

Local Government and Communities Committee

Housing (Amendment) (Scotland) Bill

Submission from the Scottish Information Commissioner

Dear Convener

Evidence on the Housing (Amendment) (Scotland) Bill

I refer to your call for written views as part of the Local Government and Communities Committee's scrutiny of the Housing (Amendment) (Scotland) Bill (the Bill).

I am aware that this follows the review by the Office for National Statistics (ONS), which led to the reclassification of Registered Social Landlords (RSLs) from the status of private sector bodies to public sector bodies. I am also aware that the principal aim of the Bill is to reduce the Scottish Housing Regulator's (the SHR's) powers of regulation so as to influence the ONS to reclassify RSLs as private sector bodies.

However, I am concerned the Bill, if passed in its current form, may result in the removal of RSLs from the scope of the Environmental Information (Scotland) Regulations 2004 (the EIRs). RSLs are Scottish public authorities for the purposes of the EIRs because they are under the control of the SHR. The proposed reduction in SHR control to meet the policy objectives of the Bill could have the unintended, but highly significant, consequence of weakening further the limited (and variable) public right of access to information about social housing in Scotland:

- Local authority providers of social housing are subject to the Freedom of Information (Scotland) Act 2002 (FOISA). This means they are automatically subject to the EIRs (definition (a)(i) of Scottish public authority in regulation 2(1) the EIRs – see Appendix). This also means there is a public right to request (and to receive) *any* information held by local authorities and the authorities must publish information proactively, particularly when there is a public interest in that information.
- RSLs are subject to the EIRs by virtue of definition (d) of Scottish public authority in regulation 2(1) of the EIRs – see Appendix, but they are not subject to FOISA. This means there is a public right to request (and to receive) the *environmental* information they hold and RSLs must actively disseminate *environmental* information. There is no public right of access to their non-environmental information, or requirement on them to publish it.

To summarise, anyone can ask a local authority landlord for information about any aspect of its social housing e.g., rents, repairs, allocations, service quality,

investment plans and disposals. But only environmental information is accessible from RSLs. This constrains participation with a large proportion of social landlords by e.g., 278,000¹ tenants, their representative bodies and non-governmental organisations working on housing and homelessness.

And this limited right may be threatened by the proposals in the Bill.

Impact of proposed amendments

The Bill, if passed, will amend the Housing (Scotland) Act 2010 (the 2010 Act) to reduce the extent to which the SHR controls RSLs. This is likely to have the effect of removing RSLs from the definition of Scottish public authority under the EIRs.

As noted above, RSLs are Scottish public authorities for the purposes of the EIRs by virtue of definition (d) of “Scottish public authority” in the EIRs. This provision contains a two part test:

- firstly the body must be under the control of a Scottish public authority
- secondly, it must have public responsibilities, public functions, or provide public services relating to the environment.

In 2014, the Scottish Information Commissioner determined that Dunbritton Housing Association, an RSL, is subject to the EIRs. The test applied to public authority control was the extent of SHR’s “power to direct, manage, oversee and/or restrict the affairs or business or assets” of the RSL, with specific reference to the 2010 Act. Therefore, although the decision focussed on Dunbritton Housing Association, it affected every RSL.

The Commissioner’s Decision Notice² details the legal provisions indicating control. These are very similar to those identified by ONS in its deliberations on status of RSLs.

The proposed amendments in the Bill may therefore have a wider and significant consequence beyond its stated policy objectives: it may also remove RSLs from the scope of the EIRs, removing the only enforceable public right of access to the environmental information held by RSLs.

¹ Estimated stock of dwellings by tenure, Scotland, calendar year time year series: 1993 to latest (2015 data provided here); <http://www.gov.scot/Topics/Statistics/Browse/Housing-Regeneration/HSfS/KeyInfoTables>

² [Decision 118/2014 Mr X and Dunbritton Housing Association Ltd](#)

Extension of FOISA to RSLs

At Stage 3 of the passage of the FOISA Bill in 2002, there were concerns about the removal of RSLs from the list of authorities that would be subject to the new legislation. The Scottish Executive made a clear commitment to consult on the issue of coverage of RSLs at the earliest possible opportunity.

