



Consultation response

On the Draft Order extending coverage of the Freedom of Information (Scotland) Act 2002 to Registered Social Landlords

Submitted 07 March 2018

1. Please provide all comments you wish to make on the terms of the draft order here:

1. I welcome the draft Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities Order 2018) (the Order) and the opportunity to comment on it. The experience my office has in applying and enforcing previous orders made under section 5 of the Freedom of Information (Scotland) Act 2002 (FOISA) allows me to comment on some of the practical implications of the Order, as currently drafted.
2. My comments on the Order relate to:
 - (i) The description of the functions covered, and whether this will meet its intent in respect of Registered Social Landlords (RSLs) and subsidiaries
 - (ii) The definition of “subsidiaries” and how complex it will be in practice for my office to identify which bodies are covered by the Order and
 - (iii) Timescales for implementing the Order, and in particular my concern about RSLs no longer being subject to the Environmental Information (Scotland) Regulations 2004 (EIRs) for the period between the Housing (Amendment) (Scotland) Bill coming into force and the Order coming into force.

Functions covered

3. The draft Order states that the persons described in column 1 of the table in the Schedule to the Order are to be subject to FOISA “in relation to the functions specified in column 2”. Column 2 provides that those functions are: “[t]he performance of housing activities as defined in section 165 of the Housing (Scotland) Act 2010” (the 2010 Act).
4. “Housing activities” are defined as: “any activities undertaken by a social landlord in relation to housing services which are or may be provided by it”.
5. “Housing services” are in turn defined in section 165 of the 2010 Act as:

“providing 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”.

6. I initially had concerns whether it was sufficiently clear that the current wording of Column 2 captured information such as the financial well-being and standards of governance within RSLs. While a more detailed reading suggests the Order will indeed capture such information, because it is about “housing activities” (i.e. “activities undertaken... in relation to housing services”, rather than just “housing services”), it would nevertheless be helpful if the Government could clarify its position on this point in its final consultation response.
7. There does, however, remain an issue about the wording of Column 2 in relation to subsidiaries. The definition of “housing activities” is restricted to activities *undertaken by a social landlord* in relation to services *provided by it* (emphasis added). This appears to exclude subsidiaries which are not RSLs.
8. Where the activity in question is undertaken by a subsidiary which is not itself an RSL, and/or is undertaken in relation to services provided by the subsidiary, rather than the RSL, the function will not meet the terms of Column 2 of the table in the Schedule. This appears to be a drafting oversight, which requires further thought and would seem to require an amendment to the draft Order, to ensure subsidiaries are properly covered.

Subsidiaries

9. I welcome the proposal to include RSL subsidiaries within the scope of the Order.
10. The definition of the bodies to be included does, however, give rise to practical issues in identifying which subsidiaries are subject to the Order.
11. The Order provides that “connected bodies under section 164(c) of [the 2010 Act]” which are performing housing activities (as defined by section 165 of the 2010 Act) are designated as Scottish public authorities under FOISA.
12. This is achieved by including “connected bodies” as a subset of RSLs in Column 1 of the table in the Schedule to the Order. However, the housing legislation does not appear to treat connected bodies as a subset of RSLs. They are two separate types of entity. It therefore would seem necessary that they should be listed separately in the Order, for example:

<i>Column 1</i>
<i>Description of persons</i>
A registered social landlord within the meaning of section 165 of the Housing (Scotland) Act 2010 (*)
and
including Connected bodies under/ <i>within</i> the meaning of section 164(c) of that Act

13. The above approach would also allow for the definitions of “function” in Column 2 to be set out separately. The existing definition of function could be retained in respect of RSLs, with the insertion of a separate description of the public functions carried out by subsidiaries. This

approach would also create greater certainty about the functions for which the subsidiaries are covered, which may vary from functions performed by RSLs.

