



A guide to the Environmental Information (Scotland) Regulations, 2004, (EISR)

Information Assurance Group

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1. Requests for Information under the Environmental Information (Scotland) Regulations (EISR)

Anyone or any organisation world-wide can ask for environmental information, without having to prove or give a reason for their interest in the information requested. All requests must receive a response within 20 working days of receipt of the initial request, unless the request is complex and voluminous and an extension of a further 20 working days is required.

Unlike under Access to Information legislation, such as Freedom of Information (Scotland) Act, 2002, (FOISA) and Data Protection Act, 1998, (DPA), a request may be made verbally. Requests should be forwarded immediately to the FOI team to log and coordinate.

1.1. Definition of Environmental Information

If information is in the possession of the Council and has been produced or received by the Council, or, is held on behalf of another person or local authority then the information is considered to be “held” and should be released under the EISR. Unlike FOISA, the EISR do not exempt information that the Council holds on behalf of another person.

The definition is very wide and is defined in the EISR as information that relates to:-

- The state of elements of the environment – such air, water, soil, land, landscape and natural sites, flora and fauna, including cattle, crops, GMOs, wildlife and biological diversity – and it includes any interaction between them.
- The state of human health and safety, conditions of human life, the food chain, cultural sites and built structures, which are, or are likely to be, affected by the state of the elements of the environment and the interaction between them.
- Any factor such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases affecting, or likely to affect, the state of the elements of environment or any interaction between them
- Measures and activities affecting, or likely to affect, or intended to protect the state of the elements of the environment and the interaction between them. This includes administrative measures, policies, legislation, plans, programmes and environmental agreements
- Emissions, discharges and other releases into the environment
- Cost benefit and other economic analyses used in environmental decision making

1.2. Procedures and Responsibilities

The Records and Heritage Manager is responsible for policy, guidelines, monitoring, reporting and advice to the Council for EISR. The Records and Heritage Manager manages the FOI Team.

The FOI team are responsible for managing and co-ordinating requests for information and sending out requests for clarification, exemptions, refusals and such like under FOISA. The FOI team will log all requests on Lagan Customer Relationship Management system (CRM) within one day of requests being received.

The FOI team will forward requests to a designated service co-ordinator in each department and provide the department with a deadline for responding. The service co-ordinator is responsible for collating and returning the response to the FOI team by the deadline.

Departments are responsible for researching and providing the answers to the information requested, any refusals should be clearly explained. Departments should return responses with details of staff time taken.

If the request is not clear, the department should request that the FOI team ask the requester for clarification. The 20 day clock is suspended until such clarification is received.

For resource intensive enquiries, departments will investigate the response and advise the FOI team of all estimated costs. A decision on whether to charge will then be made by the FOI team, the 20 days clock will be suspended until payment is received.

Any clarifications, payment demands and/or exceptions must be made within the 20 working day timescale. If the request is voluminous and complex then an extra 20 working days may be allowed, departments need to inform the FOI Team if a request will require the extra timescales as soon as possible, so the FOI team can notify the requester of the extra time required.

The Records and Heritage Manager will consider the application of any exceptions or refusals.

Once a response is received by the FOI team, they will respond to the requester with the relevant information and close the case on the CRM system.

1.3. Advice and Guidance

The FOI team and the Records and Heritage Manager can provide detailed or specific advice and guidance as required.

Legal Services are responsible for legal advice, guidance and policy. The FOI team and Records and Heritage Manager will consult with Legal as appropriate.

1.4. Monitoring

Lagan CRM will be used to monitor timescales, record enquiries, details of requesters and officers dealing with the request, and extract statistical information for reporting purposes both to the Council and to the SIC. The system will be reviewed regularly and further briefings will be sent out as necessary.

2. Implementation of the Regulations

The Council must:-

- give advice and assistance to any person making a request for environmental information
- make environmental information available to any person who requests it as quickly as possible and within 20 working days of their request, or
- exceptionally within 40 working days if the request is complex and voluminous
- refuse only in accordance with the limited exceptions available under the Regulations; give reasons, and provide details of the procedures available to requesters for review of a refusal and the process for appeal
- ensure that internal procedures are in place to deal with representations for review
- make environmental information available proactively, especially by electronic means – update and maintain the Publication Scheme.
- provide training for staff (if required please contact the FOI team)

The Council may:-

- transfer the request to another authority as appropriate

2.1. Charging

A Scottish public authority may charge a 'reasonable amount' under Section 8 (3) of the EISR for the provision of environmental information but this should not exceed the actual cost of supplying the information, for example, the actual cost of locating, retrieving and photocopying information. The fee cannot seek recovery of the original cost of creating the information.

