

# **Consultation on a Draft Order extending coverage of the Freedom of Information (Scotland) Act 2002 to Registered Social Landlords**

**December 2017**

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## Introduction

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

Scotland's Freedom of Information legislation 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.

The provisions of the Act can be extended to other bodies, including private 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.

This can be done by making an order under section 5 of the Act, which designates those bodies as a Scottish public authority for the purposes of the legislation. They are then subject to the full requirements of the Act – as well as becoming automatically subject to the Environmental Information (Scotland) Regulations 2004.

Bodies designated under section 5 are subject to the Act 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.

To date, two orders under section 5 of the Act have been agreed by the Scottish Parliament and are in force. The orders have designated as public authorities for the purposes of the Act certain arm's length organisations, private prison contractors, providers of secure accommodation for children, grant-aided and independent special schools and Scottish Health Innovation Ltd.

In line with its incremental approach to extending coverage and in order to consider the longstanding issue of whether Registered Social Landlords (RSLs) should be subject to Freedom of Information legislation, in December 2016 the Scottish Government published a consultation paper on extending coverage of the Act to RSLs.

The paper proposed that, subject to consultation, RSLs should be brought within scope of Scotland's Freedom of Information legislation.

Following consultation, the Scottish Government published an Interim Report highlighting key issues raised during the consultation exercise.

The consultation paper, responses to the consultation and the Interim Report can be accessed via the Scottish Government [consultation webpages](https://consult.gov.scot/freedom-of-information/foi-social-landlords/)<sup>1</sup>.

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<sup>1</sup> <https://consult.gov.scot/freedom-of-information/foi-social-landlords/>

## Issues arising from consultation on extending the Freedom of Information (Scotland) Act to Registered Social Landlords

The premise of the consultation earlier this year was that RSLs should be designated as public authorities for the purposes of the Act in order to provide the same information rights to tenants of RSLs (and anyone else requesting information) mirroring those rights already available to anyone wishing to request information from a local authority landlord.

The Interim Report highlighted various issues discussed below.

Comments on the administrative impact of designation are incorporated in the Business and Regulatory Impact Assessment that forms **Annex A** to this report.

In tandem with this report we are also publishing an Equalities Impact Assessment and Child Rights and Wellbeing Impact Assessment.

### *Function*

‘Function’ is central for designation – the Act can only be extended to organisations insofar as those bodies undertake functions of a ‘public nature’.

As noted in the Interim Report, a number of responses, particularly from tenant organisations, considered that simply providing ‘social housing’ – the core function of RSLs – was justification in itself for designation.

In respect of designating ‘functions of a public nature’, we note the view of the Scottish Federation of Housing Associations that an order should focus on housing services of a public nature only, along with Glasgow and West of Scotland Forum of Housing Associations noting that the majority of their members agreed that many of the mainstream services provided by housing associations were of a public nature.

We also note the comparison drawn by the Association of Local Authority Chief Housing Officers that RSL tenants signed the same form as those renting from local authorities and in all other respects have the same rights as Council tenants.

However, not all functions undertaken by RSLs will necessarily be in the context of ‘housing services’ or, more broadly, be public in nature (assessed against the range of factors set out in the earlier consultation paper).

In terms of discussion around ‘function’ and consideration of issues raised during consultation we note the identification - and distinction - between care functions as opposed to housing functions.

Responses have highlighted this distinction and expressed concern about the impact – commercial and otherwise – on those RSLs who are also involved in the provision of care services – as distinct from housing services. In particular, noting that the provision of care is subject to separate legislation, funding arrangements and regulatory regimes (for example, in being overseen by the Care Inspectorate).

## *Subsidiaries*

As commented on in the Interim Report, consultation on designating RSLs for the purposes of the Act explicitly did not propose to include RSL subsidiaries within scope of any eventual order. This was on the basis that subsidiaries were primarily set up as commercial organisations to undertake what would be regarded as ‘private activities’ not directly related to the core housing functions of the parent RSL. Indeed from available data, a significant number of the subsidiaries operated by RSLs define their activities as ‘commercial’ or ‘business’.

