

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

**GWSF response, March 2018**

**Introduction**

GWSF is responding to this consultation on behalf its 68 members, who are community controlled housing associations in Glasgow and west central Scotland.

Our comments are not on the principles of FOI extension to housing associations, as this is not what this consultation is about, but instead focus on the important points of detail around what functions are to be covered by FOI and the timescale for implementation of FOI extension.

***We would want to highlight at this point our view that an implementation date of April 2019 is unacceptable to GWSF and its members, given the volume and nature of the tasks that require to be undertaken to prepare for FOI. The outcome of the consultation is unlikely to be known before May/June 2018, and a lead-in time of less than 12 months would be completely inadequate.***

**Functions to be covered by FOI**

The order includes specific reference to those ‘housing activities’ set out at section 165 of the Housing (Scotland) Act 2010 defined as any activities undertaken by a social landlord in relation to housing services, housing services meaning the provision of housing accommodation and related services and including 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.

GWSF welcomes the clarity around housing association care/support services not being included in FOI. As the consultation notes, this area is subject to separate legislation and separate regulation, and we do not believe there could be any justification for the inclusion of care/support services run by housing associations but not where run by other bodies.

**Factoring services**

GWSF believes that many of the same arguments applying to care/support services apply equally to housing association factoring services and that factoring should not therefore be covered.by FOI purely on the basis that it is subject to regulation by the Scottish Housing Regulator. Whilst it may have been convenient for the Scottish Government to propose that FOI will cover whatever functions are regulated by SHR, there is no particular logic to this in relation to factoring, given the separate, strong legal rights which factored owners now have.

Factoring is *not* a public service in the way that mainstream housing association landlord services are: owners can change their factor much more readily than Scottish secure tenants can change their landlord.

The legal rights of factored owners to receive full written information on their services have been introduced relatively recently and have led to significant improvements for owners. It is not therefore clear how owners themselves would benefit from FOI extension. If it is to be argued that there is a wider public interest in being able to ‘FOI’ a housing association’s factoring service, it would be important to extend FOI to other factoring agencies too. To take any other approach is unfair to housing associations.

It would also be unfair to factored owners, who will have to bear the costs as it would be wrong for tenants to effectively subsidise the cost of dealing with owners’ FOI requests.

**Housing association subsidiaries**

GWSF understands the reasoning behind not excluding housing association subsidiaries if this could create a perverse incentive to move certain activities to a subsidiary.

However, including subsidiaries should be subject to excluding factoring services and those services relating purely to private housing, such as letting agency services, mid-market rent or any other activity relating to private tenancies rather than Scottish secure tenancies. In discussion with GWSF ahead of the publication of the consultation, the Scottish Government indicated that these activities relating to the private housing market would be excluded from FOI coverage. But at present, GWSF can see nothing in the definition that would exclude these activities, and we would want to see specific amendments to the draft Order to address this.

**Timescale for implementation**

Given that the outcome of this consultation is unlikely to be announced before May/June 2018, an implementation date of April 2019 does not allow anywhere near enough time for all the training and other preparations associations – regardless of their size – will need to make prior to FOI coming into force. At Appendix 1 we have reproduced, from our March 2017 response to the previous FOI consultation, a list of the tasks housing associations will need to undertake ahead of implementation.

It would not be appropriate for the Scottish Government or any other body to argue that associations can start preparing now for something they know is coming eventually. Preparations can begin only when associations know the precise basis on which FOI is to be applied. In any event all associations are currently facing the pressing priority of preparing for the introduction of the General Data Protection Regulation on 25 May 2018.

We believe that April 2020 would be more appropriate and more in line with (but still less than) the lead-in time given to local authorities when FOI was first introduced. *Under no circumstances should the implementation date be any sooner than October 2019.*

GWSF is aware that the Information Commissioner for Scotland (ICS) is concerned about a potential period of time between (a) any ONS reversal of the current classification of housing associations as public bodies for the purposes of assessing national/private debt and (b) implementation of FOI extension to housing associations. The ICS has argued that during this period of time, the Environmental Information Regulations (EIRs) may no longer apply to housing associations because the reduction in SHR powers over associations has weakened the arguments for stating that EIRs do apply to associations. The ICS will therefore be calling for the implementation date of FOI extension to housing associations to be as soon as possible and certainly no later than the currently proposed date of April 2019.

GWSF considers this to be a spurious argument on ICS’s part. We have discussed this matter in detail with SFHA in recent months. Neither GWSF nor SFHA has any reason to believe that the EIRs would no longer apply to housing associations after the reduction in SHR powers brought about by the Housing (Amendment) (Scotland) Bill comes into force (potentially around autumn 2018).

As such, neither GWSF nor SFHA plans to advise members that anything has changed with respect to EIRs applying to associations. Rather we will be advising members that they should continue to respond to EIR requests in the normal way until such time as there is any formal ruling that EIRs do not apply (such a ruling could only come from ICS). We do not believe any such ruling is likely, and even if it were to happen, we would advise members that ahead of the extension of FOI to associations (which would automatically lead to EIRs applying to associations) they should respond as constructively as possible to any requests for information on a topic which would have been covered by EIRs before such a ruling.

It is, therefore, imperative that whatever factors the Scottish Government considers in deciding on the implementation date for extension of FOI to housing associations, the ICS’s ‘issue’ over EIRs is not one of them.