The Council is not allowed to charge for access to public registers or lists of environmental information held by it or to consult information at a place which the authority makes available for that purpose. We may request the fee in advance before making the information available. We must notify the applicant in writing that there is a charge and evidence how this charge has been costed. The fee must be paid within 60 working days.

Charging was introduced by the Policy Committee, 24 October 2007. For current fees please see: http://www.moray.gov.uk/moray_standard/page_54971.html

2.2. Refusal to Provide Information

These Regulations continue and extend the presumption that environmental information will be made available on request but refusal is possible in a limited number of circumstances. These are of two categories:

1. Relating to the extent that certain circumstances exist, namely where the information is not held by the Council; the request is manifestly unreasonable;

the request has been made in too general a manner; it relates to information which is incomplete; or it relates to internal communications. In these cases the Scottish public body should provide as much advice and assistance as possible to the applicant.

2. In circumstances where making information available would, or would be likely to, prejudice substantially a number of interests.

A refusal is subject to the public interest test (see below).

Information relating to emissions is given a special status and must be supplied in most cases.

In cases where a request for environmental information relates to a combination of information that can be released and information that would not be in the public interest to release, the information should be separated out and the part that can be released made available to the applicant. The applicant must be informed of any refusal as soon as possible and within 20 working days in most cases.

Where the response to a request contains a refusal to make information available or available in a particular format then the FOI team will send a refusal that must:

- be in writing
- state clearly the reasons for refusal
- state the basis for applying any exception, if it would not otherwise be apparent
- where environmental information is incomplete and the exception in regulation 10(4)(d) is relied on, state the time by which the Council considers that the information will be complete
- provide details of the mechanisms for review and appeals procedures available against the decision to refuse the request

The purpose of providing reasons to an applicant is to enable them to determine whether the refusal is well founded in fact and law, or whether they want to challenge the decision for the refusal.

2.3. Duty to Provide Advice and Assistance

Under Section 9, authorities have a duty to provide advice and assistance to requesters. Example of this are:

- Providing an outline of the different kinds of information which might meet the terms of the request.
- Providing access to detailed catalogues and indexes to help the requester understand the nature and extent of information held.
- Providing a general response setting out options for further information which could be provided on request.

2.4. EISR and FOISA

Both Acts allow public access to information. However, there are differences as well as similarities.

Section 39(2)(a)

EISRs and FOIs are not mutually exclusive, and a request that is made specifically under FOI can be answered as an FOI so long as it is also answered as an EIR as well; alternatively the request can be refused as an FOI under section 39(2)(a), so long as it is then fully answered under EIR, as this satisfies FOI and EIR. The FOI team can provide assistance.

Key differences between EISR and FOISA

- Requests for information can be made verbally under EISR
- The 20 working day time period can be extended to a total of 40 days where the request is complex, voluminous and would involve a great deal of work
- Provision for charging of fees is different – under EISR there are no upper and lower thresholds and the Council can recover the full cost of supplying the information.
- EISR have ‘exceptions’ rather than the ‘exemptions’ found in FOISA and are all subject to the Public Interest Test. Only the exception for personal data may be considered an absolute exception and not subject to the public interest test.
- EISR requests and responses are not published online.
- Where parallel regimes are potentially applicable, the FOISA will apply unless information is environmental information, to which the EISR regime will apply instead. If the information is personal data, then DPA will apply instead. There should be no overlap.

Key similarities between EISR and FOISA

- Active dissemination – covers all stakeholders
- Records Management – the same approach should be followed for all information
- Public Interest Test – is the public interest best served in with-holding information?
- Fees for providing information – can be the same for both regimes although EISR have no lower or upper thresholds
- Enforcement procedures – the same for both regimes
- Copyright is enforced in the same way for both regimes

2.5. EISR and the Data Protection Act

The difference between a request for information under EISR and DPA:

- A request under EISR will be for environmental information and should not contain personal information. We cannot release any information if doing so would mean breaching any of the Data Protection principles.

