

# FOISA/EIRS Guidance

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## Content of notices

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**Guidance on what responses to information requests (and requirements for review) must contain**



# Contents

<b>Introduction</b> .....	<b>1</b>
<b>Responding to an information request</b> .....	<b>1</b>
<b>Initial questions: validity</b> .....	<b>1</b>
<b>Initial questions: clarification</b> .....	<b>1</b>
<b>Response</b> .....	<b>1</b>
Request to be complied with in full .....	1
Information not held .....	2
Information held but exempt.....	3
Neither confirm nor deny .....	3
Vexatious or repeated request .....	4
Excessive costs .....	4
Fees notice .....	5
<b>Responding to a request for review</b> .....	<b>5</b>
<b>Initial questions: timing</b> .....	<b>5</b>
<b>Initial questions: validity</b> .....	<b>5</b>
<b>Response</b> .....	<b>5</b>
Review being carried out.....	6
No review to be carried out: vexatious/repeat .....	6
<b>Document control sheet</b> .....	<b>7</b>

# Glossary and abbreviations

Term used	Explanation
<b>The Commissioner</b>	The Scottish Information Commissioner
<b>EIRS</b>	Environmental Information (Scotland) Regulations 2004
<b>FOISA</b>	Freedom of Information (Scotland) Act 2002
<b>SIC</b>	The Scottish Information Commissioner, staff of SIC (depends on context)
<b>Section 60 Code</b>	the Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002 (December 2016 version)
<b>Request for review</b>	Requirement for review under section 21 of FOISA – phrase used interchangeably

## Introduction

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1. This guidance sets out what responses to information requests (and responses to requirements for review) must contain to comply with FOISA and the EIRs.
2. The references in the body of the guidance are mainly to FOISA. The additional points that need to be considered under the EIRs are contained in the footnotes.
3. The guidance sets out the **minimum** required under FOISA, the EIRs and the Section 60 Code. You should provide context and explanation to help the requester, wherever possible. Providing full responses, particularly at review, can help the authority if a case is appealed to the Commissioner.

## Responding to an information request

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### Initial questions: validity

4. Is the request valid under section 8 of FOISA? If not, use your duty to advise and assist the requester (section 15 of FOISA<sup>1</sup>) to explain how to make a valid request.
5. If the request is valid, issue a response (see the guidance below).<sup>2</sup>

### Initial questions: clarification

6. If it is not clear what information the requester wants, ask them to clarify as soon as possible (section 1(3)).
7. Once clarification is received, you must reply within 20 working days from receipt of the clarification (not from receipt of the original request).

### Response

8. You have a number of options here. Depending on the case, more than one option may apply. For example, you might receive a request for information, some of which you don't hold and some of which might be exempt from disclosure.
9. All notices must be issued within 20 working days<sup>3</sup> and must contain details about the requester's right to:
  - (i) ask for a review and
  - (ii) appeal to the Scottish Information Commissioner.

#### *Request to be complied with in full*

10. Send the information and tell the requester about their appeal rights. (Telling people about their appeal rights isn't required by FOISA/the EIRs when information is being disclosed in full, but is recognised as good practice by the Section 60 Code.)

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<sup>1</sup> EIRs regulation 9

<sup>2</sup> Remember, a request under the EIRs can be verbal

<sup>3</sup> Under the EIRs, this 20 working day period can be extended by up to a further 20 working days if the information request is voluminous and complex. Public authorities need to tell applicants if they are going to extend the 20 working day period in this way and remind requesters of their rights to request a review and appeal.

### **Request complied with in full**

The notice should inform the requester about the right to:

- ask the authority to review its decision
- make an application to the Commissioner

### *Information not held*

11. Issue a notice to tell the requester the authority does not hold the information is not held, in line with section 17 of FOISA.
12. If you know who does hold the information, tell the requester and give them sufficient information to be able to make a request directly to them. If it is a request under the EIRs, offer to transfer the case, where appropriate, in line with paragraphs 9.3.4 and 9.3.5 of the Section 60 Code.
13. Where possible, it is also good practice to explain to the requester why you do not hold – or no longer hold – the information.

### **Information not held**

The notice must inform the requester:

- that the information is not held (section 17(1))
- about the right to ask the authority to review its decision
- about the right to make an application to the Commissioner (section 19(b))

### **Information not held and transferring a request under the EIRs**

The notice must inform the requester

- that you do not hold the information
- that another authority holds the information and
  - you have transferred the request to that authority with the requester's permission OR
  - provide the name and address of the other authority
- of the public authority's procedure for dealing with complaints about the handling by it of requests for information (section 19(a))
- about the right to ask the authority to review its decision
- about the right to make an application to the Commissioner (section 19(b))

*Information held but exempt from disclosure*

14. Issue a notice under section 16 of FOISA<sup>4</sup>.

**Information exempt from disclosure**

The notice must:

- disclose that the public authority holds the information (section 16(1)(a))
- state that the information is exempt from disclosure (section 16(1)(b))

For each exemption applied

- specify *exactly* the exemption being applied (section 16(1)(c)) and specifically which document/piece of redacted information the exemption applies to
- state why the exemption applies (if not otherwise apparent) (section 16(1)(d))
- if the exemption is one which is subject to the public interest test, state why the public interest is in favour of maintaining that exemption (section 16(2))

And inform the requester:

- of the public authority's procedure for dealing with complaints about the handling by it of requests for information (section 19(a))
- about the right to ask the authority to review its decision
- about the right to make an application to the Commissioner (section 19(b))

*Neither confirm nor deny*

15. If the information requested would be exempt (if you held it) **and** you consider it would not be in the public interest to disclose whether the information is held or not, issue a notice under section 18 of FOISA<sup>5</sup>.

