

# **Consultation on Extending Coverage of the Freedom of Information (Scotland) Act 2002 to Registered Social Landlords**



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## **Introduction**

### **The Freedom of Information (Scotland) Act 2002 ('the Act')**

The Act provides a statutory right of access to information held by Scottish public authorities. These range from the Scottish Parliament and Government, to local authorities, NHS boards, higher and further education bodies, doctors and dental practitioners, among others.

Requested information must be provided unless it is subject to one or more exemptions, as set out in the Act. If a requester is dissatisfied with the response received to a request or does not receive a response, he or she can ask the authority to review its decision or handling of the request.

The Scottish Information Commissioner both promotes and enforces the Act. Requesters who remain dissatisfied with the conclusions of an authority's review of their request can appeal to the Commissioner for a decision. The Act came into effect on 1 January 2005.

### **Extending coverage of the Act**

The provisions of the Act can be extended to bodies that appear to the Scottish Ministers to exercise functions of a public nature or which provide, under a contract with a Scottish public authority, a service which is a function of that authority.

This can be done by making an order under section 5 of the Act, which designates those bodies as a Scottish public authority only for the purposes of the Act. They are then subject to the full requirements of the Act and must therefore respond to written requests for information and proactively publish information described in their Publication Scheme. A body which is designated as a Scottish public authority by an order under the Act also automatically becomes subject to the requirements of the Environmental Information (Scotland) Regulations 2004 (EIRs).

In accordance with section 7(3) of the Act, bodies proposed to be designated would only be covered in respect of the information they hold about specified public functions or services. Their duties under the Act would therefore be limited to those functions or services as set out in the order.

### **Previous orders extending coverage of the Act**

The Scottish Government brought forward Scotland's first order under section 5(1) of the Act in September 2013. Following consideration by the Parliament the order came into effect on 1 April 2014. The order extended coverage of the Act to certain trusts which have been created by a local authority to deliver sporting, cultural and leisure facilities and/or activities on behalf of that local authority.

A further order extending coverage of the Act to private prison contractors, providers of secure accommodation for children, grant-aided and independent special schools and Scottish Health Innovations Ltd came into force on 1 September 2016.

## Factor-based approach to extending coverage

As noted above, the Act can be extended to bodies that carry out functions of a public nature or which provide, under a contract with a Scottish public authority, a service which is a function of that authority.

The legislation does not provide a definition of 'functions of a public nature'. However, the Scottish Government considers that a range of factors can be used in determining whether an organisation – or 'class' of organisation - would generally be recognised as undertaking public functions.

We consider these factors to include:

- the extent to which particular functions are derived from or underpinned by statute, or otherwise form part of the functions for which the state has generally assumed responsibilities;
- the extent of public funding of the activity;
- whether the functions are of a nature that would require them to be performed by a public authority if the body did not perform them;
- whether the body exercises extensive or monopolistic powers;
- the extent to which the body is subject to state regulation, oversight or control.

More widely, we would also consider as part of this assessment process:

- whether the public have lost rights to access information under the Act as a result of outsourcing of how public services are delivered;
- whether coverage would impose a significant administrative burden that may be considered to have a disproportionate business impact;
- the extent to which the body seeks to achieve some collective benefit for the public and is accepted by the public as being entitled to do so.

We note that broadly similar factors have also been identified by the Scottish Information Commissioner as set out in a Special Report on coverage published in January 2015<sup>1</sup>.

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<sup>1</sup> <http://www.itspublicknowledge.info/home/SICReports/OtherReports/otherReports.aspx>

## Background to consultation proposals

As part of the Scottish Government's Six Principles of Freedom of Information the Scottish Government is committed to adjusting the Act where it is necessary and sensible to do so. This includes regularly assessing coverage of Scotland's freedom of information legislation and bringing forward proposals to extend coverage as it considers appropriate.

To put these proposals in broader context, we note that at the time of debate on the original Freedom of Information Bill there was considerable discussion about the inclusion of RSLs in the legislation. While RSLs were not brought within scope from 1 January 2005 there was clear expectation that formal consultation would follow and that, in due course, the majority of RSLs would become subject to FOISA.

More recently, in January 2015, the Scottish Information Commissioner's Special Report (see link on page 4) included a recommendation that consideration be given to an order extending the Act to Registered Social Landlords (RSLs)<sup>2</sup>.

The Scottish Government consultation in 2015 on further extension of the Act to certain bodies also included an invitation to put forward proposals in respect of other organisations or types of body which should be considered for inclusion within the scope of the Act. The consultation paper specifically acknowledged the long-term interest in extending coverage of the Act to RSLs.

While at the time the Scottish Government was 'not persuaded of the merits of extending coverage' to RSLs, landlords and tenants were encouraged to provide their views. Consequently, approximately half of all responses made reference to RSLs<sup>3</sup>.

