



Environmental Information Briefing Series

Differences between EIRS and FOISA

Requests under FOISA and the EIRs: use of section 39(2) of FOISA

1. FOISA imposes a duty on all Scottish public authorities to respond to requests for any information they hold, even when the information is environmental.
2. This means that when a request is made for environmental information, regardless of whether it is expressly made under either EIRs or FOISA, a Scottish public authority must consider the request under both FOISA and the EIRs.
3. However, section 39(2)(a) of FOISA allows an authority to exempt information from disclosure under FOISA if it is environmental information which Scottish public authorities are obliged, under the EIRs, to make available to the public.
4. Section 39(2) (b) provides that if the information is subject to one of the exceptions under the EIRs, the authority is not obliged to disclose it.

[Decision 051/2009 Advocates for Animals and the Scottish Ministers](#)

As the Commissioner commented in this decision, “Advocates for Animals made their information requests under FOISA, at least to the extent that they referred to ‘Freedom of Information’ and ‘FOI’ rather than making any explicit reference to the EIRs. This is hardly unusual, however, and does not absolve the public authority of responsibility for considering whether the information requested is in fact environmental.”

5. Decision 051/2009 Advocates for Animals and the Scottish Ministers. As the Commissioner commented in this decision, “Advocates for Animals made their information requests under FOISA, at least to the extent that they referred to ‘Freedom of Information’ and ‘FOI’ rather than making any explicit reference to the EIRs. This is hardly unusual, however, and does not absolve the public authority of responsibility for considering whether the information requested is in fact environmental.”
6. The exemption in section 39(2) is essentially a technical provision. It creates an exemption from disclosure under FOISA where information is environmental information as defined in the EIRs. It allows authorities to manage the complex relationship between these two laws, both of which give individuals rights to request environmental information. By using the exemption under section 39(2), an authority can go on to consider whether the information

needs to be disclosed solely in terms of the EIRs. The exemption is subject to the public interest test.

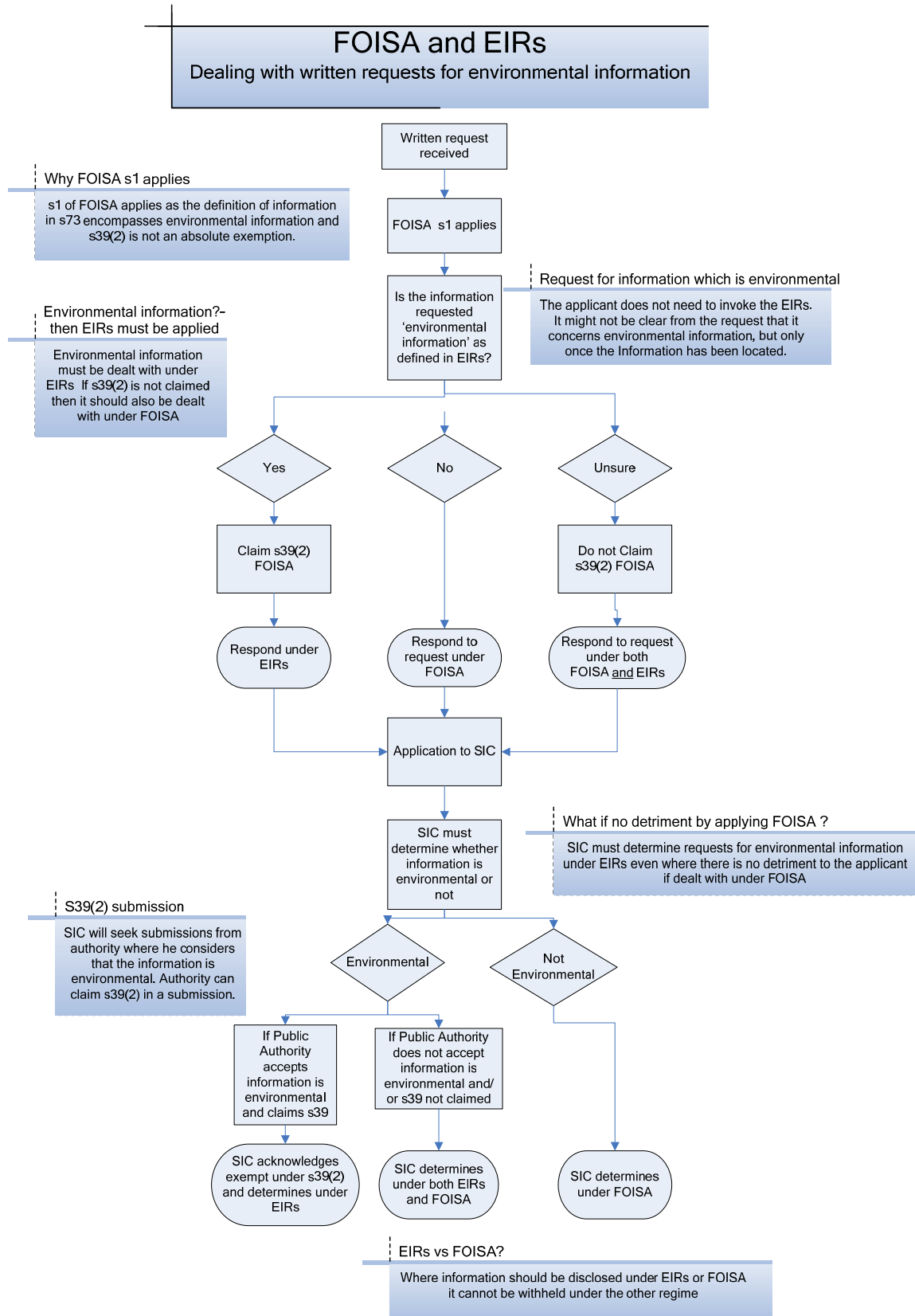
7. The Commissioner's understanding on the relationship between FOISA and the EIRs is set out in some detail in [Decision 218/2007 Professor A D Hawkins and Transport Scotland](#):
"...if the information falls within the definition of environmental information, authorities have both an obligation and an option. They have the obligation of dealing with the request under the EIRs and they have the option of claiming the exemption at section 39(2) of FOISA, which means they do not, at the same time, have to respond to the request under FOISA."
8. If a Scottish public authority claims the exemption under section 39(2), it also needs to consider the public interest test under section 2. As there is a separate statutory right of access to environmental information, the Commissioner considers that the public interest in maintaining this exemption and allowing access in line with the requirements of the EIRs will generally outweigh the public interest in the disclosure of information under FOISA. (Decision 120/2008 Mr Rob Edwards and the Scottish Ministers).
9. The effect of claiming section 39(2), so far as FOISA is concerned, is that a Scottish public authority is obliged only to consider whether there is a public interest in relation to which regime should be used to deal with the request i.e. FOISA or EIRs. The Commissioner acknowledges that it would be difficult to envisage circumstances in which there would be a prevailing public interest in disclosing the information under FOISA where the request could be dealt with under the EIRs.