**Neither confirm nor deny**

The notice must:

- state that the information, if it existed and was held by the authority, would be exempt (section 16(1)(b)), and that to reveal whether the information exists or is held would be contrary to the public interest
- specify the exemption in question (section 16(1)(c))<sup>6</sup>
- state why the exemption would apply (section 16(1)(d)) (if the exemption is subject to the public interest test, you don't need to say why, on balance, the public interest would favour maintaining the exemption)
- state why it would be contrary to the public interest to reveal whether or not the existed or was held

And inform the requester:

- of the public authority's procedure for dealing with complaints about the handling by it of requests for information (section 19(a))
- about the right to ask the authority to review its decision

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<sup>4</sup> EIRs regulation 13

<sup>5</sup> There is no direct equivalent of this under the EIRs. Regulations 10(8) and 11(6) are similar, but more restricted in scope

<sup>6</sup> This can only be one or more of the exemptions in sections 28 to 35, 38, 39(1) or 41 of FOISA.

- about the right to make an application to the Commissioner (section 19(b))

#### *Vexatious or repeated request*

16. Your authority does not have to comply with a request if it is vexatious or repeated (section 14)<sup>7</sup>. If your authority decides that a request is vexatious or repeat, it must issue a refusal notice unless:

- (i) it has already given the requester a notice in relation to an identical or substantially similar request or
- (ii) in all the circumstances, it would be unreasonable to expect it to serve a further notice (section 16(5)).

#### **Vexatious/repeated request initial refusal**

The notice must:

- state that the public authority is claiming that it is not obliged to comply with a request for information because the request is vexatious under section 14(1) or repeat under section 14(2) (section 16(5)) and
- explain why

And inform the requester:

- of the public authority's procedure for dealing with complaints about the handling by it of requests for information (section 19(a))
- about the right to ask the authority to review its decision
- about the right to make an application to the Commissioner (section 19(b))

#### *Excessive costs*

17. If the cost of complying with the request is more than the maximum in the Fees Regulations<sup>8</sup> (section 12), issue a notice under section 16(4)<sup>9</sup>.

#### **Cost of responding is higher than maximum in fees regulations**

The notice must:

- tell the requester the authority does not have to comply with the request because it has estimated that the cost of complying with the request would exceed the maximum amount in the fees regulations (section 12 and section 16(4)) and
- set out the projected costs

And inform the requester:

- of the public authority's procedure for dealing with complaints about the handling by it of requests for information (section 19(a))
- about the right to ask the authority to review its decision

<sup>7</sup> There is no equivalent of this under the EIRs although a public authority may refuse to release information if the request for information is 'manifestly unreasonable' (regulation 10(4)(b)).

<sup>8</sup> The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

<sup>9</sup> There is no equivalent of this under the EIRs although a public authority may refuse to disclose information if the request for information is 'manifestly unreasonable' under regulation 10(4)(b).

- about the right to make an application to the Commissioner (section 19(b))

### *Fees notice*

18. If, under the Fees Regulations, there will be a charge for providing the information, issue a fees notice under section 9 of FOISA<sup>10</sup>.
19. Note: the 20 working day clock stops at this point and restarts when the fee is received.

#### **Fees notice**

The fees notice must:

- explain that a fee is being charged and specify the fee which is to be charged in line with the fees regulations (the Section 60 Code provides guidance on the contents of fees notices) and
- tell the requester they must pay the fees notice within three months<sup>11</sup>

And inform the requester:

- of the public authority's procedure for dealing with complaints about the handling by it of requests for information (section 19(a))
- about the right to ask the authority to review its decision
- about the right to make an application to the Commissioner (section 19(b))

## **Responding to a request for review**

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### **Initial questions: timing**

20. Has the review request been made in time? Requesters have 40 working days to request a review from receipt of the information or from a notice in response to an information request, (section 20(5)).
21. If the request for review is made after more than 40 working days, a public authority can choose to carry out a review if it thinks it is appropriate to do so (section 20(6)).<sup>12</sup>

### **Initial questions: validity**

22. Is the review request valid under section 20(3) of FOISA? (Requests for review must be in writing under both FOISA and the EIRs.) If not, use the section 15/regulation 19 duty to advise and assist to explain to applicant how to make a valid request for review.

### **Response**

23. The review **must** be carried out (and a response issued within 20 working days of receipt) unless the authority considers:
  - (i) the requirement for review is vexatious or

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<sup>10</sup> The charging regime in the EIRs is very different. It simply allows public authorities to make a reasonable charge for providing information under regulation 8.

<sup>11</sup> 60 working days under the EIRs

<sup>12</sup> The EIRs do not give authorities the power to accept a late request for review.

(ii) the original request for information was vexatious or repeated.

24. In these cases, although a review doesn't have to be carried out, the authority must still notify the requester that it is not carrying out a review (see below).

*Review being carried out*

**Outcome of review**

The notice must inform the requester:

- what steps the public authority has taken under section 21(4) (i.e. confirm its original decision; substitute a different decision or reach a decision where no decision had been reached)
- why it has taken these steps (section 21(5))
- about the right to make an application to the Commissioner (section 19(b))
- about the right to appeal to the Court of Session (section 21(10))

*No review to be carried out: vexatious/repeat*

25. If your authority chooses not to review a case because the initial request was vexatious or repeated (or because the requirement for review is vexatious), it must issue a notice to the requester explaining why it is not carrying out a review (section 21(9)).

**Vexatious/repeated request refusal to carry out a review**

The notice must inform the requester:

- that the public authority considers that it does not have to carry out a review because the requirement to carry out the review is vexatious or because the initial request itself was vexatious or repeat (section 21(9))
- about the right to make an application to the Commissioner (section 19(b))
- about the right to appeal to the Court of Session (section 21(10))



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