Subsequently, the views of consultation respondents as well as the Commissioner's report informed the first biennial report required to be laid by the Scottish Government 'about the exercise of the section 5 power'.

The report noted the strong opinions, over a considerable period of time, on the issue of freedom of information legislation applying to RSLs. The Scottish Government therefore agreed that the housing sector should be consulted with a view to extending the Act to RSLs<sup>4</sup>.

Analysis setting out the key issues around extending coverage to RSLs follows below.

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<sup>2</sup> <http://www.itspublicknowledge.info/home/SICReports/OtherReports/otherReports.aspx>

<sup>3</sup> <https://consult.scotland.gov.uk/freedom-of-information/foi-consultation/>

<sup>4</sup> <http://www.gov.scot/Resource/0048/00488439.pdf>

## Impact Assessments

This consultation paper also includes a partial **Business and Regulatory Impact Assessment** (BRIA) setting out, as best we can at this stage, the key issues concerning the practical impact of extending coverage of the Act to registered social landlords.

Question 4 invites comments specifically in respect of the BRIA.

As part of this consultation exercise we would also welcome comments in respect of the potential impact of these proposals on 'Equality Groups', for example, in terms of age, gender, disability, ethnic background etc. Little data is available on those making information requests, particularly in terms of Equality Groups, and any specific barriers to accessing information which applicants from such groups may face.

Relevant comments will inform both the **Equalities Impact Assessment** (EQIA) and the **Child Rights and Wellbeing Impact Assessment** (CRWIA) we intend to publish following the consultation process.

Question 5 invites comments specifically in respect of the impact of the proposals on 'Equality Groups'.

## Registered Social Landlords

An RSL is a housing association or housing cooperative that is registered with the Scottish Housing Regulator (SHR). In general terms, RSLs are not-for-profit organisations that aim to provide good, affordable accommodation for people with a housing need.

The SHR is the independent regulator of RSLs and local authority housing services in Scotland. Its statutory objective is to:

"safeguard and promote the interests of current and future tenants of social landlords, people who are or may become homeless, and people who use housing services provided by registered social landlords and local authorities".

The SHR regulates social landlords to protect the interests of people who receive services from them. The SHR does this by assessing and reporting on:

- how social landlords are performing their housing services;
- RSLs' financial well-being;
- RSLs' standards of governance.

Currently, there are almost 160 non-local authority RSLs<sup>5</sup>. RSLs vary hugely in size – ranging from small organisations with under 100 units to those with tens of thousands of units. Many of them own and manage housing stock formerly owned and operated by local authorities. Some provide specialist accommodation for tenants with disabilities.

The proposal is to extend the Act to all RSLs, irrespective of size. We consider that a threshold based on a particular number of units operated by an RSL would be arbitrary and, inevitably, only extend access to information rights in respect of RSLs above the threshold.

## Private bodies

RSLs are private bodies with potential extension of the Act to RSLs having no impact on their status as private bodies. The order-making power at section 5 of the Act is specifically intended to bring within the scope of freedom of information legislation organisations *not* considered to be public authorities – insofar as their functions are recognised as being 'of a public nature'.

In September 2016 the Office for National Statistics (ONS) finished its review of the classification of RSLs and concluded that RSLs should be classified to the public sector in the national accounts. It reached its decision in view of the extent of some of the powers that the Regulator can exercise over RSLs (such as powers to appoint managers and board members to an RSL, and to consent to disposals of assets by an RSL and changes in an RSL's constitution). In announcing its decision, ONS noted that it did not affect the legal status of RSLs as private bodies.

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<sup>5</sup> <http://directory.scottishhousingregulator.gov.uk/Pages/register.aspx>

A consequence of the classification is that all future net borrowing by RSLs would count as public expenditure by the Scottish Government. Because of that, the Government confirmed on the day of the ONS announcement that it would bring forward a Bill to adjust the powers of the Regulator over RSLs so that ONS could reclassify RSLs to the private sector once again. The Government expects to introduce this Bill in 2017.

## **Subsidiaries**

We note that some RSLs operate subsidiaries responsible for undertaking a wide range of functions. The proposal in this consultation is to bring within the scope of the Act RSLs rather than their subsidiaries (other than those RSLs which are themselves subsidiaries of a parent RSL).

As indicated above, in order for bodies to be brought within scope of the Act they must be undertaking functions of a public nature. In terms of subsidiaries we do not consider that this is likely to be the case as subsidiaries are primarily created to operate commercially on the same basis as private companies providing similar services.

However, we acknowledge that exceptions may apply and welcome comment on the issue of RSL subsidiaries, for example, in terms of their functions, the extent these might be considered to be 'of a public nature' assessed against the factors set out in this consultation paper, as well as issues concerning their approach to openness and transparency.

