



Scottish Information
Commissioner
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Decision Notice 033/2026

Legal advice relating to the use of the Visitor Levy

Authority: City of Edinburgh Council

Case Ref: 202501532

Summary

The Applicant asked the Authority for legal advice provided to the Housing, Homelessness and Fair Work Committee. The Authority considered the request under FOISA and withheld the information on the basis that it was exempt from disclosure. The Commissioner investigated and found that the Authority had considered the request under the wrong legislation. The requested information was environmental information, and the Authority should have considered the request under the EIRs. The Commissioner required the Authority to respond to the request under the EIRs.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(a) and (2)(b) (Effect of exemptions); 26(a) (Prohibitions on disclosure); 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”, “the applicant”, “the Commissioner” and paragraphs (a), (b) and (c) of definition of “environmental information”) (Interpretation); 5(1) (Duty to make available environmental information on request); 16 (Review by Scottish public authority); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions).

Background

1. On 21 July 2025, the Applicant made a request for information to the Authority. He referred to a [report](#)¹ on the Edinburgh Visitor Levy Housing Options (Item 7.2) considered at a meeting of the Housing, Homelessness and Fair Work Committee on 13 May 2025. He noted that paragraph 4.4 of the report referred to legal advice being set out in Appendix 1 and requested a copy of this legal advice.
2. The Authority responded on 13 August 2025 in terms of FOISA. It informed the Applicant that it was withholding the legal advice under the exemption in section 26(a) of FOISA as disclosure was prohibited under paragraphs 3, 6, 12 and 14 of Part 1 of Schedule 7A of the Local Government (Scotland) Act 1973.
3. On 18 August 2025, 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 the legal advice should be disclosed.
4. The Authority notified the Applicant of the outcome of its review on 2 September 2025, which fully upheld its original decision.
5. On 3 September 2025, 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 because he considered that the legal advice should be disclosed.

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 16 October 2025, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and the case was subsequently allocated to an investigating officer.
8. 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, including whether it considered the information requested was environmental information.

Commissioner's analysis and findings

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

¹ <https://democracy.edinburgh.gov.uk/documents/g7784/Public%20reports%20pack%2013th-May-2025%2010.00%20Housing%20Homelessness%20and%20Fair%20Work%20Committee.pdf?T=10>

FOISA or EIRs?

10. The relationship between FOISA and the EIRs was considered at length in [Decision 218/2007](#)². Broadly, in the light of that decision, the Commissioner's general position is as follows:
 - (i) The definition of what constitutes environmental information should not be viewed narrowly.
 - (ii) There are two separate statutory frameworks for access to environmental information, and an authority is required to consider any request for environmental information under both FOISA and the EIRs.
 - (iii) Any request for environmental information therefore must be handled under the EIRs.
 - (iv) In responding to a request for environmental information under FOISA, an authority may claim the exemption in section 39(2).
 - (v) If the authority does not choose to claim the section 39(2) exemption, it must respond to the request fully under FOISA: by providing the information; withholding it under another exemption in Part 2; or claiming that it is not obliged to comply with the request by virtue of another provision in Part 1 (or a combination of these).
 - (vi) Where the Commissioner considers a request for environmental information has not been handled under the EIRs, he is entitled (and indeed obliged) to consider how it should have been handled under that regime.
11. As noted above, given the subject matter of the request, the Commissioner asked the Authority to consider whether the request properly fell to be handled as a request for environmental information and therefore responded to under the EIRs.
12. The Authority did not agree that the request fell to be considered under the EIRs and responded solely under FOISA.
13. The Authority said that it did not consider at the time of the request whether the information requested was environmental information but commented that it did not "obviously fall" within the scope of the definition set out in regulation 2(1) of the EIRs. It noted that the environmental impact of housing developments (including any supported by Visitor Levy funds) is assessed during the planning application/determination process and that such information is publicly accessible on the planning portal.
14. The Commissioner has considered the withheld information. While he must take care not to reveal its specific content, it is apparent from the report on Edinburgh Visitor Levy Housing Options considered at the Committee meeting that the legal advice at Appendix 1 relates to "options for proposed investment in Housing" (paragraph 4.4).
15. The Commissioner acknowledges that not all legal advice obtained in relation to the Visitor Levy will necessarily be environmental information. However, given the specific topics that the legal advice at Appendix 1 relates to and the Authority's [intended use for funds raised from the Visitor Levy](#)³, he is satisfied that, in this context, the legal advice is information on a measure affecting, or likely to affect, the state of the elements of the environment or factors affecting, or likely to affect, those elements.

² <https://www.foi.scot/decision-2182007>

³ <https://www.bbc.co.uk/news/articles/c2k4q274eppo>

16. In all of the circumstances, therefore, the Commissioner is satisfied that the legal advice falls within the definition of environmental information set out in regulation 2(1) of the EIRs (in particular paragraph (c) of that definition).
17. Given that the information requested is properly considered to be environmental information, the Authority had a duty to consider it in terms of regulation 5(1) of the EIRs. In failing to do so, the Authority failed to comply with regulation 5(1).

Section 39(2) of FOISA – environmental information

18. 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.
19. In this case, as stated above, the Authority did not agree that the request fell to be considered under the EIRs and instead responded solely under FOISA.
20. The Commissioner finds that the Authority would have been entitled to apply this exemption to the request, given his conclusion that the information requested was properly classified as environmental information.
21. As there is a separate statutory right of access to environmental information available to the Applicant, the Commissioner also accepts that, in this case, the public interest in maintaining this exemption and in handling the request in line with the requirements of the EIRs outweighs any public interest in handling the request under FOISA. This is particularly so given that the Authority withheld the legal advice under the absolute exemption (i.e. not subject to the public interest test) in section 26(a) of FOISA. No equivalent exception exists under the EIRs – and all exceptions under the EIRs are subject to the public interest test.

Regulation 16 of the EIRs

22. Regulation 16 of the EIRs states that, on receipt of a requirement to conduct a review, the authority shall review the matter and decide whether it has complied with the EIRs, within 20 working days (regulations 16(3) and (4)). It also states that, where an authority has not complied with its duty under the EIRs, it shall immediately take steps to remedy the breach of duty (regulation 16(5)).
23. Although the Authority responded to the Applicant's requirement for review on 2 September 2025, this was a result of the Authority considering the request solely in terms of FOISA and not under the EIRs.
24. It is apparent that the Authority failed to respond to the Applicant's request of 21 July 2025 in terms of the EIRs. As such, it failed to comply with regulation 5(1) of the EIRs. It is also apparent that the Authority failed to carry out a review meeting the requirements of regulation 16 of the EIRs.
25. The Commissioner therefore requires the Authority to provide a response to the Applicant's requirement for review of 18 August 2025 in terms of regulation 16 of the EIRs.
26. The Commissioner's decision below states a compliance date of 16 April 2026, in line with the timescales he is required to follow. This is the latest day on which the Authority must issue a response: the deadline does not prevent the Authority from issuing one sooner.

Decision

The Commissioner finds that the Authority failed to comply with the requirements of regulations 5(1) and 16 of the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the Applicant's information request and requirement for review.

The Commissioner requires the Authority to provide a response to the Applicant's requirement for review, in terms of regulation 16 of the EIRs, by 16 April 2026.

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

2 March 2026