



Draft SSI
The Freedom of Information (Scotland) Act 2002
(Designation of Persons as Scottish Public
Authorities) Order 2019
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Submission from the
Campaign for Freedom of Information in Scotland
(CFoIS)



This response is dedicated to the memory of our friend and colleague Chris Barter, who died suddenly in 2017. Chris was a long-term campaigner for the extension of FoISA to the work of registered social landlords (RSLs) and all of their subsidiaries, first in his role at UNISON Scotland and then on the Scotland Committee of CFoIS.

CFoIS wishes to place on record our appreciation of Chris for his commitment, for his communication and organisational skills and well as his determination to ensure the introduction of effective and enforceable access to information rights in Scotland.

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Overview

CFoIS believes RSLs and all their subsidiaries should be designated under the Freedom of Information (Scotland) Act 2002 (FoISA) which is “An Act of the Scottish Parliament to make provision for the disclosure of information held by Scottish public authorities or by persons providing services for them; and for connected purposes.”ⁱ However instead of simply designating RSLs and their subsidiaries, which enables a presumption of access to information unless one of the exemptions appliesⁱⁱ, the Scottish Government has deviated and adopted a complicated approach. CFoIS believes the result of this approach is a draft SSIⁱⁱⁱ that lacks precision which will lead to inconsistencies in interpretation. We believe it is unacceptable to leave interpretation to the Scottish Information Commissioner as a reaction to people requesting a review under FoISA. Parliament should decide the precise purpose **and** scope of the SSI. The way forward is for the Local Government and Communities Committee to require the Scottish Government to amend the draft SSI and come back promptly with text which is acceptable^{iv}. CFoIS still expects the latest promise of SSI implementation on 11th November 2019, to be honoured.

In offering a critical analysis of the draft SSI, we note this process has taken 17 years to deliver: originally CFoIS won the argument for the inclusion of RSLs but the Deputy First Minister, Jim Wallace, withdrew RSLs for designation at Stage 3 of the Freedom of Information (Scotland) Bill in 2002, promising that they would be re-added soon. Despite several consultations followed by promises to designate on 1st April 2018 and then 1st April 2019 both deadlines were missed. Therefore, this draft SSI is the result of prolonged consideration, so the proposed text is deliberate^v.

It is useful to remember that RSLs are currently covered by the Environmental Information (Scotland) Regulations (EI(S)Rs). Furthermore, individuals and organisations can theoretically access information from RSLs under Article 10 of the ECHR although we do not know of any Scottish successes in this regard.

CFoIS notes that the national representative body for RSLs, the SFHA, and regional groups such as the Glasgow and West of Scotland Network will not be covered by the SSI. However, we expect minutes of its meetings and documents to be available if people make an FoI request to individual RSLs which are members. We would also urge a system of pro-active publication detailed in the 'Guide to Information' in the information management programme adopted by RSLs.

Housing

The provision of housing is a public service which is the subject of law and funding from the Scottish Government: what goes on in ‘homes’ such as specific initiatives to make homes warmer and reduce fuel poverty; implementing a programme to build 50,000 new homes between 2016 and 2021. Currently too many people and families are priced out of the housing market and are unable to find a safe, warm affordable home in a place they want to live. According to Graeme Brown, Director of Shelter Scotland, “Our housing emergency is the result of decades of underinvestment in affordable housing in Scotland.”^{vi} The provision and quality of housing is a matter of public interest, parliamentary decisions and spend of public money to lever in and fund a wide range of services. RSLs core functions, wider services and their impact are a matter of public interest as well as being part of the fabric of services of a public nature directly and indirectly.

Housing engages a range of rights which are respected, protected and fulfilled by the ambitious interpretation of devolved powers at the Scottish Parliament including:

- “Human rights have special significance in relation to social housing. Quality of housing can have a huge impact on wellbeing. Inadequate housing increases the risk of severe ill health and disability; it can also lead to poor mental health, lower educational attainment, unemployment and poverty.”^{vii}
- Article 8 of the ECHR gives everyone the ‘right to respect for private and family life, home and correspondence’ which is given domestic effect through the Human Rights Act 1998.
- Research from Citizens Advice found that people claiming Universal Credit are still struggling to pay for the roof over their heads, despite the wait for their first payment being reduced from six weeks to five. Half of the people the charity helped were in rent arrears or fell behind on their mortgage payments, the same number as when the wait for the first payment was longer.^{viii}

Therefore, designating RSLs and their subsidiaries under FoISA must result in people knowing about and understanding their right to make an enforceable request for information which is **held** by RSLs and their subsidiaries. The draft SSI fails to provide clarity on what type of information is covered by the enforceable access right under FoISA.