We would note that, in the event of RSLs coming within scope of the Act, information held by the RSLs concerning their subsidiaries would also potentially be within scope - and therefore subject to information requests. In addition, as with any authority required to comply with Freedom of Information legislation, we would strongly encourage RSLs (if setting up subsidiaries or engaging with contractors) to consider the importance of maintaining information access rights, for example through contractual provisions.



## **Defining ‘functions of a public nature’ of Registered Social Landlords**

As previously stated, the provisions of the Act can be extended to bodies that appear to the Scottish Ministers to exercise functions of a public nature. The premise of this consultation is that, as providers of social housing, RSLs exercise functions of a public nature and that a case can be made for extending the Act to them.

The following sections – in accordance with our ‘factor-based’ approach - outline key considerations in our proposal to extend the Act to RSLs. However, as already noted, ‘functions of a public nature’ is not defined in the legislation. Moreover, we would not assume that all the factors outlined above would necessarily apply to all functions undertaken by RSLs.

The consultation therefore gives all interested parties the opportunity to respond and set out their reasons for considering in what way, and to what extent, RSLs undertake functions of a public nature.

### **Statutory functions carried out by RSLs**

One criterion for establishing whether a body exercises functions of a public nature is whether those functions are defined – or underpinned – in statute. It seems clear that this applies to RSLs.

Under section 11 of the *Housing (Scotland) Act 2001* RSLs are required to offer tenants Scottish secure tenancies. The reason for this is that RSLs are landlords of social housing rather than private housing. A secure tenancy is also required to be offered by local authorities and gives tenants greater security of tenure than they would receive under an assured or common law tenancy.

In addition, when setting rents, RSLs must comply with certain principles including affordability. This includes, under section 25(4), the requirement for RSLs to consult their tenants - rather than the rents being set by the market as in private tenancies.

A further obligation for RSLs is at section 5(1) which provides that, where a local authority has a duty in relation to a homeless person, it may request an RSL to provide accommodation for that person. Section 5(3) requires an RSL, within a reasonable period, to comply with such a request unless it has a good reason for not doing so.

However, it is the *Housing (Scotland) Act 2010* which sets out the ‘legislative registration criteria’ for RSLs. Section 24(1)(b) states that an RSL must be established for the purpose of, or has among its objects and powers, the provision, construction, improvement or management of:

- (i) houses to be kept available for letting,
- (ii) houses for occupation by members of that body, where the rules of that body restrict membership to persons entitled or prospectively entitled (as tenants or otherwise) to occupy a house provided or managed by that body,  
or

(iii) hostels,

Any 'additional purposes' must be from among -

(i) providing land, amenities or services, or providing, constructing, repairing or improving buildings, for its residents (or for its residents and other persons together),

(ii) acquiring, or repairing and improving, or creating by the conversion of houses or other property, houses to be disposed of on sale, on lease, on shared ownership terms or on shared equity terms,

(iii) constructing houses to be disposed of on shared ownership terms or on shared equity terms,

(iv) managing (A) houses which are held on leases or other lettings (not being houses falling within subsection (1)(b)(i) or 1(b)(ii)), or (B) blocks of flats (a block of flats meaning a building containing two or more flats which are held on leases or other lettings and which are occupied or intended to be occupied wholly or mainly for residential purposes),

(v) providing services of any description for owners or occupiers of houses in (A) arranging or carrying out works of maintenance, repair or improvement, or encouraging or facilitating the carrying out of such works, (B) arranging property insurance,

(vi) encouraging and giving advice on the formation of registered social landlords,

(vii) providing services for, and giving advice on the running of (A) registered social landlords, and (B) other organisations whose activities are not carried on for profit which are concerned with housing or matters connected with housing,

(viii) promoting or improving the economic, social or environmental wellbeing of (A) its residents (or its residents and other persons together), or (B) the area in which the houses or hostels it provides are situated,

(ix) giving financial assistance (by way of grant or loan or otherwise) to persons in order to help them to acquire houses on shared equity terms.

We suggest that the various 'purposes' identified in section 24 provide 'statutory underpinning' in establishing that RSLs undertake 'functions of a public nature'.

In tandem with those purposes set out at section 24 of the *Housing (Scotland) Act 2010* we would also make reference to section 3 of the same Act. This section outlines the general functions of the Scottish Housing Regulator (SHR) which are:

to keep a publicly available register of social landlords and to monitor, assess and report on (i) social landlords' performance of housing activities, and (ii) registered social landlords' financial well-being and standards of governance.

The legislation defines 'housing activities' as any activity undertaken by a social landlord in relation to housing services which are or may be provided by it. 'Housing services' are defined as the provision of housing accommodation and related services and includes anything done, or required to be done, in relation to:

- (a) the prevention and alleviation of homelessness,
- (b) the management of housing accommodation,
- (c) the provision of services for owners and occupiers of houses,
- (d) the provision and management of sites for gypsies and travellers, whatever their race or origin.

Section 3 of the Housing (Scotland) Act 2010 applies to both local authority landlords and registered social landlords. In other words, both categories of landlord are accountable to the SHR in terms of those 'housing activities' referenced in that section.

