



Consultation response on extending coverage of the Freedom of Information (Scotland) Act 2002 to Registered Social Landlords

Sent to the Scottish Government FOI Unit on 22 February 2017

1. Do you agree that freedom of information legislation should be extended to Registered Social Landlords, as proposed in this consultation paper?

1. Yes.

2. Freedom of Information can be extended to organisations that undertake ‘functions of a public nature’. You may wish to provide comments on how you consider that RSLs undertake functions of a public nature, for example, with reference to the factors referred to earlier in this paper.

2. As Scottish Information Commissioner, it is my duty to enforce and promote freedom of information (FOI) legislation in Scotland. Registered Social Landlords (RSLs) are already covered by the Environmental Information (Scotland) Regulations 2004 (EIRs). They are not currently subject to the Freedom of Information (Scotland) Act 2002 (FOISA).
3. In this response I will set out the reasons why, on balance, the evidence available to me strongly supports the Ministers’ proposal that RSLs should be subject to FOI.
4. It is, of course, for the Scottish Ministers to decide who will be subject to FOI legislation. My view is that RSLs are undertaking functions of a public nature, and so the case for designating them subject to FOI legislation is persuasive.
5. I set out my views on whether, and how, RSLs are undertaking functions of a public nature in response to the Scottish Government’s Consultation on Further Extension of Coverage of the Freedom of Information (Scotland) Act 2002 to More Organisations in 2015. Many of those views remain relevant to this consultation, and are included below, with some additional information to bring my response fully up to date.

Loss of rights

6. In my Special Report, I suggested two approaches for extension of FOI:
 - (i) Rights based: the restoration of lost rights and for existing rights to follow any losses that are the result of changes to how services are delivered; and
 - (ii) Factor based: considering and weighing a number of weighted factors, particularly in relation to organisations never covered by FOI law.

7. Potential designation of RSLs requires both to be considered. The basic principle is that rights should follow functions. The Ministers consider the loss of rights as one of the factors to consider in order to establish whether RSLs are performing public functions: my views on this are stated under the appropriate factor (Factor 6).
8. I would argue that loss of rights is a key consideration for the Scottish Ministers in deciding whether to designate RSLs.
9. In the past, social housing was administered by councils who are covered by FOI. Now a large proportion of social housing is administered by housing associations which are not covered by FOI. This means that information about housing that would have been accessible under FOI, but for the stock transfers, is no longer accessible either to tenants, factored homeowners, researchers or the public at large.
10. In terms of tenants (etc.), according to Scottish Government figures, 15,000 households have lost FOI rights as a result of the transfer of local authority housing stock.
11. FOI law does much more than provide a legally enforceable right to ask for and be provided with information held by public authorities. FOI also requires public authorities to proactively publish information through an approved publication scheme. Designating RSLs would not only give the right to ask, it would create a statutory duty for RSLs to tell. Bodies are not simply required to publish more information; they must publish information where it is in the public interest to make it available. It is about publishing the information the public needs and wants to see, rather than the information that bodies want to disclose.
12. Therefore, both rights to access information and the duty to proactively publish information have been lost. Both the right to ask, and the duty to tell have disappeared. That means many people have access to less information now than 10 years ago.

The Scottish Government's factors as set out in the consultation paper

13. **Factor 1: (public) statutory function or responsibility of the state.** Local authorities are under a statutory obligation (s31(2) of the Housing (Scotland) Act 1987) to provide accommodation to homeless households. S5 of the Housing (Scotland) Act 2001 imposes a statutory duty on RSLs to comply with local authority requests for support for homeless households in most circumstances. This is explained further in the Government's *Code of Guidance on Homelessness* (May 2005) and its *Homelessness Update* to local authorities in September 2002.
14. In this respect, RSLs deliver functions derived from and underpinned by statute and form part of the functions for which the state has generally assumed responsibility. When applied to RSLs, this factor supports designation.
15. **Factor 2: public funding.** In the consultation paper, the Scottish Government notes that both historically and currently RSLs have received considerable sums of public money, and that the contribution of RSLs to delivering the Scottish Government's affordable housing target is critical. In its 2016/17 Legislative Programme the Scottish Government committed to invest over £3 billion in affordable housing supply over the next Parliament, delivering at least 50,000 homes, of which 35,000 will be for social rent.
16. At the time of the 2015 consultation, there was concern about whether designation under FOISA would have the inadvertent consequence of changing the Office for National Statistics' (ONS) classification of RSLs for the National Accounts. The concern expressed was that this might bring such borrowing within the Public Sector Net Cash Requirement.

