



Ministry
of Justice

Guidance on Section 5 of the Defamation Act 2013 and Regulations: Frequently Asked Questions

COMPLAINANTS

Is there a prescribed form for the Notice of Complaint that I have to fill in?

No, but the Notice of Complaint must contain the information set out in the Defamation Act 2013 and the regulations made under Section 5 of that Act (these are described in the guidance). Some website operators may provide a template or an online form which you can use.

Do I have to send the Notice of Complaint to a specific address?

Where a website operator lists a designated means of contact for defamation complaints, you are encouraged to use the designated method of communication rather than other (generic) addresses so that the operator receives the Notice of Complaint promptly.

Do I need to get legal advice before sending a Notice of Complaint?

There is no requirement to seek legal advice, and the process is designed to be as straightforward as possible for people to use. However, it is open to you to seek legal advice should you wish to do so.

What if I want to complain about more than one statement – do I have to complete a separate Notice of Complaint for each one?

If you want to complain about more than one statement on the same website, you do not need to complete a separate Notice of Complaint for each. However, you will need to identify clearly in the Notice of Complaint all the places on the website where each statement is located.

If there are several statements on the same website making different defamatory allegations about you, you may wish to complete separate Notices of Complaint so that the operator can more easily identify them. This is particularly the case if the statements have been made by a number of different posters.

If the operator says my Notice of Complaint is defective, will it have to tell me why?

If the operator considers that your Notice of Complaint is defective, then in order to retain the Section 5 defence it must tell you what is required for a valid Notice of Complaint. However, it is not required to tell you what is wrong with the Notice of Complaint that you have sent.

The operator has told me that my Notice of Complaint is defective – what should I do?

You need to reconsider the contents of the Notice of Complaint that you sent to identify what further information is needed, and then to resubmit it to the operator.

The operator keeps refusing to accept my Notice of Complaint

If you consider that the Notice of Complaint is valid but the operator continues to reject it, then it would be open to you to seek a court order against the operator for disclosure of any information the operator holds identifying the poster.

It would also be open to you to bring legal proceedings against the operator on the basis that it had failed to follow the prescribed process and so had forfeited its defence under Section 5 of the Act. It would then be a matter for the court to decide whether or not the Notice of Complaint was valid.

You may wish to consider seeking legal advice before taking either of these steps.

How can I avoid the poster finding out my contact details?

You have to confirm in the Notice of Complaint whether you consent to your name and/or email address being provided to the poster, so it is open to you to say that you do not consent to this. The operator will then have to delete this information before sending the Notice of Complaint to the poster.

How long will I have to wait once I've sent a valid Notice of Complaint?

In order to keep the Section 5 defence, the operator has to inform you in writing (this can be by e-mail or another means of private electronic messaging) within 48 hours – not including any time that falls on a non-business day such as a weekend – that it has received the Notice of Complaint and has notified the poster of it.

The poster then has 5 full days after the day on which the operator notified him or her to respond to the Notice of Complaint. The operator must inform you of the outcome within 48 hours (not including non-business days) of the end of this period (or earlier if the poster replies sooner).

Why do the time limits for operators exclude non-working days?

Most operators are run as businesses, and may not be as well placed to deal with Notices of Complaint on non-business days. The time limits therefore take this into account.

What is the effect on the time limit if I am based outside the UK?

This would make no difference to the time within which the operator must take action, as the time period would begin to run from when the operator received the Notice of Complaint.

What happens if the poster doesn't want the statement complained about to be removed?

The operator will inform you of this and provide you with the poster's name and postal address (if the poster has consented to this being released to you), so that you can contact the poster to resolve the matter directly (including through legal proceedings if you consider this appropriate).

If the poster does not consent to his or her contact details being released to you, the operator will inform you of this. You will then need to consider what further action you wish to take, including whether to seek a court order against the operator for disclosure of the poster's details. You may wish to seek legal advice before taking any further steps.

What if the poster gives false contact details to the operator?

To keep the Section 5 defence the operator is required to remove the statement complained about if it reasonably considers that the name and address provided by the poster are obviously false.

What happens if I subsequently find that the details the poster provided are false?

