

A submission to the Independent Commission on Freedom of Information

On behalf of mySociety, operators of WhatDoTheyKnow.com and developers of the international Freedom of Information software, Alaveteli.

Key Points

- We strongly oppose the introduction of application fees for Freedom of Information requests. Evidence shows that fees will deter people from seeking information. The ability of individuals and groups to effectively scrutinise public bodies, and engage with them constructively from an informed position, is a key part of a functioning democracy.
- While effective Freedom of Information laws are essential for our democratic system to function, we advise that it is best accompanied by more routine proactive publication of information held by public bodies. This would efficiently aid the Government in their aims of openness and accountability.
- We are disappointed that the public sector's response to the introduction of the Freedom of Information Act has been more focused on creating a bureaucracy around dealing with requests rather than on changing the culture of the public sector towards operating in a more open and transparent manner.

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About mySociety, WhatDoTheyKnow and Alaveteli

1. WhatDoTheyKnow.com is a public web-based service that has helped people make over 300,000 Freedom of Information (FOI) requests to over 16,000 public authorities

since 2008. We estimate that over 10% of UK FOI requests, and around 15% of requests to central government in the UK, are made and published via the site. This figure rises to 20–30% for requests to key departments including the Department for Work and Pensions and the Home Office.¹²

2. WhatDoTheyKnow has over 90,000 registered users, who use the site either to make requests themselves or to follow requests made by others and read the responses provided. 500,000 monthly visitors read material published on the site. Our users include elected representatives, journalists and campaigners as well as those contacting public bodies for the first time.³
3. mySociety has made Alaveteli, the software behind WhatDoTheyKnow, openly available for use by others. The mySociety team actively works with groups around the world setting up local services using the software to open up access to governments and other public bodies. Alaveteli has been translated into 20+ languages, and deployed in 25 jurisdictions. We are part of a global community of digital civic practitioners, a group which includes those who use other software and approaches to promote access to public information.

Application Fees

4. Introducing a fee for making a Freedom of Information request would have a significant negative impact on our users' ability and willingness to obtain information from public bodies and would make it difficult, if not impossible, for us to continue to serve our users as well as we do now.
5. Around a third of WhatDoTheyKnow's users have only ever made one Freedom of Information request via our service; these people are not habitual or professional users of the Act. We expect the introduction of an application fee will particularly deter those who have never made a request before and are not familiar with, or feel intimidated by, the legislation.
6. As noted in the Ministry of Justice's memorandum to the House of Commons Justice Committee's Post-Legislative Scrutiny of the Freedom of Information Act in 2012⁴, WhatDoTheyKnow has successfully promoted the rights people have to access information held by public bodies. It has also been recognised that our service has made it easier for people to keep track of and follow up requests. Application fees

¹ <https://www.mysociety.org/2011/07/01/> "WhatDoTheyKnow's Share of Central Government FOI Requests – Q2 2011", Alex Skene, mySociety, July 2011

² <http://www.theyworkforyou.com/wrans/?id=2012-01-30b.92119.h> Work and Pensions written question, House of Commons, 30 January 2012

³ <https://www.mysociety.org/files/2014/12/manchester.pdf> "The Third Sector and Online Citizen Empowerment: the Case of mySociety", Rachel Gibson, Marta Cantijoch, and Silvia Galandini, University of Manchester, November 2014

⁴ p110 [Ministry of Justice's memorandum on the Freedom of Information Act to the House of Commons Justice Committee's Post-Legislative Scrutiny of the Freedom of Information Act in 2012](#)

would create a new hurdle for those considering making a request and undo the work we've done to attempt to make the process of submitting a request less daunting.

