

EIRS Guidance Series

Which bodies are covered by the EIRs?



Scottish Information
Commissioner

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Glossary and abbreviations

Term used	Explanation
The Commissioner	The Scottish Information Commissioner
EIRS	Environmental Information (Scotland) Regulations 2004
FOISA	Freedom of Information (Scotland) Act 2002
SIC	The Scottish Information Commissioner, staff of SIC (depends on context)
(UK) EIRs	Environmental Information Regulations 2004
CJEU	Court of Justice of the European Union
Directive	Directive 2003/4/EC on public access to environmental information
Upper Tribunal	Administrative Appeals Chamber of the Upper Tribunal

EIRs Guidance Series

1. This is the third part of a series of guidance on the EIRs. The full series covers the following:
 - Introduction to the EIRs¹
 - What is environmental information?²
 - Which bodies are covered by the EIRs?
 - What do the EIRs require Scottish public authorities to do?³
 - Handling requests for environmental information⁴
 - An overview of the exceptions⁵
 - Differences between the EIRs and FOISA⁶.
2. See **Appendix 1: Resources** for a link to all of the guidance.

The definition of “Scottish public authority” in the EIRs

3. Under regulation 5(1) of the EIRs, a Scottish public authority that holds environmental information must make it available when requested to do so.
4. Regulation 2(1) of the EIRs defines “Scottish public authority.” This is considered in detail in this guidance. The full definition is also set out in **Appendix 2: Definitions**.
5. The definition of “Scottish public authority” in the EIRs is wider than the definition in FOISA. Every body which is subject to FOISA is automatically subject to the EIRs, but not every body which is subject to the EIRs is subject to FOISA.

Definition (a): Public authorities subject to FOISA

any body which, any other person who, or the holder of any office which is –

- (i) listed in schedule 1 to FOISA (but subject to any qualification in that schedule), or
- (ii) designated by order under section 5 of FOISA

6. Any authority listed as a Scottish public authority for the purposes of Schedule 1 of FOISA is automatically subject to the EIRs.
7. Under section 5(1) of FOISA, the Scottish Ministers can extend the provisions of FOISA to bodies that appear to the Scottish Ministers to exercise functions of a public nature; or who

¹ http://www.itspublicknowledge.info/Law/EIRs/EIRs_Introduction.aspx

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

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

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

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

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

are providing, under contract with a Scottish public authority, any services whose provision is a function of that public authority.

8. Bodies which are designated by the Scottish Ministers under section 5 of FOISA are also automatically subject to the EIRs.
9. If a body is listed in Schedule 1, but for only limited purposes, then it will only be subject to the EIRs for those limited purposes. For example, a doctor contracted to do work for the NHS is subject to FOISA, but only in respect of information relating to the work done for NHS services. The same qualification exists for such doctors under the EIRs.
10. See **Appendix 1: Resources** for more information about which bodies are subject to FOISA.

Definition (b): Publicly-owned companies

a publicly-owned company as defined by section 6 of FOISA

11. Publicly-owned companies are subject to the EIRs, provided they fall within the definition in section 6 of FOISA.
12. A company is a “publicly-owned company” if it is wholly owned by the Scottish Ministers or by any other authority listed in Schedule 1 to FOISA (unless that authority is listed only in relation to information of a specified description).
13. This provision covers companies which are wholly owned by one or more public authorities. These include companies set up by local authorities to explore new economic and transport initiatives and companies set up by universities to develop their research commercially.
14. The following are well-known publicly-owned companies:
 - Caledonian MacBrayne Limited, owned by the Scottish Ministers
 - Glasgow Life, owned by Glasgow City Council
 - Glasgow Prestwick Airport, owned by the Scottish Ministers

Definition (c): Public authorities with mixed or no reserved functions

any other Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998)

15. The Scotland Act 1998 established the Scottish Parliament. Schedule 5 of the Scotland Act lists the functions (“the reserved functions”) which are outwith the legislative competence of the Scottish Parliament. These include the defence of the realm, money laundering, data protection, immigration and rail transport. (See **Appendix 1: Resources** for a link to the Scotland Act.)
16. Bodies with no reserved functions within the meaning of the Scotland Act are those which operate exclusively in Scotland and their function is wholly within the legislative competence of the Scottish Parliament and Scottish Government.

17. Bodies with mixed functions are those which conduct public functions assigned to them by both Holyrood and Westminster. Local authorities, for example, have mixed functions. They, however, are already designated through Schedule 1 of FOISA and so fall into the first category of Scottish public authorities. To date, no public authority has been identified as being subject to the EIRs purely on this basis.