**Appendix 1 – Tasks for housing associations in preparing for FOI implementation**

[This is taken from GWSF’s response (March 2017) to a previous Scottish Government consultation on FOI.]

The research jointly commissioned by GWSF and SFHA into local authority housing functions’ experiences of dealing with FOI points to a wide range of issues associations will need to consider – with the full involvement and agreement of their governing bodies – in preparing for implementation. Below we have set out what we understand will be the main areas of preparation for and implementation of FOI compliance.

1. **Staffing arrangements**
* Consideration of how many staff, and at what level, will have responsibility for dealing with FOI requests added to their role, given the need to ensure adequate cover for holidays, sickness etc., and whether additional staffing capacity will be needed overall
* Judging capacity will not be easy; it is possible that there may be an initial spike in FOI requests in the early stages which is not sustained as time passes. In general terms, the volume and nature of requests likely to be received is almost impossible to predict, but what we do know is that where a journalist, for example, sends the same FOI request to all housing associations, this will impact disproportionately on smaller associations with very limited staff resources
* Working practices will need amending, particularly as (for most GWSF members) dealing with FOI will be added to existing duties, for example for a housing officer. It is clear from our research that the process of responding to FOI requests needs to start on the day the request is received, and this will mean changes to allow staff the time to manage this, often having to prioritise FOI over providing direct services to tenants
1. Legal advice
* The need to ensure that the provision of legal advice on FOI on a case by case basis is included in the contracts associations have with those providing them with legal services
1. **Data management systems**
* The need to consider what data management systems will be needed to co-ordinate and track FOI requests and then hold for the required timescales, and whether such systems can be integrated into existing systems or require new IT which is then linked appropriately to existing systems. Where new systems are required, associations will have to consider whether an ‘off the shelf’ system will meet their needs or whether a bespoke system is necessary. More broadly, it is not clear how long will be needed for software suppliers to produce appropriate new or add-on systems for housing associations
* Associations will need to consider the extent to which the quarterly statistical returns which must be made to the Information Commissioner for Scotland via its online portal should be linked to their FOI co-ordination/tracking system or dealt with separately
1. **Training**
* Assessing what training is needed for whom, how that can best be procured, and then carrying out the training, is clearly a very significant area. We note the expectation in the statutory Codes and in guidance from the Information Commissioner that FOI is an organisational duty with which everyone has to be familiar, not just those responsible for implementation. GWSF believes that training for governing body members too will be important: they will not be working with requests day to day, but will need a good understanding of what is involved and its impact on the association’s work, reputation etc.
1. **Adoption of the statutory Model Publication Scheme**
* Adoption of the statutory Model Publication Scheme will require significant time. The Model Publication Framework produced for members by GWSF and SFHA was itself published only relatively recently, in autumn 2016, and members will have started working towards adopting this. But the statutory Scheme goes beyond this in a number of ways and requires publication of a range of material which is not included in the GWSF/SFHA Framework, including:
* Register of Interests – SIC requires publication; MPF supports inspection on request
* Delivery of functions and services – depending on the terms of the Order, there may be requirements about specific activities and how they are provided/undertaken
* Internal procedures – there may be additional requirements relating to the publication of internal procedures
* Minutes and papers of governing body meetings – SIC expects publication; MPF accepts publication of decisions in alternative formats (i.e. there is no requirement to publish minutes or papers)
* Finance – SIC Model Publication Scheme has more extensive expectations about the range of financial information to be published than MPF (including internal financial regulations; pay and grading; investments)
* HR policies – SIC expects publication of an extensive range of policies, procedures and guidelines (including recruitment, performance management, staff development, disciplinary and grievance)
1. **Provision of advice and assistance**
* The FOI legislation requires organisations to provide advice and assistance: associations will need to consider how this can best be done and then make appropriate preparations and provide training etc.
1. **Production of template documents**
* The sector will need to consider how best to produce the many templates which will be required to respond to FOI requests using the most appropriate route in the case in question. Those routes comprise:
* A request for clarification
* Disclosure
* Issuing a fees notice (i.e. informing the requester that there will be a charge and advising what the charge will be)
* A notice that the information requested is not held by you (Section 12)
* A notice that to provide the information would incur excessive costs (more than £600) (Section 17)
* A ‘neither confirm nor deny’ notice (Section 18)
* A refusal on the grounds that it is either vexatious or repeated (Section 14)
* A refusal on the grounds that the information can be withheld either fully or in part (Section 16)
1. **Review process**
* Associations will need to ensure that appropriate arrangements are in place for a review process to deal with situations where a requester is unhappy with the response they have received
1. **Managing the procurement implications of FOI**
* The statutory Code contains specific guidance on dealing with FOI requests relating to procurement, and it is likely that associations would need to review their procurement documentation to ensure that potential contractors were aware of the implications of FOI being extended to associations
1. **Assessing and managing the financial implications of FOI**
* The need to estimate the likely costs of FOI compliance and then take these into account in considerations of future rent increases

The above points cumulatively illustrate the scale of the task which will face associations in preparing for implementation, if extension goes ahead. Indeed many of our members will be among the smallest organisations in the UK which are subject to FOI, and this needs to be factored into consideration of an appropriate lead-in period.