7. The Alaveteli software is used in a number of jurisdictions, including some where Freedom of Information application fees apply, such as New South Wales and the Northern Territory in Australia (we note that the Commission's call for evidence states "In Australia, the fee is around \$15 per hour to search and retrieve documents" however RightToKnow.org.au advises "Making a Freedom of Information request to a Federal or ACT authority is always free. For other states and territories there is an application fee around \$30" which we understand is a better summary of the position. Requests which are deemed to be of public interest do not incur a charge)⁵.
8. While experience in Australia shows some people abandon a request following a request for payment, we also see requesters being encouraged or advised to make a public interest case for waiving a fee. We also see public bodies inviting "informal requests", apparently so they can avoid having to refuse to release information when a fee has not been paid. Asking officers to determine if the public benefit in releasing material is sufficient to warrant waiving a fee creates added complexity and extra bureaucracy.
9. Our Australian partners also advise requesters on making applications for fees to be waived on the basis of the requester's inability to afford to pay. We do not want to see a situation where public information is only accessible to the wealthy or those able, and prepared, to demonstrate financial hardship.
10. The Commission has drawn a parallel between the application fee for a Subject Access request under the Data Protection Act and the mooted application fee for making a Freedom of Information request. Freedom of Information requests have a different character in that the information released is not specific to an individual. The information released is public information which is often of interest not only to the requester but to many others as well. The Commission also notes Companies House and the Land Registry make a charge for access to some information. We note both organisations are increasingly offering more information as open datasets in recognition of the fact many uses of the data requiring bulk access would be impractical if a per-request fee was levied limiting the potential societal benefits of the registers.
11. Often very useful Freedom of Information requests involve requests to a number of bodies; such requests will become impractical for those without substantial financial backing if an application fee is imposed.
12. We have multiple examples of requesters who have used WhatDoTheyKnow to carry out research in the public interest which required them to make requests to many

⁵ <https://www.righttoknow.org.au/help/requesting#fees> "Does it cost me anything to make a request?", Australian Alaveteli service "Right To Know".

bodies, and so would have been especially hard hit by a per-request fee. However for the purposes of this document we will list only a few:

- https://www.whatdotheyknow.com/user/kiara_vincent **Dr Kiara Vincent** who sought the release of information about weekend working by consultants in the NHS. The responses were reported in the national media, including the [Mirror](#) and [Independent](#).
- https://www.whatdotheyknow.com/user/clare_lucas **Clare Lucas**, “Activism Lead” at the charity Mencap, who researched the provision of short break (respite) services for children with a learning disability.
- https://www.whatdotheyknow.com/user/l_reynolds_4 **L Reynolds** who requested information on the use of Community Safety Accreditation Scheme powers from each police force in the UK.
- https://www.whatdotheyknow.com/user/chris_ebberley **Chris Eberly** who investigated whether and how local authorities utilised sponsorship and promotional activities to generate revenue, for his MBA dissertation at the University of Leicester.
- https://www.whatdotheyknow.com/user/graham_atherton **Graham Atherton** who researches the extent, and costs, of problems of damp and mould in council homes.
- https://www.whatdotheyknow.com/user/stuart_lawson **Stuart Lawson**, https://www.whatdotheyknow.com/user/ben_meghreblian **Ben Meghreblian** and others who researched payments by universities to academic journal publishers. They have [published the resultant dataset](#) and have [written about their research](#).

13. Freedom of Information requests also have value beyond research: in 2012, this [list of 366 things we would not have known without the Freedom of Information Act](#) was picked up and published by the Guardian newspaper, providing an informative, entertaining and useful resource to its readers.

14. Under current Freedom of Information law in the UK it is very rare for someone making a request under the Freedom of Information Act to be asked to pay a fee or costs. However, public bodies often include forbidding warnings about potential fees and costs on web pages about Freedom of Information or when acknowledging requests. Despite the reality of fees being rare, our postbag tells us that very existence of provisions enabling fees and costs to be levied in certain circumstances worries, and perhaps puts off, some of those considering making requests. Reassuring people that making a Freedom of Information request is nearly always free is something we've done as part of our efforts to help people to use their rights to access public information.⁶

⁶ <https://www.whatdotheyknow.com/help/requesting#fees> “Does it cost me anything to make a request?”
- WhatDoTheyKnow.com

15. Our fellow activists and civic technology campaigners from countries including the USA, Germany, Hungary, Spain, Australia the Czech Republic and Ireland⁷ have been in touch to warn us about the impact application fees for Freedom of Information requests have had in their countries. They have told us that the effect of fees has been negative in a variety of ways, from drastically reducing the number of requests made by the general public and journalists, to allowing the application of fees (per piece of information) so prohibitive that very few requesters would pay. We urge the Commission to learn from the experiences of other countries and not to repeat mistakes they have made:

- **Republic of Ireland:** The Irish Government has recently reversed its decision to impose a fee, citing restoring balance and bringing the country into line with international best practice.⁸ While the Irish constraints were in place, overall usage of the FOI Act fell by over 50%, and requests by the media, who have a key role in informing public debate, fell by over 83%.
- **United States of America:** MuckRock.com, a Freedom of Information website operating in the USA, has reported that a system of fees based on the amount of work a public body says is required to deal with a request has sometimes resulted in fees reaching levels far beyond the reach of ordinary requesters. Examples cited include \$270,000 for [details of contracts between the FBI and a contractor](#), and \$452,000 for [summary information on a mail surveillance program](#). Payment of fees has been requested in these cases despite the fact that fees are supposedly waived when there is a public interest case for doing so.
- **Germany:** In Germany their Freedom of Information fee regime has been [challenged by the courts](#) which have ruled that charges must not restrict access to information by deterring applicants from making requests. [Fees are thought to deter requesters](#), and as in Australia some requests are abandoned when a request to pay a fee is made. Some public bodies appear keen to provide information despite the fee regime, leading to significant variations in the fees charged. As in the UK, bodies are not only subject to Freedom of Information law but also other access to information legislation including that required by the European Union's environmental information directive, under which the scope for public bodies to levy charges is strictly limited.