This would seem to strongly indicate that, for the purposes of statutory regulation by the SHR, there is a recognition of parity in terms of those functions defined as 'housing activities' between local authority landlords and RSLs. In other words, at least insofar as 'housing activities' are defined, there is reason to consider the activities of RSLs to be on a par with those of local authority landlords – and as such also to be of a public nature.

### **Public Funding**

We also consider the extent – and regularity – of public funding to be key in assessing the 'public nature' of organisations. Both historically and currently RSLs have received considerable sums of public money. The contribution of RSLs to delivering the Scottish Government's affordable housing target is critical. Grant is therefore available to RSLs to acquire land or buildings and to build, convert or improve housing for social rent.

We note the considerable private funds also invested in support of social housing. However, given the extent of RSL public funding – and the direct relation between much of this funding and particular functions it is allied to - we consider that there is strong reason to take into account public funding in determining whether or not RSLs are undertaking functions of a public nature.

### **Social role of RSLs**

The provision of social housing in Scotland has a long history with many early associations and co-operatives evolving into present day RSLs.

Almost half of social housing in Scotland is provided by RSLs. Indeed, as rates of home ownership decline and the numbers of people renting properties grows we consider it very likely that social housing – including that provided by RSLs - will play an increasingly important role in housing provision.

We would not suggest that, given the scale and scope of the RSL sector, the state would - or could - assume the responsibilities that RSLs, whether individually or collectively, currently undertake. However, it is clear that RSLs are heavily relied upon to play a central role in the provision of social housing – and in all probability will be increasingly expected to do so by the state.

In other words, we believe it is clear that RSLs, as providers of social housing - supported by considerable financial assistance from the state – have been accepted as being responsible for providing a key public service. We would also suggest that, in applying to be registered as a social landlord – with the benefits and responsibilities that this brings - there is at least a degree of acceptance on the part of the RSL that they will be undertaking public functions.

Finally, given the critical role of social housing - predominantly provided by RSLs - in the modern Scottish housing mix, we would also suggest that RSLs would be seen as providing a collective benefit for the wider public good.

## **Regulation and Oversight**

Registered Social Landlords are subject to regulation by the SHR. The SHR is an independent regulator directly accountable to the Scottish Parliament. As already noted, the *Housing (Scotland) Act 2010*, which created the SHR, also sets out its statutory objectives, functions, powers and duties.

The SHR's statutory objective is to safeguard and promote the interests of current and future tenants, homeless people and other people who use services provided by social landlords. Service users are identified as: tenants and their families; people who are homeless; Gypsy/Travellers and owner/occupiers who receive factoring services from a local authority or RSL.

The SHR keeps a register of social landlords and publishes it to give access to accurate and transparent information about RSLs. The SHR approves which organisations can be listed on the register – and can remove RSLs from the register under certain circumstances.

As noted above, in regulating RSLs the SHR seeks to monitor, assess and report on social landlords' performance of 'housing activities' as well as on their financial well-being and standards of governance. If required, the SHR will intervene to secure improvement and protect the interests of tenants and other service users.

We would suggest that, given the central role of the SHR as a statutory body tasked with the regulation of RSLs, 'the state' can be seen to exercise a form of oversight over RSLs that it does not exercise over private landlords. RSLs cannot be recognised as such without satisfying SHR registration criteria.

In addition, they are accountable to the SHR in a wide variety of ways, for example, in terms of how effective they are in providing a range of services and complying with the Scottish Social Housing Charter, which itself sets out various standards and outcomes to be achieved in relation to the provision of social housing.

We also note that some RSLs are subject to regulation by other authorities, for example, the Care Inspectorate undertakes statutory inspections of those that provide support services. In addition, RSLs with charitable status are subject to the regulation of the Office of the Scottish Charity Regulator (though the MOU between SHR and OSCR confirms SHR as the lead regulator of charitable RSLs).

## **Access to Information**

At present, while RSLs may voluntarily act ‘in the spirit’ of Freedom of Information legislation – as well as choosing to make information proactively available – there is no legal obligation under the Act for them to do so. This contrasts with local authority landlords as local authorities are subject to the Act and required to respond to information requests.

However, it is important to note that RSLs are considered to fall within scope of the EIRs (which provide the right of access to environmental information). The EIRs also apply to organisations ‘under the control of’ an authority subject to the Act – and are therefore broader in coverage. The Scottish Information Commissioner has previously determined that the:

*‘SHR’s significant powers of oversight and direction contained in the 2010 Act, along with its extensive powers of intervention, amount to "control" for the purposes of the EIRs. In particular, the Commissioner notes the monitoring role of SHR in ensuring that RSLs progress towards achieving the standards required by the Scottish Government’s Social Housing Charter<sup>6</sup>.’*

In addition, there are other circumstances where non local authority landlords are under a statutory duty to provide information. For example, Section 5(6) of the *Housing (Scotland) Act 2001* requires an RSL which holds housing for housing purposes in a local authority’s area to comply ‘with any reasonable request for information in relation to that housing made to it by the authority in connection with the exercise of the authority’s functions’.