Jim Wallace, the then Justice Minister said:

*“When RSLs were added to the list of authorities at stage 2, I do not think that there had been any consultation ...There will be consultation before any organisation is added. I assure members that we expect the majority of organisations to be covered...Section 5(5), which requires ministers to consult, does not require us to wait for the appointment of the commissioner before doing so. Once the bill has received royal assent, we can begin the consultation process.”*³

Since FOISA came into force in 2005, both Scottish Information Commissioners have repeatedly urged the Scottish Government and its predecessors to conduct the consultation. Respecting that the decision whether to designate bodies as Scottish public authorities is a political decision, i.e. a matter for Ministers, the Commissioners nonetheless expressed concern about loss of rights to information that was once available e.g., as a result of housing stock transfers from local authorities to RSLs) and lack of parity of rights among tenants of social landlords.

They have also drawn the Ministers’ attention to the limitations of the access to information provisions in the Social Housing Charter, particularly given that it is neither enforceable nor universal.

In December 2016, following an informal consultation in 2015, the Scottish Government launched a formal consultation⁴ on extension of FOISA to RSLs. The consultation document considers several “designation factors” and concludes “...we consider that RSLs should be brought within the scope of Scotland’s Freedom of Information legislation”. An Interim Report⁵ on the consultation was issued in June 2017.

The Ministers’ decision is awaited:

- Should the Ministers decide to designate RSLs as Scottish public authorities for the purposes of FOISA, RSLs will automatically be subject to the EIRs (by virtue of definition (a)(ii) of Scottish public authority in regulation 2(1) (see

³ Official Report, Freedom of Information (Scotland) Bill: Stage 3, Wednesday 24 April 2002

⁴ [Consultation on Extending Coverage of the Freedom of Information \(Scotland\) Act 2002 to Registered Social Landlords](#)

⁵ [Consultation on Extending Coverage of the Freedom of Information \(Scotland\) Act 2002 to Registered Social Landlords: Interim Report](#)

Appendix)). This would resolve the concern about the impact of the reduction in control by the SHR, as proposed by the Bill.

- However, should Ministers decide not to bring RSLs within the scope of FOISA and the Bill is passed in its current form, there may no longer be any enforceable right of access to environmental information held by an RSL. That would represent a removal of rights.

The right to information held by RSLs is important

A universal right to access information from and about public services is a fundamental pillar of both public engagement and social justice. Without information, the public cannot participate fully in consultation, understand decisions taken on their behalf, or hold bodies to account for their decisions, spending or actions.

The United Kingdom is a signatory to the United Nations' Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice, on which the EIRs are based. The objective of the Convention (Article 1) states:

*“In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”*⁶

David Kaye, Special Rapporteur of the Human Rights Council, said, in August 2017: *“Without freedom to access information of all kinds — in particular when Governments withhold information from the public and its judicial, legislative and media mechanisms — abuses may take place, policies affecting the general welfare may not be tested and improved and overall public engagement and participation diminishes, often by design. By contrast, information-rich environments help promote good decision-making and meaningful public debate, building credibility for public institutions”.*⁷

As the Scottish Government's consultation on extension of FOISA to RSLs makes clear, RSLs deliver functions of a public nature that is underpinned by statute.

Conclusion

As noted above, I am aware of the reasons for the proposed amendments to the 2010 Act and that they are unconnected to the position of RSLs under the EIRs.

⁶ <https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

⁷ http://www.un.org/ga/search/view_doc.asp?symbol=A/72/350

However, I would ask that the Committee take account of the possible unintended consequences of the Bill in taking away an important right to information from RSL tenants in Scotland.

This is something the Committee may also wish to explore with Government as part of its consideration as to whether RSLs should be designated as public authorities under FOISA, given that such designation would automatically make RSLs subject to the EIRs.

Do not hesitate to contact me if I can be of any further assistance.

Yours sincerely

Margaret Keyse
Acting Scottish Information Commissioner

Appendix

Regulation 2 of the Environmental Information (Scotland) Regulations 2004

(1) In these Regulations –

...

“Scottish public authority” means –

(a) any body which, any other person who, or the holder of any office which is

–

- (i) listed in schedule 1 to [FOISA] (but subject to any qualification in that schedule); or
- (ii) designated by order under section 5(1) of [FOISA];

...

(d) any other person who is neither a public body nor the holder of a public office and who is under the control of a person or body falling within paragraphs (a), (b) or (c) of this definition and –

- (i) has public responsibilities relating to the environment;
- (ii) exercises functions of a public nature relating to the environment; or
- (iii) provides public services relating to the environment; ...