16. Simply by continuing to run our service at WhatDoTheyKnow.com in the way we do now, cases of refusals to release information for the want of payment of a fee would be made public. The refusal of reasonable requests risks damaging public bodies' reputations and negatively impacting how the UK state is viewed.

⁷ <http://tinyurl.com/op97j32> "What happens when you restrict Freedom of Information? Experiences from around the world" - mySociety blog, 20 Nov 2015

⁸ <https://www.irishtimes.com/news/politics/cabinet-abolishes-15-freedom-of-information-fee-1.1851481>
Cabinet abolishes €15 Freedom of Information fee, The Irish Times, 1 July 2014

Reducing the Burden of Freedom of Information on Public Bodies

17. We are in favour of efficient government, so we support measures that enable public bodies to deal with Freedom of Information requests more quickly, easily and cheaply.
18. Information released via Freedom of Information responses is used to inform debate and scrutiny at all levels from local community meetings, through local council chambers, to the House of Commons. Our democratic system does cost money: elections, councils, Parliament are all expensive. Freedom of Information helps ensure we get value for that money, and helps our democracy function, by enabling deliberations and decisions to be well informed.
19. Money spent responding to Freedom of Information requests needs to be considered in the context of wider public spending. In 2012 it was reported that Staffordshire County Council had spent £38,000 in a year responding to Freedom of Information requests. The then Director of mySociety, Tom Steinberg, commented: "From this I can see that oversight by citizens and journalists cost only £38,000 from a yearly total budget of £1.3bn. I think it is fantastic that Staffordshire County Council can provide such information for only 0.002 per cent of its operating budget."⁹
20. Information held by public bodies is information owned by the public who have funded its creation via taxes; people shouldn't have to pay to access material they have already paid to produce.
21. More proactive publication of material will prevent people having to ask for it, and if requests are made they can quickly, cheaply and easily be replied to by just pointing to where the information is published.
22. We are disappointed that the public sector's response to the introduction of the Freedom of Information Act has been more focused on creating a bureaucracy around dealing with requests rather than on changing the culture of the public sector towards operating in a more open and transparent manner.
23. We would like to see more requests dealt with promptly, simply and cheaply, as 'business as usual' avoiding the unnecessary complex and costly procedures for logging correspondence and monitoring compliance with Freedom of Information law which have been created by some public bodies.

⁹ <http://www.expressandstar.com/news/2012/09/06/freedom-of-information-costs-staffs-council-38000/>
"Freedom of information costs Staffs Council £38,000", Express and Star, 6 September 2012.

24. We would be happy to see public bodies engaging with requesters, proactively offering advice and assistance, and suggesting ways a requester can be satisfied while minimising effort required by a public body. Public bodies assisting requesters by explaining how they hold information and how a request could best be formulated in the interests of both requester and public body is all too rare. There appears to be a significant opportunity to improve the functioning of our access to information regime though a change in culture and mindset in this area.
25. As an example: a request for a contract can appear innocuous and straightforward, but the contract may incorporate many documents that are only held on paper, some of which may contain personal information. In cases like this, it would be perfectly reasonable for a public body to discuss a request with a requester with a view to narrowing it down. Such discussions already occur when the Freedom of Information Act cost limits are exceeded, but could also occur around simpler requests, or where consideration is being given to redactions which can't be taken into account for the purposes assessing if costs exceed the limits.
26. Some public bodies do already react to receiving many requests for certain types of information by proactively publishing material. For example WhatDoTheyKnow have seen many requests to the Department for Education for information about schools which were dealt with by officers extracting the requested material from the 'Edubase' database. The Department now offer an 'Edubase' data download, making requests easier to respond to, and perhaps reducing the number of requests made.
27. Provisions relating to datasets in the Freedom of Information Act (introduced by the Protection of Freedoms Act 2012) require public bodies to publish whole datasets when requests are made for information contained in them as well to proactively publish updated versions of datasets which have been requested and released. These principles could be extended to other information accessible via Freedom of Information requests. For example if a request is made for the papers of a particular committee that should prompt a public body to consider proactively publishing the papers for that committee in the future. A request for an organisation's policy on, say, 'Home Working' should prompt consideration of proactively publishing all the organisation's Human Resources policies and keeping what's published up to date.
28. We note that from time to time people cite requests which clearly have no serious purpose, and as such are vexatious, as examples of the burden Freedom of Information puts on public bodies. At WhatDoTheyKnow we do take steps to reduce, and deter, abuse of our service; nonetheless we think most such requests that do get through can be dealt with quickly and easily, by means of a single sentence response. And in any case, there needs to be caution when dismissing requests as frivolous: there are examples of public bodies spending money on, and therefore holding recorded information on, subjects such as ghosts, UFOs and homeopathy. On the face of it, the requests may appear frivolous, but the results are all facts about public expenditure, which should be openly available so that the public may decide whether their money has been responsibly allocated.