Further, under section 32(1)(l) of the *Housing (Scotland) Act 2010* RSLs must provide information to the public on their housing services and governance arrangements - as set out in the Scottish Social Housing Charter. The Charter, in effect since 2012, imposes a range of obligations on social landlords. These obligations include a specific outcome requiring social landlords to manage their business so that:

*‘tenants and other customers find it easy to communicate with their landlord and get the information they need about their landlord, how and why it makes decisions and the services it provides’*

The SHR recently reported on how open and accessible social landlords are to their tenants and other service users. The SHR’s assessment included analysis of social landlords’ data submitted during 2013-2016 in the Annual Return on the Charter.

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<sup>6</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2015/201402883.aspx>

The report<sup>7</sup> found tenant satisfaction with being kept informed about services and decisions to be high at just over 90% (though the information available varied).

Similarly, we note the recent joint publication by the Scottish Federation of Housing Associations (SFHA) and Glasgow and West of Scotland Forum of Housing Associations (GWSFHA) of guidance and a 'Model Publication Framework' for housing associations and co-operatives<sup>8</sup>.

The Framework and guidance are designed to encourage the housing sector to demonstrate its commitment to being open and transparent about its activities. They aim to set out minimum 'good practice' standards and, in terms of identifying relevant categories of information, in part mirror both the Charter and the Model Publication Scheme issued by the Scottish Information Commissioner.

However, while there are undoubtedly a number of access routes to acquiring information from RSLs, all are limited in some respect in comparison to the right to information provided under Freedom of Information legislation. For example, the EIRs apply only to environmental information while the Charter is specific to 'tenants and other customers' of an RSL. And though overseen by the SHR, the Regulator's role in enforcing the Charter does not compare to the quasi-judicial enforcement powers of the Scottish Information Commissioner.

### *Loss of Information rights*

A number of local authorities have undertaken 'housing stock transfers' – transferring their housing stock to non-local authority landlords. Three of these transfers (in Argyll & Bute, Na h-Eileanan Siar and Inverclyde) took place after the Act had come into force on 1 January 2005.

It will therefore be the case that, in respect of these three areas, while a tenant (or anyone else) could have requested information from their local authority as their landlord before the stock transfer, there was no transfer of Freedom of Information rights to the non local authority landlords. This has been highlighted on a number of occasions, particularly by the Scottish Information Commissioner, as a significant example of a loss of information rights.

Extending the Act to RSLs responsible for stock transfer properties would therefore restore information rights where these had previously been removed.

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<sup>7</sup> <https://www.scottishhousingregulator.gov.uk/publications/openness-accessibility-scottish-social-housing-thematic-inquiry>

<sup>8</sup> <http://www.sfha.co.uk/mediaLibrary/other/english/2467.pdf>

## Conclusion and Next Steps

For the reasons set out above, we consider that RSLs should be brought within scope of Scotland's Freedom of Information legislation.

However, a decision on whether to lay a draft order extending coverage to RSLs will only be taken following this consultation exercise and related stakeholder engagement. Any order would be subject to affirmative procedure in the Scottish Parliament.

In the event of an order being agreed to by the Scottish Parliament, to allow sufficient preparation time for the RSLs, we would not propose that the order came into effect until 1 April 2018.

An important part of this consultation process will be an assessment of the practical impact of these proposals, for example the administrative consequences of extending coverage on the RSLs themselves. **Annex A** consists of a partial business and regulatory impact assessment (BRIA) and we would welcome comments on the BRIA to inform this element of the consultation process.

It would be the intention to include in an order a 'class description' covering registered social landlords and setting out the function(s) considered to be covered by the order. A class description is intended to provide for flexibility and avoids the need for further orders each time a social landlord is added to (or removed from) the register.

**Annex B** of this consultation paper provides information on how to respond - as well as the questions you are invited to respond to.

## **Partial Business and Regulatory Impact Assessment (BRIA)**

*This 'partial' Assessment accompanies the public consultation on the proposal to extend coverage of the Freedom of Information (Scotland) Act 2002 to registered social landlords. We welcome any comments on or contributions to the analysis it contains. On completion of the consultation process a 'final' Assessment will be prepared taking into consideration relevant contributions.*

### **1. TITLE OF PROPOSAL:**

1.1 Extending coverage of the Freedom of Information (Scotland) Act 2002 ('the Act') to Registered Social Landlords.

### **2. PURPOSE AND INTENDED EFFECT**

#### **Objective**

2.1 To consider whether Registered Social Landlords should be made subject to the requirements of the Act and associated legislation including those duties public authorities are required to undertake under the Climate Change (Scotland) Act 2009.

