Summary

- This is a response submitted by mySociety. It has been prepared with input from WhatDoTheyKnow.com volunteers and mySociety staff.
- WhatDoTheyKnow is a service that simplifies access to Freedom of Information for ordinary citizens, as well as journalists and other professionals who make use of FOI.
- WhatDoTheyKnow publishes information released in response to FOI requests for the purposes of building an accessible public archive of information released under FOI. This can lead to threats of legal action to remove material that is privately accessible to anyone who asked, and where there is a good case that publication is in the public interest.
- We strive to run WhatDoTheyKnow in a responsible manner, with all those involved adhering to high standards of impartiality, rigour and transparency in our administration processes. In cases where people or organisations ask us to remove material we are publishing from our website, we endeavour to take decisions that are consistent and considered.
- WhatDoTheyKnow's legal situation (and the public benefit of the service) would be improved by legislation being explicit that information released under the Freedom of Information Act (and similar access to information legislation) is covered by the privilege defence.
- WhatDoTheyKnow would also benefit from:
  - Universities as corporate bodies being explicitly unable to sue for libel, in line with the wider set of local authorities (Derbyshire principle).
  - Greater clarity on re-publication of Freedom of Information in regards to GDPR-based take-down requests.
About mySociety

mySociety is a not-for-profit group, based in the UK but working with partners internationally. We build and share digital technologies that help people be active citizens, across the four practice areas of Democracy, Transparency, Community and Climate.

mySociety runs WhatDoTheyKnow.com in the UK, and maintains the Alaveteli software and network which powers Freedom of Information sites around the world. This software allows users to make public requests through a website that are sent to authorities via email.

About WhatDoTheyKnow

WhatDoTheyKnow.com is a website where people can make Freedom of Information requests online using a form. These requests are sent via email to public authorities.

The requests and responses are also displayed in public, meaning that information is available to all users of the site, rather than just the original requesters.

WhatDoTheyKnow makes Freedom of Information more efficient, because information requested once is accessible to a wider range of people and discoverable through search engines. This reduces the need for different people to request the same information, and means that information may be found and used by people who would never make a request.

We believe that our service has significant public benefits including enabling informed civic debate; making it easier for people to access information behind news stories, academic research and other publications; and in turn hopefully improving public services, improving value for public money and contributing to a fairer, happier society.

WhatDoTheyKnow acts as a publisher, both of the contents of requests sent from the public and responses from public authorities.

The moderation of this public archive is managed by a small team of dedicated volunteers with the support of mySociety staff and board.
WhatDoTheyKnow publication risks

The information released in FOI requests is legally held by the public authority and can be requested by any member of the public. Publishing this information engages different legal considerations and risks. Both the messages sent to local authorities and publishing the responses from public authorities can lead to legal complaints.

Our 2021 Transparency report summarises information removed from the site during the course of the year. In the majority of examples (especially when the issue is a complaint about the content of a request rather than a response), issues are dealt with either by making the request visible only to the requester, or by redacting problematic elements (e.g. defamation) while preserving the substantial request for information. We deal with almost all concerns without removing substantive FOI requests and responses, or indeed ending up in court.

We go to great lengths to keep substantive requests and responses published, but this is dependent on a huge amount of work by the administration team. There have only been a few cases where substantive material has been removed, and in each instance this was because we lacked the legal ability to defend publication. We do not have the legal resources necessary to make an argument, even where we believe there is a solid moral and legal case for keeping the information public. We mitigate the impact of this by adopting policies of minimal redaction, and transparent administration. When we have removed material from our website, where possible we add an annotation to explain what we have removed and why.

Question responses

Q1: Have you been affected personally or in the conduct of your work by SLAPPs? If so, please provide details on your occupation and the impact SLAPPs had, if any, on your day to day activity including your work and wellbeing.

Over the course of the last two years we have engaged in 304 pieces of correspondence raising defamation issues — an average of three a week. The provision of our service over the last ten plus years has been possible only due to the work of a small team of volunteers who deal with these complaints when they arise.

Without legal resources to contest legal threats, we, on occasion, have no choice but to act contrary to the service's core purpose: putting more information of public interest in the public
domain. This is a frustration to staff and volunteers personally, and an obstacle to our broader mission.

That we might be able to win a libel case in practice is not useful to us. We are not in a financial position to take matters to court, or to take the risks associated with a court case. We are actively seeking to become an organisation which is able to take a stronger stance, but the risks involved in defending legal actions relating to defamation are high.

