



GWSF response to Scottish Government consultation on extension of Freedom of Information to housing associations

March 2017

On behalf of its 68 member associations, GWSF welcomes the opportunity to respond to the Scottish Government's consultation on extending the Freedom of Information provisions to housing associations.

1 Summary of GWSF response

GWSF and its member associations take the issue of access to information very seriously. Housing associations have a good track record of making high quality, accessible information available, whether through their websites or publications such as reports on annual Charter performance.

Few of our members believe that the consultation paper sets out a convincing case for extension. In particular, members generally felt that the paper did not convey that extension would be putting right a significant injustice, nor that extension was being proposed in response to pressure from significant numbers of people feeling aggrieved that housing associations are not currently subject to FOI.

There was a more even spread of views among members on the practical question of whether extension should go ahead, with a slight majority indicating opposition, and GWSF's overall position is therefore that it does not support extension. It is clear that some members who have concluded that there is little value in opposing extension believe that extension is in any case a *fait accompli*, as demonstrated, for example, by the Minister's reference – on the day of the consultation launch – to this being 'unfinished business' from many years ago.

Neither GWSF nor any of our members are underestimating the very significant amount of time and resources which would be involved in preparing for and then managing FOI. The great majority of members believe that a much longer lead-in time would be needed if extension were to go ahead. The need to implement the Information Commissioner's statutory Model Publication Scheme, along with the myriad requirements for setting up systems for co-ordinating and responding to requests, arranging detailed training across all staff and board members, and assessing the need for new or adapted IT systems, mean that April 2019, and not April 2018, is the earliest start date our members would find reasonable. The

capacity of smaller housing associations in particular to prepare for and implement FOI should not be underestimated.

2 The importance of information provision by housing associations

The issue of access to information is a very important one for community controlled housing associations, which have a good track record of making high quality, accessible information available, whether through their websites or publications such as reports on annual Charter performance.

Keen to raise the bar even further, in autumn 2016 GWSF and SFHA jointly published a Model Publication Framework for member associations. This focused primarily on the information available on housing association websites and was informed by helpful discussions with the Information Commissioner for Scotland. Members are in the early stages of working towards meeting the good practice standards outlined in the Framework.

3 Lack of a convincing case for extension

Few of our members believe that the consultation paper sets out a convincing case for extension. In particular, members generally felt that the paper did not convey that extension would be putting right a significant injustice, nor that extension was being proposed in response to pressure from significant numbers of people feeling aggrieved that housing associations are not currently subject to FOI. Nothing in the proposals indicates any evidence that housing associations have not been making available information which has been reasonably requested. We would argue, therefore, that the case set out for extension is a highly theoretical one.

Whilst we recognise that FOI is about a wider public than tenants alone, it is revealing that Charter results show housing association tenants to feel significantly better informed by their landlord than do council tenants, who have FOI rights. Our members believe that FOI is not at all about helping the community: in practice it usually ends up as being 'helpful' for a small minority of external enquirers who in most cases could have got the information without the rigmarole of FOI. But unlike the position for local authorities, in the case of housing associations it is specifically and exclusively the tenants who would have to bear the costs of FOI compliance.

The argument that tenants who stock transferred from councils have been denied FOI rights is not a strong one in practice. The loss of FOI rights has to be considered against the huge benefits that stock transfer normally brings to tenants, including modernisation of homes, improved repairs and more responsive housing management services. The undue emphasis that the Information Commissioner has always placed on this issue is an illustration of its tendency to see FOI in complete isolation from other issues that affect people's lives.

So whilst we wholeheartedly encourage and support the best possible practice in the provision of information by housing associations, we do not see in the consultation paper any strong or convincing case for subjecting associations' information provision to the statutory FOI framework.

4 Providing services of a public nature

The majority of our members agree with the consultation paper's arguments that many of the mainstream services provided by housing associations are of a public nature, much as they are provided by organisations which are quite distinctly different from most public bodies, run as they are by voluntary governing bodies and constituted as fully independent, and in most cases charitable, bodies.

It could be argued that some of the factors which lead the consultation paper to describe housing associations services as being of a public nature could be used as arguments against extension of FOI – in particular the fact that associations are closely regulated by the Scottish Housing Regulator, providing protection for tenants and a framework around entitlement to information and consultation. The Forum recognises, though, that the regulatory regime does not specifically cover requirements around making information available *beyond* tenants.

5 What functions should be excluded?

A significant majority of members agree that the activities of housing association subsidiaries should be excluded from any extension of FOI on the grounds that they are separate organisations which are undertaking mainly commercial activities and which have separate boards.

We recognise that some activities such as mid market rent (MMR) are sometimes funded with an element of public funding, but MMR falls outwith the Scottish Secure Tenancy regime and, to a degree, is more in competition with the private rented sector than with the social rented sector. And it is invariably run through a subsidiary, as indeed it has to be. We believe, therefore, that MMR provision should not be subject to FOI.

On the fringes, there may be some functions carried out by the main housing association body which it would not be appropriate to include within any FOI extension, and we would be keen to discuss the detail around this with the Scottish Government, should Ministers decide to proceed with FOI extension. One example is where a relatively small factoring service is run by the core association and not through a subsidiary. It makes sense to exclude any factoring service from FOI extension, firstly to ensure a consistent approach to what is and is not covered by FOI, and secondly because there are now robust legislative obligations around factoring services and the type and quality of information which must be provided to owners.

6 Impact on housing associations

It is worthy of note that the Scottish Government's consultation paper cannot indicate what the impact of extension will be on housing associations. As the consultation paper notes, in para 4.9 of Annex A, "The risks, including costs... will be more clearly established following the consultation process".

The consultation paper states (at para 4.13) that "It is not possible to predict with certainty the number or scope of requests that a body will receive". It then says that "initial estimates suggest that request numbers for RSLs are likely to be low", but there is no explanation of how these initial estimates were arrived at.

The consultation suggests (at para 4.15) that as some housing associations seek to comply voluntarily with the Act, some costs of compliance will already have been absorbed. This is misleading. Many associations will have developed as open as possible an approach to making information available, but this is a far cry from the rigorous bureaucracy of, for example, complying with the highly detailed and prescriptive Model Publication Scheme and additional requirements such as submitting lengthy quarterly returns to the Information Commissioner.

Frustratingly, it is not easy for GWSF or any other body to put a figure on the cost impact which extension would have on members, as there is no reliable way of predicting how many queries different housing associations will receive. What we do know is that both the process of preparing for FOI and then the day to day management of it will bring significant costs and other resource impacts for all associations, and very particular challenges for smaller associations. When a journalist sends an FOI request to every housing association in Scotland, this will impact disproportionately on smaller associations with more limited resources.

Our understanding is that the Information Commissioner will receive funding to cover its extra costs in managing the extension of FOI to housing associations, but for associations themselves there will be no funding and it is tenants who must cover the costs.

7 The implementation timescale

If Ministers do decide to extend FOI to housing associations, we would strongly assert that April 2018 is far too early to bring the provisions into force. 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.

(a) 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

(b) 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

(c) 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

(d) 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.

(e) 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)

(f) 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.

(g) 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)

(h) 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

(i) 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

(j) 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. GWSF believes that a period of two years after the outcome of the consultation is announced would be needed, and therefore that implementation should in no circumstances be at any point before April 2019.

8 Further implementation issues

During our consultation with members, a number of practical issues and questions about FOI extension were raised, and we believe further issues would be raised if Ministers decide to progress extension. An example is the need for clarity over whether a requester can subsequently use the association's complaints process where they remain dissatisfied with the outcome of their request.

Another issue relates to the need – which we trust is obvious – to avoid duplication between regular returns made to the Information Commissioner and those made to the Scottish Housing Regulator.

9 Conclusion

GWSF believes that the consultation paper does not set out a compelling case for extension of FOI to housing associations. There was a fairly even spread of views on extension, with a slight majority supporting opposition to extension, and GWSF's overall position is therefore that it does not support extension.

It was clear to GWSF that among some members who felt there was little point in opposing extension, there was a sense that Ministers had already made up their mind: this comes partly from the direction of travel indicated in the consultation paper, partly from comments made by the Minister at the consultation launch (suggesting that extension was 'unfinished business') and partly from the strong support for extension from the Information Commissioner.

If Ministers choose to extend FOI, it will be with no reliable sense of what the costs and other resource impacts will be for housing associations. As stated above, GWSF believes the overall impact on all associations will be significant, with particularly acute impacts on smaller associations, and with all the costs borne by tenants.

We believe we have set out a strong and detailed case above for a significantly longer lead-in time than that proposed in the paper, should Ministers decide to proceed with extension. April 2019 is the earliest date at which any extension of FOI to housing associations should come into force.