17. Following an announcement in the June 2016 Classification Forward Work Plan, ONS undertook a review of RSLs' classification, and concluded that they are public, market producers and will be reclassified to the Public Non-Financial Corporations sub-sector for the purposes of the National Accounts and other ONS economic statistics.
18. Since then, the Scottish Government has confirmed its intention to legislate to ensure that RSLs are classified as private bodies in the National Accounts. The Government's 2016-17 Legislative Programme confirms that a Housing (Amendment) (Scotland) Bill will be introduced to do this.
19. It is therefore clear that reclassification is no longer a concern in considering the question of whether RSLs should be covered by FOISA.
20. **Factor 3: taking the place of a public authority.** I refer back to the comment in relation to provision of accommodation for homeless households made under factor 1. The Government has issued a *Code of Guidance on Homelessness May 2005* and its *Homelessness Update* to local authorities in September 2002. Given the statutory basis of the obligation to support local authorities in delivery of their function, it is difficult to see how these two factors (1 and 3) would not apply.
21. **Factor 4: extensive or monopolistic powers.** As I said in 2015, this is an area where I would encourage Ministers to carry out further research. Arguably, the existence of a private housing sector suggests RSLs do not have extensive or monopolistic powers, especially in light of the guidance provided by Government. However, this is far from clear in relation to the social housing sector, as many tenants and homeless people have little option but to seek housing provided by RSLs. This, arguably, creates a position where the limited number and type of provider of social housing has the effect of reducing tenants' and prospective tenants' choice, effectively creating a monopolistic market. If research or further enquiry shows this to be the case, this strongly supports designation.
22. **Factor 5: state regulation, supervision or inspection.** RSLs are supervised and regulated by a variety of bodies including, Office of the Scottish Charity Regulator, Scottish Public Services Ombudsman and the Scottish Housing Regulator (SHR).
23. Of particular relevance to this consultation is the role of the SHR. The SHR is an independent Non-Ministerial Department, directly accountable to the Scottish Parliament. It operates through a framework agreement with Scottish Ministers. It sets out its approach in detail in <https://www.scottishhousingregulator.gov.uk/sites/default/files/publications/Our%20Regulatory%20Framework.pdf>)
24. SHR's powers, responsibilities and activities include monitoring, assessing, comparing and reporting on performance of housing activities and RSL's financial well-being and standards of governance. This includes: keeping the public register of social landlords, from which it has the powers to remove an organisation; monitoring performance against the standards set out in the Charter and regulatory standards of governance and financial management.
25. Changes to the SHR's powers over RSLs are anticipated in the Housing (Amendment) (Scotland) Bill. The Scottish Government's Legislative Programme for 2016-17 states that the Bill will:
 - (i) remove the need for the SHR's consent to the disposal of assets by RSLs
 - (ii) limit the SHR's ability to appoint members and managers to RSLs

- (iii) remove the need for the SHR's consent to the restructuring, winding up and dissolution of RSLs.
26. While these changes (if made) would clearly diminish the extent of "state regulation, supervision or inspection", I am of the view that SHR's role in supervising and regulating RSLs will continue to be a factor supporting RSLs' coverage by FOISA.
27. **Factor 6: loss of rights.** I am concerned about parity of rights to information in the widest sense. Tenants of former local authority housing lost FOI rights because their tenancies transferred to RSLs. But others too lost those rights: communities, interest and political groups, and academics no longer have a right of access to the information they need to understand and engage with the RSL sector. That type of engagement is generally recognised to bring benefits to the bodies concerned and wider societal benefits.
28. The lack of parity is at its most stark for service users: tenants, prospective tenants and factored home-owners of RSLs. But it also applies to wider civil society, political and academic engagement with RSLs. As Frank La Rue, Special Rapporteur to the UN General Assembly observes, "*Obstacles to access to information can undermine the enjoyment of both civil and political rights, in addition to economic, social and cultural rights.*" I would argue that a country committed to all of those rights and to the benefits of community engagement, cannot afford to restrict access to information.
29. The existence of a right is one thing; making it straightforward to use is something else entirely. In addition to the gaps in the coverage of FOI, the changing public sector landscape has also resulted in inconsistencies which make it increasingly complex for the average person to know where to go to get answers to questions and to raise concerns.
30. Coverage by FOI simplifies access to information by providing a universal right.
31. There are now inconsistencies in the law which mean that, e.g. RSLs are not covered by FOISA, but are listed as "persons liable to investigation" in the Scottish Public Services Ombudsman Act 2002. This means that some organisations are public authorities for the purposes of some legislation, but not others.
32. Other legislation can provide limited rights to information but this often makes it more complex for the average person to know what and how they can ask for information. A good example of this is the Procurement Reform (Scotland) Act 2014. This makes provision for a right to specific information for unsuccessful tenderers for public sector contracts. The provision does not remove FOI rights so does not preclude any other person asking for the same information, but means that different considerations have to be given to whether it should be disclosed depending on who is asking. To keep it simple for people, it would be preferable to extend FOI and only use other routes where it is desirable to make specific additional provision for specific individuals or groups.
33. Other routes to increasing openness and transparency of RSLs have recently been proposed, both via the Scottish Social Housing Charter and a Model Publication Framework. Provision has been made for access to some information, by some people (mostly tenants) via the Scottish Social Housing Charter (April 2012). This provides that tenants and other customers of RSLs should be able to get all the information they need about their landlord, how and why it makes decisions and the services it provides. Positive as this is, it falls far short of the rights that used to exist under the FOI Act as it fails to preserve the general rights of any person, and the benefits of enforcement through an independent (free to the user) appeal route if information is withheld or requests are ignored.