The high damages awards in libel cases have meant that we consider risks associated with libel threats to be existential risks not only to WhatDoTheyKnow.com but to mySociety and the other services it provides. Dealing with the constant fear of disproportionate court action, sustained over many years, has been draining both on individuals and our organisation. We put significant resources and effort into identifying and managing defamation risk.

As well as receiving libel threats ourselves directly, we are also impacted indirectly when those wishing to take libel action against our users seek information from us to identify them. In these cases we require a court order prior to releasing our users’ personal information. It is important that we protect our users’ personal data, generally, and particularly given that some of our users are journalists, political activists and whistleblowers. We put considerable resources into reviewing and commenting on draft orders, seeking to ensure they are appropriately targeted, lawful, and proportionate. To date we have not challenged any such orders in court, but we do seek to ensure that the court has the information required to make a well-informed decision. Often libel cases are connected to allegations of harassment.

Q3: If you have been subject to a SLAPP action how did it proceed? For example, a pre-action letter or a formal court claim resulting in a hearing. Did you settle the claim and what was the outcome of the matter?

WhatDoTheyKnow does not have the legal resources to dispute libel claims even when we believe there is a decent case to be made. All legal complaints to date have stopped at the pre-action letter, as we have generally removed the contested material at this stage.

Our stance in respect of defamation risk is such that generally we remove any potentially defamatory material from our service when made aware of it.
The exception is where it is clear there are no (as opposed to disputable) legal grounds for action, such as the defamation of dead people or public bodies (not actionable following precedent in Derbyshire case).

We are not prepared to pursue less clear cut cases even where we might have a good case to defend a libel action. The defences of Truth, Honest Opinion, etc may in principle support our activities, but we cannot support the cost of arguing this.
Q5: If you are a member of the press affected by SLAPPs, has this affected your editorial or reporting focus? Please explain if it did or did not do so, including your reasons

SLAPP action against WhatDoTheyKnow has an indirect effect on journalists' work.

WhatDoTheyKnow is journalism-adjacent in that we both directly support journalists using the platform, and through hosting large amounts of information in public, make accessing information much easier for journalists investigating a story. This is especially significant for under-resourced local journalism.

The removal of material from WhatDoTheyKnow makes information less accessible. This makes certain kinds of reporting harder.

While some of our users are professional journalists, many could be described as citizen journalists, or just citizens doing journalistic work which may later get picked up by others and amplified by mass-market platforms. The current state of libel law can chill the ability of many people to engage. Members of the public, who make up many of our users, seeking to delve into stories themselves lack the awareness of the state of libel law to do so in a legally safe manner.
Q6: If you have been affected by SLAPPs, please provide details on the work you were undertaking at the time, including the subject matter referred to by SLAPPs

The context of libel threats having previously been made means we cannot link in specific detail to individual cases. In broad terms, here are several examples of complaints made and the action we have taken.

- We removed an audit report on a university, having been made aware of threats of legal action on behalf of senior staff and governors who considered that the material defamed them.

- A property developer threatened libel action in relation to a FOI response from a council which indicated they had developed contaminated land which had not been properly remediated; we removed the council’s response from our website.

- We have dealt with a large number of concerns about defamation which relate to the situation at Liverpool City Council that resulted in the Government appointing commissioners to oversee improvements.
  - The Government has noted “It is a matter of public record that Merseyside Police have for many months been conducting an investigation which has resulted in a number of arrests made on suspicion of fraud, bribery, corruption and misconduct in public office”.
  - Some complaints come from the content of requests. Even if allegations are in the public record, repeating them in the context of making FOI requests can be potentially libellous. This requires review of the request, and potentially making redactions to the original request to preserve the substantial question being asked.
  - The contents of responses can also lead to complaints. In one case, someone who was mentioned in a FOI request, and response, relating to developments in Liverpool asked us to remove their name or delete the content from our website. Their request was made on the basis of privacy and defamation. The request sought information on contacts by email, phone, and physical meetings. We corresponded for a month. Threats of legal action never resulted in an application to court and we didn’t remove any material. We took legal advice from our volunteer legal advisor, who is a barrister.
In other cases there have been requests for information relating to the complaints records and professional status of regulated professionals such as police officers, teachers, social workers, doctors, etc. Many takedown requests citing defamation come from those who are, or have been, such regulated professionals. We are keen to enable our users to use our service to, fairly, seek information about professionals’ regulatory status.
Q14: Are there additional reforms you would pursue through legislation? Please give reasons

Universities and libel

We would recommend legislation to bring universities back into line with the wider set of public authorities, who are unable to sue for libel.