2.2 The public's right to access information about RSLs (unless environmental in nature) currently extends only to information held by Scottish public authorities. Extending coverage to RSLs themselves would mean that freedom of information requests could be made directly to the RSLs in respect of their public functions.

#### **Background**

2.3 The Act provides a statutory right of access to information held by Scottish public authorities. Under section 5 of the Act, coverage can be extended by order to bodies which appear to the Scottish Government to be exercising functions of a public nature and to contractors who provide services that are a function of a public authority.

2.4 We consider that Registered Social Landlords exercise functions of a public nature – as assessed against a range of factors set out in this consultation paper.

2.5 The Scottish Government is aware however that any extension of coverage may place additional administrative and financial pressures on RSLs (which may vary depending on the size of an RSL). This assessment outlines (so far as possible at the pre-consultation phase) the likely costs and benefits of the proposal. Responses to the consultation will help provide evidence on whether extension of coverage is appropriate and proportionate.

#### **Rationale for government intervention**

2.6 Ministers are committed to promoting increased openness and transparency in the delivery of public services. Ministers also acknowledge that, dependent upon



how public services are delivered, for example by private bodies not subject to freedom of information legislation, there may be limitations regarding the public's right of access to information about public services.

2.7 The Scottish Government is committed to providing public services that are high quality, continually improving, efficient and responsive to local people's needs – and that people should be able to influence the decisions which affect their local area. To this end the Scottish Government believes that ongoing review – and revision - of coverage of freedom of information legislation plays a key part in allowing people to hold their public services fully to account and in promoting increased transparency.

2.8 In addition, enabling the public to make information requests directly to RSLs in terms of their public functions in effect extends statutory information access rights to RSL tenants which are currently only available to tenants of local authority landlords. In other words, extending coverage of the Act would ensure that different groups of social housing tenants – as determined by the status of their landlord – would benefit from the same information rights. In effect, extension equalises information access rights.

### **3. CONSULTATION**

#### **Within government**

3.1 This consultation paper has been developed by Scottish Government officials.

#### **Public consultation**

3.2 The Scottish Government periodically consults on coverage of the Act and has brought forward two section 5 orders to date<sup>9</sup>. Consultation has repeatedly identified interest in extending coverage of the Act to Registered Social Landlords.

3.3 Registered Social Landlords are aware that extending FOI coverage to them is being considered. They now have an opportunity to feed in their views formally.

3.4 The consultation will close on 23 February 2017. Responses received and evidence provided will be considered in detail before the Scottish Government's conclusions are reached. A full BRIA will be developed before any order is laid in the Scottish Parliament.

#### **Stakeholder engagement**

3.5 As part of the consultation process, the Scottish Government will meet a number of organisations and representatives from the housing sector so we can better assess the costs and/or benefits to them.

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<sup>9</sup> <http://www.gov.scot/About/Information/FOI/Coverage>

## **4. OPTIONS**

4.1 This section gives consideration to the impact, in terms of costs and benefits, of the various options available. Given the early stage of the consultation process there is limited evidence allowing assessment of the impact of the proposals. Following the consultation process a more detailed assessment can be undertaken.

### **Option 1: Take no action**

4.2 This would mean not proceeding with the proposed section 5 order and therefore not extending coverage of the Act to those organisations at 1.1 above.

4.3 *Sectors and groups affected:* There would be no impact on any of the Registered Social Landlords.

4.4 *Costs and benefits:* This option presents no added costs to the Scottish Administration, to public authorities, or to private organisations. However this would not help promote openness and transparency in the delivery of core public functions.

### **Option 2: Making a further section 5 Order**

4.5 We are aware that some RSLs aim to operate 'in the spirit of the Act' i.e. to respond to information requests as fully as possible and as promptly as possible. RSLs are also subject to the EIRs as discussed above and are required to comply with obligations set out in the Scottish Social Housing Charter in terms of their communication with their tenants and other customers.

4.6 However, no current information rights are as extensive as those that would be provided by the statutory and enforceable rights contained in Scotland's Freedom of Information legislation. While there may be some merit in considering voluntary arrangements – or in further review of the communication aspects of the Housing Charter – we suggest that the only meaningful alternative to the current position is in legislating to bring RSLs within scope of the Act.

4.7 Formal extension of coverage would mean that RSLs would have to comply with the Act with the role of the Scottish Information Commissioner being extended in respect of promotion and enforcement to cover the additional bodies. The benefits of the proposal extend to the wider public (within and outwith Scotland) whose legal rights to access information would be enhanced.

4.8 This preferred option would extend coverage of the Act to RSLs in respect of the information they hold concerning their functions of a public nature. The right of access to information from these organisations would therefore be on a par with the statutory right to access information from all other authorities subject to the Act.