As long as a reasonable operator would not have concluded that the details provided were "obviously false" then the operator will be able to rely on the Section 5 defence. However, if such a situation were to arise, it would be open to you to explain the position to the operator and ask them to remove the statement complained about. It would then be a matter for the operator to decide whether to do this, but it would not affect whether they had a defence to any subsequent proceedings.

What if the statement is removed, but I still want to seek damages from the poster?

If the statement has been removed because the poster has agreed to removal or has failed to respond, the poster will not have had to provide his or her name and postal address to the operator under the Section 5 process. However, it is still open to you to pursue a claim for damages against the poster if you wish, and to seek a court order for the operator to release whatever information it does hold regarding the poster's identity.

What if the poster keeps posting the same or substantially the same defamatory allegations about me?

If a defamatory statement is removed, but the poster reposts the same or substantially the same statement about you on the same website, you will need to send the operator a further Notice of Complaint. On the first such occasion, to keep the Section 5 defence the operator will have to notify the poster in accordance with the standard process, and the same time limits will apply.

However, if the same or substantially the same statement about you is reposted by the same poster on the same website for a second time or on subsequent occasions, you should inform the operator of this when sending the Notice of Complaint. In this situation you are encouraged to provide the operator with information to help it identify the previous Notices of Complaint. To keep the defence, the operator will then have to remove the statement within 48 hours (excluding non-business days) and inform you that this has been done.

What if a different poster posts substantially the same defamatory allegations on the website?

In this situation to keep the Section 5 defence the operator will have to deal with your Notice of Complaint in accordance with the standard process.

What if I think the operator is colluding with the poster?

Section 5 of the Act provides for the operator's defence against a defamation claim to be defeated if you can show that it has acted with malice in relation to the posting of the statement, and collusion might therefore affect the availability of the defence. You may wish to seek legal advice before taking further steps in such a situation.

If I want to bring a claim against the operator where I don't think they have complied with the process, what evidence will I have to provide (eg to show that it wasn't possible for me to identify the poster, or that the operator has failed to comply with the process)?

The evidence that would be required to succeed in a claim against the operator will be a matter for the court to decide in the light of the circumstances of the case. You may wish to seek legal advice before bringing such a claim.

OPERATORS

Do I have to follow the Section 5 process?

There is no obligation on an operator to follow the Section 5 process. On receipt of a Notice of Complaint an operator can still choose to remove the statement complained about straight away, or to allow it to remain posted. In these circumstances it will not have a defence under Section 5 of the Act, although other defences may be available (for example under the E-Commerce Regulations or section 1 of the Defamation Act 1996).

Can I opt out of following the process at any stage?

Yes, although doing so would mean that you would not be able to rely on the defence under Section 5 of the Act.

How will I know when a Notice of Complaint is received – are there special arrangements that I need to adopt?

It is a matter for operators which might wish to rely on the Section 5 defence to ensure that they have effective systems in place for handling Notices of Complaint.

Do I have to create a designated email address for this type of complaint?

This is not required by the Regulations, but operators are encouraged to set up and publicise a designated email address for Notices of Complaint as a matter of good practice. Operators may also wish to provide an online form that complainants can use to submit a Notice of Complaint.

What if the complainant doesn't want his or her name or contact details sent to the poster?

If the complainant indicates that he or she does not wish his or her name or contact details to be passed to the poster, then to keep the defence the operator must ensure that these are deleted before the Notice of Complaint is sent to the poster. However, there is no requirement for the operator to remove any other information in the Notice of Complaint that might identify the complainant.

What if the complainant doesn't provide all the required information in the Notice of Complaint?

If the Notice of Complaint doesn't contain all the required information, then the operator may reject it. In this situation, to keep the defence the operator must inform the complainant in writing and tell them what the requirements are for a valid Notice of Complaint. You are not required to tell the complainant what is wrong with the Notice of Complaint that the complainant has sent, but can do so if you wish.

What should I do if I receive a Notice of Complaint and the defamatory statement has already been removed before I am required to do so under the Regulations?

