March 2019

Dear James

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002
EXTENSION TO REGISTERED SOCIAL LANDLORDS AND SUBSIDIARIES

When I appeared before the Committee on 20 March 2019 to give evidence about the draft Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2019, Andy Wightman MSP asked for further information about whether this Order represented the first occasion where bodies had been made subject to FOISA but only in relation to certain functions. I undertook to respond to the Committee in writing.

As I mentioned in my evidence, this Order is the third one that the Scottish Ministers have laid in six years to extend the coverage of the Freedom of Information (Scotland) Act 2002 (FOISA). The previous Orders are:


The 2013 Order extended FOISA to arms-length external organisations set up by local authorities to deliver recreational, sporting, cultural or social facilities and activities. It also provides that those bodies are subject to FOISA in relation to functions of a public nature that are set out in the Order. The Order goes on to say that the functions are those contained in sections 90 and 183 of the Local Government (Scotland) Act 1973, section 14 of the Local Government and Planning (Scotland) Act 1982, and section 20 of the Local Government in Scotland Act 2003.

The same approach was taken in the 2016 Order, which extended coverage to private prison contractors, provicers of secure accommodation for children and young people, grant-aided

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schools, independent special schools and Scottish Health Innovations Ltd. In each case, specific functions of that type of body are set out in the Order and the body is subject to FOISA in relation to those functions.

It is therefore not the case that this Order is the first occasion on which the Scottish Ministers have designated a body for the purposes of FOISA but only in respect of certain functions. It has happened on every occasion where the Ministers have laid an order under section 5 of FOISA. Indeed, section 5(4)(a) of FOISA says that a section 5 order must specify the functions of a public nature that the body designated appears to exercise.

I would accept that the way in which functions are specified in this Order may appear more complex than the specifications in previous Orders. However, this reflects the complexity of registered social landlords and their subsidiaries as organisations, as well as the wide range of functions that they carry out. After careful consideration, the Scottish Ministers did not consider that all of the functions of RSLs and their subsidiaries were public in nature for the purposes of designation under section 5. On that basis, activities such as factoring could not be included in the Order and indeed had to be specifically omitted from inclusion. The specification of the functions of RSLs and their subsidiaries is therefore necessarily more complex.

Concerns were expressed about the potential burden on requesters who would have to interpret housing legislation before making a request. I would like to reassure the Committee that this is not the case. If a request is made, it will be for the RSL or subsidiary to explain why the information requested does not relate to one of the functions in the Order and so is not available under FOISA. The RSL or subsidiary will also have a statutory duty under FOISA to give advice and assistance to requesters. This would include assisting the requester to formulate a valid request. Finally, RSLs and their subsidiaries will have to prepare and publish a publication scheme which sets out the information that they hold. This too will assist requesters in understanding what information they can request.

As I mentioned in my concluding remarks, if the Parliament approves this Order then we will carry out a review of it one year after it comes into force (in November 2020). That is an opportunity for all of the bodies that become subject to FOISA to provide detailed feedback on its operation in practice. If the evidence shows that the legislation is not working as it should, then the Scottish Ministers will bring forward a further order to ensure that it achieves its intended aims.

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