector:

- An ALMO is usually set up as a company limited by guarantee, with the local authority as the sole member or guarantor. In this way the definition of section 6(2)(b)(i) is met and the ALMO is a publicly-owned company, and therefore a public authority, for the purposes of FOIA.
- The ALMO will manage and improve all or part of the local authority's housing stock with the ownership remaining in the hands of the local authority. For example, Leeds City Council owns three ALMOs (East North East Homes Leeds, West North West Homes Leeds, and Aire Valley Homes Leeds) who are responsible for managing council-owned housing in Leeds.
- The intention is that with a significant degree of independence an ALMO will be able to develop new approaches to the management of the housing stock.
- An ALMO should not be confused with organisations that are sometimes known as Arm's Length Trading Organisations (ALTOs) which will operate separately, with their own governance and management arrangements, whilst remaining part of the public authority.

## **Responsibilities**

18. If a company meets the definition of a publicly-owned company under FOIA, it is a public authority in its own right and has the same responsibilities as any other public authority in complying with the Act. The 'owning' public authority or authorities should raise awareness of these responsibilities with the companies concerned.
19. All information held by a publicly-owned company is held for the purposes of FOIA. However, the Secretary of State can, by order, define certain information held by a publicly-owned company as 'excluded information' which falls outside the scope of FOIA. To date no such order has been made.

## Public authorities to which FOIA has limited application

20. As mentioned above in the context of publicly-owned companies, some of the bodies listed in Schedule 1 are only covered for certain purposes or information held for certain of their functions. Section 7 of FOIA gives details of the provisions that apply to these public authorities.

Information held by public authorities that is not subject to FOIA in this way is often referred to as 'derogated information'.

21. A public authority which the Secretary of State adds to Schedule 1 by order under section 4 may be listed only in relation to information of a specified description. It is also possible for the Secretary of State to change an existing entry in Schedule 1 by limiting the information to which FOIA applies. Likewise an entry in Schedule 1 can be changed by either removing or amending the existing limitation on information covered. Similarly, the Secretary of State may, by order, limit the application of FOIA relating to information held by a publicly-owned company. An order designating an organisation as a public authority under section 5(1)(a) must specify the functions of the authority in respect of which the designation is to have effect.
22. The wording of these limited applications varies. For example, the British Broadcasting Corporation (BBC) is a public authority "in respect of information held for purposes other than those of journalism, art or literature", and the Competition Commission – now the Competition and Markets Authority (CMA) - is a public authority "in relation to information held by it otherwise than as a tribunal." Certain categories of public authority also have limited coverage, such as general medical practitioners who will be covered only for information about the provision of specific services under specific NHS legislation.
23. It is important to interpret the designation of a public authority under FOIA broadly, yet with care and precision. The comments of the Upper Tribunal in the following decision illustrate this point.

### Example

In *UCAS v the Information Commissioner and Lord Lucas* [\[2014\] UKUT 0557 \(AAC\) \(GIA/1646/2014\)](#) the Upper Tribunal considered the designation of UCAS by an Order under FOIA in

respect of specific functions, namely the provision and maintenance of a central applications and admissions service in respect of universities and FE colleges. It rejected UCAS's arguments that its designation should be interpreted narrowly, similarly to that for the BBC.

The Upper Tribunal stated: "The starting point of the two bodies was fundamentally different in that the BBC is designated as a public authority in relation to all of its functions, except those exempted by the wording of its designation in Schedule 1 to FOIA. UCAS, by contrast, is not designated as a public authority generally, but only for the function(s) included by the specific wording in the Designation Order."

In relation to the Designation Order, The Upper Tribunal commented: "The primary aim of the Order was surely to ensure that bodies of whatever formal legal status that exercise functions of a public nature are subject to the same degree of scrutiny under FOIA as 'ordinary' public authorities in relation to those functions and as a result become more open, transparent and accountable. The non-designation of UCAS' other functions (e.g. commercial functions) is necessarily a secondary purpose of the Designation Order. In those circumstances it seems to me that the golden thread I have referred to must carry the day in terms of mandating a liberal construction of the legislative provisions in issue."

24. Although the extent to which these bodies are subject to FOIA is limited, they are public authorities and as such the Information Commissioner can issue decision notices to confirm whether or not the information that has been requested falls within the derogation.

## More information

25. This guidance relates only to FOIA. If the information is environmental, public authorities will instead need to consider their status under the EIR. For more details, please refer to our guidance [Public authorities under the EIR](#).
26. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered

from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

27. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
28. If you need any more information about this or any other aspect of freedom of information, please [Contact us](#) – see our website [www.ico.org.uk](http://www.ico.org.uk).

#### **Version control**

<b>Publication date</b>	
<b>Version</b>	
<b>Review date</b>	