34. Ministers undertook a review the Scottish Social Housing Charter in 2016. I welcomed this as a contribution to greater parity in what information is accessible, and to openness and transparency. However, I recognise now, as I did then, that strengthening the Scottish Housing Charter **cannot** achieve the same equality of information rights, and enforceability which would be afforded by FOI designation.
35. The Scottish Social Housing Charter sets the framework for relationships between tenants and social landlords. Whilst bringing many benefits, the Charter does not provide equivalent rights to those conferred by FOISA.
36. The Charter is focused on communication, part of which is providing information to tenants and other customers. While this approach is very positive, it falls short of FOISA which provides a *legal right to any person* to request and receive information.
37. The Charter encourages proactive communication, but is not the same as the FOISA *duty to proactively publish* information through an approved publication scheme (supported by a guide to information).
38. The Charter communication provision is not *enforceable*: under the Charter provisions the SPSO and Scottish Housing Regulator (to whom complaints under the Charter are made) cannot compel an RSL to disclose information. FOISA provides an appellate body which has powers to order disclosure.
39. The Charter communication provision is limited to the information tenants and other customers “*need*”; FOISA provides an entitlement to any information held by a body. FOISA is also supported by the Ministers’ Section 60 Code of Practice which sets out the standards of practice public authorities are expected to achieve in relation to information provision.
40. While strengthening the Charter could reduce the equality and parity gap for some information requesters, it will not eliminate it, or give the same benefits and protections as designation under FOISA. It was in this context that I encouraged Ministers, irrespective of FOI designation, to consider bringing the Charter outcomes and standards as close as possible to FOI law. In my response to the Ministers’ review I suggested changes intended to bring the Charter outcomes and narratives more into line with FOI law, particularly the universality of the right (so it is not restricted to just tenants or customers of the RSLs).
41. In September 2016 the Scottish Federation of Housing Associations and Glasgow and West of Scotland Forum of Housing Associations published *Open All Hours? A Model Publication Framework and Guidance for Housing Associations and Co-operatives*. I contributed comments during the drafting of this document.
42. The Framework supports RSLs to publish information proactively, as they are already required to do under the EIRs (this duty is currently enforceable). It also encourages RSLs to publish more of the non-environmental types of information they would have to make available if the Ministers decide to designate them under FOISA. For example, the way they take decisions, facts and analyses behind important decisions, the services they deliver, their cost and how they perform. There is currently no enforceable duty on RSLs to publish this type of information in which there is an established public interest.
43. Though several RSLs are working towards adoption of the Framework, our understanding is that at the time of submission of this response, none has yet actually adopted it. Designation under FOI would require RSLs to have a publication scheme approved by the Scottish Information Commissioner. For all current Scottish public authorities this duty is met by adopting the Commissioner’s Model Publication Scheme (MPS). An essential element of the

MPS is the “Guide to Information” (www.itspublicknowledge.info/mps). Any work carried out now by RSLs working toward adoption of the Framework would not be wasted should they be designated as work carried out so far to support adoption of the Framework is likely to be the basis of a template guide to information to support RSLs to adopt the Commissioner’s Model Publication Scheme.

