

Consultation on Extending Coverage of the Freedom of Information (Scotland) Act 2002 to Registered Social Landlords

SCVO response

21 February 2017

Our position

We support the extension of FOI to include the provision of all public services, irrespective of whether those services are provided by public, private or third sector organisations.

SCVO opposes the extension of FOI legislation to individual third sector organisations per se or in their entirety as this would represent a disproportionate burden and would discriminate against them in respect of their non-government and non-public service work.

FOI clauses should be inserted into all contractual relationships between government and public service providers that are limited to that contract

Our response

We welcome the opportunity to respond to this consultation on the extension of Freedom of Information.

We support the extension of Freedom of Information (FOI) to include the provision of all public services, irrespective of whether those services are provided by public, private or third sector organisations. In our view the public have a right to know all aspects of how publicly funded services are funded and run.

We would therefore support the extension of FOI to Registered Social Landlords (RSLs), provided that the focus is on the public functions delivered, rather than organisations themselves.

SCVO opposes the extension of FOI legislation to individual third sector organisations per se or in their entirety as this would represent a disproportionate burden and would discriminate against them in respect of their non-government and non-public service work.

SCVO is a lead driver in the Open Government Partnership, a project concerned with promoting openness and transparency. We believe that local people should be able to influence the decisions which affect their local area and that opening up RSL to FOI can help to ensure public services are delivered to a high standard. The transferring of housing stock from Local Authorities to non-local authority partners can have a negative impact on individuals' information rights. We believe that a commitment to protecting these rights is a strong message of intent with regards to transparency.

The key question within this consultation centres on the balance of promoting tenants' rights to information versus the potential cost burden of extending FOISA and the precise standing of third sector organisations.

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

SCVO has maintained a clear position on extension of FOI to the third sector. We support the extension of FOI to include the provision of all public services, irrespective of whether those services are provided by public, private or third sector organisations. In our view the public have a right to know all aspects of how publicly funded services are funded and run.

We have suggested previously that the best way to achieve this would be to insert a FOI clause into all contractual relationships between government and public service providers which requires compliance. This requirement would remain active for the lifetime of the contract and would apply only to information related to the contract.

SCVO has consistently opposed the extension of FOI legislation to individual third sector organisations per se and in their entirety. In our view this would represent a disproportionate burden on charities and social enterprises and would discriminate against them in respect of their non-government and non-public service work. We believe that the extension of information rights should continue to be limited to the public functions and not the organisation itself. The protections provided by section 7(3) of the Act¹ ensure that the coverage will be limited to public functions and services.

The extension of FOI to RSLs also raises questions in the context of the Lobbying Act. Under the new Lobbying guidelines, public bodies subject to FOI requests will not have to register publicly with the lobbying body. This is because the Lobbying Act excludes public bodies under the assumption that information on lobbying will be available via FOI requests. However, public bodies will not be asked to record the same level of face-to-face engagement with politicians as charities and others affected by Lobbying Act will have to (this is clearly laid out in Section 30 of the FOI (Scotland) Act).

Therefore, a consequence of any decision to extend FOI to RSLs may be the removal of RSLs from the remit of the Lobbying Act. This is perhaps an inconsistency with regards to information rights between RSLs and other non-public bodies. We believe such practical difficulties with the Lobbying Act should be considered in the context of this consultation.

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

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reference to the factors referred to earlier in this paper.

As noted in the consultation document, the legislation does not provide a definition of 'functions of a public nature' and thus depends on the Ministers' interpretation. There is a need for a common understanding and clear criteria about how functions are assessed. The extension of FOISA should not discriminate against third sector organisations in respect of their non-government and non-public service work. Based upon the characteristics outlined in the consultation document and a general understanding of public functions, it is clear that RSLs do fulfil functions of a public nature and also an important social role in forming a central pillar of social housing provision.

Therefore, we would support extending FOISA to organisations but only to cover the specific *functions* of a public nature they are delivering, not to *all* activities of the organisation.

However, SCVO would note that merely receiving public money cannot be seen as a valid reason in and of itself for coverage by FOI legislation. It would become a highly complex picture if all functions of charities financed through government grants became covered by FOISA. Moreover, if this is something that charities would do with, or without, public money, this should not be covered. It must only be those functions that an organisation completes on behalf of a local authority, not those delivered in assistance to local authority functions. For a public function to be covered by FOISA, the perceived 'public function' must satisfy a number of clear criteria rather than merely the acceptance of public funding.

