



Scottish Information
Commissioner
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Decision Notice 102/2025

Whether information should be provided free of charge

Authority: East Lothian Council
Case Ref: 202401573

Summary

The Applicant requested several planning case files relating to a specified property. The Authority responded under the EIRs and issued a fees notice. The Commissioner investigated and found that the Authority failed to meet the requirements of regulation 8 of the EIRs when responding to the request. 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); 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 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 1 August 2024, the Applicant made the following request for information to the Authority:

“I would like to view a number of planning case files that relate to the Abbey Care Home (also known at some point as the Abbey Retirement home) in Old Abbey Road, North Berwick EH39 4BP. The files I would like to see are as follows:

93/00749/HIS _L and _P
94/00749/HIS _L and _P

94/00449/HIS_L and _P
95/00267/HIS_L and _P 95/00418/HIS_p
98/00015/HIS_L”

2. The Authority responded on 2 August 2024 in terms of the EIRs. It issued the Applicant with a fees notice, under regulation 8 of the EIRs, advising her that it would have to search for the files requested in its archives and, to do this, it required a non-refundable fee of £7.60 per file.
3. On 2 September 2024, following intervening correspondence from the Applicant disputing the nature of the fee notice, the Authority wrote to the Applicant to advise that her request for information was excepted from disclosure under regulation 6(1)(b) of the EIRs on the basis the information was already publicly available and easily accessible.
4. On 20 September 2024, the Applicant wrote to the Authority requesting a review of its decision. She stated that that she was dissatisfied with the decision because the information requested could only be viewed by arrangement and by paying a fee. She said she strongly disagreed with the requirement for a fee and that she disagreed that the information was “available in any other way”.
5. The Authority notified the Applicant of the outcome of its review on 25 October 2024, which upheld the original decision to request a payment of a fee for providing the information requested and the reasonableness of the payment requested.
6. On 2 December 2024, 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 she was dissatisfied with the outcome of the Authority’s review because she did not consider that the Authority was entitled to charge a fee to produce the information requested.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 3 December 2024, the Authority was notified in writing that the Applicant had made a valid application, and the case was subsequently allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions relating to the fees notice it issued to the Applicant.

Commissioner’s analysis and findings

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

Application of the EIRs

11. The information requested appears to fall clearly within the scope of the definition of environmental information contained in regulation 2(1) of the EIRs.
12. The Applicant made no comment on the Authority's application of the EIRs in this case, and the Commissioner will consider the request in what follows solely in terms of the EIRs.

Regulation 8 of the EIRs – charging

13. The Authority issued a fees notice in terms of regulation 8 of the EIRs. This allows a Scottish public authority to charge a fee for making environmental information available under regulation 5(1) (regulation 8(1)). By virtue of regulations 8(4) and (6), the authority may require the payment of the fee in advance and is not required to make the information available unless the fee is paid.
14. The Commissioner recently issued [Decision 257/2024](#)¹ in which he considered the Authority's general approach to charging. This decision found that the blanket approach to charging by the Authority failed to meet the requirements of regulation 8 of the EIRs. The Commissioner has since updated [his guidance on charging for environmental information](#)² to reflect his finding in this decision.

The Authority's submissions

15. The Authority stated that since Decision 257/2024 was issued it had placed its charging policy and Schedule of Fees under review and that it was "taking a general approach of waiving fees for EIR requests" until such time as these documents could be amended with reference to up-to-date guidance from the Commissioner.
16. However, the Authority explained that this was not a blanket approach. In this case, it maintained the application of a fee was reasonable "as a measure of recouping costs incurred by the [Authority] to produce the information requested", which it considered was in line with the provisions of regulation 8 of the EIRs.
17. The Authority initially advised the Applicant that a non-refundable fee of £7.60 would be required per file. However, during the investigation, it clarified that the total fee payable to produce the files would be £7.60 only. It explained that the Planning Department modified its charges in September 2024 from £7.60 per file to £7.60 per property and that it wished to apply the per property rate to the Applicant's request in recognition that this fee was modified while her case was still in progress. It issued the Applicant with a revised fees notice on 28 March 2025 to this effect.
18. The Authority explained that the charge in this case was calculated on the basis of transport costs to travel to the off-site storage facility where planning records are stored. The fee included staff time to retrieve the paper file and make it available for inspection.
19. The Authority submitted that the £7.60 charge was significantly lower than the actual staffing costs to retrieve the information, and so it considered the charge to "fall well within" the stipulations of regulation 8(3) of the EIRs, which states that such fees "shall not exceed a reasonable amount and in any event shall not exceed the costs to the authority of producing the information requested".