- If information requested contains sensitive personal information it will be dealt with via a DPA Subject Access Request. A SAR request must be from a living individual requesting personal information about himself/herself (the data subject); under DPA the Moray Council charges a £10 fee. For further information [here](#).

A request may in part need to be handled as an EISR and also in part as a Subject Access Request or FOI. These types of requests are handled by the FOI Team and they can provide specific guidance as required.

3. Withholding Information

3.1. Section 6 (1)(b) Already Publicly Available

If the information requested is already publicly available and easily accessible to the applicant, even if in another form or format than requested, then the request can be answered citing Sec. 6 and providing a suitable link to the information.

3.2. Section 12 Ministerial certificates

Scottish Ministers may certify that making certain environmental information available would or could compromise national security; this information is therefore withheld without need to apply the Public Interest Test.

3.3. Public Interest Test (Sec. 10(1)(b))

Before a Scottish public authority can refuse a request using an Exception it will first need to carry out a public interest test. This is a similar public interest test to that in section 2 (1)(b) of FOISA.

The public interest has been described as something that is “of serious concern or benefit to the public not merely of individual interest”. It has also been stated that public interest does not mean “of interest to the public” but “in the interest of the public”.

The term is not defined in the EISRs and its meaning may change over time and according to the circumstances of each situation. Scottish public authorities will therefore need to make a subjective judgement based on the circumstances of each case and in the light of any emerging Guidance or good practice.

It is difficult to set out a definite list, but amongst the factors that may inform a decision about the public interest are:

- the general public interest that information is accessible i.e. whether disclosure would enhance scrutiny of decision-making processes and thereby improve accountability and participation
- whether disclosure would contribute to the administration of justice and enforcement of the law or would prejudice the prevention or detection of crime

- or the apprehension or prosecution of offenders
- whether disclosure would affect the economic interests of the whole or part of the UK
- whether disclosure would contribute to ensuring effective oversight of expenditure of public funds and that the public obtain value for money
- whether disclosure keeps the public adequately informed of any danger to public health or safety, or to the environment
- whether disclosure would impact substantially on safeguarding national security or international relations
- whether disclosure would contribute to ensuring that any Scottish public authority with regulatory responsibilities is adequately discharging its functions
- whether disclosure would contribute to a debate on a matter of public interest
- whether disclosure would prejudice the protection of an individual's right to privacy

In deciding whether a disclosure is in the public interest, authorities should not take into account:-

- possible embarrassment of Scottish public authority officials
- possible loss of confidence in government or other public authority
- the seniority of persons involved in the subject matter
- the risk of the applicant misinterpreting the information

Refusal to provide environmental information is permissible only in circumstances where the public interest in refusing the information outweighs the public interest in disclosing it.

3.4. EISR Exceptions

10(4)(a) – Information not held

10(4)(b) – A “manifestly unreasonable request” (the words of the Regulations), this could include a request for information that places a substantial and arduous burden on the Council.

10(4)(c) – Request is too general – the Council may refuse a request for information on the grounds that it has been presented in too general a manner to allow the information to be identified and then formulated into a sensible response.

10(4)(d) – Incomplete data. Whether or not a document can be categorised as complete data will depend on the circumstances and should be considered on a case by case basis. Data that is part of routine monitoring should not be regarded as part of an ongoing unfinished set but should normally be released as soon as practicable after collection, or according to a planned and published timescale.

10(4)(e) – Internal communication. Information contained in internal communications or between Scottish public authorities may be excepted from the duty to release if it is of a confidential nature

10(5)(a) –

International relations. Information relating to international relations may be excepted if it is of a confidential nature

In case of defence. Information that may jeopardise the ability of the armed forces to carry out their defence function

National Security and public safety.

10(5)(b) – The course of justice. Where disclosure may substantially prejudice the outcome of a case

10(5)(c) – Intellectual property rights

10(5)(d) – Confidentiality of proceedings of any Scottish public authority

10(5)(e) – Commercial or industrial confidentiality

10(5)(f) – Interests of the person providing the information, ensure continuation of flow of information e.g. sample surveys etc. or if the person has not consented to disclosure.