Where section 39(2) is not claimed

10. There is no obligation on a Scottish public authority to claim the section 39(2) exemption. Where section 39(2) is not claimed, a Scottish public authority must consider the application under FOISA. However, this does not detract from the Scottish public authority's obligation to also consider the request under the EIRs, to the extent that the information requested is environmental information – accordingly, in such circumstances, the Scottish public authority is required to consider the request under both regimes.
11. FOISA and the EIRs are not identical and it is possible for different results to be reached under each regime.
12. Where applications are made to the Commissioner under section 47 of FOISA, these applications necessitate a decision on whether a request for information has been dealt with in accordance with Part 1 of FOISA (and under regulation 17(2)(b) of the EIRs, s47 applies equally to appeals made under the EIRs). Where a public authority has not claimed the exemption under section 39(2) the Commissioner is therefore also obliged to consider the application under both regimes.
13. Therefore, where the request concerns environmental information, Scottish public authorities are required to consider the request under the EIRs whether or not the section 39(2) exemption is claimed and where there is a conflict, the provisions of the EIRs will prevail. Scottish public authorities should therefore note that there is no advantage to be gained by relying on the provisions of FOISA.
14. Where, during the course of an investigation, it is the Commissioner's view that a request encompasses environmental information, which has previously been considered under FOISA, the Commissioner will discuss this with the public authority in question and offer it an opportunity to apply section 39(2) of FOISA.

15. Where an authority declines to apply section 39(2) of FOISA, the Commissioner will require full submissions from that authority with its reasons for withholding information under both regimes.
16. Where the request encompasses both environmental and non-environmental information, the EIRs will only apply to the extent that the information is environmental and the provisions of FOISA will apply to the remainder.
17. Public authorities may find it useful to refer to the **Environmental Information Process Flowchart** when dealing with requests for information.