The Scottish Parliament was established in 1999 to be ‘open, accessible and accountable’. How it delivers its functions is determined by the Scotland Act 1998, including Section 29 that legislation can only be passed if it is compatible with the ECHR. Additionally reports come from Committees such as the November 2018 report from the Equalities and Human Rights Committee ‘Getting Rights Right – Human Rights and the Scottish Parliament’ which made 40 recommendations including that the ‘Scottish Parliament should be an international leader in human rights and adopt procedures that ensure best practice becomes standard practice’.^{ix} This will complement the First Minister’s Task Force to deliver on the report from her Advisory Group on Human Rights Leadership ‘Recommendations for a new human rights framework to improve people’s lives’.^x

CFoIS appreciates the role of RSLs in making people’s lives better, enabled by the hard work of paid staff and voluntary work by elected Committee members. We believe being designated under FoISA sits comfortably with the purpose of local housing associations and co-ops in that they are community owned and controlled.

The Right to Enforce Access to Information Requests

The Scottish Housing Regulator (SHR) has promptly responded, twice, to the CFoIS request under FoISA to provide a complete list of all subsidiaries owned/operated/managed by RSLs in Scotland. CFoIS believes this list is essential to understanding the range of work undertaken which includes property services, care and support services, energy, heat and community development. Comparing the lists also evidences the increase in number over two years from 148 at 31st March 2016 to 160 currently.

CFoIS recognises that people and organisations, not just tenants, will seek access to information from RSLs and all their subsidiaries on issues as diverse as:

- Factoring services delivered to owner occupiers, to tenants and shared owners
- Landscaping
- Proposals to use land in the neighbourhood for social housing
- Plans to offer apprenticeships in the construction of social housing
- Contracts for tendered services
- Spend on repairs, numbers on waiting lists and for how long people have been on the waiting list.
- Management of assets
- Care services – planning and provision

The draft SSI needs to reconcile the extension of FoISA to RSLs and RSL subsidiaries insofar as they undertake functions of a public nature (as required by the legislation) and how that is interpreted. Section 73 of FoISA states ‘Scottish public authority’ has the meaning given by section 3(1) which states:

“In this Act, “Scottish public authority” means—

- (a) any body which, any other person who, or the holder of any office which—
 - (i) is listed in schedule 1; or
 - (ii) is designated by order under section 5(1); or
- (b) a publicly-owned company, as defined by section 6.

The Scottish Government is creating a narrower definition of ‘public authority’ for the purposes of this SSI. Parliament has passed a wide range of legislation which impacts on the work of RSLs and their subsidiaries and is subject to compliance not just by the SHR but also potentially by the national Care Inspectorate and the Office of the Scottish Charity Regulator. Locally there are also regulatory frameworks such as for factoring services.

CFoIS recognises that the regulatory framework for RSLs can be interpreted broadly such as “All landlords must ensure that they fully comply with their responsibilities under relevant human rights and equalities legislation.”^{xi} However two hurdles will exist: the requestor arguing that the information falls within the terms of designation; the requestor making the case for the information disclosure. In this environment of uncertainty, CFoIS is concerned that gaps will emerge between regulatory functions and services of a public nature.

Impact

The Scottish Government is adopting a restrictive approach and is designating RSLs and their subsidiaries only insofar as they undertake functions for which, as we understand it, they are already subject to regulation by the SHR. CFoIS disagrees that this narrow focus is viable. People and organisations will make information requests about a range of issues and not just on those RSL responsibilities which are subject to regulation by the SHR. The result of the experience can be disempowering. CFoIS recommends that the Committee consider the SSI’s relationship with rights contained in other legislation such as the Community Empowerment (Scotland) Act 2015 and the Human Rights Act 1998.

This restrictive designation conflicts with the settled will of the Scottish Parliament that tenants, just like everyone else, should be empowered and puts RSL tenants at a disadvantage compared to tenants of local authorities. For example, an

interpretation of the homelessness statement could be used to cover the potential purchasing of land and the building of housing by the RSL, which is possible under the Community Empowerment (Scotland) Act. Another outcome is that an information request may be restricted to housing only once it is built.

