



Leasehold, Rentcharge and Commonhold Team  
 Department for Communities and Local Government  
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**BY EMAIL ONLY**

21 September 2017

Dear Sirs

**Consultation on recognising residents’ associations, and their power to request information about tenants**

LEASE supports the government’s vision to grow home ownership and increase transparency and fairness for leaseholders. Through our work we also encourage best practice and improvements in the management of residential leasehold property.

We welcome the opportunity to provide views on the matters set out in the consultation paper. As the leading source of independent leasehold advice to leaseholders in England and Wales, providing that advice across both the public and private sectors, we are well placed to comment; and keen to help DCLG as it moves forward its transparency and fairness agenda for residential leasehold.

<p><b>Q1: Do you agree that the contact information suggested at paragraph 16 should be supplied? If not, what other details should be supplied and why?</b>  <b>Yes X</b>  <b>No</b></p>	<p>We agree that the contact information suggested in paragraph 16 should be supplied. Landlords and managing agents are encouraged to support residents associations and it is good practice to do so as set out in both the The Association of Retirement Housing Managers code (ARHM code) and the Royal Institution of Chartered Surveyors (RICS) Code of Practice Service charge residential management Code.</p> <p>Chapter 11 of the ARHM Code entitled ‘Encouraging Residents’ Associations’ states in 11.1 that “Managers should have a formal commitment to encourage properly constituted and democratically run residents’ associations at their schemes. Managers should supply literature to leaseholders giving guidance on how to set up and run an association. The ARHM has produced a model constitution for residents’ associations that is available free of charge to managers and leaseholders....” <a href="http://www.arhm.org/publication-category/code-of-practice/">http://www.arhm.org/publication-category/code-of-practice/</a></p> <p>Separately the RICS Code highlights the advantages of a having a residents association. Chapter 14.1 states that “The creation of an association can bring advantages to the management in general, and in particular can ease communication with the leaseholders to establish what they want and to appreciate the differing points of view.....” <a href="http://www.rics.org/uk/knowledge/professional-guidance/codes-of-practice/service-charge-residential-management-code-3rd-edition/">http://www.rics.org/uk/knowledge/professional-guidance/codes-of-practice/service-charge-residential-management-code-3rd-edition/</a></p>
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<p><b>Q2: How frequently should a secretary of a residents' association be able to repeat the request for contact information?</b></p>	<p>On the one hand, the secretary requires the information to enable the tenants association to be recognised and the landlord is required in Diagram B to send any consent received from qualifying tenants within 30 working days. If the information is not received within the specified timescale, the secretary may send another request to the landlord.</p> <p>Equally, over time, the secretary should be able to repeat the process whenever necessary such as to obtain contact information of new qualifying tenants in order to invite them to become new members when the properties change hands.</p> <p>One instance where qualifying tenants have a statutory right to obtain information about superior interests from their landlord is Section 11 of the Leasehold Reform Housing and Urban Development Act 1993 (the 1993 Act). There is no limit to how many times such a request may be made.  <a href="http://www.legislation.gov.uk/ukpga/1993/28/section/11">http://www.legislation.gov.uk/ukpga/1993/28/section/11</a></p> <p>Consideration had been given to recommending that an annual request could be made by the secretary to the landlord to require the landlord to contact qualifying tenants to request their consent to pass on their information to the secretary. However, we decided to mirror the provision of section 11 of the 1993 Act, which does not set a limit on how frequently a request for information could be made.</p>
<p><b>Q3: Are you content with the process outlined in Diagram A? (Please see consultation for diagram)</b>  <b>Yes</b>  <b>No X</b></p>	<p>We are not content with the process outlines in Diagram A for the following reasons:</p> <p>In the diagram, after the landlord informs the secretary of qualifying tenants that have granted consent for their contact information to be passed to the secretary, the end of the process states that the secretary updates their membership of the residents association.</p> <p>This suggests everyone who consents to having their contact information passed to the secretary automatically becomes a member of the association. It is unclear from the diagram whether this is a statement of legal intention of this process or whether it is part of the assumption membership will follow on from there. If it is the latter, we suggest an additional step be included in the diagram where the secretary contacts the qualifying tenants to ask them to become members of the association.</p> <p>If the government's intention is the former where qualifying tenants who have granted consent for their contact information to be passed to the secretary automatically means the qualifying tenant is also consenting to becoming a member of the association, this needs to be made very clear in the form. A residents association is an unincorporated association and there may be membership or subscription fees payable to become a member as such, it is important for the qualifying tenants to understand the nature and status of the association, and what their obligations will be in the constitution before they sign up.</p> <p>Consequently, we propose the form be amended as follows:</p> <ul style="list-style-type: none"> <li>• A copy of the constitution of the association is sent the qualifying tenant with the prescribed form by the landlord so that they can make an informed decision on whether or not</li> </ul>