If the defamatory statement is removed (by the poster or anyone else) at any point before the operator is required to do so under the process, the operator is treated as having complied with the requirement to remove the statement and will not lose the Section 5 defence for that reason.

What if the poster alters the statement in response to the Notice of Complaint but doesn't remove it?

If the poster alters the statement but doesn't remove it, the operator must follow the process in order to keep the Section 5 defence. This means that, for example, if the poster fails to reply to the operator within the specified period, or fails to provide all the information required under the Regulations, then the operator must remove the statement in order to retain the Section 5 defence.

Why doesn't the Section 5 process allow me to reach a view on whether a claim is valid or not?

The process is designed to remove the need for an operator to have to reach a view on the merits of the complaint. However, if you wish to take a view on the validity of a complaint and either remove or allow material to remain posted, there is nothing to stop you doing so. In these circumstances you would not be able to rely on the Section 5 defence.

If I miss a time limit, do I automatically forfeit the Section 5 defence?

To be sure of having the Section 5 defence it is necessary to carry out the required actions within the time limits prescribed in the Regulations. However, if a complainant brings proceedings against an operator for failure to comply with the process on the basis of failure to meet any of the prescribed time limits, the court has a discretion to waive the time limit (and hence allow the operator to benefit from the Section 5 defence) if it considers it in the interests of justice to do so.

What if the part of my business that deals with complaints is based outside England and Wales?

To take advantage of the Section 5 defence in proceedings before the courts in England and Wales all operators must follow the process in the normal way regardless of where the part of the operator's business dealing with it is located.

What is the effect on the time limits for dealing with a Notice of Complaint if I am based outside England and Wales?

If an operator were based outside England and Wales, the time would begin to run from the time the Notice of Complaint was received where the operator was based. However, any time falling on a non-business day in England and Wales would be disregarded.

What if the poster is based outside England and Wales?

The operator is required to provide a deadline for the poster to respond of midnight UK time at the end of the 5th day after the day on which the operator sends the information to the poster. The operator has to tell the poster exactly when the time period expires – for example "at midnight in the United Kingdom on Tuesday 21 January 2014" - so that the poster is clear what the deadline is.

What if I already have the poster's details – do I still need to ask him for these?

Yes. In these circumstances, to keep the Section 5 defence, you must still ask the poster to provide the relevant details to avoid any possible difficulty that may arise, for example from inaccurate or out of date details being held.

When notifying the poster, should I explain what may happen if they choose not to consent to the posting being removed?

The Regulations require you to notify the poster that, where the poster does not consent to your sending his or her contact details to the complainant, you will not release them unless ordered to do so by a court. There is no requirement for you to do more than this, although it is open to you to provide further information if you wish.

What if I am unable to contact the poster?

If you are unable to contact the poster, for example because you don't have an email address or another means of contacting the poster by private electronic messaging, then to keep the Section 5 defence you must remove the statement complained about and inform the complainant within 48 hours of receipt of the Notice of Complaint (not including any time falling on a non-business day in England and Wales)

What should I do if my communication to the poster is returned as undeliverable (for example because the poster's mailbox is full or unreachable)?

In this situation, it is possible that the communication may still reach the poster (for example if he empties the mailbox and thereby enables delivery). The operator should therefore wait until the end of the specified time period for the poster to respond before taking whatever action is then appropriate.

What if I want to defend a posting even if the poster doesn't want to do so or doesn't respond?

If you wish to allow the statement complained about to remain posted, there is nothing to stop you doing so. However, in these circumstances you would not be able to rely on the Section 5 defence.

How can I tell whether the poster's contact details are false or not?

To keep the defence, the Regulations require an operator to remove the statement complained about if a reasonable operator would consider that the name and address provided by the poster are obviously false. This does not require you to carry out checks on the validity of the information provided, but you will need to decide if you think the details are obviously false.

If a complainant brings an action against an operator on the basis that the operator has failed to comply with the process in these circumstances, it will be a matter for the court to decide whether a reasonable operator would have considered the details provided by the poster to be obviously false.

What should I do if the complainant subsequently contacts me to say that the details given by the poster were false?

There is no requirement under the process for you to take any action in this situation in order to keep the Section 5 defence. However, you may wish to consider whether in these circumstances you should remove the statement complained about.