While few responses made specific comment on RSL subsidiaries, we note the Scottish Information Commissioner’s concerns about excluding subsidiaries from the scope of an order – and that the rationale for excluding subsidiaries from designation was not robust.

As the Commissioner suggests, in the event of RSLs (or their subsidiaries) becoming designated for the purposes of the Act, as with any public authority already subject to the legislation, exemptions could be applied to information potentially of a commercial nature – or indeed of other potential sensitivity such as personal data (whether in terms of housing, care or any other function undertaken).

In not considering subsidiaries for designation we note the potential for inconsistency in that access to information rights would potentially be determined by whether a housing service was provided directly by the parent RSL or their subsidiary.

We also note that, in the event of the designation of RSLs, if deemed to be ‘under the control of’ an RSL, subsidiaries could be considered subject to the Environmental Information (Scotland) Regulations 2004 insofar as they hold environmental information.

## *Housing (Amendment) (Scotland) Bill*

Subsequent to consultation on the designation of RSLs, in September 2017 the Scottish Government introduced the Housing (Amendment) (Scotland) Bill into the Scottish Parliament. The purpose of the Bill is to pave the way for the Office for National Statistics to reclassify RSLs to the private sector by reducing the control and influence that the Scottish Housing Regulator and local authorities are able to exercise over RSLs.

Given the Bill’s purpose and given that the Scottish Information Commissioner has determined that RSLs are subject to the Environmental Information (Scotland) Regulations 2014 on the basis of being ‘under the control of’ the Regulator, we note that one of the potential consequences of the proposed legislation could be to remove RSLs from the scope of the Environmental Information (Scotland) Regulations 2004.

## Conclusion

The consultation paper set out the basis on which the Scottish Government supported designation of RSLs as public authorities for the purposes of Freedom of Information legislation.

Having considered all issues in respect of the consultation, the Scottish Government is of the view that RSLs should be designated as public authorities for the purposes of the Act insofar as they undertake functions for which they are already subject to regulation by the Scottish Housing Regulator (as referenced at section 3 of the Housing (Scotland) Act 2010). The intention is to align information access rights to the regulatory powers of the body responsible for overseeing RSLs.

The order therefore proposes to designate RSLs insofar as they undertake functions as defined by the term 'housing activities' at section 165 of the Housing (Scotland) Act 2010 and in respect of which are already subject to regulation by the Scottish Housing Regulator.

The Housing (Scotland) Act 2010 defines 'housing activities' as

any activities undertaken by a social landlord in relation to housing services which are or may be provided by it,

and continues:

'housing services' means 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.

We acknowledge that insofar as RSLs undertake functions relating to care, as opposed to housing, such activities might constitute functions of a public nature. However, the provision of care services is a particularly wide-ranging function undertaken by numerous organisations, but which, as far as we are aware, only forms a relatively small part of those activities undertaken by RSLs – most of which by definition will relate to the provision of social housing and related activities.

The present order focuses designation on housing services – specifically those functions and activities for which the Scottish Housing Regulator has existing regulatory responsibility. We would note that this focus on a particular function is consistent in also being the approach taken in extending the Act to grant-aided and independent special schools - specifically in respect of the educational functions undertaken by these organisations.

However, we also note, specifically in respect of care functions, the intention (as highlighted in the biennial report<sup>2</sup> published in October) to explore whether certain organisations delivering health and social care functions but currently not subject to the Act should be brought within scope of the legislation.

A number of consultation responses noted issues around factoring services provided by RSLs. We consider that the provision of a factoring service - usually relating to general maintenance or improvement of common aspects of property - would be widely recognised as a 'housing service' in terms of section 165 of the Housing (Scotland) Act 2010.

We also note that a number of local authorities – who are subject to the Act - provide factoring services. In addition, the Scottish Social Housing Charter sets out the standards and outcomes that owners should receive from the property management services they receive from social landlords. In common with the other standards and outcomes set by the Charter, the Scottish Housing Regulator monitors, assesses and reports on how social landlords perform against these standards and outcomes.