10(5)(g) – Release of information may cause harm to the environment e.g. withholding the whereabouts of endangered or protected species to keep them safe from harm

Sec. 11 – Personal information – Data Protection Act (1998) will apply

4. Reviews and Appeals

The applicant has a right to a review by the Council if they are dissatisfied with the response to their enquiry. It is important to keep all paperwork and replies filed where they can be easily retrieved as they may be needed for the review and appeal process. All applicants must be informed of the right to review and appeal; the templates used and issued by the FOI team carry this information.

The Review Panel will comprise of department staff involved in the original decision, Records and Heritage Manager, Legal Services and FOI team. Someone not involved with the original decision may also attend the review hearing.

If after the review the requestor is still dissatisfied they have the right to appeal to the Scottish Information Commissioner (SIC). Again, this appeal option is issued on the standard templates used by the FOI team.

5. Copyright

Copyright (the Copyright, Designs and Patents Act, 1988) applies to information supplied in the replies to EISR enquiries and is owned by the Moray Council. In supplying the information the Council does not give an automatic right to re-use material in any way that would infringe copyright. Extracts may be taken from copyright material for the purposes of non-commercial private study or research,

review, or current news reporting. For all other purposes only insubstantial extracts may be re-used without infringement of copyright. Information stating this is included in the EISR templates used by the FOI team.

The Re-use of Public Sector Information Regulations sets out guidance for how public sector information can be re-used and where charges may be applicable. More information is available on the council website under Re-Use of Public Sector Information (please see below for links).

6. Publication Scheme

Under EISR the Council is obliged to maintain a Publication Scheme. As the Council is already subject to produce a publication scheme under FOISA Sec. 23 there is no further demand under EISR. However, unlike FOISA, under Reg. 4 there is an indication that this information should be promoted with 'active dissemination', particularly for electronically available information.

The Council has a duty to keep the publication scheme up to date. If there are any suggestions for material that could be added to the scheme then please contact the Records and Heritage Manager.

The current Publication Scheme and further information is available: www.moray.gov.uk/moray_standard/page_84996.html

7. History of the EISR

The first Environmental Information Regulations date from 1992 amended in 1998. In 1998 the UK signed the Convention on Access to Information, Public Participation and Access to Justice in environmental matters at Aarhus in Denmark in 1998 – the Aarhus Convention. The EISR 2004 enable Scotland to comply with the Convention and with the Aarhus-based EU Directive 2003/4/EC of 28 January 2003 on public access to environmental information. Separate regulations apply to the rest of the UK.

8. References and Links

Moray Council's Website pages:

Information Management

http://www.moray.gov.uk/moray_standard/page_41220.html

Freedom of Information

http://www.moray.gov.uk/moray_standard/page_53728.html

Environmental Information

http://www.moray.gov.uk/moray_standard/page_54160.html

Re-Use of Public Sector Information

http://www.moray.gov.uk/moray_standard/page_54272.html

Access to Information fees

http://www.moray.gov.uk/moray_standard/page_41220.html

All Council fees

http://www.moray.gov.uk/moray_standard/page_54971.html

Moray Council's Intranet Pages:

Information Security (inc. FOI, DPA)

http://intranet.moray.gov.uk/Information_management/information_security.htm

Records Management (inc. Retention Schedules, Confidential waste etc.)

http://intranet.moray.gov.uk/Information_management/records_management.htm

Environmental Information (Scotland) Regulations, 2004:

www.legislation.gov.uk/ssi/2004/520/contents/made

A Code of Practice on the Discharge of Functions by Scottish Public Authorities under the EISR was published on July 2006 by the Scottish Executive Environment Group. See website below for copy of the Code of Practice:

www.gov.scot/Resource/Doc/143347/0036381.pdf

Scottish Government produced guidance on the implementation of EISR available:

www.scotland.gov.uk/Resource/Doc/69582/0017416.pdf

Scottish Information Commissioner:

www.itspublicknowledge.info/index.htm

Differences between EIRs and FOISA

<http://www.itspublicknowledge.info/Law/EIRs/EIRsDifferencesEIRSandFOISA.aspx>

<http://www.itspublicknowledge.info/Law/WhichLawApplies.aspx>

The Information Commissioner's Office:

<https://ico.org.uk/>

9. Contact

If you have any questions or suggestions please contact:

FOI Team:

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