44. As the consultation paper says “...while there are undoubtedly a number of access routes to acquiring information from RSLs, all are limited in some respect in comparison to the right to information provided under [FOI] legislation”.
45. The Charter and voluntary Model Publication Framework do not, and cannot, replace the enforceable rights people have to access information under the FOI Act. Nor can they provide a sufficiently robust alternative route to access information that is proactively published in the public interest.
46. At best, the only option open to people who find themselves unable to access information from RSLs by either asking for it or through the Framework, is to pursue access through the courts. This can be costly, and for the average person present a very real barrier to accessing information, and potentially to accessing justice and other rights.
47. Designation would remove this barrier in relation to information requests as appeals to me are free. Designation would strengthen access to published information because of the duty to publish in the public interest and the ability for people to raise issues with my office, again for free, in relation to how RSLs discharge their proactive publication duties.
48. In light of all of this evidence, this factor clearly supports designation of RSLs.
49. **Factor 7: administrative burden.** As in 2015, I would raise a word of caution about giving disproportionate weighting to burden arguments. FOI law is based on principles of universal entitlement: the public should be free to determine what information they want to see. It is almost impossible to estimate demand and the nature of information that people will ask for under FOI. For example, could we have foreseen that bereaved relatives of patients at the Vale of Leven Hospital would have made FOI requests, or that the Scottish Rural Schools Network would seek information to help them engage in local authority decision-making? Both examples indicate the positive benefits that accrue from the universality of the FOI right.
50. It is important to remember that RSLs already respond to requests for information. They already routinely respond to enquiries which include providing information. In relation to FOI designation, consideration should be given to what the *additional* administration required will be, rather than what the cost of an FOI function created from scratch may be, as some of the functions required by FOI may already be in place, just not recognised as such. This is especially pertinent since some RSLs are working towards implementation of the Model Publication Framework and compliance with the Framework will take those RSLs a good way towards compliance with FOI publication duties under section 23 of FOISA.
51. Information it would be useful to know includes, for example:
 - (i) RSLs already respond to enquiries; how many of these are information requests, in how many cases do they simply provide information, and how many do they not answer or refuse information?
 - (ii) How many such enquiries require further communication because the enquirer was dissatisfied?
 - (iii) How quickly do they respond to enquiries?

- (iv) What type of information is asked for?
- (v) Is there any correlation between tenant satisfaction with the openness of RSLs and the volume of requests? Many smaller RSLs reported extremely high levels of satisfaction to the Scottish Housing Regulator.

At the moment, any logging and monitoring of the volumes of requests or enquiries is carried out at local level, by individual RSLs, and we do not have access to that information.

- 52. There is no evidence that other bodies which have been designated experienced significant increase in request/enquiry numbers as a result of designation. In fact, the evidence suggests the opposite.
- 53. On 1 September 2016 several organisations became subject to FOISA as a result of a section 5 order. The organisations designated were:
 - (i) Contactors who run privately managed prisons
 - (ii) Providers of secure accommodation
 - (iii) Grant-aided schools
 - (iv) Independent special schools
 - (v) Scottish Health and Innovations Ltd.
- 54. As with all other bodies subject to FOISA, these organisations submit quarterly statistics to my office about the information requests they receive, which we subsequently publish as a publicly accessible open-data set. Data for the quarter from 1 October to 31 December 2016 are due to be published on 23 February 2017.
- 55. The data submitted by the newly designated organisations suggests strongly that FOI has not created the burden feared. Of the 35 such organisations that had submitted their first quarter's statistics at the time of writing, only five had received any requests. Three organisations reported receiving two requests each in the period, and two other organisations received one request each.
- 56. It is not, in my view, disproportionately burdensome for organisations that undertake functions of a public nature to handle 1-2 requests per quarter. For the majority of the designees, there were no requests to answer.
- 57. The only other group of organisations designated under section 5 of FOISA are culture and leisure trusts. Their experience was that the "burden" from FOI was similarly low. In paragraphs 55-62 of my special report, I reported the findings of my survey of culture and leisure trusts. This concluded that the impact of designation has not been problematic. There was, and remains, no evidence that designation resulted in significant changes to the volume or complexity of requests for information, compared with requests received before designation.
- 58. I would also point to data provided by Fife Council about requests received by its housing service in 2014 and 2015, which provides further insight into the likely impact of FOISA designation.

59. **Requests received by Fife Council housing service**

Period	FOISA	EIRs
Jan – Dec 2014	62	79
Jan – August 2015	37	35

60. According to its website, Fife Council has just over 30,000 houses, a rental income of approximately £95 million and is Scotland's third largest landlord. Focusing solely on FOISA requests in 2014, Fife Council received approximately 2 requests per annum per 1,000 houses. Of course, a local authority is likely to record requests about wider corporate functions separately.
61. All of the available evidence suggests that designation is highly unlikely to result in an undue or disproportionate administrative burden.
62. **Factor 8: collective benefit.** An organisation applying for registration as a social landlord must meet several criteria, including that it is not-for-profit and that it aims to provide good, low cost accommodation for people who need it (s24(1) Housing (Scotland) Act 2010).
63. RSLs provide collective benefit for the public and are accepted by the public as being entitled to do so.