CFoIS is also concerned that the law will be interpreted by OSIC through appeals going to him rather than clarity and certainty being delivered by the SSI. The right will therefore be determined by the pace and nature of appeals to the Commissioner under Section 47 of FoISA. It is unsatisfactory that the onus will be on requestors to have the resources and stamina to make access to information rights clear and robust. This approach will also raise issues of inconsistency in interpretation amongst RSLs and their subsidiaries especially if the SSI is initially interpreted in a restrictive manner. Therefore, CFoIS urges the Committee to consider if the draft SSI is 'fit for purpose'.

Section 60 Code – Making information accessible reactively and pro-actively

We note the British Sign Language (Scotland) Act 2017 and Scottish Government's Action Plan on UNCRPD will impact on compliance with and accessibility to rights.

Conclusion

Given the above we conclude that whilst we welcome the designation of RSLs and all subsidiaries effective from 11th November 2019, the Local Government and Communities Committee should require the Scottish Government to amend the text to offer clarity on transparency, on accountability, on rights and responsibilities. As CFoIS is concerned about the practical impact of the SSI, it would be helpful if the Committee can ascertain how many of the 160 subsidiaries are expected to be covered by the SSI. We invite the Committee to agree with our view that:

1. RSLs and their subsidiaries should be subject to FoISA when they are delivering public services and those of a public nature. This is consistent with the title of the SSI and therefore its purpose. The SSI must deliver that.
2. Requestors, ie those using their Section 1 rights under FoISA, deserve clarity on what information they should have access to. The SSI must deliver that.
3. RSLs and their subsidiaries deserve clarity on the detail of their FoISA obligations so they can agree their information management policies, decide what to pro-actively publish and lawfully process and answer individual requests for information. The SSI must deliver that.
4. There are financial and staffing implications for the Scottish Information Commissioner if his energies are initially dominated by providing clarity on the SSI. His expertise and resources need to be managed across his range of functions which relate to over 10,000 bodies in Scotland.

CFoIS would be disappointed if the Committee passed this SSI in the expectation that current post-legislative scrutiny of FoISA addresses SSI implementation issues. CFoIS believes it is unwise to pass this SSI unamended, if it is inadequate.

About CFoIS

The Campaign for Freedom of Information in Scotland (CFoIS) was established in 1984 to secure a legal right of access to information so that people could find out about how they are governed and how their services are delivered. We have been involved in all the major campaigns for and developments of, the legislation at a Scottish level. CFoIS is independent of government and relies on donations and

income generated through the delivery of projects and training <https://www.cfoi.org.uk/scotland/>

ⁱ Introductory Text at <http://www.legislation.gov.uk/asp/2002/13/introduction>

ⁱⁱ Part 2, Ibid

ⁱⁱⁱ Available at <http://www.legislation.gov.uk/sdsi/2019/9780111040805/contents>

^{iv} Scottish statutory instruments cannot be amended: "*unlike primary legislation, SSIs cannot be amended by the Parliament during the scrutiny process.*" https://www.parliament.scot/S5_Delegated_Powers/Guide_to_SSIs.pdf

^v The Housing (Scotland) Act 2010 Section 165

<http://www.legislation.gov.uk/asp/2010/17/section/165/2015-08-31>

^{vi} 'SFHA, Shelter Scotland and CIH Scotland announce new research to build case for social housing investment post-2021', pub 12th March 2019 at <https://www.sfha.co.uk/news/news-category/sfha-news/news-article/sfha-shelter-scotland-and-cih-scotland-announce-new-research-to-build-case-for-social-housing-investment-post-2021>

^{vii} 'Human Rights at Home: Guidance for Social Housing Providers' pg. 6, pub by EHRC

https://www.equalityhumanrights.com/sites/default/files/human_rights_at_home.pdf

^{viii} [Managing Money on Universal Credit](#), reveals new analysis based on the 190,000 people Citizens Advice has helped with Universal Credit.

^{ix} <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EHRiC/2018/11/26/Getting-Rights-Right--Human-Rights-and-the-Scottish-Parliament-3/EHRiCS052018R6Rev.pdf>

^x <http://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>

^{xi} 'Regulation of Social Housing in Scotland - Our Framework February 2019, Para 2.14

https://www.scottishhousingregulator.gov.uk/sites/default/files/publications/Regulatory%20Framework%20-%20final%20-%20February%202019_0.pdf