Given the integral nature of factoring to 'housing services' potentially provided by RSLs we consider that information relating to factoring would fall within scope of the terms of the proposed order.

As noted above, there is potential for inconsistency in terms of access to information depending on whether a function as defined in terms of 'housing activity' is undertaken by an RSL or an RSL subsidiary. Therefore, in the interests of consistency and in acknowledging the close relationship between parent RSLs and their subsidiaries, we propose to include within scope of the order RSL subsidiaries (as defined at section 164(c) of the Housing (Scotland) Act 2010) within the terms of the draft order.

Finally, the proposal to designate RSLs as public authorities for the purposes of the Act ensures that, irrespective of the changes made to the role of the Scottish Housing Regulator by means of the Housing (Amendment) (Scotland) Bill currently before the Scottish Parliament, access to information rights to information held by RSLs will ultimately be maintained – and strengthened.

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<sup>2</sup> <http://www.gov.scot/Resource/0052/00526916.pdf>

## Commencement

The Scottish Government consulted on proposals to extend coverage of the Act to Registered Social Landlords from 1 April 2018. However, this timescale was considered too short and unrealistic by those organisations most directly affected by the proposed order – the RSLs (especially in context of these bodies also preparing for the General Data Protection Regulation, effective from 25 May 2018).

We also note the concerns expressed by the Scottish Information Commissioner in not allowing sufficient time for preparation in the event of an order being approved.

It is clearly in the interests of applicant, authority and regulator that sufficient preparation time is allowed prior to commencement of the proposed order. This view is also informed by the experience of previous such orders – including that which came into force on 1 September 2016 – which clearly indicated that the better the preparation the more effective was the implementation.

We therefore now propose a commencement date of **1 April 2019**.

While acknowledging that this may result in a period of time when RSLs might not be subject to the Environmental Information (Scotland) Regulations 2004 we consider that it is in the longer term interests of all parties concerned that sufficient time is allowed for adequate preparation for designation. We would also encourage RSLs to continue to respond to requests for information – environmental or otherwise – as helpfully and timeously as possible.

We would propose to review the impact of the order one year after commencement.

## Next Steps

It is clearly in the interests of potential requestors as well as RSLs that the terms of an order are clear to ensure its effectiveness.

We therefore consider it important that all interested parties have the opportunity to comment on the proposed order – particularly given the inclusion of RSL subsidiaries insofar as they also undertake functions as defined in the draft order.

Comments are therefore invited on the draft order at **Annex C** by **7 March 2018**.

We anticipate publishing a final consultation response following this further engagement on the precise terms of the order.

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

This updated Assessment follows consultation on designating Registered Social Landlords as public authorities for the purposes of the Freedom of Information (Scotland) Act 2002. Comments received in respect of this consultation on the terms of a draft order will be taken into account in preparing a final Assessment.

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

1.1 Designation of Registered Social Landlords (and their subsidiaries) as public authorities for the purposes of the Freedom of Information (Scotland) Act 2002 ('the Act').

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

#### **Objective**

2.1 Following earlier consultation, to consider the terms of an order extending the Act to Registered Social Landlords and RSL subsidiaries – as well as 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. The draft order would extend coverage to RSLs (and their subsidiaries) meaning that freedom of information requests could be made directly to these bodies in respect of their public functions – as defined by the terms of the order.

#### **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 Having considered the issues raised during consultation we consider that Registered Social Landlords (and their subsidiaries) exercise functions of a public nature to the extent defined by the terms of the order. These terms broadly propose to extend the scope of the Act to those functions for which the Scottish Housing Regulator has regulatory responsibility – including those defined as 'housing activities' for the purposes of section 165 of the Housing (Scotland) Act 2010.

2.5 As set out in the earlier consultation paper, the Scottish Government is aware that any extension of coverage may place additional administrative and financial pressures on bodies designated for the purposes of the Act. Comments made during consultation on the potential administrative impact of designation are reflected in this assessment (as well as in the Interim Report published in June 2017).