Definition (d): Bodies controlled by another authority

any other person who is neither a public body nor the holder of a public office and who is under the control of a person or body falling within paragraphs (a), (b) or (c) of this definition and –

- (i) has public responsibilities relating to the environment
- (ii) exercises functions of a public nature relating to the environment; or
- (iii) provides public services relating to the environment

18. Private companies, bodies, persons or organisations which are “under the control of” a Scottish public authority may have responsibilities relating to the environment. This could include private contractors involved in PPP/PFI or similar contracts and other bodies with environmental functions, e.g. functions relating to waste disposal, energy production, drainage, transport or environmental consultancy.
19. If a body has functions relating to the environment and is under the control of a Scottish public authority, it will be subject to the EIRs.
20. In 2013, the Court of Justice of the European Union (CJEU) issued its decision in *Fish Legal v Information Commissioner* in 2013. See **Appendix 1: Resources** for a link to the decision. The CJEU looked at the matters which had to be taken into account in determining whether privatised water companies in England and Wales were public authorities under the UK EIRs. As part of this, the CJEU considered whether the water companies were under the control of another public authority (i.e. Ofwat or the Secretary of State).
21. According to the CJEU, an entity may be under the control of another body where it does not determine in a genuinely autonomous way the manner in which it performs its functions. An entity may also be under the control of another body if the other body is able to exert a decisive influence on the entity’s actions.
22. The CJEU referred the matter back to the Administrative Appeals Chamber of the Upper Tribunal, which hears appeals under the (UK) EIRs against decisions of the Information Commissioner and the First-Tier Tribunal. The Upper Tribunal concluded that the water companies were not under the control of Ofwat (the economic regulator of the water sector in England and Wales) or the Secretary of State (although they were subject to the (UK) EIRs for other reasons – see paragraph 50 below. See **Appendix 1: Resources** for a link to the Upper Tribunal decision.

Deciding whether an entity is subject to definition (d) of the EIRs

23. As noted above, there is a twofold test to determine if bodies are covered by part (d) of the definition of Scottish public authority in the EIRs:
- (i) they must be under the control of a Scottish public authority and

- (ii) the body must either have public responsibilities relating to the environment; exercise functions of a public nature relating to the environment or provide services relating to the environment.

Under the control of an authority

24. "Control" means a relationship, constituted by law, rights, licence, contract, financial or other means, which allows one body to directly or indirectly exercise a decisive influence on another body.
25. The following factors may therefore be relevant when establishing whether control exists:
 - (i) regulatory control, including the issuing (or refusal) of permits or licences
 - (ii) investment (both financial and non-financial)
 - (iii) contractual relationships and obligations
 - (iv) environmental function and public responsibility in relation to that function
 - (v) governance and accountability
 - (vi) legal duties
26. As noted above, the level of control should be sufficient to exert a significant or decisive influence, effect or direction on the body under consideration. It is expected that the influence exerted will be by a Scottish entity or one of Scottish origin, and that this will be one distinguishing factor from control under the UK EIRs.
27. To understand what, if any, control is exerted over a body, the Commissioner may need to request:
 - (i) contracts and memoranda of understanding between the bodies
 - (ii) the statutory duties conducted by, or powers invested in, both entities involved
 - (iii) other responsibilities of the organisations in question, and
 - (iv) the regulatory framework
28. When determining whether the body falls under the scope of the EIRs or the UK EIRs, the Commissioner will take into account the status of the controlling authority in determining whether that body falls under the scope of FOISA or FOIA. Where there is ambiguity regarding the appropriate jurisdiction for any such body, the Commissioner will consult with the UK Information Commissioner. A body cannot be subject to both the EIRs and the UK EIRs (see regulation 2(3) of the UK EIRs). If the UK Regulations apply, the Scottish EIRs will not.

Registered social landlords

29. The Commissioner has decided that registered social landlords (RSLs) in Scotland are Scottish public authorities for the purposes of the EIRs. This is because they are under the control of the Scottish Housing Regulator and have public responsibilities relating to the environment. See **Appendix 1: Resources** for a link to the Commissioner's decisions on this point.

30. RSLs and their subsidiaries are due to become subject to FOISA in November 2019. At that time, RSLs will automatically also be subject to the EIRs. Public responsibilities, etc. relating to the environment
31. To fall within the scope of this part of the definition, the organisation in question must have **either** public responsibilities, exercise functions of a public nature **or** provide public services relating to the environment.

Public responsibilities

32. “Public responsibilities relating to the environment” is broader in nature than the term “public administrative functions” as set out in the UK EIRs. Private individuals’ actions impacting on the environment are often set by government, e.g. the use of fertilisers and pesticides is controlled by both criminal and civil law.
33. However, “public responsibility” here is intended to be interpreted more widely. Where the environment has to be managed or safeguarded, the public responsibility is clearer.

