

EIRs Guidance

Charging for environmental information

Guidance on applying regulation 8 of the EIRs



Scottish Information
Commissioner

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Glossary and abbreviations

Term used	Explanation
FOISA	Freedom of Information (Scotland) Act 2002
EIRs	Environmental Information (Scotland) Regulations 2004
SIC/The Commissioner	The Scottish Information Commissioner, staff of SIC (depends on context)
The Directive	Directive 2003/4/EC on public access to environmental information

Charging a fee for environmental information

The main points

1. Regulation 8 of the EIRs allows public authorities to charge a “reasonable amount” for making environmental information available. Any fee charged must not exceed the costs to the authority of making that information available.
2. A charge can be made for providing a relatively small amount of information because there is no lower fees limit under the EIRs. This is different to FOISA. However, given that the charge must be reasonable and must not exceed the actual costs to the authority of providing the information, the charge for a small amount of information is likely to be low.
3. There is no upper fees limit under the EIRs. A public authority can, however, refuse to comply with a request if the request is manifestly unreasonable (regulation 10(4)(b)). See **Appendix 1: Resources** for links to the Commissioner’s guidance on applying regulation 10(4)(b) and on charging under FOISA.

Charging

Where charges may be applied

4. Regulation 8(3) of the EIRs allows authorities to charge a “reasonable amount” for making environmental information available. Any fee charged must not exceed the costs to the authority of producing the information requested. This means that indirect costs (such as the original cost of amassing data and creating a report) must not be passed on to the requester and that fees must not create a profit or surplus for the authority.
5. Regulation 8 is set out in full in **Appendix 2**. See **Appendix 1: Resources** for a link to the EIRs in full.
6. “Producing” is not defined in the EIRs. As with FOISA, public authorities are entitled to charge for the staff time taken in the location and/or retrieval of that information. Charges can include staff time redacting information so that it can be provided in response to a request, but **cannot** include time spent determining whether information is actually held or is subject to one or more of the exceptions. Charges can also include the actual costs of supplying the information such as the cost of photocopying the documents and postage.
7. The European Court of Justice has considered charging under the Directive on which the EIRs are based. The ECJ was clear that no charge can be made for dealing with a request if the authority does not hold the information which the requester has asked for. Similarly no charge may be made if the authority decides that the information is subject to one of the exceptions in the EIRs. See **Appendix 1: Resources** for a reference to the ECJ judgement.

Free inspection

8. An authority is not allowed to charge a fee for allowing requesters to access any public registers or lists of environmental information held by it or to examine (inspect) the information requested at a place which the authority makes available for that purpose (regulation 8(2)).

9. For example, the Scottish Pollutant Release Inventory, a publicly accessible database of annual mass releases of pollutants to air, water, and land from SEPA regulated industrial sites, is available on SEPA's website. If SEPA was to impose a charge to access the data on site (not that it wishes to do so), the charge would be contrary to regulation 8(2).
10. Anyone who walks into a public inspection point can expect to be given free access to environmental information which is in a public register or list.
11. The free inspection provision also applies to information that is not in a public register or list and which the requester accesses by viewing on site. For example, where information would be costly to reproduce, the authority might offer the requester the opportunity to view it onsite, so removing the need to charge for reproduction. In that case, because the information is not already in a public register or list, the authority could still charge for the location and retrieval of the information.

Is the charge reasonable or excessive?