A challenge WhatDoTheyKnow moderators face is that universities are subject to FOI, but have a different status under libel law to the wider set of public authorities. Requesters asking for information related to allegations of an issue, or problems at a university need to be more careful in how they phrase their requests than they might for an equivalent request at a local authority (where requesters need to be careful not to defame individuals, but have a broader scope to talk about the local authority as an institution).

Universities are considered to be similar to the public sector for the purposes of Freedom of Information legislation (and similar public sector oriented legislation). However, in an accounting sense they are considered to be outside the public sector. This confused status means that, in Duke v The University of Salford [2013], it was found that universities may sue for libel, whereas public bodies more generally may not under the Derbyshire principle. As this decision was released after the Defamation Bill had passed through the committee and report stages, this change was not explicitly discussed in the last review of defamation law.

In a 2015 editorial for the Times Higher Education, John Morgan reiterated the case for universities to be subject to Freedom of Information:

*Scrutiny by the public or the media can, on occasion, lead to embarrassing coverage for universities. But, as many working in universities would agree, it can also be a positive – improving the quality of decision-making.*

*Some universities were established by local authorities. All have buildings created by public funding. The sector as a whole relies on billions of pounds a year in direct public funding and student funding coming via the public loans system. Universities are institutions of vital importance to their regions and to the nation.*

The importance of universities to local economies was highlighted in the Government’s Levelling Up white paper:

*HE institutions have a vital part to play in supporting regional economies, as significant local employers and through their role as anchor institutions supporting regional collaboration.*
In this vital and public role of universities, it is appropriate that free and open criticism is encouraged, and that the same Derbyshire standard should be explicitly applied to universities.

**GDPR-based approaches to removing information from archives**

While not the subject of this consultation, we note that GDPR rights-based takedown requests can have a similar effect. This is a similar area with potential fines and legal uncertainty.

The Data Protection Act 2018 (which incorporates UK GDPR) has an exemption for the ‘special purposes’ of journalism, art, and literature. The [ICO’s guidance for journalists](https://ico.org.uk/for-journalists/) allows that organisations like WhatDoTheyKnow and citizen bloggers/journalists (who make up some of the service’s users) are able to make use of this exemption and generally that the ICO will respect clear procedures around the consideration of the public interest in relation to a story.

Where a difficulty arises is that there is still a right of compensation for damage and distress through the courts as a result of a data protection breach. There is a defence available that there was no breach because the original publication was exempt under the journalism exception, but this requires legal resources.

For instance, the publication on WhatDoTheyKnow of information about a public sector official's expenses could be challenged on the basis that the publication of that information is distressing to the individual concerned. This approach could be challenged in court, to argue that the publication was not a breach of the DPA. But the [lack of test cases](https://ico.org.uk/for-journalists/) means that requests to remove information from newspaper archives and WhatDoTheyKnow can be effective where there are not the resources to challenge them.

In line with our response to the privilege defence, we would benefit from legal clarity that when information released under the Freedom of Information (or similar access to information legislation), where:

- there has already been a consideration from the public authority of the trade-off between disclosure and data protection considerations, and
- where the original release by the authority is not considered a data breach,

re-publication of this information is not a data breach, and so there is no practical right to compensation for the publication of this information. This would help us challenge this kind of use of GDPR-based take-down requests more confidently.
Q24: Are there any reforms to the privilege defence that could be considered in SLAPPs cases?

We would like an extension to the privilege defence to be explicitly inclusive of all information released by a public authority through Freedom of Information (and other similar access to information schemes).

Our problem with the privilege defence is that it is unclear whether it applies to publication of all information released under Freedom of Information.

Privilege is defined in the Defamation Act 2013 as:

“A fair and accurate copy of, extract from or summary of a notice or other matter issued for the information of the public by or on behalf of—

(a) a legislature or government anywhere in the world;
(b) an authority anywhere in the world performing governmental functions”

In principle, an audit report being published on a local authority website would fairly clearly meet this definition, and the same legal status should logically apply if the audit report was released under Freedom of Information.

We feel this definition, if tested, should cover information released under Freedom of Information, as it has been issued for the ‘information of the public’, even if the public was one individual. However, we can’t afford the risks associated with a test case, and would prefer explicit clarity in law that information released under access to information legislation is ‘issued for the information of the public’ rather than privately to the requester.