Public services

34. The notion of what constitutes “public services” may vary over time. Generally, this will include those services provided by national or local government to its citizens whether directly, through arm’s length agencies or even through private providers. They may be provided for the common good without regard to income (e.g. paid for out of general taxation) such as health care and social services. They may also involve payment or subsidy from the public purse, e.g. social housing and public transport, even where directly related payment for the service is required.

Public functions

35. The term “public function” also appears in section 5 of FOISA. (Section 5 allows the Ministers to designate bodies as Scottish public authorities for the purposes of FOISA if they are exercising functions of a public nature or are providing, under contract with a Scottish public authority, any service whose provision is a function of that authority.)
36. Any body designated under section 5 of FOISA is automatically subject to the EIRs. This provision is therefore likely to apply to bodies which could be designated under section 5. The following bodies have been designated under section 5:
 - (i) Arms length culture, sports and leisure trusts established by local authorities
 - (ii) Private prisons
 - (iii) Grant-aided schools
 - (iv) Independent special schools
 - (v) Scottish Health Innovations Limited
37. The notion that there are “functions” which should be delivered in a “public” way is a difficult concept to pin down. The Commissioner will therefore consider each application on a case-by-case basis.
38. Readers interested in this subject may find it useful to read the Commissioner’s Special Report: FOI 10 Years On – are the right organisations covered? Although the report focusses on designation under section 5 of FOIA, the discussion around the definition of

“public function” is also likely to be relevant here. See **Appendix 1: Resources** for a link to the special report.

39. Similarly, the House of Lords Joint Committee on Human Rights has produced a series of reports entitled “The Meaning of Public Authority under the Human Rights Act”. Some of its findings may also assist in the interpretation of “public function” under the EIRs. The key test it sets out is whether the “public function” is one for which the Government has assumed responsibility in the public interest. For the purposes of the EIRs, the devolved matters for which the Scottish Parliament currently has legislative competence would dictate the scope of this interpretation.

“...relating to the environment”

40. The public responsibilities, functions or services must “relate to” to the environment. In other words, do the public responsibilities, functions or services, viewed objectively, have an impact on the environment, or does the environment impact on them?
41. Bodies which fall under the scope of this part of the definition will only be covered to the extent of that environmental function, service or responsibility. The Aarhus Implementation Guide⁷ gives examples of water management functions which might be provided by a government institution or a private entity (in Scotland, Scottish Water is already listed as a Scottish public authority in Schedule 1 of FOISA). Another example would be the provision of waste collection services outsourced by a local authority. The incumbent contractor would be covered by the EIRs to the extent that the function is carried out for the local authority to fulfil a statutory duty. To date the Commissioner has not determined any bodies fall within this part of the definition and are therefore subject to the EIRs.
42. If any individual/body or organisation is unclear as to its status under the EIRs, it should seek legal advice. Any disputes will be considered by the Commissioner and, ultimately, the Courts. Each case will be considered on its own merits, and whether a body is wholly or partly covered by the EIRs may change over time as regulation, the operation of markets, legislation, public policy on the delivery of public services and devolution affect matters.
43. Therefore, there can be no comprehensive list of authorities which fall within this part of the definition, as the relationship between private entities and the public sector is complex and subject to developments over time, which may result in bodies being drawn within or falling outwith the scope of this definition.
44. For some bodies, if greater powers are devolved from Westminster to Holyrood in the future, this may require a re-assessment of whether the body, and/or its functions so far as the EIRs are concerned, fall under the EIRs or whether its functions fall to be covered by the UK EIRs.
45. See **Appendix 1: Resources** for a link to some decisions from the (UK) ICO as to bodies which are – or aren’t – subject to the (UK) EIRs.

Administrative functions – an important difference in approach

46. The definition of “public authority” in the EIRs is different from the definition in the Directive. Both definitions are set out in **Appendix 2: Definitions**.

⁷https://www.unece.org/env/pp/implementation_guide.html

47. The Directive makes it clear that any natural or legal person performing administrative functions under national law, including specific duties, activities or services in relation to the environment is a public authority for the purposes of the Directive.
48. The Scottish EIRs do not reflect this definition, although the UK-wide EIRs do. The decisions issued in Scotland have therefore focussed on the definition of “control” rather than of “public administrative functions.”
49. Much of the case law in the rest of the UK has focussed on the definition of public administrative functions. As noted above, the CJEU issued its decision in *Fish Legal v Information Commissioner* in 2013. See **Appendix 1: Resources** for a link to the decision.
50. The CJEU looked at the matters which had to be taken into account in determining whether privatised water companies in England and Wales were public authorities under the UK EIRs. As part of this, the CJEU considered whether the water companies performed public administrative functions under national law in relation to the environment.
51. The CJEU said (at paragraph 52) that this category:

... concerns administrative authorities defined in functional terms, namely entities, be they legal persons governed by public law or by private law, which are entrusted, under the legal regime which is applicable to them, with the performance of services of public interest, inter alia in the environmental field, and which are, for this purpose, vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.
52. The CJEU referred the matter back to the Administrative Appeals Chamber of the Upper Tribunal, which hears appeals under the (UK) EIRs against decisions of the Information Commissioner and the First-Tier Tribunal. The Upper Tribunal concluded that the water companies were subject to the EIRs by having “special powers” (definition (b) of the Directive). See **Appendix 1: Resources** for a link to the Upper Tribunal decision.