14. Certainty about which bodies are subject to the Order is particularly important to the efficient delivery of my functions under FOISA. Where there is uncertainty:
 - (i) Applications for decisions may be unnecessarily delayed¹ and may be the subject of costly legal challenge to the Court of Session.
 - (ii) I will be unable to ensure that bodies under jurisdiction are complying with the publication scheme duty (section 23 of FOISA).
 - (iii) I will be unable to reach all new bodies preparing for designation with the advice, support and training they will need.
15. Even with clear definitions of the persons and functions subject to the Order, establishing whether it applies to individual subsidiaries may be complex. This has been the case in the past for some section 5 designations. There does not appear to be a comprehensive list of RSL subsidiaries available from any source. I will have to establish, on an individual basis, whether:
 - (i) any particular body falls under section 164(c) (as opposed to any other subsections in section 164); and
 - (ii) whether they carry out functions falling within the description in Column 2 of the Schedule (i.e. whether they are performing housing activities under section 165 of the 2010 Act).
16. Only RSLs appear to be suitably placed to identify subsidiaries. Although the Scottish Housing Regulator (SHR) maintains a list of subsidiaries, it uses a different definition of “subsidiary” to that contained in section 164(c). Therefore, the SHR list will not assist me in identifying the connected bodies to be caught by the section 5 Order. I would therefore be dependent on self-reported information from RSLs. Though I will encourage RSLs to alert me to their relevant subsidiaries as soon as possible, in the shorter term, it may be difficult to reach subsidiaries in the preparation phase.
17. In the longer term, I intend to require RSLs, via the Model Publication Scheme, to list their subsidiaries in their Guides to Information, i.e. publish this information, and keep it up to date as part of their publication duty under section 23 of FOISA. This means that this information will be available not only to me, but to anyone who wants to know which bodies are covered by the Order and, consequently, which bodies are subject to FOISA and the EIRs.

Timescales

18. As set out in my predecessor’s consultation response, the lead-in time I require from the Order being approved until it comes into force is nine months. This time is needed to allow preparation work with the organisations to be covered. The lead-in time will be particularly important as RSL subsidiaries are also to be designated.
19. It is essential that the staff of RSLs, and their subsidiaries, are able to attend training and take advantage of other support from my office. As the experience of other section 5 orders

¹ Under FOISA, I am expected to issue decisions within four months of an appeal being made to me, and must report to Parliament where I fail to do so.

shows, the greater the reach of advice, guidance and training, the more effectively RSLs and subsidiaries will be able to prepare for FOISA.

20. The proposed date for the Order to come into force is 1 April 2019. I appreciate that the lead-in period depends on when the Order is laid in Parliament, and will be subject to Parliamentary timetables. However, even taking this into account, the proposed lead-in time appears sufficient and I would not wish the commencement to be delayed further.
21. I continue to be concerned about the reduction by the Housing (Amendment) (Scotland) Bill, in the SHR's control over RSLs and the impact that may have in terms of RSLs continuing to be (as at present) subject to the EIRs. It is very likely there will be a time gap between the changes made by the Bill taking effect (expected September 2018) and the Order coming into force (proposed April 2019). That gap will create a degree of confusion and uncertainty about RSLs being subject to the EIRs.
22. I have made my concerns, including the perceptual impact on access to information rights, known to the Local Government and Communities Committee².
23. The scope and importance of the information available to the public under the EIRs should not be underestimated. It can include information about the types and specifications of materials used in buildings, the repairs that are commissioned, or health and safety and fire safety assessments.
24. The definition of environmental information is much wider than people generally realise. For example, it extends to information on the environmental impact of an RSL's vehicle fleet, the condition, maintenance and repair of buildings and footpaths, noise complaints, energy consumption, policies and plans for new housing developments, and the economic analyses and assumptions behind policies. If there were to be a lapse in the application of the EIRs to RSLs, people may not be able to access such information
25. Although it is noted in the consultation paper that RSLs may continue to operate within the spirit of the EIRs during any lacuna, my office has experience of some RSLs arguing, under the current legislative provisions, that they are not subject to the EIRs.
26. At present, requesters have an enforceable right to pursue such matters by way of an application to me and, if I find a breach of the EIRs, I have the power to order the RSL to take action. Whether that continues to be the case will depend on whether, once the planned changes to the housing legislation have been made, RSLs continue to be public authorities for the purposes of the EIRs..
27. Ultimately, if an application comes to me, I *may* find myself in a position of being unable to offer any redress to the applicant in relation to the issues they are unhappy with, e.g. whether all the relevant information was found and provided, whether information should have been disclosed to the requester (e.g. whether exceptions have been properly applied), whether the timescales in the EIRs have been complied with, or whether any charge made for the information was reasonable.

