

# EIRs Guidance Series

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## Differences between FOISA and the EIRs

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Scottish Information  
Commissioner

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## Glossary and abbreviations

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<b>Term used</b>	<b>Explanation</b>
<b>Commissioner/SIC</b>	The Scottish Information Commissioner
<b>EIRS</b>	Environmental Information (Scotland) Regulations 2004
<b>FOISA</b>	Freedom of Information (Scotland) Act 2002
<b>Section 60 Code</b>	Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs (December 2016 version)

# FOISA and the EIRs

## Introduction

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1. This short briefing looks at the differences between the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004 (the EIRs).
2. Although the regimes have a lot in common, they're not identical. For example, a request under the EIRs can be made verbally and, in some cases, authorities are allowed to take 40 working days to respond to an EIRs request. This means it's important to understand the differences between the two.

## EIRs Guidance Series

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3. This is the seventh and final part of a series of guidance on the EIRs. The guidance aims to provide an understanding of what constitutes environmental information, which bodies are covered by the EIRs, and how to handle a request for environmental information.
4. The full series covers the following:
  - (i) Introduction to the EIRs <sup>1</sup>
  - (ii) What is environmental information?<sup>2</sup>
  - (iii) Which bodies are covered by the EIRs<sup>3</sup>
  - (iv) What do the EIRs require Scottish public authorities to do?<sup>4</sup>
  - (v) Handling requests for environmental information<sup>5</sup>
  - (vi) An overview of the exceptions<sup>6</sup>
  - (vii) Differences between the EIRs and FOISA.

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<sup>1</sup> [http://www.itspublicknowledge.info/Law/EIRs/EIRs\\_Introduction.aspx](http://www.itspublicknowledge.info/Law/EIRs/EIRs_Introduction.aspx)

<sup>2</sup> <http://www.itspublicknowledge.info/Law/EIRs/WhatIsEnvironmentalInformation.aspx>

<sup>3</sup> <http://www.itspublicknowledge.info/Law/EIRs/EIRsCoverage.aspx>

<sup>4</sup> <http://www.itspublicknowledge.info/Law/EIRs/EIRsObligations.aspx>

<sup>5</sup> <http://www.itspublicknowledge.info/Law/EIRs/EIRsHandlingRequests.aspx>

<sup>6</sup> <http://www.itspublicknowledge.info/Law/EIRs/EIRsExceptions.aspx>

## The differences

5. The key differences between the two regimes are set out in table below.

	EIRs	FOISA
<b>Active dissemination</b>	<p>Authorities must:</p> <ul style="list-style-type: none"> <li>organise and keep environmental information up to date</li> <li>disseminate that information actively and systematically.</li> </ul>	<p>Authorities must adopt and maintain a publication scheme.</p>
<b>Charging</b>	<p>Authorities can make a reasonable charge for making the information available (but not for inspecting information).</p> <p>Authorities must publish a schedule of charges.</p>	<p>Authorities can charge for locating, retrieving and providing the information under the Fees Regulations<sup>7</sup>.</p>
<b>Copies of documents</b>	<p>The duty to make environmental information available includes the duty to provide copies of documents.</p>	<p>FOISA gives people the right to access information, not documents. (In many cases, the easiest way to respond to a request is to give a copy of a document.)</p>
<b>Cost limit</b>	<p>The EIRs don't have an upper or lower cost limit. This means a request can't be refused just because it would cost too much. (However, requests might be manifestly unreasonable.)</p> <p>With no lower cost threshold, an authority can charge for providing any information under the EIRs, providing the charge is reasonable.</p>	<p>An authority is not obliged to respond to a request if complying would exceed £600.</p> <p>An authority cannot charge for the first £100 of costs.</p>
<b>Late requests for review</b>	<p>Authorities can't accept late requests for review under the EIRs. If they do – and the requester appeals to the Commissioner – the appeal will be invalid.</p>	<p>An authority can comply with a late request for review if it considers it appropriate to do so.</p>
<b>Emissions</b>	<p>Information on emissions has a special status: some of the exceptions in the EIRs can't be used to withhold information on emissions.</p>	<p>No equivalent under FOISA.</p>

<sup>7</sup> The Freedom of Information (Fees for Required Disclosure) (Scotland) 2004 and the Freedom of Information (Fees for Disclosure under Section 13) (Scotland) Regulations 2004

	EIRs	FOISA
<b>Extending the response time</b>	The 20 working day period for responding to a request can be extended by up to 20 working days if the volume <i>and</i> complexity of the information requested makes it impractical for the authority to deal with the request more quickly.	The authority must respond in 20 working days. <sup>8</sup>
<b>Format of request</b>	Requests can be made in any format: verbal requests for environmental information are valid under the EIRs.	Requests must be in writing or any other format capable of having some permanency.
<b>Historical records</b>	The exceptions can be applied regardless of how old the information is.	Some exemptions can't be applied to "historical records". In many cases, this means information which is more than 15 years old.
<b>Neither confirm nor deny</b>	An authority can refuse to confirm or deny whether it holds: <ul style="list-style-type: none"> <li>information if the exception in regulation 10(5)(a) applies and revealing whether the information exists would not be in the public interest</li> <li>personal data if disclosure would be contrary to regulation 11</li> </ul>	An authority can refuse to confirm or deny whether it holds information if one of the exemptions in sections 28 to 35, 38, 39(1) or 41 applies <u>and</u> revealing whether the information exists would be contrary to the public interest.
<b>Prohibitions on disclosure</b>	The EIRs trump other laws: any law which would prevent an authority making environmental information available does <i>not</i> apply.	Other laws trump FOISA: information is exempt if its disclosure is prohibited by other laws.

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<sup>8</sup> The Coronavirus (Scotland) Act 2020 allows the Commissioner to find that, despite taking more than 20 days, an authority did not breach FOISA. The 2020 Act does not affect requests made under the EIRs. For more information on the 2020 Act, see <https://www.itspublicknowledge.info/Law/Covid-19EmergencyLegislation.aspx>.

	<b>EIRs</b>	<b>FOISA</b>
<b>Public interest and restrictive interpretation</b>	<p>All of the EIRs exceptions:</p> <ul style="list-style-type: none"> <li>• are subject to the public interest test</li> <li>• must be read in a restrictive way</li> <li>• a presumption in favour of disclosure should be applied.</li> </ul> <p>(Regulation 11, which deals with personal data, is a quasi-exception. The public interest test applies only to parts of the regulation.)</p>	<p>The public interest test applies to only some of the exemptions in FOISA.</p>
<b>Scottish public authority</b>	<p>The definition of a Scottish public authority is wider under the EIRs than FOISA.</p>	<p>FOISA covers:</p> <ul style="list-style-type: none"> <li>• bodies listed in Schedule 1</li> <li>• bodies designated under section 5 of FOISA</li> <li>• publicly-owned companies.</li> </ul>
<b>Transfer of request</b>	<p>The EIRs allow authorities to transfer a request to another body.<sup>9</sup></p>	<p>FOISA does not allow authorities to transfer requests to another authority.</p>

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<sup>9</sup> Guidance on transferring requests can be found in paragraphs 9.3.4 and 9.3.5 of the Section 60 Code.

## Document control sheet

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