Appendices

Appendix 1: Resources

SIC Decisions

Reference	Decision Number	Parties	Summary
29	118/2014	Mr X and Dunbritton Housing Association	The Commissioner concluded that a housing association was a public authority in line with definition (d) in regulation 2 of the EIRs: it was under the control of the Scottish Housing Regulator, itself a public authority for the purposes of the EIRs, and had public responsibilities, etc., relating to the environment.
29	099/2015	Mr X and Dunbritton Housing Association	A year later, Dunbritton Housing Association again argued that it was not subject to the EIRs. Again, the Commissioner disagreed.

All of the Commissioner's decisions are available on the Commissioner's website. To view a decision, go to www.itspublicknowledge.info/decisions and enter the relevant decision number (e.g. 032/2014).

If you do not have access to the internet, contact our office to request a copy of any of the Commissioner's briefings or decisions. Our contact details are on the final page.

Other Resources

Paragraph	Resource	Link
2	Introduction to the EIRs	http://www.itspublicknowledge.info/Law/EIRs/EIRs_Introduction.aspx
2	What is environmental information?	http://www.itspublicknowledge.info/Law/EIRs/WhatIsEnvironmentalInformation.aspx
2	What do the EIRs require Scottish public authorities to do?	http://www.itspublicknowledge.info/Law/EIRs/EIRsObligations.aspx
2	Handling requests for environmental information	http://www.itspublicknowledge.info/Law/EIRs/EIRsHandlingRequests.aspx
2	An overview of the exceptions	http://www.itspublicknowledge.info/Law/EIRs/EIRsExceptions.aspx
2	Differences between the EIRs and FOISA	http://www.itspublicknowledge.info/Law/EIRs/EIRsDifferencesEIRSandFOISA.aspx

10	Bodies subject to FOISA	http://www.itspublicknowledge.info/YourRights/Whocanlask/Whocanlask.aspx
15	Scotland Act 1998	http://www.legislation.gov.uk/ukpga/1998/46/contents
20	CJEU: Fish Legal v Information Commissioner	http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CJ0279:EN:HTML
Error! Reference source not found.	Directive	http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF
Error! Reference source not found.	Aarhus Convention	https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf
22	Upper Tribunal: Fish Legal v Information Commissioner	http://administrativeappeals.decisions.tribunals.gov.uk/judgmentfiles/j4428/%5B2015%5D%20AACR%2033ws.doc
38	Commissioner's Special Report: FOI 10 Years On – are the right organisations covered	http://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=8212&SID=377
45	(UK) ICO decision on the Port of London Authority	http://www.ico.gov.uk/upload/documents/decisionnotices/2006/fer0086096_dn001.pdf
45	(UK) ICO decision on Network Rail	http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fer0071801.pdf
45	(UK) ICO decision on Environmental Resource Management Ltd	https://ico.org.uk/media/action-weve-taken/decision-notices/2006/369978/DECISION_NOTICE_FS50090259.pdf
45	(UK) ICO decision on Belfast Improved Housing Association	https://ico.org.uk/media/action-weve-taken/decision-notices/2008/449260/FER_0152607.pdf

Appendix 2: Definitions

Regulation 2 of the EIRs

(1) In these Regulations –

...

“Scottish public authority” means –

- (a) any body which, any other person who, or the holder of any office which is-
 - (i) listed in schedule 1 to [FOISA] (but subject to any qualification in that schedule),
or
 - (ii) designated by order under section 5(1) of [FOISA];
- (b) a publicly-owned company as defined by section 6 of [FOISA];
- (c) any other Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998); and
- (d) any other person who is neither a public body nor the holder of a public office and who is under the control of a person or body falling within paragraphs (a), (b) or (c) of this definition and-
 - (i) has public responsibilities relating to the environment;
 - (ii) exercises functions of a public nature relating to the environment; or
 - (iii) provides public services relating to the environment; ...

Article 2(2) of the Directive

“Public authority” shall mean:

- (a) government or other public administration, including public advisory bodies, at national, regional or local level;
- (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
- (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b).

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