### **Risk Assessment**

4.9 The risks, including costs, associated with this option will be more clearly established following the consultation process. However, compliance with the Act

will create additional administrative responsibilities with the possibility of related costs being passed on, for example, to the tenant.

4.10 There are also wider risks involved. There may be hidden costs to the public purse if an extension of coverage deters RSLs from competing for public funds, thus hindering competition and ultimately affecting the quality and cost of goods and services provided.

4.11 There are though some general factors mitigating the possible costs and risks involved in proceeding with this option:

- The Act has now been in force for almost 12 years and it is commonly accepted that increased transparency is a key part of working with the public sector and receiving public funds.
- At least some RSLs will already have a degree of knowledge of the legislation from liaising with public bodies regarding requests made to the public authority for information in which the body has an interest.
- RSLs are already considered to be within scope of the EIRs (which in effect have many parallels in terms of compliance with the Act)
- A considerable body of guidance is now available for bodies subject to the Act. Additionally, the Scottish Information Commissioner would support bodies in preparing to meet the requirements of the Act.
- Good records management is key to effective request handling and should not be a new requirement for the bodies.
- Proactive publication of information that is likely to be of public interest can help reduce the volume of requests received. Those bodies that make more information available up front are likely to receive fewer requests.
- We note the recent joint publication of guidance and a 'Model Publication Scheme' by the SFHA and GWSFHA which, though voluntary, set out minimum good practice standards and go some way in mirroring existing statutory requirements.
- Coverage by the Act would enable these bodies to manage information requests themselves, and judge what, if any, exemptions would be applicable.
- There may be a reduction in the number of requests, for example to the Scottish Housing Regulator and local authorities, about the delivery of these functions, leading to some small costs savings.
- The proposed order would not be expected to come into force until 1 April 2018, allowing significant preparation time.

## Cost estimates

4.12 The costs of implementing the Act for the bodies concerned are difficult to quantify. We set out below some key factors:

### *(a) The numbers of requests received per year*

4.13 It is not possible to predict with certainty the number or scope of requests that a body will receive. They may also receive larger numbers of requests in the first year as requesters make use of their new rights for the first time.

<i>Registered Social Landlords</i>	Initial estimates suggest that request numbers are likely to be low.
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### *(b) The costs of establishing FOI procedures*

4.14 While some RSLs (primarily the larger ones) may have limited awareness of the legislation, it would not be reasonable to expect all RSLs to have a detailed knowledge of the Act or familiarity with request handling procedures. We would therefore anticipate organisational costs – particularly in the first year of coverage - in providing staff training, in ensuring there are proper systems in place, including records management processes, and in developing Publication Schemes.

4.15 As noted above, some RSLs seek to comply voluntarily with the Act – which suggests, at least in respect of these RSLs, that some costs of compliance will have been absorbed. However, even with RSLs which are already acting in the spirit of the legislation, we would still anticipate a degree of initial cost to prepare for actual inclusion and the more formal processes that this entails.

### *(c) The average resources required to handle a FOI request*

4.16 There has been limited research undertaken into the costs of handling FOI requests to the authorities subject to the Act. In [research undertaken in 2012](#) the Scottish Government estimated that the average time spent in responding to a request we received was approximately 7 hours, at an average cost in staff time of £231. However average cost figures would vary significantly depending on the organisation and the type of requests it received.

## Sectors and groups affected

4.17 Option 2 would impact on all bodies proposed for coverage. It would also affect the Office of the Scottish Information Commissioner (OSIC), whose oversight and enforcement duties would extend to these additional bodies. An initial assessment by OSIC – taking into training, support and the predicted increased volume of enquiries from RSLs and appeals – identified a cost in the region of £110,000 in the first year reducing to £100,000 per annum thereafter.

4.18 Importantly, it would also impact on the public, whose information rights would be extended. While it is not possible to quantify the benefits to tenants and the wider

public of extending information rights in financial terms, the benefits of extension would still be widely recognised as being of value.

## **5. SCOTTISH FIRMS IMPACT TEST**

5.1 This section will be informed by the evidence gathered during the consultation and completed in the final BRIA. In addition to the written consultation process, we will meet a number of organisations affected by the proposals.

### **Competition assessment**

5.2 We welcome views and evidence as to whether extension of coverage is likely to impact on Registered Social Landlords' ability or willingness to engage with public or private sector partners. This will help a full assessment to be made, which will inform Ministers' final decision. We would note that, in proposing to extend coverage of the Act to all RSLs, this would ensure a level playing field amongst RSLs in terms of ongoing engagement with both the public and private sectors.

5.3 While RSLs may have concerns about being forced to release commercially sensitive information, there are FOI exemptions and EIR exceptions to enable information which is genuinely commercially sensitive to be withheld. We would not anticipate coverage to deter RSLs from commercial engagement with either public or private sector partners.

### ***Test run of business forms***

5.4 There are no new business forms required.

## **6. LEGAL AID IMPACT TEST**

6.1 These proposals would not have any impact on legal aid. No legal advice is required in order for a requester to seek information under FOI.

