

POLICY NOTE

THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002 (DESIGNATION OF PERSONS AS SCOTTISH PUBLIC AUTHORITIES) ORDER 2019

SSI 2019/XXX

This instrument is laid in exercise of the powers conferred by section 5(1) of the Freedom of Information (Scotland) Act 2002. The instrument is subject to affirmative procedure.

<p>Purpose of the instrument. To extend the rights of the public to request information from registered social landlords and their subsidiaries about the functions of a public nature that they deliver.</p>
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Policy Objectives

The Freedom of Information (Scotland) Act 2002 ('the Act') came into force on 1 January 2005. The Act encourages the development of a more open culture across the public sector. It does so by providing a statutory right of access to information held by Scottish public authorities (including, for example, the Scottish Ministers, local authorities, health boards, doctors and dental practitioners).

The provisions of the Act may be extended to bodies that appear to the Scottish Ministers to carry out functions of a public nature and to those which provide, under a contract made with a Scottish public authority, a service whose provision is a function of that authority. This may 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 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. They also become subject to the requirements of the Environmental Information (Scotland) Regulations 2004 (the EIRs) in relation to any requests they receive for environmental information and to those duties public authorities are required to undertake under the Climate Change (Scotland) Act 2009.

The policy objective of this Order is to extend coverage of the Act to registered social landlords (RSLs) and their subsidiaries meaning that freedom of information requests could be made directly to these bodies in respect of their functions of a public nature (as specified in the Order).

These bodies exercise functions of a public nature by providing certain housing services, which involves providing housing accommodation and related services. It also includes anything done, or required to be done, in relation to the prevention and alleviation of homelessness, the management of housing accommodation (where the RSL has granted a Scottish secure tenancy or short Scottish secure tenancy), and the provision and management of sites for gypsies and travellers. RSLs must be registered with the Scottish Housing Regulator and they are subject to its oversight. Accordingly, they also have the public function of supplying the Regulator with information about their financial well-being and standards of governance to enable the Regulator to discharge its oversight functions.

Therefore, in the interests of transparency and accountability, the Scottish Ministers consider it appropriate that RSLs and their subsidiaries should be subject to the provisions of the Act in respect of their functions of a public nature (as specified in the Order). Designating such bodies as Scottish public authorities for the purposes of the Act would also remove the anomalous situation whereby identical services, such as the provision of housing accommodation by a local authority, are already subject to freedom of information legislation.

The changes in this Order will come into force on 11 November 2019.

Consultation

To comply with the requirements of section 5(5) of the Act, the Scottish Ministers consulted publicly on the principle of extending coverage to RSLs from 1 December 2016 to 23 February 2017. They then consulted on the terms of a draft Order extending coverage from 6 December 2017 to 7 March 2018.

For many respondents, the question was one of principle – that of ensuring RSL tenants should have the same information access rights as local authority tenants. Some responses offered qualified support for extension, raising concerns in relation to whether certain functions were or were not truly of a public nature.

Two main issues raised in the consultations led to the draft Order being amended to (i) designate RSL subsidiaries as Scottish public authorities and (ii) clarify the extent of the functions covered.

The initial consultation had not proposed to designate RSL subsidiaries, other than those which were themselves subsidiaries. However, the Scottish Information Commissioner noted that if RSLs were designated but their subsidiaries were not, then requesters could only access information held by the RSL and not by its subsidiaries. The Commissioner also observed that if functions were delivered by subsidiaries in future, information rights would be lost. Accordingly, the second consultation proposed to designate subsidiaries (those “connected bodies” mentioned in section 164(c) of the Housing (Scotland) Act 2010) because doing so would mean that access to information would depend on the function rather than the corporate structure of the organisation delivering it.

A number of responses objected to the inclusion of factoring services, primarily based on the non-social housing nature of factoring, its commercial basis and the apparent contradiction of not proposing to extend the Act to other large commercial factoring firms. We considered all issues raised around factoring and the competing arguments on whether it can be defined as a function of a public nature. We have concluded that the provision of a factoring service to a homeowner by an RSL or a connected body is essentially a private arrangement between the factor and the owner. The Order therefore excludes reference to the provision of services to owners and occupiers of houses. As a result, the provision of factoring services is not designated as a function of a public nature.

The consultation papers and responses to the consultations (where the consultee gave consent for them to be published) are available on the Scottish Government’s Citizen Space website¹. The interim report (on the first consultation) and the final report (on the second consultation)

¹ <https://consult.gov.scot/freedom-of-information/foi-social-landlords-2/>

are also published on Citizen Space. It includes responses from the Scottish Information Commissioner, Unison Scotland, Stirling Council, Dumfries & Galloway Council, Scottish Federation of Housing Associations, Glasgow and West of Scotland Forum of Housing Associations, Wheatley Housing Group, Glasgow Homeowners' Campaign and the Campaign for Freedom of Information in Scotland.

Impact Assessments

The consultation asked for views on any impacts the proposals may have on different equalities groups. The consultation responses did not identify any equalities issues regarding extension of coverage and concluded that extension would not have any significant impact on members of any particular equality group and that, if there were any impacts they would be positive ones in terms of helping people from equalities groups to access further information. An Equalities Impact Assessment (EQIA) and a Child Rights and Wellbeing Impact Assessment have been prepared on the basis of the consultation findings².

A Data Protection Impact Assessment was not considered necessary because extending the application of the Act will not have an impact on the collection or processing of personal data by RSLs and their connected bodies. We consider that the Act has a sufficiently strong exemption for personal data to ensure that no information would need to be released in response to an information request if releasing it would breach any of the data protection principles in the General Data Protection Regulation or in the Data Protection Act 2018.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached.

The costs and administrative impact of designation are difficult to quantify. However a number of factors mitigate the possible costs and risks involved in proceeding with designation:

- Based on evidence of the number of requests on housing matters reported by Perth and Kinross and Fife Councils – the latter being Scotland's third largest landlord – the Scottish Information Commissioner anticipates RSLs receiving a low number of requests.
- RSLs are already subject to the EIRs and respond to requests for environmental information on that basis; they are also data controllers and so have significant experience in complying with the GDPR and its predecessor legislation.
- Many RSLs already go some way to mirror existing requirements under the Act by providing information to tenants through adoption of the model publication framework developed by the Scottish Federation of Housing Associations and the Glasgow and West of Scotland Forum of Housing Associations.
- The Scottish Information Commissioner will provide support to RSLs in preparing to meet the requirements of the Act.

Scottish Government
Constitution and Cabinet Directorate
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² Available at <https://www.gov.scot/publications/freedom-of-information-document-collection/>