12. The fee which an authority is entitled to charge shall not exceed a reasonable amount and must not exceed the costs of producing the information requested (regulation 8(3)). In considering whether a fee is reasonable, account should be taken of the following:
 - (i) Any costs charged must not be such that requesters are dissuaded from seeking to obtain environmental information or that the right to access is restricted.
 - (ii) In deciding whether a charge is reasonable, a public authority is not expected to take account of the particular circumstances of the requester (although it may choose to do so, e.g. by setting a specific scale of charges for unwaged people or students).
 - (iii) Public authorities should be able to demonstrate to the Commissioner that, in setting charges, they have undertaken a proper study of all of the relevant factors which should be taken into account; that they have given those factors proper consideration and that they have not taken into account any other, irrelevant factors.
 - (iv) Fees charged by other, comparable bodies, will prove a useful benchmark in determining whether a fee is reasonable.
 - (v) Authorities must be careful when agreeing a set charge for a particular type of document, e.g. a planning file, to ensure that the charge is reasonable for all documents which fall within the description. While a charge may be reasonable for a larger file, the same charge may not be reasonable for a smaller file.
 - (vi) Similarly, account should be taken of the actual costs to the authority of providing the information. For example, it is likely to be cheaper to provide a document by email than to send it out in hard copy, and this should be reflected in the charge.
 - (vii) It is not reasonable to take account of the use to which the information might be put by the requester in determining a charge.
 - (viii) Where public authorities make environmental information available on a commercial basis, and where this is necessary to guarantee the continuation of the collection and publication of the information, authorities are entitled to charge a market-based fee for the information. This will only involve information which is genuinely marketable commercially. In determining a market-based fee, the authority can only expect a rate of return which is in line with rates achieved by comparable businesses facing a similar

level of risk. A public authority cannot charge a market-based fee where it collects the environmental information to fulfil a statutory function or other normal function of the authority.

13. See **Appendix 1- Resources** for details about some decisions the Commissioner has issued on charging under the EIRs.

Has the authority informed the public of its charging regime?

14. In terms of regulation 8(8) of the EIRs, an authority must publish and make available a schedule of its fees and information on the circumstances in which a fee may be charged, waived or required to be paid in advance.
15. Recital 18 of the Directive makes it clear that the cases in which advance payment is required should be limited. Public authorities should take this into account in determining the circumstances in which fees are required to be paid in advance. A blanket approach to advance fees is likely to fall foul of the Directive.
16. Authorities which have not published a schedule of fees are not entitled to impose a fee in response to an environmental information request. See **Appendix 1: Resources** for a link to a decision of the Irish Information Commissioner on this point.
17. The Commissioner's Model Publication Scheme (adopted by all Scottish public authorities subject to FOISA) requires authorities to include information about their EIRs charging schedules in their Guides to Information.
18. The EIRs permit authorities to set their own charging schedules for environmental information.
19. For published environmental information, the Model Publication Scheme charging principle is that no charge may be made to view information on the authority's website or at its premises except where there is a fee set by other legislation. The authority may charge for computer discs, photocopying, postage and packing and other costs associated with supplying the information. The charge may be no more than these elements actually cost the authority, for example cost per photocopy or postage. An exception is made for commercial publications (Class 8) where pricing may be based on market value.
20. Public authorities should regularly review their charging structures to ensure that the fees they charge remain reasonable. In doing this, account should be taken of any changes in technology which might have the effect of reducing the cost of making environmental information available.

Fees notices and timescales

21. When a public authority issues a fees notice, the 20 working day clock (this can be extended to 40 working days under the EIRs if the request is voluminous and complex) stops until the fees notice has been paid. An applicant has 60 working days to pay the fees notice.
22. Where a fees notice is issued, and the public authority subsequently finds that it actually costs less to provide the information than anticipated, the authority should refund any overpayment. As with FOISA, the Commissioner has the power to order a public authority to repay a fee or portion of a fee if the finding is that a fee was inappropriate or excessive.

What if a request is subject to both FOISA and the EIRs?

23. This guidance focuses on charging under the EIRs. There is a separate regime covering requests for non-environmental information: FOISA. FOISA has different charging rules. (See **Appendix 1: Resources** for a link to the Commissioner's guidance on charging under FOISA.)
24. If an authority receives a request for information that can easily be split into FOISA or the EIRs, then the parts should be responded to under the correct charging regime.
25. However, it's possible that a single request could cover information which is subject to both regimes. For example, someone might ask for a copy of an authority's management team minutes and won't know, without going through the minutes, which of the information is environmental information and which is subject to FOISA.
26. In cases like this, the authority will still need to split up the information into environmental and non-environmental information. It will be entitled to take account the cost of collating all of the information (whether environmental or non-environmental) in determining whether the excessive costs provisions in section 12 of FOISA apply to the non-environmental information or whether the request for the environmental information is manifestly unreasonable.

