



Scottish Information
Commissioner
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Decision Notice 090/2025

Charging under the EIRs

Authority: East Lothian Council

Case Ref: 202300567

Summary

The Applicant asked the Authority for information about potholes. The Authority issued the Applicant with a fees notice under the EIRs. The Commissioner investigated and found that the Authority was not entitled to issue the Applicant with a fees notice in this case. He required the Authority to issue a revised review outcome.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant” and “the Commissioner” and paragraphs (a) and (c) of the definition of “environmental information”) (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 8(1), (3), (4) and (8) (Charging); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

Background

1. On 13 April 2023, the Applicant made a request for information to the Authority. He asked for a copy of the requests made for [the Authority] to repair a specific road and a full breakdown for the cost of 74 pot holes that were repaired in 2023.
2. The Authority responded on 19 April 2023. It issued the Applicant with a fees notice for £96.90, under regulation 8 of the EIRs, and stated that it was not obliged to proceed with the request until the fee was received.

3. On 26 April 2023, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because he considered that he should be treated as exempt from charges under the EIRs by virtue of being in receipt of benefits.
4. The Authority notified the Applicant of the outcome of its review on 3 May 2023, which fully upheld its original decision.
5. On 5 May 2023, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. The Applicant stated that he was dissatisfied with the outcome of the Authority's review for the reasons set out in his requirement for review.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 11 May 2023, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
8. The case was subsequently allocated to an investigating officer.

Commissioner's analysis and findings

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Application of the EIRs

10. Where information falls within the scope of the definition of "environmental information" in regulation 2(1) of the EIRs, a person has a right to access it (and the public authority a corresponding obligation to respond) under the EIRs, subject to various restrictions and exceptions contained in the EIRs.
11. The Commissioner is satisfied that the information requested falls within the definition of environmental information in regulation 2(1) of the EIRs (in particular paragraphs (a) and (c) of that definition).

Section 39(2) – Environmental information

12. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs.
13. In this case, the Commissioner accepts that the Authority was entitled to apply this exemption to the information withheld under FOISA, given his conclusion that it is properly classified as environmental information.
14. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public

interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA.

15. The Commissioner therefore concludes that the Authority was entitled to apply section 39(2) of FOISA and to consider the Applicant's information request under the EIRs. In what follows, he will therefore consider this case solely in terms of the EIRs.

Regulation 8 of the EIRs – Charging

16. In the fees notice it issued to the Applicant, the Authority stated that since 2019 it has been its policy to recover full staff costs for every information request received which falls under the EIRs.
17. In [Decision 257/2024](https://www.foi.scot/decision-2572024)¹, the Commissioner found that this blanket approach to charging by the Authority failed to meet the requirements of regulation 8 of the EIRs. He has since updated his [guidance on charging for environmental information](https://www.foi.scot/sites/default/files/2025-03/Charging_for_environmental_information.pdf)² in view of his finding in Decision 257/2024.
18. Following this decision, the Authority informed the Commissioner that it was reviewing its approach to charging under the EIRs. It subsequently confirmed it now considered it appropriate to waive the fee for the Applicant's request.
19. In the absence of any explanation of why, other than the Authority's previous approach to charging, it was appropriate to issue a fees notice in this case, the Commissioner must find that the Authority failed to meet the requirements of regulation 8 of the EIRs in responding to the Applicant's information request.
20. Consequently, the Commissioner requires the Authority to issue the Applicant with a revised review outcome under regulation 16 of the EIRs (which must not impose a fresh charge under regulation 8(1)).

Decision

The Commissioner finds that the Authority failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that the Authority, in responding to the Applicant's information request, failed to meet the requirements of regulation 8 of the EIRs.

The Commissioner therefore requires the Authority to provide the Applicant with a revised review outcome under regulation 16 of the EIRs (which must not impose a fresh charge under regulation 8(1)), by **13 June 2025**.

¹ <https://www.foi.scot/decision-2572024>

² https://www.foi.scot/sites/default/files/2025-03/Charging_for_environmental_information.pdf

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Cal Richardson
Deputy Head of Enforcement

29 April 2025