



Scottish Information
Commissioner
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Decision Notice 002/2025

Charging under the EIRs

Authority: East Lothian Council
Case Ref: 202301547

Summary

The Applicant asked the Authority for information about the number of people arrested and/or fined or prosecuted in relation to dog fouling, as well as dog warden costs. The Authority responded under the EIRs and issued a fees notice. The Commissioner investigated and found that the Authority failed to meet the requirements of regulation 8 of the EIRs when responding to the request. He required the Authority to issue a revised review response.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 39(2) (Health, safety and the environment); 47(1) and (2) (Application for decision by Commissioner)

The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (definition of “the Act”, “applicant” and “the Commissioner”) (Interpretation); 5(1) and (2)(b) (Duty to make environmental information available on request); 8(1), (3), (4) and (8) (Charging); 17(1), (2)(a), (b) and (f) (Enforcement and appeal provisions)

Directive 2003/4/EC of the European Parliament and of the Council 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (the Directive) recital 18

Background

1. On 8 November 2023, the Applicant made a request for information to the Authority. He asked for information about how many people in the Authority area had been arrested, fined, or appeared in court over not removing dog waste from a public place since 1998. He also asked for information relating to the cost of wages, motor vehicles, insurance and other expenses relating to the transport used by the dog warden since 1998.
2. The Authority responded on 15 November 2023. The Authority issued the Applicant with a fees notice for £3.62, under regulation 8 of the EIRs and stated that it was not obliged to proceed with the request until the fee was received.
3. On 20 November 2023, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he did not believe the decision to charge a fee was justified.
4. The Authority notified the Applicant of the outcome of its review on 29 November 2023. It upheld its decision without modification.
5. On 4 December 2023, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he believed the information should be easily available to all members of the public. He believed it was not environmental information, and it was in the public interest that the public was allowed to access the information.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 15 February 2024, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
8. The Authority provided the Commissioner with its submissions and the case was allocated to an investigating officer.

Commissioner's analysis and findings

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

FOISA or the EIRs?

10. The Authority handled the Applicant's request under the EIRs. Environmental information is defined in regulation 2(1) of the EIRs. Where information falls within the scope of this definition, a person has a right to access the information under the EIRs, subject to various restrictions and exceptions contained in the EIRs.

11. The Authority argued that the information met the definition of environmental information as described in regulations 2(1)(a), (c) and (f) of the EIRs.
12. It noted that regulation 2(1)(a) defined environmental information as “the state of elements of the environment, such as...land, landscape...biological diversity and its components...and the interaction among these elements.”
13. The Authority referred to the [Commissioner’s guidance](#)¹ which stated that “the state of the elements...will include physical, biological and chemical characteristics”. It submitted that the Applicant’s request addressed the presence of dog waste (a biological entity) in public areas of the local authority area of East Lothian (i.e. within the land/landscape). Accordingly, it argued that the request addressed elements of the environment and the interactions between these elements, and so met the definition of environmental information under Regulation 2(1)(a).
14. The Authority also referred to regulation 2(1)(c), which defined environmental information as “measures (including administrative measures) ...and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements.” It submitted that the Applicant’s request concerned measures and activities undertaken by the Authority to address and reduce the issue of dog fouling (i.e. the interaction of dog waste and landscape) thereby protecting the landscape. Given this, the Authority argued that the information met the definition of environmental information under Regulation 2(1)(c).
15. Finally, the Authority referred to regulation 2(1)(f), which defined environmental information as “the state of human health and safety, including...conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)”. The Authority argued that the presence of dog waste posed a risk to human health and safety through the transmission of disease and parasites. It submitted that measures it undertook to control and reduce dog fouling therefore addressed the state of human health and safety, and this information met the definition of environmental information under Regulation 2(1)(f).
16. The Applicant did not believe that the information was environmental.
17. Having considered the terms of the request, and all the submissions, the Commissioner is satisfied that the information requested is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs, in particular paragraphs (a), (c), and (f) of that definition. In this regard, he broadly upholds the submissions provided by the Authority.

Section 39(2) of FOISA – Environmental information

18. The exemption in section 39(2) of FOISA provides, in effect, that environmental information (as defined by regulation 2(1) of the EIRs) is exempt from disclosure under FOISA, thereby allowing any such information to be considered solely in terms of the EIRs.