² [Scottish Parliament Official Report, Local Government & Communities Committee 29 November 2017](#), col 3-7.

2. Please provide any comments you wish to make on the Business and Regulatory Impact Assessment here:

28. I note the contents of the BRIA and would comment as follows.
29. As noted in my predecessor's consultation response of 22 February 2017, while the research carried out by the Scottish Government in 2012 provides a useful benchmark for the average cost in staff time (of £231) per government request, the figure is not representative of an average cost for all authorities. The reliance by small RSLs on this figure has led them to be concerned about large estimated annual costs. I do not believe that these will arise in reality, partly because the cost per request will not be so high for most, if not all, RSLs, but also because the request volumes are anticipated to be low, for a number of reasons:
- (i) Firstly, RSLs already have experience of responding to requests under data protection legislation and of responding to requests and publishing information under the EIRs. Staff within RSLs are therefore familiar with both records management and disclosing and publishing information. Generally, smaller organisations hold fewer records than larger organisations and therefore can find requested information more quickly.
 - (ii) Evidence gathered from Fife Council to inform my predecessor's previous response indicated that housing-related requests made to the Council, which was Scotland's third largest landlord with housing stock of just over 30,000 houses, were:

Period	FOISA	EIRs
Jan – Dec 2014	62	79
Jan – Aug 2015	37	35

Just this week, Perth and Kinross Council, which has a housing stock of 7,500, has reported that it received 65 housing-related requests last year.

- (iii) Additionally, I will provide support to the new bodies, as in the past. I can help RSLs and their subsidiaries streamline the systems they already have in place. This help has been recognised as being important for preparation by previous designees³.

Commercial impact

30. By drafting the Order in a way that captures all RSLs and subsidiaries undertaking housing activities, appropriate legal protection is already provided by FOISA and the EIRs to the commercial interests of those organisations. As the consultation paper notes, it ensures a level playing field. The existing exemptions in FOISA provide clear statutory protection to RSLs, their subsidiaries, and those who do business with them, while ensuring information will be disclosed (or proactively published) where it is appropriate to do so. This is one area where the work I will undertake to help the new authorities prepare for designation will be extremely beneficial.
31. There are exemptions in FOISA which protect commercial information, the principal ones being: the exemption for commercial sensitivity (section 33(1)(b)) and the exemption for confidential information (section 36(2)).

³ A survey by the Scottish Information Commissioner of culture and leisure trusts after their designation in 2014, as reported in the Commissioner's consultation response of 22 February 2017, available at: <http://www.itspublicknowledge.info/home/SICReports/OtherReports/otherReports.aspx>