## **7. ENFORCEMENT, SANCTIONS AND MONITORING**

7.1 Option 1 (do nothing) presents no enforcement or monitoring issues. The current enforcement regime (provided by the Scottish Information Commissioner) would remain the same, with no additional bodies brought within its scope.

7.2 Option 2 (laying an order) would require those bodies affected to comply with the Act. Compliance would be monitored and enforced by the Scottish Information Commissioner. The Commissioner can receive appeals from any person who has gone through the request and review stages of the legislation and is dissatisfied with the response from a public authority. She can also investigate a public authority if she believes that it may be failing to comply with the terms of the legislation or the Codes of Practice issued under the legislation.

7.3 At the conclusion of an investigation (if settlement is not reached) the Commissioner will issue a decision notice which sets out her conclusions. Compliance may require the organisation to release the information sought.

7.4 Failure to comply with a decision notice may be treated by the Court of Session as a contempt of court, the penalty for which may be a fine or imprisonment. An organisation may appeal, on a point of law, to the Court of Session against a decision by the Commissioner. An applicant can also appeal to the Court of Session against a decision by the Commissioner.

## **8. IMPLEMENTATION AND DELIVERY PLAN**

8.1 Depending on the outcome of the consultation we envisage bringing forward an order in the spring of 2017 to come into effect on 1 April 2018.

8.2 We would propose to review the impact of an order once it has been in effect for a period of one year.

### **Statement by the Minister for Parliamentary Business**

I have read the impact assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

## Responding to the consultation

This consultation can be viewed and responded to online at:

<https://consult.scotland.gov.uk/freedom-of-information/foi-social-landlords/>

Alternatively, you can respond by e-mail using the **Respondent Information Form** to:

[foi@gov.scot](mailto:foi@gov.scot)

If you do not have access to e-mail, you may still submit your response by post with your completed **Respondent Information Form** by sending it to:

Freedom of Information Unit (2W)  
The Scottish Government  
St Andrew's House  
Regent Road  
Edinburgh EH1 3DG

Consultation commenced on 1 December 2016 and will run for 12 weeks. If you wish to respond to the consultation, please provide your response by 23 February 2017.

## Handling your response

We need to know how to handle your response and in particular, whether you are happy for it to be made public. Completing the attached **Respondent Information Form** will ensure that we treat your response appropriately. If you ask for your response not to be published we will treat it as confidential.

As the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and the Data Protection Act 1998 any request made to it relating to the responses will be considered in terms of the appropriate legislation.

Following the closing date, all responses will be analysed and considered along with any other available evidence before a decision is made on the precise terms of any resulting order.

If you have given permission for your response to be made public and after we have checked that it contains no potentially defamatory material, your response will be made available to the public.

## Comments and complaints

If you have any queries or comments about this consultation exercise please contact Andrew Gunn on 0131 244 5061 or via the contact details above.

**FREEDOM OF INFORMATION (SCOTLAND) ACT 2002:  
EXTENDING COVERAGE TO REGISTERED SOCIAL LANDLORDS****RESPONDENT INFORMATION FORM**

**Please Note** this form **must** be returned with your response.

Are you responding as an individual or an organisation?

- Individual  
 Organisation

If you are an organisation please indicate which category best describes your organisation:

- Academic or Research Institute  
 Community organisation  
 Local government  
 Private sector organisation  
 Public body, including Executive Agencies, NDPBs etc.  
 Representative body for professionals  
 Third sector / equality organisation  
 Others – please state:

Full name or organisation's name

Phone number

Address

Postcode



Email

The Scottish Government would like your permission to publish your consultation response.

Please indicate your publishing preference:

- Publish response with name
- Publish response only (anonymous) – Individuals only
- Do not publish response

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. We may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Government to contact you again in relation to this consultation exercise?

- Yes
- No

## CONSULTATION QUESTIONS

1) Do you agree that freedom of information legislation should be extended to Registered Social Landlords, as proposed in this consultation paper?

Yes

No

2) Freedom of Information can be extended to organisations that undertake 'functions of a public nature'. You may wish to provide comments on how you consider that RSLs undertake functions of a public nature, for example, with reference to the factors referred to earlier in this paper.

Comments

3) The proposed order would be expected to come into force on 1 April 2018. Do you consider this a reasonable timescale, allowing for preparation for inclusion?

If not, you may wish to indicate what timescale you feel would be more appropriate and why.

Comments

4) We would welcome comments on the draft partial Business and Regulatory Impact Assessment provided at **Annex A**.

Comments

5) We would welcome comments on how these proposals might impact on 'Equality Groups' i.e. in respect of age, gender, race, religion, disability, sexuality, children's rights etc. Comments will inform the **Equalities Impact Assessment** and **Child Rights and Wellbeing Impact Assessment** to be completed following consultation.

Comments



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