29. Sometimes public bodies appear to struggle with technology, and for example print documents out before scanning them to release: such approaches create an unnecessary workload. This could be addressed by requiring the release of information electronically and in reusable form where practical. Again this is something the Act already requires in relation to datasets.
30. When documents are being created, or more importantly processes designed, in public bodies consideration should be given to the proactive publication of material, and Freedom of Information requests at an early stage. Such consideration could reduce the burden created by requests for information. For example if a contract, or report, is structured so that personal and confidential material is contained within separate annexes, the main body of the report can be more easily published or released than if redactions are required throughout first.

Commercial Users of Freedom of Information Requests

31. Use of Freedom of Information by commercial organisations is sometimes criticised. We at WhatDoTheyKnow.com are happy for our service, and Freedom of Information rights, to be used by those pursuing a commercial interest. It is good for both the public sector and commercial organisations if businesses can, for example, find out about services which the public sector needs and offer to provide them in better and cheaper ways.
32. Proactive publication of public sector contracts would satisfy many of the requests from commercial organisations which can be seen both on WhatDoTheyKnow.com and on public bodies' disclosure logs.
33. The Leader of the House of Commons, Chris Grayling, said, of the Freedom of Information Act¹⁰: "It is, on occasion, misused by those who use it as, effectively, a research tool to generate stories for the media, and that is not acceptable." We consider journalists using Freedom of Information to uncover newsworthy material from public bodies, which they then bring to wider public attention, to be the law working well and as intended. Journalists are excellent, professional users of the Act, whose work informs the wider public, and elected representatives. Many journalists are signed up to WhatDoTheyKnow.com, making particular use of the features we have for tracking requests and responses related to public bodies of interest.

A Safe Space for Internal Deliberations

34. Many of our users have requested the release of "risk registers" but have had their requests rejected on the basis of both Section 35 (information relating to "the formulation or development of Government policy") and in the case of the Health and

¹⁰ <http://www.theyworkforyou.com/debates/?id=2015-10-29a.522.1> Chris Grayling MP, House of Commons, 29 October 2015.

Social Care reforms in 2012, the invocation of a ministerial veto¹¹. We consider that the publication of risk registers and risk assessments would improve the quality of public debate and enable more effective scrutiny of Government proposals. We anticipate that it may take the media, politicians and the wider public some time to get used to interpreting and properly applying the information in such documents but think their routine, proactive release, would assist in improving how we consider, and debate, such matters in our society.

Ministerial Veto

35. We believe that central Government should be treated like any other public body, and that decisions on what to release should be made on technical, legal grounds rather than political ones. It is important for the public to know what information our elected representatives are basing decisions on. If there are crime, security, safety or other concerns then there are specific exemptions which can be invoked in such cases.

36. We are in agreement with Maurice Frankel of the campaign for Freedom of Information, when he says:

"When the FOI Bill was passed, parliament assumed the veto could be used against decisions of the Information Commissioner in certain circumstances. The possibility of it being used against a court or tribunal decision, as in the Prince Charles case, was never debated. In that case the Supreme Court ruled ministers must show they are relying on new evidence, an error of law or, at least, have proper grounds for rejecting a court or tribunal's factual findings, if that was what they were doing. It couldn't meet any of these tests.