	<p>to consent to join.</p> <ul style="list-style-type: none"> <li>The prescribed form includes an option for the qualifying tenant to consent to becoming a member. To achieve this, point number 2 on the prescribed form could be broken down to read: <ul style="list-style-type: none"> <li>a) I consent to the landlord providing my contact information to the secretary of the residents' association</li> <li>b) I consent to the landlord providing my contact information to the secretary of the residents' association and to becoming a member of the association</li> <li>c) I do not consent to the landlord providing my contact information to the secretary of the residents' association or to becoming a member of the residents association.</li> </ul> </li> </ul>
<p><b>Q4: Do you agree with the timescales for responses outlined in Diagram B? If not, what other timescales would you suggest and why?</b>  Yes X  No  Other (please specify)</p>	<p>Yes we agree with the timescales for responses outlined in Diagram B</p>
<p><b>Q5: Do you agree that the proposed form at Annex A should be used? If not, what changes should be made to the form or what other method or format would you suggest and why?</b>  Yes  No X  Other (please specify)</p>	<p>We agree that a form should be used but we consider the form in Annex A to be too technical and should be simplified. The changes we propose to the prescribed form are:</p> <ul style="list-style-type: none"> <li><b>The form</b>  Using the numbers in the prescribed form, we suggest: <ol style="list-style-type: none"> <li>We suggest including notes at the bottom of the form and moving the information about section 29A Landlord and Tenant Act 1985 to the notes at the end of the form. An example of a form with notes is the Form of rent demand notice under section 166 of the Commonhold and Leasehold Reform Act 2002 (the 2002 Act)  <a href="http://www.legislation.gov.uk/uksi/2004/3096/schedule/made">http://www.legislation.gov.uk/uksi/2004/3096/schedule/made</a></li> <li>Please refer to Question 3 above for our recommendations</li> <li>Should be moved to 4. The address to send the completed form should come last</li> <li>Should come after 2 so the qualifying tenant fills in their details and then signs and dates the form in order rather than jumping from 2 to 4 which may be confusing for some qualifying tenants.</li> </ol> </li> <li><b>Glossary:</b>  We also feel that certain amendments should be made to the glossary as follows: <ol style="list-style-type: none"> <li>the glossary should be in alphabetical order</li> <li>it should include a manager appointed under Part 2 of the 1987 Act to act in relation to the premises as the request will be sent to the manager where one is appointed</li> <li>Assured shorthold Tenant should be defined separately rather than being included under 'Qualifying Tenant'. The reason being that guidance from the First-tier Tribunal (Property Chamber) on recognising tenants' associations suggests voting</li> </ol> </li> </ul>