## **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 Designating RSLs for the purposes of the Act in terms of their public functions in effect extends the universal statutory information access right which currently only applies to local authority landlords. We note in passing that designating RSLs will restore information access rights in instances where these rights were lost due to the transfer of local authority housing stock in a limited number of local authority areas.

2.9 Finally, as highlighted above, in reducing the regulatory powers of the Scottish Housing Regulator, a potential consequence of the Housing (Amendment) (Scotland) Bill would be to remove the current requirement on RSLs to comply with requests for environmental information in accordance with the Environmental Information (Scotland) Regulations 2014. This would clearly have negative implications for information access rights.

## **3. CONSULTATION**

### **Within government**

3.1 This consultation paper on the terms of a draft order designating RSLs and RSL subsidiaries as public authorities for the purposes of the Act has been developed by Scottish Government officials.

### **Public consultation and stakeholder engagement**

3.2 The Scottish Government periodically consults on coverage of the Act and has brought forward two section 5 orders to date<sup>3</sup>. We also note extensive debate at the time the Freedom of Information (Scotland) Bill was being considered by the Scottish Parliament and the expectation at the time that consultation would be undertaken on proposals to designate RSLs for the purposes of the Act.

3.3 The Scottish Government consulted on proposals to designate RSLs for the purposes of the Act between 1 December 2016 and 23 February 2017. Registered Social Landlords, their representatives and tenant organisations were fully engaged

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<sup>3</sup> <http://www.gov.scot/About/Information/FOI/Coverage>

in the consultation process. The Interim Report<sup>4</sup> published in June 2017 highlights the main issues raised in the consultation and summarises the key responses.

3.4 Consultation on the terms of the draft order will close on 7 March 2018. A final report will be issued at the conclusion of this process – during which the Scottish Government anticipates further stakeholder engagement.

## **4. OPTIONS**

4.1 This section gives consideration to the impact, in terms of costs and benefits, of the proposal to designate RSLs as public authorities for the purposes of the Act. A significant number of consultation responses highlighted the practical and administrative issues arising from designation – with some identifying specific costs.

4.2 As noted in the consultation exercise, not proceeding with designation would have no impact on RSLs (or to the Scottish Administration, to public authorities, or to private organisations) - and would not promote greater openness and transparency.

4.3 In proposing to formally designate RSLs and RSL subsidiaries for the purposes of the Act we acknowledge (as noted in some responses) that some RSLs operate ‘in the spirit of the Act’ 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.

4.4 However, no current information rights are as extensive as those that would be provided by the universal, statutory and enforceable rights contained in Scotland’s Freedom of Information legislation. The objective of the proposed designation, having taken into account consultation responses, is to extend coverage to RSLs and their subsidiaries insofar as they undertake public functions – as defined by the extent that they are currently subject to regulation and oversight by the Scottish Housing Regulator.

### **Risk Assessment**

4.5 Consultation identified a number of risks and potential cost implications arising from designation. Paramount amongst the concerns was the administrative and resource impact – an impact which several respondents felt would be passed on to tenants in the form of higher rents.

4.6 As also noted below, consultation identified concerns around the commercial impact of designation in respect of the ability of RSLs to compete for business, for example, in providing care services, alongside private companies who would not be subject to the Act.

4.7 Responses from the RSL sector – a selection are included below - reflected this range of concerns:

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<sup>4</sup> <https://beta.gov.scot/publications/consultation-extending-coverage-freedom-information-scotland-act-2002-registered-social-9781788510783/>

For example, **Knowes Housing Association** noted the requirements placed on RSLs by the Scottish Social Housing Charter as well as Procurement Reform legislation and obligations under Charity law. **Port of Leith Housing Association** noted the additional costs of data systems development, training and resourcing the co-ordination of responses and statistical returns. **Cassiltoun Housing Association** expressed concern about the impact on smaller community based RSLs while **Manor Estates Housing Association Ltd** considered that designation was unnecessary due to their generally open and transparent approach including compliance with the Scottish Housing Charter. Obligations under the Charter were noted in several RSL responses including that of **Shire Housing Association** who noted the higher level of RSL tenant satisfaction against Charter outcomes in comparison with local authority tenants. The concern was also raised by **Link Group Ltd** that designation might deter RSLs from competing for public funds – with a significant impact on the Scottish Government’s target of 50,000 new homes.