How will I know whether the statement should be removed straight away because the poster has already posted it on two or more occasions?

It is up to the complainant to inform you when sending a Notice of Complaint if he or she has sent a Notice of Complaint about the same or substantially the same material on two or more occasions. If the complainant does not do this, there is no requirement for you to check the position.

How will I know that the same person is responsible for the reposting – for example if they use a different online ID?

You will have to reach a view on the information you have as to whether this is the case, and decide on that basis whether to remove the statement within 48 hours or follow the full Section 5 process.

How am I to tell whether a reposted statement conveys the same or substantially the same imputation? What if the complainant disagrees?

You will need to reach a view on whether the defamatory imputation made in the statement is the same or substantially the same as in the previous postings by the same poster. For example the poster may just have changed the wording so that it is not identical, but the defamatory imputation is effectively the same.

In this situation, if you follow the full process rather than removing the statement within 48 hours of receiving the Notice of Complaint, and the complainant brings proceedings against you on the basis that you have failed to comply with the Regulations, it will be a matter for the court to decide whether your action was appropriate.

Should I tell the poster if I receive notice of an application by the complainant for a court order for release of the poster's contact details?

This is not a requirement under the Regulations, but operators are encouraged to do this as a matter of good practice.

POSTERS

How long do I have to respond to a Notice of Complaint? Does this include non-working days?

The operator will inform you exactly when the time period for you to respond will end. This will be at midnight UK time at the end of the 5th day after the day on which the Notice of Complaint was sent to you by the operator, including any non-working days.

What if I'm based outside the UK?

The operator is required to give you a deadline based on UK time – for example “at midnight in the United Kingdom on Tuesday 21 January 2014” so that you are clear what the deadline is.

What happens if I just ignore the Notice of Complaint?

If you do not respond within the time period for a response, then the operator may remove the statement which has been complained about.

Do I need to seek legal advice on being informed of a Notice of Complaint?

There is no requirement for you to seek legal advice. However, it is open to you to do so if you wish.

What happens if I'm on holiday and don't realise the Notice of Complaint has been sent to me?

The time period given for a response will still apply, and if you do not respond within that period the operator may remove the statement which has been complained about.

Can't I just repost the material when it's been removed?

You are not prevented from doing this. However, if the complainant sends a further Notice of Complaint, the operator will contact you again and may remove the statement complained about if you do not respond within the specified time period.

If you repost the same or substantially the same material about the complainant on the same website on two or more occasions, the operator may remove the statement within 48 hours of being informed by the complainant without contacting you again.

What if I want to stand by what I have said?

It is open to you to tell the operator that you do not wish the statement which has been complained about to be

removed. In these circumstances you will need to provide the operator with your name and postal address.

What if I amend the statement myself in response to the Notice of Complaint but don't remove it?

If you alter the statement complained about but don't remove it, the operator must follow the process in order to keep the Section 5 defence. This means that if you wish to stand by the amended statement you will need to tell the operator and provide your name and postal address. If you fail to reply to the operator within the specified period, or fail to provide all the information required under the Regulations, then the operator must remove the statement in order to retain the defence.

Do I always have to provide my identity and contact details to the operator?

No. You only have to provide your name and postal address to the operator if you do not wish the statement which is the subject of the Notice of Complaint to be removed.

Do I still need to provide my details if the operator already has them?

Yes. In these circumstances you should still provide details of your name and postal address to avoid any possible difficulty that may arise, for example if the operator holds inaccurate or out of date details.

What if I don't want my details released to the complainant?

You must still provide your details to the operator, but if you do not wish them to be released to the complainant, you should tell the operator that you do not consent to this. If you do this, the operator will not release this information to the complainant unless ordered to do so by a court.

Why do I have to provide my postal address and not just an email address?

This is to ensure that the complainant has sufficient details to bring legal proceedings against you if he or she wishes to do so.

How will I know if the complainant seeks a court order for the operator to release my contact details?

Operators are encouraged as a matter of good practice to inform posters if they are served with notice of an application for a court order for release of contact details, so that the poster can consider what action to take.