Ministers are now suggesting that they should be able to overturn a judicial decision under the FOI Act simply because they prefer their own view, disregarding the fact that the court may have tested the arguments rigorously and persuasively justified its findings. That is too much power for ministers to have. They should appeal against decisions they disagree with, not simply overturn them."¹²

Further Proposed Improvements to Freedom of Information Law

37. The content of the Commission's call for evidence implies that it is not intending to consider opportunities to strengthen access to information laws during its review. We

¹¹ <https://www.whatdotheyknow.com/request/117164/> "Health & Social Care Bill Risk Register", Freedom of Information request, & correspondence, J A Lord, WhatDoTheyKnow.com, January 2012

¹² <https://www.cfoi.org.uk/2015/05/campaign-criticises-government-veto-proposals/> "Campaign criticises government veto proposals", CFOI, May 2015

consider the Commission's terms of reference¹³ to be broad enough to warrant reviewing potential changes to the law, and changes to practices within public bodies, with a view to improving transparency and accountability, in the public interest. A review considering only restricting rights of access to information would be unbalanced and a missed opportunity to assist the Government in meeting its stated aspirations to strengthen accountability, make it easier to access information, and ultimately to improve public services and ensure public money is spent in a responsible manner.

38. We would like to see the scope of the Freedom of Information Act extended to more public bodies. At WhatDoTheyKnow we list bodies which distribute substantial public funds, regulate professions or control significant national infrastructure whether they are formally subject to the Freedom of Information Act or not.
39. We would like to see it made easier to use the Freedom of Information Act to obtain information held by providers of outsourced services (such as prisons run by Serco).
40. Many shared service providers are set up as joint ventures with minority stakes held by private companies (e.g. Southwest One Ltd, Liverpool Direct Ltd) meaning they are not currently within the scope of Freedom of Information law, but given their substantial public role we think they should be. Housing Associations are one set of bodies not subject to the Act which we often get asked to add to our site. We do list Housing Associations and often they are keen to operate openly and transparently; we think bringing them within the scope of the Freedom of Information Act is required for those cases when they don't.
41. We oppose moves by universities seeking to be removed from the scope of the Freedom of Information Act, on the basis of universities' significant public role in controlling access to professions, awarding degrees, and their ability to discipline their members.
42. The public interest test extension allows public authorities to delay final responses to a Freedom of Information Act request for a 'reasonable' time while the balance of the public interest is considered. There is no statutory limit on the time that can be taken for this. The internal review process that is required before complaining to the Commissioner also has no statutory limit. Although the Information Commissioner has produced guidance that sets absolute limits on what is 'reasonable' in each case, these do not have the direct force of law and have proved ineffective in practice. Fixed time limits for conducting public interest tests and internal reviews should be added to the Act, in line with the position in Scotland. We believe that this change would provide more certainty and reduce delays which undermine the purpose of the Act. It is in everyone's interest that our access to information laws operate efficiently: delays and dragging out proceedings over months or even years does not benefit anyone.

¹³ <https://www.gov.uk/government/speeches/freedom-of-information-new-commission> Written statement by the Parliamentary Secretary for the Cabinet Office Lord Bridges, 17 July 2015

43. We are also concerned about the time taken for the Information Commissioner to investigate delayed responses to respond to applications for decisions on if a public body has complied with its duties under the Freedom of Information Act.
44. The exemption in Section 21 of the Freedom of Information Act covering “information accessible to applicant by other means” appears to allow public bodies to exempt any material they can describe, and put up for sale for a price, from the provisions of the Act. In one egregious case a council appeared to advertise a policy document for sale for £45 after a request had been made for it.¹⁴
45. There is no requirement in the Freedom of Information Act for a public body subject to the Act’s provisions to publish contact details. We suggest such a provision should be introduced and think public bodies should be required to provide an email address for information requests.
46. Existing powers under Section 75 of the Freedom of Information Act should be used to review and repeal unnecessary restrictions on information publication. The legislation ‘Impact Assessment’ process should include the effects of the new law on FOI and transparency. Parliamentary legislation scrutiny committees should draw MPs’ attention to any FOI restrictions proposed.
47. Section 79 of the Act extends privilege to public authorities issuing requesters with defamatory information. We recommend this privilege be extended to third parties who re-publish such information without malice, allowing campaigners or journalists working with such material a level of legal protection. This would help maximise public benefit from the public resources put into responding to Freedom of Information requests.

This response has been compiled by contributors from the staff of mySociety and the volunteer administration team at WhatDoTheyKnow, with input from international partners and associates.

More information

www.mysociety.org/about/
www.whatdotheyknow.com/help/about

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¹⁴ https://www.whatdotheyknow.com/request/school_pe_policy#comment-63675 “School PE Policy” - Freedom of Information request made via WhatDoTheyKnow.com, 8 September 2015