A similar point was made by the **Council of Mortgage Lenders (CML)** who considered designation of RSLs would place an unnecessary burden and expense on RSLs at a time when they were meeting the Government’s substantial new social and affordable housing targets. CML also noted the amount of RSL information already available including through annual reports and Board minutes. Similar concerns about an unnecessary burden were also noted by the **Chartered Institute of Housing** Scotland, particularly for smaller organisations.

In acknowledging the impact of the Act, particularly for smaller RSLs, **Falkirk Council** considered that designation would allow RSLs to be fully accountable and increased transparency. Similarly, **North Ayrshire Council** noted that while FOI changed culture there would be costs.

We note the comprehensive support for extension amongst tenant organisations, with **Northern Lights Regional Network** considering that designation would not be a burden on RSLs if they were being ‘open and transparent’. Similar points – broadly on the extent that RSLs should already be operating openly and transparently – were made by the **Campaign for Freedom of Information in Scotland (CFoIS)**. Finally, **Shelter Scotland** considered that designation would drive good practice among RSLs in making information publically available as a matter of course.

4.8 While noting the issues raised in consultation responses, particularly those from the RSL sector themselves above, as highlighted in the earlier consultation paper there are some general factors mitigating the possible costs and risks involved in proceeding with designation:

- 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 considered to be within scope of the EIRs (while noting this may not be the case depending on changes to the role of the Scottish Housing Regulator including in the Housing (Amendment) (Scotland) Bill).
- 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 – including addressing concerns about handling ‘vexatious’ requests.
- 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.
- Publication of guidance and a ‘Model Publication Framework’ 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 draft order is not expected to come into force until 1 April 2019, allowing significant preparation time.

### **Costs and administrative impact of designation**

4.9 The costs and administrative impact of designation are difficult to quantify. In research undertaken in 2012<sup>5</sup> 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 – and these figures do not take into 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.

4.10 Based on this data a number of respondees raised concerns about the potential costs of designation. For example, one response noted that a day’s work to respond to a single request – particularly in smaller RSLs – was disproportionate and not sustainable. **Argyll Community Housing Association Ltd** considered that based on the Scottish Government’s analysis designation would put pressure on organisations potentially resulting in RSLs having to divert resources from landlord services to meet legal requirements. Similarly, **Weslo Housing Management**

<sup>5</sup> <http://www.gov.scot/About/Information/FOI/Reporting/CostingExercise2012>

estimated annual costs of £11,500 based on 50 requests a year – which did not take into account any financial start-up costs that may be involved including staff training.

4.11 The response from the **Chartered Institute of Housing Scotland** noted the limited research on costs though observed that a report commissioned by the Scottish Federation of Housing Associations and Glasgow and West of Scotland Forum of Housing Associations found that those local authorities contacted estimated they received 60-90 housing related requests a year. However, we also note that **Glasgow City Council** estimated they received around 12 RSL-related FOI requests each year.

### **Impact of previous designation**

4.12 Earlier this year, in seeking to assess the impact of designation, the Scottish Government invited organisations brought within scope of the Act from September 2016 to comment on their experience of designation.

4.13 As reported in the biennial report published in October, a number of common themes came out of their responses. Perhaps chief amongst these was the importance of preparation ahead of designation, for example, through training and workshops. While this had primarily been provided by the Office of the Scottish Information Commissioner, peer group support and close working relationships with public authorities already subject to the Act were also valued.