¹ <https://www.foi.scot/sites/default/files/2022-03/EIRBriefingsDefinition.pdf>

In this case, the Commissioner accepts that the Authority was entitled to apply the exemption to the information withheld in this case, given his conclusion that it is properly classified as environmental information.

19. The exemption in section 39(2) is subject to the public interest test in section 2(1)(b) of FOISA. As there is a statutory right of access to environmental information available to the Applicant in this case, the Commissioner accepts, in all the circumstances, that the public interest in maintaining this exemption (and responding to the request under the EIRs) outweighs any public interest in disclosing the information under FOISA.
20. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA and to consider the Applicant's information request wholly under the EIRs. In what follows, the Commissioner will consider this case solely in terms of the EIRs.

Regulation 8 of the EIRs – charging

21. The Commissioner recently issued [Decision 257/2024](https://www.foi.scot/decision-2572024)² in which he considered the Authority's general approach to charging. This decision found that the blanket approach to charging by the Authority failed to meet the requirements of regulation 8 of the EIRs in response to the information request made by the Applicant.
22. In this case, the Authority issued a fees notice for £3.62 in terms of regulation 8 of the EIRs. This allows a Scottish public authority to charge a fee for making environmental information available under regulation 5(1) (regulation 8(1)). By virtue of regulations 8(4) and (6), the authority may require the payment of the fee in advance and is not required to make the information available unless the fee is paid.
23. In its fees notice, the Authority stated that it had been its policy since 2019 to recover full staff costs for every information request received that fell under the EIRs.
24. While regulation 8(1) of the EIRs allows a Scottish public authority to charge a fee for making environmental information available under regulation 5(1), the Commissioner does not accept that the EIRs (or, for that matter, the fundamentals of administrative law) justify the blanket application of charging without any consideration of individual circumstances, exceptions or the potential deterrent effect (even if unintended). The Commissioner does not dispute the Authority's right to have a policy, in this or any other aspect of the management of FOISA or the EIRs, but the indiscriminate application of such a policy is a very different matter.
25. Charging for making environmental information available needs to be consistent with the fundamental purposes of the legislation, particularly allowing general access to environmental information and participation in environmental decision-making.
26. In this spirit, the Commissioner notes that recital 18 in [Directive 2003/4/EC](https://www.legislation.gov.uk/eudr/2003/4/pdfs/eudr_20030004_adopted_en.pdf)³ (the Directive), from which the EIRs are derived, states, in relation to charging for supplying environmental information, that instances where advance payment will be required "should be limited".

² <https://www.foi.scot/decision-2572024>

³ https://www.legislation.gov.uk/eudr/2003/4/pdfs/eudr_20030004_adopted_en.pdf

27. Recital 18 in the Directive also states that a schedule of charges should include information on the circumstances in which a charge may be “waived”, which regulation 8(8)(b) of the EIRs also requires.
28. Further to this, the [Aarhus Implementation Guide](#)⁴, which offers guidance on the interpretation of convention from which the EIRs are derived, states that if information is to be truly accessible it must also be affordable and notes that many countries with access to information regulations try to keep information available – and free whenever possible.
29. More specifically, the Aarhus Implementation Guide notes that, to ensure financial barriers are not an impediment to access to information, and every person can afford information, public authorities often waive fee requirements. The Commissioner does not believe these reflections on practice are included simply as passing comment: they are clearly intended to have a purpose, in the context of guidance.
30. The Commissioner has also had regard to the decision of the European Court of Justice in Case 217/97 Commission v Federal Republic of Germany (specifically paragraph 47) which is reproduced (on page 94) in the Aarhus Implementation Guide:
- “Any interpretation of what constitutes “a reasonable cost” for the purposes of Article 5 of the [EC] directive [on information, 1990] which may have the result that persons are dissuaded from seeking to obtain information or which may restrict their right of access to information must be rejected.”
31. In addition, the Commissioner has considered [guidance from the UK Information Commissioner \(UK ICO\) on charging for environmental information](#)⁵. This guidance states that:
- When thinking about a charge, public authorities should begin by considering whether it is reasonable to apply a charge and whether it would deter the requester from accessing the information.
 - The UK ICO’s position is that routinely charging for supplying environmental information is not reasonable, as it does not align with the purpose of the Environmental Information Regulations 2004 (the EIR) and may act as a deterrent to requesters.
 - The UK ICO’s view is that public authorities should accept the costs associated with the routine administration of complying with requests as part of their obligations under the EIR (which most authorities follow by not routinely charging for complying with requests). As such, his view is that there are limited circumstances in which charging for making environmental information available is reasonable.
 - The UK ICO considers the overall reasonableness of any charge to be the most important consideration, rather than a focus on the precise activities which public authorities can include in the cost.
32. The UK ICO guidance is very firmly of the view that charging must not deter individuals from their right to obtain environmental information:

⁴ https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

⁵ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/charging-for-information-under-the-eir/#can-we-charge>

“Access to environmental information is an important right and the financial cost of making a request should not prevent the ability to exercise that right.

“You should ensure that any charge you apply does not mean that only those who can afford it can access the environmental information you hold. It is vital that everyone has access to environmental information and has the same opportunities to contribute to public debate. If an applied charge does deter requesters, this undermines the intended purpose of the EIR and the fundamental objectives that it is seeking to achieve.”

33. Overall, the Commissioner endorses the approach taken by the UK ICO. While his own guidance on the matter could perhaps be stronger on overriding principles (and it will be reviewed shortly, with this in mind), he does not believe his guidance to be inconsistent with anything rehearsed above. Bearing in mind the fundamental purposes of the legislation, the reasonableness of the decision to charge has to be as important as the reasonableness of the charge itself.
34. In this case, the Authority issued the Applicant with a fees notice of £3.62. In its submissions to the Commissioner, it stated that it was its policy to recover reasonable costs to produce information requested under the EIRs, and that this was set out in its [published Schedule of Fees](#)⁶. It based its calculations on the information taking 10 minutes of a Grade 6 officer's time and explained that Grade 6 was the lowest grade available having sufficient knowledge of the relevant recordkeeping systems to produce the information. It is the Authority's position that this is a reasonable reflection of the actual costs for producing the information requested.
35. While the Commissioner acknowledges that the sum involved is among the lowest (if not the lowest) upon which he has issued a decision with regard to this Authority's charging under the EIRs, in his view this case is illustrative of a specific problem arising from the blanket charging for environmental information. The Authority's own stated position is that it charges for environmental information in order to “recover costs”.
36. However, in the Commissioner's view, it is clear that imposing a fee and dealing with the Applicant's subsequent appeal to his office has cost the Authority far more (in terms of staff time and costs) than the original sum of £3.62 that it wanted to recoup from the Applicant. The Commissioner considers that the Authority's determination to recover the full cost of providing information under the EIRs, has in this case, resulted in the Authority incurring significantly more costs than if it had simply just complied with the request.
37. The Commissioner has carefully considered the Authority's submissions and all other matters of relevance. In this case, in view of all the factors detailed above, the Commissioner cannot accept the Authority's approach to charging in this case, and he cannot see any merit in the Authority's decision to charge the Applicant a fee for information that it could provide in only ten minutes.
38. He concludes, in all the circumstances of the case, that the Authority failed to meet the requirements of regulation 8 of the EIRs in responding to the information request made by the Applicant.

⁶ https://www.eastlothian.gov.uk/downloads/file/33175/schedule_of_fees_2023_to_2024

While previous decisions have upheld individual charges under the EIRs, (as the Commissioner observed in Decision 157/2024 reference above) he is not aware of any of them having endorsed the blanket approach to charging which the Authority is clearly pursuing, and which by no stretch of the imagination could be said to be compatible with the spirit of any the relevant legislation, as discussed above.

39. Consequently, the Commissioner requires the Authority to issue the Applicant with a revised review outcome under regulation 16 of the EIRs (which must not impose a fresh charge under regulation 8(1)).

Decision

The Commissioner finds that the Authority failed to comply with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by the Applicant.

The Commissioner finds that the Authority, in responding to the Applicant's information request, failed to meet the requirements of regulation 8 of the EIRs.

The Commissioner therefore requires the Authority to provide the Applicant with a revised review outcome under regulation 16 of the EIRs (which must not impose a fresh charge under regulation 8(1)), by **24 February 2025**.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Jennifer Ross
Deputy Head of Enforcement

09 January 2025