



# Decision Notice 128/2024

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## Whether road inspection reports fall under the EIRs

**Applicant: The Applicant**

**Authority: East Lothian Council**

**Case Ref: 202300897**

### Summary

The Applicant asked the Authority for the four-weekly inspections reports of a named road for the previous 12 months. The Authority responded under the EIRs and issued a Fees Notice. The Applicant did not agree the information was environmental information. The Commissioner investigated and agreed that the information requested was environmental, and the Authority was entitled to issue a Fees Notice.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6); 2(1)(b) (Effect of exemptions); (General entitlement); 39(2) (Health, safety and 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” and paragraphs (a) (c) and (f) of definition of “environmental information”) (Interpretation); 5(1) (Duty to make environmental information available on request); 8(1) and (3) (Charging); 17(1), (2)(a), (b), (c) and (f) (Enforcement and appeal provisions)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

1. On 6 July 2023, the Applicant made a request for information to the Authority. He asked for the results of its four-weekly inspections of the A198 Luffness to Aberlady road for the previous 12 months.
2. The Authority responded on 12 July 2023. It issued the Applicant with a Fees Notice for £69.50, under Regulation 8 of the EIRs, and referred him to the [Schedule of Fees](#)<sup>1</sup> published on the Authority's website.
3. On 12 July 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 requested information fell under the scope of the EIRs.
4. The Authority notified the Applicant of the outcome of its review on 13 July 2023. It upheld its original decision and explained that the information fell within paragraphs (a) and (c) of the definition of environmental information in regulation 2(1) of the EIRs, as it was land likely to be affected by the state of the elements. The Authority also provided the Applicant with a [link to guidance](#)<sup>2</sup> on the definition of environmental information on the Commissioner's website.
5. On 14 July 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 did not believe the information requested fell under the EIRs.

## 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. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on the application and to answer specific questions. These related to its reasons for concluding that the information was environmental.
8. The case was subsequently allocated to an investigating officer.

## Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the submissions made to him by the Applicant and the Authority. He is satisfied no matter of relevance has been overlooked.

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<sup>1</sup>

[https://www.eastlothian.gov.uk/downloads/download/13194/environmental\\_information\\_scotland\\_regulations\\_2004](https://www.eastlothian.gov.uk/downloads/download/13194/environmental_information_scotland_regulations_2004)

<sup>2</sup> <https://www.foi.scot/sites/default/files/2022-03/EIRBriefingsDefinition.pdf>

## FOISA or the EIRs

10. "Environmental information" is defined in regulation 2(1) of the EIRs (paragraphs (a), (c) and (f) of the definition are reproduced in full in Appendix 1 to this decision). Where information falls within the scope of this definition, a person has a right to access the information under the EIRs, subject to qualifications and exceptions in the EIRs.
11. The request sought the Authority's inspection reports for the named road for the previous 12 months. The Authority handled the Applicant's request under the EIRs and submitted that the information sought was environmental. It therefore sought to apply section 39(2) of FOISA (Health, safety and environment).

## The Authority's comments on whether the information requested was environmental

12. In its submissions to the Commissioner, the Authority referred to the definitions contained in paragraphs (a), (c) and (f) of regulation 2(1) of the EIRs. It argued that the information fell under regulation 2(1)(a) of the EIRs, highlighting that the Applicant had requested information relating to roads (specifically the A198) which forms part of the landscape as a result of human action to build roads and maintain their condition (or state) over time.
13. The Authority commented that the Applicant had requested information relating to the inspection of the A198, which is governed by the authority's administrative processes, procedures and activities to review the condition of the road and make recommendations for improvements, i.e. to "protect" this element of the landscape. It argued that the information requested therefore met the definition of environmental information under regulation 2(1)(c) of the EIRs.
14. Finally, the Authority argued that the information requested by the Applicant met the definition of environmental information contained in Regulation 2(1)(f) of the EIRs, which states;  
  
"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 paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c)".
15. The Authority submitted that the condition of the road was affected by elements and factors of the environment (wind, water, humidity, air quality, emissions) as well as human activity producing wear and tear. It noted that any significant deterioration of the road had implications for human health and safety by increasing the risk of accidents. In light of this, the Authority explained that it undertook regular inspections of the road to ensure that human health and safety was not placed in jeopardy and the surrounding landscape was preserved. It submitted that the information requested by the Applicant, met the definition of environmental information under Regulation 2(1)(f) of the EIRs.
16. The Authority also referred to the Commissioner's guidance which advises that court cases have confirmed a broad definition is applied to environmental information. The Authority referred to previous decisions issued by the Commissioner, namely [Decision 218/2007](#)<sup>3</sup> and

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<sup>3</sup> [Decision 218/2007 | Scottish Information Commissioner \(foi.scot\)](#)

[Decision 045/2020](#)<sup>4</sup> to support its view.