4.14 The Business and Regulatory Impact Assessment contained in the 2015 consultation paper anticipated generally low numbers of requests in respect of the bodies proposed for designation (as also for the consultation on designation of RSLs). Feedback from the designated bodies shows these estimates to have been broadly accurate with the numbers of requests responded to in terms of the Act universally in single figures (if any). The low numbers of requests responded to by the newly designated bodies is also reflected in the statistical data compiled by OSIC and available via the OSIC database.

4.15 Feedback in respect of the resource impact of designation varied greatly. While a number of bodies referred to the considerable time required in terms of, for example, training, the setting up of systems and IT/website implications (especially given the limited actual demand), others observed far less of an impact on resources.

4.16 Responses from designated bodies indicated that responsibility for handling information requests had generally been recognised as a corporate function and was handled alongside similar governance duties, such as compliance with data protection legislation and record management. The involvement of senior management was also noted in a number of the designated bodies.

### **Sectors and groups affected**

4.17 Designating RSLs would impact on all bodies proposed for coverage including the Office of the Scottish Information Commissioner (OSIC). OSIC's assessment – taking into account 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 Designation 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.

4.19 In assessing the impact of designation, we note those responses highlighting the existing reporting requirements on RSLs in terms of obligations under the Scottish Social Housing Charter as well as Procurement and Charity legislation. We also note that many RSLs seek to provide a range of information to tenants – a practice encouraged through adoption of the voluntary model publication framework developed by the Scottish Federation of Housing Associations and the Glasgow and West of Scotland Forum of Housing Associations.

4.20 We would suggest that in complying with existing legislative obligations – as well as through voluntary proactive publication of information – RSLs are already in effect undertaking many of the duties and responsibilities required under the Act. This would seem to be reflected in the view of the Scottish Information Commissioner that, rather than being an ‘extra function’ in isolation from the whole business, FOI should be considered as part of an integrated service.

4.21 However, while acknowledging the openness and transparency of many RSLs – reflected in the Annual Return on the Charter – neither the Charter (nor the model publication framework) provide the statutory underpinning of information rights central to Freedom of Information legislation.

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

### ***Competition assessment***

5.1 A number of responses identified issues around commercial information. One respondent noted that given concerns around commercial sensitivity also applied to aspects of the way that local authorities operated their housing, RSLs should also be able to cope.

5.2 The response from Blackwood Homes and Care noted the potential commercial impact on their Care Services but if these concerns could be addressed designation would fit with their values and principles.

5.3 Both the Scottish Federation of Housing Associations and Glasgow and West of Scotland Forum of Housing Associations agreed with the initial assessment that subsidiaries should be excluded from designation given they undertake mainly commercial activities.

5.4 A further response observed that as private companies RSLs competed in the commercial market place and expressed concern that, while exemptions could apply these were narrowly drawn in order to ensure that maximum information could be disclosed.

5.5 While the draft order in no respect precludes RSLs (or their subsidiaries) from commercial engagement, we note the concerns expressed about the potential release of commercial information.

5.6 However, we also note (as did some respondents including the Scottish Information Commissioner) that the various legislation does contain exemptions and exceptions specific to commercial information intended to ensure that information which is genuinely commercially sensitive can be withheld.

5.7 In proposing to designate all (rather than some) RSLs, the draft order seeks to establish a level playing field amongst RSLs in terms of ongoing engagement with both the public and private sectors. Moreover, in seeking to align the order to those functions already subject to regulation by the Scottish Housing Regulator (which oversees both local authority landlords and RSLs) we do not consider that the order is likely to inhibit engagement on a commercial basis with either public or private sector partners – whether by local authority or RSL - anymore than would currently be the case. However, this consultation on the terms of the order provides further opportunity for interested parties to consider any commercial impact of the proposed order.

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

5.8 There are no new business forms required.

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

6.1 The 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 The draft 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. He can also investigate a public authority if he believes that it may be failing to comply with the terms of the legislation or the Codes of Practice issued under the legislation.

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

7.3 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 Subject to views on the terms of the draft order – including comments received in respect of the BRIA - we envisage laying an order in the spring of 2018 to come into effect on 1 April 2019.