Environmental Information Process Flowchart



EIRs v. FOISA: The Key Differences

	EIRs	FOISA
Format of request	There is no requirement under the EIRs that requests should be made in a format capable of having some permanency. Verbal requests are valid requests for environmental information, although Scottish public authorities are encouraged to record any verbal requests for reference.	FOISA requires requests to be in writing or any other format capable of having some permanency (section 8(1)(a)).
Copies of documents	The duty on public authorities to make environmental information available includes the duty to provide copies of documentation.	FOISA provides a right of access to information, not to documentation.
The definition of a Scottish public authority	The definition of a Scottish public authority is wider under the EIRs than FOISA.	Only those bodies listed in schedule 1 of FOISA, designated by order under section 5 of FOISA, or publicly-owned companies as defined by section 6 of FOISA (section 3).
Charging	<p>Scottish public authorities may charge only for producing the information requested (regulation 8(3)), but may not charge for inspecting information (regulation 8(2)).</p> <p>Charges may be made only in accordance with a published schedule of charges (regulation 8(8)), but which may be at variance with the FOISA fees regulations.</p>	Scottish public authorities may charge for locating, retrieving and providing the information only in terms allowed by the Fees Regulations ¹ .
Cost limit	<p>The EIRs do not have an upper or lower cost limit, effectively meaning that a request cannot be refused on cost grounds. (However excessive cost may mean that the request is manifestly unreasonable (regulation 10(4)(b)).</p> <p>With no lower cost threshold, a Scottish public authority may make a charge for the provision of any information under the EIRs.</p>	<p>Section 12(1) of FOISA provides that a Scottish public authority is not obliged to respond to a request if it estimates that the cost of complying with the request would exceed a prescribed amount (currently £600).</p> <p>A Scottish public authority may make a charge for information between specified limits (Fees regulations made under section 9(4)) but cannot charge for the first £100 of costs.</p>

¹ The Freedom of Information (Fees for Required Disclosure)(Scotland) and the Freedom of Information (Fees for Disclosure under Section 13)(Scotland) Regulations 2004

	EIRs	FOISA
What information is 'held'	Environmental information is held by an authority if it is in its possession and it has been produced or received by that authority (regulation 2(2)(a)). Unlike FOISA the EIRs do not specifically exclude information held on behalf of another person.	Under FOISA, information is not held if it is held on behalf of another person (section 3(2)(a)(i)).
Transfer of request	Unlike FOISA, the EIRs make provision for the transfer of a request from one body to another (regulation 14) (but only if the body does not hold the information or makes use of the services of another body to hold this information on its behalf (regulation 2(2))).	FOISA does not allow for the transfer of requests between Scottish public authorities. A refusal notice must be served. The applicant should be advised of which body does hold the information if it is reasonable to expect an authority to do so (section 15(1)).
Extension of 20 working day period	A Scottish public authority may extend the 20 working day period for making the information available by up to a further 20 working days, but only if the volume <i>and</i> complexity of the information requested makes it impractical for the authority to comply with the request or to make a decision to refuse to do so (regulation 7(1)).	There is no extension to the 20 working day period in which a Scottish public authority must respond to a request under FOISA.
Active dissemination	A Scottish public authority must organise and keep up to date environmental information with a view to active and systematic dissemination of that information (regulation 4(1)).	There is no direct equivalent under FOISA, although Scottish public authorities are required to adopt and maintain a publication scheme (section 23(1)).
Prohibitions on disclosure	The EIRs specifically provide that any enactment or rule of law which would prevent the making available of information in accordance with the EIRs shall <i>not</i> apply (regulation 5(3)).	FOISA specifically provides that information is exempt information if its disclosure is prohibited by or under an enactment (section 26(a)).
Emissions	Special status is given to information relating to emissions (regulation 10(6)). Essentially there will be very limited situations in which information relating to emissions can be withheld by a Scottish public authority.	There is no equivalent under FOISA of special status for emissions information.

	EIRs	FOISA
Discretion to accept representations/ requests for review	There is no discretion afforded to Scottish public authorities under the EIRs to accept representations for review where they fall outwith the timescales set out in the EIRs.	A Scottish public authority may comply with a requirement for review made after the expiry of the time allowed if it considers it appropriate to do so (section 20(6)). Unlike the EIRs, any subsequent application to the Commissioner will be valid where this provision is invoked.
Public interest and restrictive interpretation	All of the EIRs exceptions are subject to the public interest test (regulation 10(1)(b)); should be read in a restrictive way (regulation 10(2)(a)) and a presumption in favour of disclosure should be applied (regulation 10(2)(b)). (Regulation 11, which deals with personal data, is a quasi-exception to which the public interest test applies only in parts.)	The public interest test only applies to certain exemptions under FOISA, as set out in section 2.
Historical records	The exceptions in the EIRs do not fall away after a set period.	Certain exemptions cannot be applied to a 'historical record' as defined by section 57 of FOISA.

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