32. The first key consideration when applying the exemption for commercial sensitivity is whether a commercial interest is engaged. An interest is “commercial” if it relates to any commercial trading activity an organisation undertakes, e.g. sale of products or services, usually (but not always) for the purpose of making money, and normally within a competitive environment. The commercial interest could belong to the organisation receiving the request, or a third party: the exemption protects the commercial interests of third parties, e.g. contractors and those responding to procurement opportunities.
33. The exemption contains a harm test and a public interest test. Disclosure must cause, or be likely to cause, real, actual and significant harm to the commercial interest before the exemption can be applied. If this harm test is met, the public interest arguments in favour of releasing the information must be balanced against those in withholding the information.
34. FOISA has now been in force for 13 years. It covers almost all of Scotland’s public sector. I am not aware of any evidence showing that the requirements of FOISA cause problems for authorities regarding procurement, or in obtaining best value for money in contracts.
35. The authority can also consider whether the confidentiality exemption applies. If disclosure would breach the Scots law of confidence, the exemption in section 36(2) can be relied on. This exemption is also subject to a number of tests, but exists to ensure that genuinely confidential information is exempt from disclosure under FOISA.
36. RSLs are already subject to requests for commercially sensitive environmental information. As noted in response to Q1 of this consultation, the range of information held by RSLs which will fall under the EIRs, and which is therefore already accessible on request, is wide. The EIRs cover a wide range of information, such as the types and specifications of materials used in buildings, the repairs that are commissioned, or health and safety and fire safety assessments, information on the environmental impact of an RSL’s vehicle fleet, the condition, maintenance and repair of buildings and footpaths, noise complaints, energy consumption, policies and plans for new housing developments, and the economic analyses and assumptions behind policies.
37. There is an exception in the EIRs for commercially confidential information, which is similar to (although not identical to) the exemptions in sections 33(1)(b) and 36(2) of FOISA.
38. The concerns expressed in the BRIA are not borne out by RSLs’ experiences under the EIRs. Despite the EIRs covering such a wide range of information, I am not aware of RSLs receiving challenging volumes of requests, or having been inhibited in their commercial activities as a result of being subject to the EIRs.
39. The consultation paper refers, at paragraph 4.17, to projected additional costs for my office arising from the designation of RSLs. These costs arise from the additional workload associated with a significant increase in the number of bodies subject to my jurisdiction. This is the largest ever increase in bodies (approximately 240⁴) since FOISA’s inception. The impact will have effect throughout the forthcoming financial year and beyond as it will involve considerable preparation, training and support to the bodies prior to the date of their formal designation as well as an increase thereafter in enquiries, support, monitoring, enforcement and applications.

⁴ Approximately 160 RSLs and 80 subsidiaries.

40. The inclusion of RSL subsidiaries in the Order will increase the number of new bodies in scope since the last consultation by approximately 50%. The projected cost of enforcing the legislation provided in our response to that consultation therefore needs to be adjusted.
41. While, due to their specific functions, the range of information held by subsidiaries is likely to be narrower than the range of information held by RSLs, the issues raised in discussion of Public Petition PE01539 to the Scottish Parliament suggest a public appetite for access to information that they are likely to hold, particularly information about factoring services. It is therefore reasonable to anticipate that my future caseload concerning subsidiaries will be proportionately similar to that of RSLs. Moreover, subsidiaries are unlikely to have the same levels of familiarity as RSLs with the EIRs. I therefore expect that the training, support and monitoring for subsidiaries will be similar or slightly greater to that required for RSLs.
42. In the light of this, I project the additional staffing costs for my office arising from the Order to be in the region of £143,000 per annum. In addition to this there will be set up costs of £12,000 in the first year (2018/19). These figures are, of course, based on current salary costs.
43. The figures are estimated on the anticipated increases in workload. If actual workload is noticeably greater than anticipated, further resource will be required.

Conclusion

44. When considering the impact of designation, there is a tendency to focus on the negative aspects, but it is also important to consider the positive aspects. There may be times when RSLs and their subsidiaries find FOI law challenging, but the benefits that accrue from access to information are significant.
45. Provision of information to the public, whether by proactive publication or in response to a request, builds public trust and reduces distrust. It promotes accountability and transparency in the way we do business, spend money and provide public services.
46. FOI law strengthens participation of citizens in decision-making, and reduces bad practice and inefficiencies. These are tangible benefits for the bodies that are subject to it.

Daren Fitzhenry
Scottish Information Commissioner

Contact us

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info

© Scottish Information Commissioner 2018

You may use and re-use this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence v3.0. To view this licence, visit

<http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3/>