

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

# **Designation of Registered Social Landlords (and their subsidiaries) as Scottish public authorities for the purposes of the Freedom of Information (Scotland) Act 2002**

February 2019

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

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

1.1 Designation of Registered Social Landlords (and their subsidiaries) as Scottish 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 activities in relation to housing services as defined in 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.

### **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>1</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 in the consultation process. The Interim Report<sup>2</sup> published in June 2017 highlights the main issues raised in the consultation and summarises the key responses.

3.4 A partial Business and Regulatory Impact Assessment formed part of a package issued for public consultation on the terms of the draft order between 6 December 2017 and 7 March 2018. The affected bodies, their representatives and other key stakeholders were invited to contribute their views.

3.5 The consultation paper – as well as responses to the consultation – can be accessed via the Scottish Government [consultation webpages](#). Responses were

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<sup>1</sup> See our reports on the use of the section 5 power: <https://www.gov.scot/publications/foi-use-of-section-5-2017-report/>

<sup>2</sup> <https://beta.gov.scot/publications/consultation-extending-coverage-freedom-information-scotland-act-2002-registered-social-9781788510783/>

received from RSLs, their representative bodies, tenant organisations, other stakeholders and members of the public.

#### **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 earlier 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. These concerns were particularly pronounced in relation to the inclusion of RSL subsidiaries.

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

For example, **Port of Leith Housing Association** considered that competitors would have an unfair advantage of obtaining detailed financial information or information about business plans which would not as a matter of practice be disclosed in annual accounts, and pointed to increased costs if RSLs had to enter into lengthy correspondence about the application of exemptions. The **Glasgow and**

**West of Scotland Forum of Housing Associations**, supported by **Ayrshire Housing**, thought that designation would be unfair to factored owners who will have to bear the costs of owners' FOI requests, as it would be wrong for tenants to effectively subsidise those costs. The **Scottish Federation of Housing Associations** and **Wheatley Housing Group** both considered that insufficient consideration had been given to assessing whether RSL subsidiaries undertook functions of a public nature.

Support for extension amongst tenant organisations broadly continued to be strong, with South East Scotland and Central Scotland Regional Networks reiterating the previously-expressed view that extension would not be an undue burden on those RSLs 'that operate in an open and transparent way and that meet the outcome on communication in the Scottish Social Housing Charter', **CaRTO (Castlehill Tenants' Organisation)**, by contrast, was concerned that designation might be detrimental for tenants, as they would not benefit from non-tenants being able to submit requests (and tenants would ultimately bear the cost of handling those requests). The **Campaign for Freedom of Information in Scotland (CFoIS)** considered that the list of concerns from RSLs presented a somewhat fearful culture, and called for training by the Scottish Information Commissioner for civil society groups and tenants' organisations, as well as for the staff of RSLs. **Unison Scotland** also pointed out that proactive publication would help RSLs comply with their duties under FOISA and would reduce the number of requests received.

4.8 While noting the issues raised in consultation responses, particularly those from the RSL sector itself, 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.
- 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 GWSF 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 11 November 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>3</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 respondents raised concerns about the potential costs of designation. For example, the **Glasgow and West of Scotland Forum of Housing Associations** was concerned about the impact as between different groups of individuals who use the services of RSLs, and **Stirling Council** considered that extension would inevitably place additional financial and administrative burden on RSLs, resulting in them having to divert resources and making it not unreasonable to expect this would result in further upward pressure on tenants' rents.

4.11 By contrast, the **Scottish Information Commissioner** did not consider that the costs for RSLs would be high because: request numbers are anticipated to be low (he highlighted the low number of requests on housing matters previously reported by Perth and Kinross and Fife Councils – the latter being Scotland's third largest landlord), RSLs already are experienced in responding to requests under the EIRs and smaller organisations generally hold fewer records. It also noted that the concerns expressed in the partial BRIA were not borne out by RSLs' experiences under the EIRs, in terms of RSLs receiving challenging numbers of requests or having been inhibited in their commercial activities.

### **Impact of previous designation**

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<sup>3</sup> <http://www.gov.scot/About/Information/FOI/Reporting/CostingExercise2012>

4.12 In 2017, 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 £143,000 per annum, with setup costs of £12,000.

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. For example, **Wheatley Housing Group** considered that the extension of coverage to non-regulated activities of connected bodies could materially disadvantage such bodies who would regularly be competing with private sector providers of similar services and so would significantly distort competition in the relevant markets.

5.2 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.

5.3 In proposing to designate all (rather than some) RSLs and relevant subsidiaries, the draft order seeks to establish a level playing field amongst RSLs in terms of ongoing engagement with both the public and private sectors. Similarly, the designation of subsidiaries would mean that access to information would depend on the function (as defined by the Order) rather than the corporate structure of the organisation delivering it. 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 – any more than would currently be the case.

### ***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 A number of responses, including those from the SFHA and the GWSF, expressed particular concern about the proposed commencement date of the Order (at the time of consultation 1 April 2019). A date of 1 April 2020 was considered more appropriate to allow adequate preparation.

8.2 While 1 April 2019 is clearly no longer realistic, we are not persuaded that delay until 1 April 2020 is necessary. The Commissioner has long advocated a period of nine months as being a suitable lead in time, in large part informed by previous experience and an assessment of the time required for his staff to provide training and guidance for organisations new to FOISA.

8.3 Subsequent to the announcement of the intention to bring RSLs within scope of the Act in December 2017 we are aware that considerable work has been undertaken by the RSL sector, supported by the Commissioner, to prepare for designation. We are therefore of the opinion that delaying commencement until 1 April 2020 is unjustified and propose that the Order comes into force on 11 November 2019, nine months after it is laid before the Scottish Parliament.

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

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

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.



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