Other factors

64. In my Special Report I identified a number of other factors which the Scottish Government has not included in the consultation. I consider those other factors to be relevant to RSLs, and have commented on them below.

Activities enmeshed with the relevant public authority

65. RSLs' statutory role in providing accommodation to homeless households indicates that they are substantially enmeshed with the activities of local government. That enmeshment is increasing: the Scottish Government's statistics bulletin, *Operation of the Homeless Persons Legislation in Scotland 2014-15*, observes "There has been a marked increase in the number of homeless households securing a housing association tenancy – increasing from 1,488 in 2002-03 to a peak of 8,297 in 2009-10 since when it has reduced to 5,891 in 2014-15. The increase in housing association lets to homeless households is partly explained by stock transfers in six local authority areas, where ownership of the local authorities housing stock transferred to housing associations. For these local authorities, what would have been classified as local authority lets are now classed as housing association lets."
66. In particular, stock-transfer RSLs are increasingly performing a function that would otherwise have to be delivered by local authorities.
67. RSLs activities can therefore be said to be enmeshed with those of local authorities, providing further support for the argument that they are performing functions of a public nature.

Appointment of decision makers

68. Under its duties in Part 3 of the Housing (Scotland) Act 2010, the SHR monitors and assesses governance structure and arrangements and can hold the governing body of an RSL to account in meeting those standards.
69. SHR can remove and (at least for the time being, but see my earlier comment in paragraph 26) appoint members of governing bodies, or direct the transfer of assets to another RSL.

Civic engagement and inequality

70. In addition to the need for parity, discussed under factor 6, it is important to remember that extension of FOI to RSLs would give the right to information to more than tenants. It would enable others such as researchers, academics and those with an interest in housing, homelessness and related issues to engage more meaningfully with both the issues and the organisations delivering social housing.
71. This in turn provides the opportunity for more meaningful civic engagement, not only about the homes people live in, but also about their neighbourhoods and how housing is managed to contribute to a happier, healthier and stronger society.
72. Scotland is a subnational “pioneer” of the international Open Government Partnership (OGP – see <http://www.gov.scot/Publications/2016/12/2667> for more information). Civic engagement is critical to open government and the delivery of the Scottish Government’s OGP commitments. It is for Ministers to consider the extent to which designation of RSLs under FOI would be consistent with its approach to creating meaningful opportunities for citizen participation by tenants of all social landlords. My view is that would further transparency and openness as currently the right to access information from social landlords is limited. In the absence of FOI designation of RSLs, opportunities for tenants and non-governmental organisations to engage in full debate about social housing will be restricted and undermine participative policy development and delivery in the area of social housing.
73. Designation of RSLs would support increased civic engagement and parity of rights.

Other matters

Public opinion

74. There is strong public support for extension of FOI to RSLs.
75. In an Ipsos MORI poll commissioned by the Scottish Information Commissioner in 2013, (www.itspublicknowledge.info/research) we asked “*To what extent do you agree or disagree with the (FOI) Act being extended to cover the following organisations?*” In response to housing associations, support was very high:
 - (i) 79% agreed: 47% strongly, 32% tended to
 - (ii) 5% neither agreed / nor disagreed
 - (iii) 11% disagreed: 6% tended to, 5% strongly
 - (iv) 5% didn’t know.
76. In our 2014 poll (www.itspublicknowledge.info/research), we asked the public about the importance they attach to particular factors or types of service.

77. Perhaps unsurprisingly, the public thought it was important to consider whether the body provides public services paid for with public money, and whether the body receives grants or other benefits from public money.
78. However, the public's view is that ***what the organisations do for the public is important for reasons other than how money is spent***. When asked how important it was to consider whether the body delivers a service that could be thought of as a public service, like prisons and housing, 96% thought it was essential or important:
- (i) 38% essential, 39% very important, 19% somewhat important
 - (ii) 2% thought it was unimportant
 - (iii) 2% didn't know.