## **The Applicant's comments on whether the information was environmental**

17. The Applicant did not agree that the information requested was environmental information as defined in regulation 2(1) of the EIRs, and thought it should have been considered under FOISA. He considered his request for information did not fall under the definitions of the EIRs "as my request was to obtain the inspection records for the condition" of the road.

## **The Commissioner's view on whether the information requested is environmental**

18. The information requested by the Applicant concerns the Authority's inspection reports of a named road over a 12-month period.
19. The Commissioner agrees that any information falling within the scope of the Applicant's request, and which relates to the condition of the A198 road, 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.
20. Specifically, the Commissioner is satisfied that the information relates to measures and activities (paragraph (c) of the definition of environmental information in regulation 2(1) of the EIRs) that affect the state of the elements contained in paragraph (a), specifically the land and landscape. The information also relates to the health and safety of the built environment (which encompasses roads) as described in paragraph (f).
21. The Commissioner has investigated a number of cases where individuals have requested information regarding the inspections of roads or the built environment, and as in this case, he has generally found such information to be environmental. He notes that [Decision 057/2019](#)<sup>5</sup> involved information relating to the state of a specific road, including an engineering report, and [Decision 175/2016](#)<sup>6</sup> concerned information relating to the inspection, maintenance and repairs of the Authority's roads. In each case, the Commissioner found that the requested information was environmental information. He has reached the same conclusion in this case.
22. The Commissioner is satisfied that the Authority was correct to exempt the information under section 39(2) of FOISA. 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.
23. The Commissioner therefore concludes that the Authority was correct to apply section 39(2) of FOISA, and consider the Applicant's information request wholly under the EIRs.

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<sup>4</sup> [Decision 045/2020 | Scottish Information Commissioner \(foi.scot\)](#)

<sup>5</sup> <https://www.foi.scot/decision-0572019>

<sup>6</sup> <https://www.foi.scot/decision-1752016>

## **Regulation 8 of the EIRs - Charging**

24. The Authority issued a Fees Notice in terms of regulation 8 of the EIRs. Under regulation 8(1) of the EIRs, a Scottish public authority may charge a fee for making environmental information available under regulation 5(1). Regulation 8(3) makes it clear that a fee charged under the EIRs shall not exceed a reasonable amount and in any event shall not exceed the costs to the authority of producing the information requested.
25. The Authority, in its Fees Notice, stated that it had been its policy since 2019 to recover full staff costs for every information request received that falls under the EIRs.
26. As the Commissioner has found that the Authority was correct to consider the Applicant's request under the EIRs, it follows that it is permissible for it to charge a fee for making the requested information available, as provided for in regulation 8.
27. In his application to the Commissioner, the Applicant did not question whether the fee was reasonable, he only challenged the Authority's view that the information was environmental. Consequently, the reasonableness of the Fee is not a matter which can be considered by the Commissioner.

## **Decision**

The Commissioner finds that East Lothian Council complied with the Environmental Information (Scotland) Regulations 2004 in responding to the information request made by the Applicant.

## **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.

**Jennifer Ross**  
**(Acting) Deputy Head of Enforcement**

**14 June 2024**

## **Appendix 1: Relevant statutory provisions**

### **Freedom of Information (Scotland) Act 2002**

#### **1 General entitlement**

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

#### **2 Effect of exemptions**

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
  - ...
  - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
  - ...

#### **39 Health, safety and the environment**

- ...
- (2) Information is exempt information if a Scottish public authority-
  - (a) is obliged by regulations under section 62 to make it available to the public in accordance with the regulations; or
  - (b) would be so obliged but for any exemption contained in the regulations.
- ...

#### **47 Application for decision by Commissioner**

- (1) A person who is dissatisfied with -
  - (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- (2) An application under subsection (1) must -

- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
- (b) state the name of the applicant and an address for correspondence; and
- (c) specify –
  - (i) the request for information to which the requirement for review relates;
  - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);  
and
  - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

# The Environmental Information (Scotland) Regulations 2004

## 2 Interpretation

(1) In these Regulations –

“the Act” means the Freedom of Information (Scotland) Act 2002;

“applicant” means any person who requests that environmental information be made available;

“the Commissioner” means the Scottish Information Commissioner constituted by section 42 of the Act;

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

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(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, 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;

...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, 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 paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

## 5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

...



## **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.

...

- (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.

...

## **17 Enforcement and appeal provisions**

- (1) The provisions of Part 4 of the Act (Enforcement) including schedule 3 (powers of entry and inspection), shall apply for the purposes of these Regulations as they apply for the purposes of the Act but with the modifications specified in paragraph (2).

- (2) In the application of any provision of the Act by paragraph (1) any reference to -

- (a) the Act is deemed to be a reference to these Regulations;
- (b) the requirements of Part 1 of the Act is deemed to be a reference to the requirements of these Regulations;

...

- (f) a notice under section 21(5) or (9) (review by a Scottish public authority) of the Act is deemed to be a reference to a notice under regulation 16(4); and

...