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

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

20. The Authority referred to the Commissioner's guidance on charging for environmental information which stated that, in circumstances where the authority might offer the requester the opportunity to view information onsite, the authority could still charge for the location and retrieval of the information. It considered the £7.60 fees notice was reasonable and not of such a value as to dissuade requesters from seeking to obtain environmental information.
21. The Authority confirmed that it had been incorrect to apply the exemption in regulation 6(1)(b) of the EIRs to the information requested as it was not published or otherwise accessible. It said that the information requested had been located and would be readily produced on receipt of the fee requested.

The Applicant's submissions

22. The Applicant did not agree that the Authority should be entitled to charge to see files "that should be publicly accessible". She noted that if she wanted to see "current" files, it would be arranged. She did not believe that there should be a difference between current files and historic files and disagreed that the Authority was "entitled to charge members of the public or that historic planning files are exempt from free inspection".
23. The Applicant explained that she was acting on behalf of a community group that was seeking to acquire a specified property and her request sought to establish if the alterations to the listed building were lawful. She submitted that the actions of the Authority prevented access to information which she believed should be in the public domain and prevented her from establishing the scope of the approved works and the scope of the implemented works.
24. The Applicant explained that she was unhappy with the fees notice. She noted that the original fees notice was not simply a charge of £7.60, but £7.60 per file. In response to the revised fees notice, she noted that the Authority had failed to let her know the fees had changed until after she made an appeal to the Commissioner. She explained she considered this an attempt by the Authority to avoid adverse comment from the Commissioner and stated that she would not withdraw her appeal for a decision.

The Commissioner's view

25. The fundamental purposes of the EIRs (and the Convention and Directive they implement) are to allow general access to environmental information and participation in environmental decision-making. A fee or system of fees which is inconsistent with these fundamental purposes, either intentionally or in effect, will not be reasonable
26. As stated above, the Authority originally issued the Applicant with a fees notice that said it required a "£7.60 non-refundable fee per file". However, during the investigation, it clarified that the total fees payable to produce the files would be £7.60 only (and it issued the Applicant with a revised fees notice on 28 March 2025 to this effect).
27. As detailed in paragraph 16 above, the Authority submitted that charging a fee in relation to request under the EIRs was not a "blanket approach". However, this is inconsistent with the information provided to the Applicant within the revised fees notice the Authority issued on 28 March 2025, which says:

"Since 2019, it has been [the Authority's] policy to recover full staff costs for every information request received which falls under the Environmental Information Regulations 2004 (EIRs)."

28. Charging for making environmental information available needs to be consistent with the fundamental purposes of the legislation, particularly allowing general access to environmental information and participation in environmental decision-making.
29. The Commissioner understands the Applicant's dissatisfaction with the original fees notice. The original fees notice required the Applicant to pay a non-refundable fee of £7.60 per file and the Authority maintained the reasonableness of this fees notice in its review outcome (dated 25 October 2024), despite it having modified its approach to charging in September 2024 to apply charges per property rather than per file.
30. In terms of the sum involved in the revised fees notice, it is among the lowest upon which the Commissioner has issued a decision regarding this Authority's charging under the EIRs. Notwithstanding the Authority taking a general approach of waiving fees for EIR requests following Decision 257/2024, the Commissioner considers this illustrative of a specific problem arising from the blanket charging (as described in the Authority's revised fee notice dated 28 March 2025) for environmental information.
31. The Authority's own stated position is that it charges for environmental information in order to "recover costs". However, it is clear to the Commissioner that imposing a fee and dealing with the Applicant's subsequent appeal to his office has cost the Authority far more (in terms of staff time and costs) than the £7.60 that it now wants to recoup from the Applicant. The rationale for the charge, in the circumstances, is not entirely clear, but it does not appear to lie in straightforward cost recovery.
32. The Commissioner considers that the Authority's determination to recover even some of the cost of providing information under the EIRs has, in this case, resulted in the Authority incurring significantly more costs than if it had simply just complied with the request.
33. The Commissioner has carefully considered the Authority's submissions and all other matters of relevance. In this case, in view of all the factors detailed above, the Commissioner cannot accept the Authority's approach to charging in this case. He concludes, in all the circumstances of the case, that the Authority failed to meet the requirements of regulation 8 of the EIRs in responding to the information request made by the Applicant.
34. 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)).
35. The Commissioner notes that the Applicant has said that her reason for requesting the files has now "long gone". The fact that the Applicant no longer has the same need for the information requested underlines the importance of public authorities making the correct assessment at the time requests are received on whether to impose a charge to produce the information requested. Often, requests for information are important at particular points in time – and a decision to wrongly impose a charge to produce information requested can frustrate requesters and the ultimate purpose of FOI law.

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 12 June 2025.

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.

Euan McCulloch
Head of Enforcement

28 April 2025