

Petition PE1539: Submission by Scottish Information Commissioner, Rosemary Agnew

16 January 2015

1. Thank you for inviting my views on Petition 1539. Ms Anne Booth, the petitioner, calls for housing associations to be made subject to the Freedom of Information (Scotland) Act 2002 (FOISA).
2. I am supportive of this petition.
3. Section 5 of FOISA gives the Scottish Ministers the power to make bodies subject to FOI law if they appear to Ministers to be exercising “*functions of a public nature*”. This is often referred to as “designation” and is the mechanism by which housing associations would become subject to FOI. My view, explained in the attached Special Report to the Parliament¹, is that this power has been woefully underused for the past decade, resulting in an erosion of rights to information. I recommend that Ministers use their designation powers to prevent further erosion of our FOI law and to repair the damage already done. This is by:
 - (i) Addressing the loss of rights as a result of changes in delivery of public functions and services, and
 - (ii) Creating access to information rights for the first time, where it is in the public interest to do so.
4. As the report indicates, I recommend Ministers should consider whether all Scottish registered social landlords (RSLs), should be designated under FOISA. While the Ministers’ considerations may be different for different types of RSLs , I recommend that Ministers consider designation of **all** RSLs.
5. My reasons are:
 - (i) There is a clear and established public benefit to the right to access information about social housing. Currently, tenants of local authority landlords (which are subject to FOISA) can ask for any information they hold. For example, they can ask for information about the quality or timeliness of repairs, and for the background to decisions on rent levels.
 - (ii) The FOI right is not restricted to people who have a direct relationship with the authority. *Anyone* can ask for information. For example, prospective tenants of RSLs could ask about waiting lists and factored home owners could ask about the cost of repairs or materials used. We have also seen very positive use of FOI as a research tool by voluntary organisations advocating on behalf of groups. Both Inclusion Scotland and most recently, Leonard Cheshire Disability, have published reports based on FOI responses to lobby for more appropriate housing provision for disabled

¹ *FOI 10 years on: Are the right organisations covered?*, laid on 16 January 2015, published at www.itspublicknowledge.info/reports (from 19 January 2015)

people. The introduction of FOI rights to information held by RSLs would bring similar public benefit and remove an apparent unfairness.

- (iii) RSLs are already subject to the Environmental Information (Scotland) Regulations 2004. They are required to respond to requests for environmental information that they hold and to publish environmental information proactively. It appears inconsistent that they are not required to do the same for non-environmental information.
- (iv) As the petitioner indicates, RSLs are already considered to be public bodies for the purposes of procurement legislation. They are also listed authorities for the purposes of the Scottish Public Services Ombudsman Act 2002. This inconsistency about whether a body is a public body is both confusing and could introduce inequalities for tenants in how they exercise rights. For example, a tenant of an RSL could make a complaint to the SPSO but would not necessarily have the right to access relevant information to support that complaint. Designation under FOISA means only that the body is considered a public authority for FOI. It does not change the constitutional status of the body.

6. I appreciate that the petition raises a wide range of issues. If the Committee wishes, I would be pleased to provide oral evidence to aid its deliberations. In the meantime, I hope that the following points will also be of assistance.

Type of RSL

7. In paragraph 3 above, I explain that there are two routes for designation: addressing loss of FOI rights, and considering coverage of a function for the first time. When Ministers are considering designation of RSLs, the weighting they attach to considerations may be different according to the authority in question. This is why, in my Special Report, I emphasise that it is preferable to think about designation in terms of the *function* of the body.
- (i) Housing stock transfer meant that a function previously carried out by the public sector was devolved to an organisation outside the public sector. According to the Scottish Government's own figures, some 15,000 household tenancies have moved in this way. These households have, in the process, lost the enforceable right to ask for information from their landlord. Designation is recommended for these organisations to restore those lost rights.
 - (ii) Tenants of non-stock transfer RSLs have never had that right. For these bodies, Ministers would need to consider the relative merits and weighting of the many other factors in favour of designation, such as those set out in paragraph 5 above. I would recommend that a key consideration to focus on is equality: all tenants of social housing should have the same rights to information and all RSLs should be subject to the same level of scrutiny.

FOI costs

8. RSLs, if designated, would have to proactively publish information and prepare to respond to FOI requests. I expect that the relative costs of that would not be overly burdensome when considered in the context of current business. These are bodies which are used to communicating with the public and providing high levels of customer care. They are probably already receiving enquiries which would amount to information requests and answering

them. They are also used to maintaining websites and making information available without being asked for it.

9. From the statistics submitted to us by Scottish public authorities, I anticipate that the smaller RSLs could expect to receive low numbers of FOI requests and that very few of these would be “new” business. As RSLs are already required by the Scottish Social Housing Charter to publish information, I do not expect that they would find the FOISA publication scheme requirement costly.

Scottish Social Housing Charter

10. The Charter, introduced in 2012, requires RSLs to, among other things, manage their business so that “*tenants and other customers find it easy to communicate with their landlord and get the information they need about their landlord, how and why it makes decisions and the services it provides*”. In August 2014, the Scottish Housing Regulator disclosed extensive research of tenant satisfaction with the Charter requirements for all RSLs. Tenant perceptions of their compliance with the Communication requirement of the Charter were very high and compared favourably with those of local authority landlords. This suggests that the culture of information sharing already exists.
11. However, there are important differences between the Charter and the rights under FOISA which means the rights under the Charter and FOISA are not comparable:
 - (i) Where someone has been unlawfully refused information by a body subject to FOISA, the Scottish Information Commissioner can order its release. The Scottish Housing Regulator may make interventions, but does not have power to compel an RSL to provide particular information to an individual.
 - (ii) FOISA provides a universal right to anyone to ask for information. The Charter provides a requirement that landlords should ensure that tenants and other customers get the information they need. The Charter requirement, although welcome, falls significantly short of the FOISA right in that it does not provide the same level of access to information to enable public scrutiny.