Approach to consultees and information relied on

79. I would reiterate the caution I voiced in 2015 relying predominantly on feedback about individual experiences of asking for and receiving information from RSLs under the current arrangements.
80. It might appear logical to seek evidence of individuals' experiences of asking for information from RSLs: both good and bad. However, we suggest this could be inadvertently misleading on a number of counts:
- (i) It could result in decisions being based on the experiences of too small a cross-section of tenants (and others with rights under the Housing Charter).
 - (ii) There is a high likelihood that feedback would be skewed. For example it might be skewed negatively, as there is a greater likelihood that those with a poor experience are more likely to speak up. A good parallel to draw in FOI is if my views on FOI practice in Scotland were based entirely on appeals made to me, it would give a disproportionately negative view. This is because over 62% of my decisions in 2015-16 found fully or partially in favour of the requester, suggesting practice is universally poor. Figures this year suggest that this proportion has risen to over 70%. In reality, of the 60,000+ information requests in Scotland each year, fewer than 1% result in appeals, which suggests that practice and experience is varied, but not predominantly negative or poor. Equally the evidence could be skewed positively, giving a false impression that there are no access to information issues in the social housing sector.
 - (iii) This type of evidence is unlikely to take into account those not covered by the charter who may not have sought information up to now because they do not have the "Charter Rights". Their experience will always be an unknown quantity.
81. Notwithstanding all of the above points, this type of evidence misses the fundamental point that the decision to designate should be taken on its own merits and not as a reaction to perceived flaws within the current system which, themselves, may be based on a skewed view in the first place. In other words, are there reasons why, based on assessment of weighted factors, designation is desirable in the public interest irrespective of current experience.

Subsidiaries

82. This consultation excludes consideration of extension of FOI to the subsidiaries of RSLs, but invites respondents to comment on potential exceptions.

83. As regulator, my concern is twofold:
- (i) Whether RSLs would hold the information about their subsidiaries that the public want to access
 - (ii) Whether there is sufficient safeguard to ensure that FOI continues to apply to the delivery of public functions
84. **Whether RSLs would hold the information about their subsidiaries that the public want to access.** There is a strong public interest in much of the information that client RSLs hold about their subsidiaries. But this information is limited in scope and they will not hold other information in which there is a significant public interest. For factoring subsidiaries, for example, the client RSL will hold contract terms and cost, service standards and performance information. They are unlikely to hold information relating to individual works or materials. So the public would not be able to request information about sub-contracts or the costings of particular jobs.
85. **Whether there is sufficient safeguard to ensure that FOI continues to apply to the delivery of public functions.** If RSLs were to divest public functions to subsidiaries, information about those functions would no longer be accessible under FOI. Whether deliberately to evade FOI, or as an unintended consequence of a more practical business decision, such action would have the effect of eroding FOI rights.
86. The consultation paper explains that the rationale for excluding RSL subsidiaries is they operate commercially on the same basis as private companies providing similar services. Yet a significant proportion of public authorities and publicly owned companies already subject to FOI are in a similar position. For example:
- (i) Dentists, GPs, ophthalmic opticians and pharmacists all operate in a competitive environment.
 - (ii) Scottish Water is the only water company operating in the UK that is subject to FOI
87. I am confident that there are sufficient protections in the form of exceptions and exemptions in FOI law to ensure that commercial organisations can continue to operate without damage to their commercial interests. I therefore do not consider the rationale for excluding subsidiaries from FOI designation is robust.
88. Where a subsidiary is wholly owned by an RSL, I suggest it should be treated as part of the RSL and designated at the same time as the parent body. The wording of the s5 order would of course have to be particularly carefully drafted to ensure that the subsidiaries, as they change over time, are included. Alternatively, Ministers could consider whether designation for RSLs under s4 of FOISA would be a more nimble route, as s6 of FOISA would apply to any wholly publicly owned companies thereafter.
89. I note that there is currently a Housing (Amendment) (Scotland) Bill planned as part of the Scottish Government's legislative programme for 2016-17, which will address the classification of RSLs as private sector for ONS purposes. RSLs could be added to Schedule 1 of FOISA by way of an amendment made by the Housing (Amendment) (Scotland) Bill.

Class definition

90. The consultation paper indicates that the intention would be to use a class description of RSLs setting out the function(s) considered to be covered.

91. If the Ministers are persuaded that RSLs should be covered by FOISA, whether by amendment by another Act of Parliament (i.e. the Housing (Amendment) (Scotland) Bill) or a section 5 order, it is imperative that my office be consulted when the description is being drafted. I am aware of difficulties that have arisen around the descriptions of other bodies in section 5 orders, and my office would offer valuable advice based on experience of interpreting descriptions in legislation to determine whether particular bodies are or are not covered.

3. The proposed order would be expected to come into force on 1 April 2018. Do you consider this a reasonable timescale, allowing for preparation for inclusion?