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.gov.scot/freedom-of-information/foi-social-landlords-2>

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 6 December 2017 and will run for 13 weeks. If you wish to respond to the consultation, please provide your response by 7 March 2018.

## 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:  
DRAFT ORDER EXTENDING FREEDOM OF INFORMATION 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

The Scottish Government proposes to designate Registered Social Landlords and their subsidiaries as public authorities for the purposes of the Freedom of Information (Scotland) Act 2002 in the terms set out in the draft order at **Annex C**.

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

Comments

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

Comments

*Draft Order laid before the Scottish Parliament under section 72(2)(b) of the Freedom of Information (Scotland) Act 2002, for approval by resolution of the Scottish Parliament.*

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D R A F T   S C O T T I S H   S T A T U T O R Y   I N S T R U M E N T S

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**2018 No.**

**FREEDOM OF INFORMATION**

**The Freedom of Information (Scotland) Act 2002 (Designation of  
Persons as Scottish Public Authorities) Order 2018**

*Made*   -   -   -   -

*Laid before the Scottish Parliament*

*Coming into force*   -   -

The Scottish Ministers make the following Order in exercise of the powers conferred by section 5(1) of the Freedom of Information (Scotland) Act 2002<sup>(6)</sup> and all other powers enabling them to do so.

In accordance with section 72(2)(b) of that Act a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

In accordance with section 5(5) of that Act they have consulted every person to whom the Order relates or persons appearing to them to represent such persons and such other persons as they consider appropriate.

**Citation, commencement and interpretation**

**1.**—(1) This Order may be cited as the Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2018.

(2) This Order comes into force on 1st April 2019.

(3) In this Order, “the 2002 Act” means the Freedom of Information (Scotland) Act 2002.

**Extension of coverage of the 2002 Act**

**2.**—(1) The persons described in column 1 of the table in the Schedule to this Order are designated under section 5(2)(a) of the 2002 Act as a Scottish public authority in relation to the functions specified in column 2 of that table.

*Name*

[Authorised to sign by the Scottish Ministers]

St Andrew’s House,  
Edinburgh  
Date

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<sup>(6)</sup> asp 13 as amended by the Freedom of Information (Amendment) Scotland Act 2013 asp 2.

## SCHEDULE

Article 2(1)

<i>Column 1</i> <i>Description of persons</i>	<i>Column 2</i> <i>Functions</i>
<p>A registered social landlord within the meaning of section 165 of the Housing (Scotland) Act 2010 <sup>(7)</sup> including connected bodies under section 164(c) of that Act.</p>	<p>The performance of housing activities as defined in section 165<sup>(8)</sup> of the Housing (Scotland) Act 2010.</p>

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<sup>(7)</sup> asp 17.

<sup>(8)</sup> Section 165 of the Housing (Scotland) Act 2010 has been amended as follows. Definition inserted by Housing (Scotland) Act 2014 asp 14, Pt 7 section 98(4) subject to transitional provisions specified in S.S.I. 2014/264 art.3. Words inserted by Bankruptcy (Scotland) Act 2016 asp 21 Sch.8 para.27(3) (November 30, 2016: insertion has effect subject to savings and transitional provisions specified in 2016 asp 21 s.234)

## EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order makes provision for the extension of coverage of the Freedom of Information (Scotland) 2002 Act (“the 2002 Act”) under section 5 of that Act.

Section 5 of the 2002 Act enables the Scottish Ministers to designate as Scottish public authorities by order any person who is neither listed in schedule 1 to the 2002 Act (nor capable of being added to that schedule under section 4(1)), is neither a public body nor the holder of a public office, and who appears to the Scottish Ministers to exercise functions of a public nature or is providing, under contract to a Scottish public authority, any service whose provision is a function of that authority.

Article 2(1) designates registered social landlords as persons who appear to the Scottish Ministers to exercise a function or functions of a public nature under section 5(2)(a) of the 2002 Act in accordance with the descriptions and functions set out in the table in the Schedule.



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