Appendices

Appendix 1: Resources

SIC Decisions

Reference	Decision number	Parties	Summary
Error! Reference source not found.	040/2015	Mrs L and Glasgow City Council	Mrs L asked the Council about the resurfacing of a road. The Council issued her with a fees notice under the EIRs. After Mrs L paid the fee, the Council told her that the information was in fact exempted from disclosure. We criticised the Council for this and made it clear that a fee could only be charged where information was being made available. It was the responsibility of the Council to determine if information could be made available before issuing a fees notice.
13	089/2017	Q and Aberdeen City Council	The Council was asked for a plan relating to a specified planning application. It charged £50, which was challenged. The Council submitted that planning documents are routinely published and available under its publication scheme, and that fees for planning documents are published on its website. The standard charge of £50 represented the average cost of providing information from a planning file. The Model Publication Scheme guidance states that authorities cannot charge more than the cost they incur. We didn't accept that £50 was a reasonable charge for a single plan from a planning file. The decision notice summarises our advice on the use of standard charges.
13	095/2007	John B Mackintosh and Renfrewshire Council	Here, we concluded that the fees charged by the Council were unreasonable. We required the Council to issue a new fees notice. We also found that the Council had breached the EIRs by not publishing a schedule of charges.

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 don't 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
3	Commissioner's guidance: Manifestly unreasonable requests	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Manifestly_unreasonable_requests.aspx
3 21	Commissioner's FOISA guidance: Charging a fee or refusing to comply with a request on excessive cost grounds	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Fees/ChargingFOISA.aspx
5	Environmental Information (Scotland) Regulations 2004	http://www.legislation.gov.uk/ssi/2004/520/contents/made
Error! Reference source not found.	C-217/97 Commission v Federal Republic of Germany [1999] ECR I-5087	http://www.bailii.org/eu/cases/EUECJ/1999/C21797.html
16	Open Focus and Sligo County Council	https://www.ocei.ie/decisions/dCEI_07_0006-Open-Focus-Sligo-Count/

Appendix 2: Regulation 8

Charging

- (1) Subject to paragraphs (2) to (8), where a Scottish public authority is under a duty to make environmental information available under regulation 5(1), it may charge a fee for so doing.
- (2) A Scottish public authority shall not charge a fee for allowing an applicant to-
 - (a) access any public registers or lists of environmental information held by it; or
 - (b) examine the information requested at a place which the authority makes available for that purpose.
- (3) Fees charged under paragraph (1) shall not exceed a reasonable amount and in any event shall not exceed the costs to the authority of producing the information requested.
- (4) A Scottish public authority may require that payment of the whole or part of a fee under paragraph (1) be made in advance of making information available.
- (5) Where a Scottish public authority imposes a requirement under paragraph (4) it shall notify the applicant in writing.
- (6) Where a Scottish public authority has notified an applicant that advance payment is required under paragraph (5) then that authority is not obliged to-
 - (a) make the information requested available under regulation 5(1); or
 - (b) comply with regulations 6, 7 or 13,

unless the fee is paid; and any such fee must be paid within a period of 60 working days beginning with the day on which the authority gave such notification.
- (7) No working day from and including the day on which notice under paragraph (5) is given up to and including the day on which a fee is paid shall count for the purposes of determining any period of working days in accordance with regulations 5(2)(a), 6(2)(a) and 13(a).
- (8) A Scottish public authority shall publish and make available to applicants-
 - (a) a schedule of its fees; and
 - (b) information on the circumstances in which a fee may be charged, waived or required to be paid in advance.

Document control sheet

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