	<p>must be restricted to those members liable to pay variable service charges and for the purposes in connection with sections 18 – 30 of the Landlord and Tenant Act 1985 (LTA 1985).</p> <p>iv) Constitution – a definition of ‘constitution’ should be included and it should also be indicated that a model constitution can be obtained from the First-tier Tribunal (Property Chamber). A suggested definition is ‘a document that sets out the aims and objectives of the association and governs the running of the association.’</p> <ul style="list-style-type: none"> <li>• <b>Template letter – Request by secretary of a residents association to the landlord to require the landlord to request information about qualifying tenants</b></li> </ul> <p>The first step in this process starts with the secretary of the residents association contacting the landlord to request the landlord provides each qualifying tenant with the prescribed form to ask for consent to the landlord providing their contact information to the secretary. We recognised that it would be helpful for the secretaries of associations to have a standardised format to use to make the request to the landlord.</p> <p>To further assist in this regard LEASE has drafted a free template letter which secretaries may use to make the request to the landlord. The form will be available on the LEASE website under template letters at: <a href="http://www.lease-advice.org/template-documents/">http://www.lease-advice.org/template-documents/</a></p> <p><b>A sample template letter is attached in the annex to this response.</b></p>
<p><b>Q6: Do you agree that consent should be sought from the qualifying tenant before the landlord passes on contact information to the secretary? If you do not agree, what reasoning can you present to say why?</b>  <b>Yes X</b>  <b>No</b>  <b>Other (please specify)</b></p>	<p>We agree that consent should be sought from the qualifying tenants before the landlord passes on contact information to the secretary for the following reasons:</p> <p>i) A qualifying tenant might not want other residents to have their contact details.</p> <p>ii) It could be a breach of Schedule 1 Part 1 Paragraph 2 of the Data Protection Act 1998 which provides that personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes. Guidance from the Information Commissioners Office (ICO) states:</p> <p>“In practice, the second data protection principle means that you must:</p> <ul style="list-style-type: none"> <li>• be clear from the outset about why you are collecting personal data and what you intend to do with it;</li> <li>• comply with the Act’s fair processing requirements – including the duty to give privacy notices to individuals when collecting their personal data;</li> <li>• comply with what the Act says about notifying the Information Commissioner; and</li> <li>• ensure that if you wish to use or disclose the personal data for any purpose that is additional to or different from the originally specified purpose, the new use or disclosure is fair.</li> </ul> <p>In practice, you often need to get prior consent to use or</p>

	<p>disclose personal data for a purpose that is additional to, or different from, the purpose you originally obtained it for.”</p> <p><a href="https://ico.org.uk/for-organisations/guide-to-data-protection/principle-2-purposes/">https://ico.org.uk/for-organisations/guide-to-data-protection/principle-2-purposes/</a></p>
<p><b>Q7: What justification might be provided for an opt-out, rather than an opt-in, system and what precedents exists to justify this?</b></p>	<p>We would recommend an opt-in rather than an opt – out for the following reasons:</p> <p>i) Members of the association may be required to pay membership or subscription fees and as such, qualifying tenants should first be given all the information they need about joining the RTA so they can make an informed decision on opting in. Freedom of choice would be taken away if qualifying tenants are forced to be members of an association that is voluntary</p> <p>ii) Understanding the complexities of the leasehold structure is complicated enough for leaseholders and throwing in the requirement for an opt out will only add to the complication for qualifying tenants</p> <p>iii) With the Right to Manage (RTM) process under the provisions of section 78 of the 2002 Act, the RTM company is required to send the Notice of Invitation to Participate (NITP) to qualifying tenants to invite them to join the process.</p> <p><a href="http://www.legislation.gov.uk/ukpga/2002/15/section/78">http://www.legislation.gov.uk/ukpga/2002/15/section/78</a></p> <p>The NITP is an 'opt – in' procedure and the purpose was aptly explain by Lord Whitty (in addressing a proposed amendment to the 2002 Act): ".....The noble Lord, Lord Kingsland, also proposes allowing the landlord to require evidence that the notice to participate has been served. We see no need for such a provision. The invitation to participate is intended to ensure that all leaseholders know that it is proposed to acquire that right, which will also help the RTM company to sign up sufficient members.”</p> <p><a href="https://publications.parliament.uk/pa/ld200001/ldhansrd/vo010301/text/10301-32.htm">https://publications.parliament.uk/pa/ld200001/ldhansrd/vo010301/text/10301-32.htm</a></p> <p>iv) The government is investigating the ‘subscription trap’ where consumers are automatically opted in and charged at the end of a free trial and consumers have to opt out. In the Spring Budget 2017 the government set out proposals to investigate ways to protect consumers from unnecessary costs including preventing consumers from being charged unexpectedly when a subscription is renewed or a free trial ends</p> <p><a href="https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/597467/spring_budget_2017_web.pdf">https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/597467/spring_budget_2017_web.pdf</a></p>
<p><b>Q8: How should the cost charged by landlords be calculated?</b></p>	<p>We are of the view that this process should be at no cost to the residents association or its members jointly or severally. The danger in costs being charged to the residents association is that an unscrupulous landlord may threaten to use costs as a means to discourage the setting up of the association.</p> <p>A modern managing agent or landlord should already be engaging with qualifying tenants and they should have a process in place already to send out service charge demands to those tenants and if they are engaging, the need to go down this process should be unnecessary.</p> <p>However, if the government is minded to pass the costs to the</p>

residents association, the costs must be capped so that it is not used by a landlord to frustrate or deter the process.