If not, you may wish to indicate what timescales you feel would be more appropriate and why.

92. In principle, the sooner FOI rights are restored, the better. However, it is important this is done in a measured and efficient way.
93. The issue for my office, requesters, and, importantly, RSLs themselves is not so much when an order would come into effect but the timescales between the approval of the order and the date it comes into effect. The “lead in” time, i.e. the period of time from which it is known by us and by designees that they will be covered until the “go live” date (proposed for 1 April 2018) is critical.
94. This is because:
- (i) my office offers support to new bodies which become covered by FOISA. In the past this has included the preparation and provision of written materials, arranging and delivering training events, providing support in the implementation of the Publication Scheme, and responding to enquiries from new bodies about their duties.
 - (ii) RSLs themselves will need to ensure they have appropriate policies and procedures in place.
95. If RSLs are designated, this will be the biggest single tranche of new bodies becoming subject to FOI at one time since FOISA came into force. Resources available to both my office and RSLs are limited, and so, therefore, I think realistically, nine month’s preparation time (from the date the order is approved) *as a minimum* is needed.

4. We would welcome comments on the draft partial Business and Regulatory Impact Assessment provided at Annex A.

96. The Commissioner is familiar with concerns expressed about designation including:
- (i) it will cost too much
 - (ii) the number of “information requests” will increase significantly
 - (iii) “information requests” will become more complex.
97. Nicola Sturgeon set out her views at the 11th Annual Holyrood Freedom of Information Conference in December 2013: “But my position is clear. The costs that arise from FOI are outweighed by the increase in transparency and accountability to the citizen that result.”

98. FOI has played a significant part in the changing expectations in relation to information; how we create it, use it, access and share it. Public appetite for information since FOISA came into force has grown, not diminished, and continues to grow. This is not purely because of FOI, but also reflects the sea-change in expectations about access to information generally. Expectations have shifted massively about what is, or should be, accessible, how it is accessed (particularly using IT), the speed with which it is accessed and what is shared and how. Even if FOI did not exist, people would still ask for information and public authorities would still incur a cost in handling these requests.
99. Being subject to FOI is a critical part of the access to information landscape in Scotland because it does more than provide a legally enforceable right to ask for and be provided with information held by public authorities. It confers duties on public authorities to proactively publish information. In short, it gives people the right to ask, and requires public authorities to tell.
100. Public awareness of FOI is at its highest ever level as the Commissioner's most recent poll, in 2015, illustrates: 85% of respondents had heard of the FOI Act.
101. While I understand the concerns, I question whether, in the context of the total cost and scope of service provision, it is always going to be the case that FOI is costly or burdensome to the organisations covered by it. Often the points are made from the perspective of looking at FOI as an "extra function" in isolation from the whole business, rather than as part of an integrated service. They also fail to take into account other benefits afforded by FOI: engagement, accountability, openness, service improvement and more informed decision making. This is why I caution against giving disproportionate weighting to the burden arguments against designation.
102. It is important to remember that RSLs already respond to requests for information. They already routinely respond to enquiries which include providing information. Therefore, it is important when considering designation, to consider what the *additional* costs of setting up and administering FOI duties would be, rather than basing decisions on what the cost of an FOI function created from scratch may be. This is even more important when considered in the context of developments in recent years. RSLs are already moving towards greater openness and transparency. For example, they are endeavouring to operate in the spirit of the legislation, meeting their duties to actively disseminate information under the EIRs and working towards implementation of the Model Publication Framework.
103. To gain a better understanding and indication of what the impact is on a newly designated authority, the Commissioner surveyed culture and leisure trusts after their designation in 2014:
 - (i) 100% of respondents felt prepared for FOI: 38% very and 62% fairly
 - (ii) 63% said volumes of requests for information had stayed the same since designation
 - (iii) Not one respondent reported a significant increase in information requests after designation
 - (iv) Over half said there was no change in the type of information requested, with 31% reporting a slight change. 6% reported a significant change
 - (v) All but 6 of the trusts surveyed responded.
104. These results, together with the comments received from the trusts, allowed us to draw some broad conclusions:

- (i) The impact of designation on the trusts has not been especially problematic or caused any great change in either the volume or complexity of requests for information compared to those trusts received prior to designation
 - (ii) Support to prepare for designation is important, particularly the resources, training and support available from the Commissioner's office and other public authorities
 - (iii) Becoming subject to FOISA has not made responding to information requests more or less difficult.
105. Some specific concerns relating to coverage of RSLs are raised by the Scottish Government in the consultation paper. The consultation paper makes reference at paragraphs 4.10 and 5.2 of the BRIA to potential hidden costs to the public, or a reduction in competition, should RSLs be deterred from competing for public contracts, and the potential impact on RSLs' ability or willingness to engage with public or private sectors. There is no evidence that extension of FOI coverage has such an impact. The expectation of those working with bodies that are covered by FOISA is that some information about that work will be made public. That expectation is well-established, and the Scottish Ministers' Section 60 Code of Practice sets out guidance on how requests for such information should be handled, including liaison with the third party.
106. Paragraph 4.16 of the BRIA refers to research undertaken in 2012 where the Scottish Government estimated that average time spent in responding to a request they received was approximately 7 hours, at an average cost in staff time of £231. While the figures were helpful in that they gave an indication of the cost to the Scottish Government, I caution against using this as an absolute cost calculation for all organisations as the size and scope are different, as is the type and complexity of information they hold. In my own organisation, for example, the majority of requests are for information we do not hold: this makes them straightforward and inexpensive to respond to. As the Scottish Government itself recognises in the consultation paper, average cost figures will vary significantly depending on the organisation and the type of requests it receives.
107. Option 1 set out in the BRIA is to take no action. As the consultation paper notes, this would have no impact on RSLs, but it would negatively impact on requesters.
108. At paragraph 4.6 of the BRIA, it is noted that there may be some merit in considering voluntary arrangements for provision of information instead of going down the designation route. We already have such voluntary arrangements in place, e.g. in the Model Publication Framework, and it is free to RSLs to operate within the spirit of FOISA although not covered by it. For the reasons given in response to Q2 in relation to the Model Publication Framework and compliance with the Charter, the evidence supports the Government's view that to achieve meaningful change, designation is the way forward (option 2).
109. I provided an initial assessment to the Ministers of the estimated cost to my office for providing training and support to RSLs, investigating appeals against them and responding to enquiries from them in the region of £110,000 in the first year, reducing to £100,000 per annum thereafter. It is unlikely that this can be met in full from our existing budget.

6. We would welcome comments on how these proposals might impact on 'Equality Groups' i.e. in respect of age, gender, race, religion, disability, sexuality, children's

rights etc. Comments will inform the Equalities Impact Assessment and Child Rights and Wellbeing Impact Assessment to be completed following consultation.

110. FOI is an important component of civic engagement and accountability. To achieve an equitable society, engage openly and transparently and deliver public services in a responsible and effective way, FOI coverage must keep pace with change.
111. The case for designation of RSLs is persuasive. Within the social housing sector, some landlords are subject to FOI law and others are not. Local government housing services, as part of their parent councils, are subject to FOI law, while RSLs, including housing associations and housing co-operatives, are not.
112. RSLs provide housing to some of the most vulnerable people in our society and the activities of RSLs directly impact on the living conditions of thousands of Scottish tenants. It is a source of inequality that tenants of local authority provided social housing are entitled to information about their homes which tenants of RSLs are not, simply because their tenancies transferred to an RSL. Recent government announcements anticipate a growth in social housing in Scotland, and in the role of RSLs in delivering social housing for Scotland.
113. I have considered the proposals in terms of all of the protected characteristics. My general comment would be that the effect of coverage of RSLs would be to remove or mitigate existing inequalities. I have set out in my response to the consultation questions what I consider to be the inequalities with the status quo, and why I take the view that coverage would ensure parity of rights.
114. In respect of the Child Rights and Wellbeing Impact Assessment, children and young people use services provided by RSLs, perhaps because their families are tenants or prospective tenants, or because they themselves are moving into their own property.
115. The organisation Children in Scotland, in its response to the review of the Charter, (<http://www.childreninScotland.org.uk/consultation/review-of-the-scottish-social-housing-charter-august-2016>) pulls together various of evidence about the ways in which children and young people in particular may be affected by access to information about social housing. For example, children and young people have been shown to be significantly more vulnerable to negative experiences related to their housing, and find the transition into their own home a major source of stress and anxiety. In Children in Scotland's research, specific mention is given to a lack of transparency in the eligibility process which acted as a barrier to accessing housing and also to a difficulty in accessing holistic, timely and appropriate information and support to help young people to sustain their tenancy.
116. As I also pointed out in the response to the Charter review, children and young people have legal rights to ensure they have the opportunity to contribute meaningfully to housing processes (e.g. Article 27 of the UN Convention on the Rights of the Child gives a right to a good standard of living, including housing). Designation of RSLs under FOISA would improve that opportunity by giving children and young people (and all others) a legally enforceable right to information they need in order to contribute meaningfully.

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