We recommend that this criteria is defined in collaboration with the third sector, but it is our expectation that, in addition to the extent of public funding of the activity, the criteria for assessment would include:

- whether the public have lost rights to access information under the Act as a result of outsourcing of how public services are delivered;
- functions for which the state has generally assumed responsibilities;
- whether the functions would be performed by a public authority if the body did not perform them

We would also note that there should be an obvious distinction between public functions and public benefit within the extension of FOI. In order to become charities, organisations must meet OSCRs public benefit test which means that work of charities should always be in the public benefit. However, this is not synonymous with public functions and while benefiting the public, may sit soundly outside any definition of public function. We would therefore resist attempts to cover charities by FOI legislation based upon public benefit.

In this vein, we would have some hesitation with regards to the consultation document which outlines 'the extent to which the body seeks to achieve some collective benefit for the public and is accepted by the public as being entitled to do so' as one of the assessment criteria.

A class description covering RSLs and setting out the functions considered to be covered by the order would also be welcomed and helpful. We note that we only support the extension of FOI in respect to the information they hold concerning their functions of a public nature. In the legislation, similar arrangements have been implemented for groups

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such as general medical practitioners who will be covered only for information about the provision of specific services under specific NHS legislation.¹

Moreover, we note that FOI legislation was drafted with public bodies in mind and there may be some difficulty in extending this to non-public bodies. In particular, issues may arise with regards to data storage and what happens to financial information and accounts once a charity ceases operation. It would be an unfair burden if unpaid or even historical trustees of that organisation had to store information for the specified time, in case of a potential FOI request and then resource the request out of their own pocket.

While many RSLs are of the opinion that FOISA is unnecessary given that they intend to act in the spirit of FOI, it is worth noting that not all associations provide information as readily as others. Shelter Scotland have raised this point in relation to their helpline. Although rare, there have been occasions where tenants have contacted Shelter because they were struggling to access information from their housing association. In this respect, FOISA would bring the information access rights of RSL tenants up to the level of local authority tenants and create consistency between all tenants of RSLs.

The rebranding of RSL as public bodies within the context of the FOI Legislation must not set a dangerous precedent where RSLs become rebranded as 'public bodies' in other contexts.

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?

Whether the timescale is appropriate will depend on the support being offered to the organisations to meet their new obligations.

RSLs will require time to adapt to the changes in internal procedures and for staff to receive training to deal with FOI request to the satisfaction of those requesting information and to ensure they comply with legal obligations. In this respect, guidance is often insufficient and practical training is also necessary.

While we acknowledge that some RSLs may voluntarily already act 'in the spirit of FOI legislation' and that good record management should not be a new requirement for RSLs, it is clear that FOI places new obligations on these bodies.

We would be concerned that, without appropriate training and guidance, additional administrative responsibilities may be passed on to tenants. This would clearly have a negative impact and should thus be avoided.

We would hope that the Information Commissioner will work with these bodies to assist with transitions and that the money allocated by Scottish Government, £110,000 for the first year, will include money for training and promotion.

At present, RSLs are already expected to submit a large amount of information to the ARC. In order to minimise the burden for housing associations, the information requirements for the ARC must be aligned with those required by FOISA.

¹ https://ico.org.uk/media/1152/public_authorities_under_the_foia.pdf

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

N/A

5. 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.

N/A

Conclusion

SCVO is supportive of the public's right to access information and the principles of openness, transparency and accountability that underpin that right.

We support the extension of Freedom of Information to include the provision of all public services, irrespective of whether those services are provided by public, private or third sector organisations. However, our support for the extension is limited to a function-approach in that FOI coverage is extended only to the public services but not the other activities of the organisation.

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About us

The Scottish Council for Voluntary Organisations (SCVO) is the national body representing the third sector. There are over 45,000 voluntary organisations in Scotland involving around 138,000 paid staff and approximately 1.3 million volunteers. The sector manages an income of £4.9 billion.

SCVO works in partnership with the third sector in Scotland to advance our shared values and interests. We have over 1,600 members who range from individuals and grassroots groups, to Scotland-wide organisations and intermediary bodies.

As the only inclusive representative umbrella organisation for the sector SCVO:

- has the largest Scotland-wide membership from the sector – our 1,600 members include charities, community groups, social enterprises and voluntary organisations of all shapes and sizes
- our governance and membership structures are democratic and accountable - with an elected board and policy committee from the sector, we are managed by the sector, for the sector
- brings together organisations and networks connecting across the whole of Scotland
- SCVO works to support people to take voluntary action to help themselves and others, and to bring about social change.

Further details about SCVO can be found at www.scvo.org.uk.

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