Two examples of where costs are capped are:

- Application fees in the Leasehold valuation Tribunal Wales where there is a fixed hearing fee of £150 and for applications concerning dispensation with consultation requirements, determination as to suitability of nominated insurer, appointment of managers and variation of leases the application costs are as follows:

Number of dwellings	Application fee
up to five	£150
between six and ten	£250
more than ten	£350

<http://gov.wales/docs/rpt/publications/lvt-rpt-q1-guidance-en.pdf>

- Application fees at the First-tier Tribunal (Property Chamber) are fixed at £100 application with a hearing fee of £200. The Civil Proceedings, First-tier Tribunal, Upper Tribunal and Employment Tribunals Fees (Amendment) Order 2016 <http://www.legislation.gov.uk/ukxi/2016/807/made>

**Q9: Who should pay the costs?**

The residents association is an unincorporated association with no legal personality to acquire liability and as such, if the government is minded to require the residents association to pay the costs, the process will need to be thought out very carefully in terms of how this would work.

By contracts, with the Right to Manage (RTM) process where a company limited by guarantee is set up, the provisions of section 89 (3) of the 2002 Act in relation to costs provide that in addition to the RTM company, each person who is or has been a member of the RTM company is also liable for those costs (jointly and severally with the RTM company and each other person who is so liable)

<http://www.legislation.gov.uk/ukpga/2002/15/section/89>

In the case of the residents association, can the association itself as well as its members be held jointly and severally liable for the landlord's costs incurred in complying with this procedure? If the association fails to pay, can the landlord go after the officers or members personally as the association has no legal identity?

It is vital to explain to the individuals involved their liability in undertaking this process. This underlines how important it is for qualifying tenants to see the constitution before they consent to becoming members.

We would suggest that the costs are absolved as part of the managing agent's fees and not passed on to the residents association.

<p><b>Q10: What safeguards should be in place so that charges are reasonable?</b></p>	<ul style="list-style-type: none"> <li>• The First-tier Tribunal (Property Chamber) should have the jurisdiction to determine the reasonableness of the charges.</li> <li>• We suggest that the presumption should be that the costs are unreasonable and the burden to prove that they are reasonable should lie with the landlord.</li> <li>• There should be no application or hearing fee payable to make an application to the Tribunal.</li> <li>• The landlord should be prevented from being able to pass on any legal costs incurred at the Tribunal back to the qualifying tenants through the service charge or to members or officers of the association. This could be achieved by the Tribunal making an order similar to section 20C of the Landlord and Tenant Act 1985.  <a href="http://www.legislation.gov.uk/ukpga/1985/70/section/20C">http://www.legislation.gov.uk/ukpga/1985/70/section/20C</a></li> </ul> <p>The Tribunal application form provides that “a tenant may apply to the Tribunal for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.”</p>
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We hope that these comments prove helpful, but if you have any questions please feel free to contact me.

Yours faithfully

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**ANNEX**

**Letter from the secretary of a tenants' association requiring the landlord to request information about tenants**

**Section 29A Landlord and Tenant Act 1985**

**s130 Housing and Planning Act 2016**

In connection with the building/estate known as [*give address of the building/estate*]

To: [*state name and address of landlord*]

From: [*state name and address of secretary of the relevant tenants' association*]

TAKE NOTICE THAT:

1. I am the secretary of ..... (*give full name of the relevant tenants' association*) ("the Association")

2. I am seeking formal recognition of the Association.

3. I require you as the landlord to request the leaseholders/tenants paying a service charge to you to confirm whether

**a)** they consent to you or a managing agent acting on your behalf sending their contact information to me AND/OR

**b)** they consent to becoming a member of the Association

4. You are required to comply with this request by sending FORM No. XX – Housing and Planning Act 2016 Section 130, SI # XXXXX to the leaseholders/tenants paying a service charge to you **within 5 working days** of receiving this request.

Signed:                    [*Signature of secretary*]

Dated: