FOISA and the EIRs (Scotland): What Differs

Scottish public authorities, including councils, NHS boards, universities and Scottish Government bodies, work under the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information (Scotland) Regulations 2004, not the Freedom of Information Act 2000. The principles are similar, the section numbers are different, and some important tests are set higher. Teams who handle both regimes, or who move between them, need a clear map.

AT A GLANCE

	FOIA (England, Wales and Northern Ireland)	FOISA (Scotland)
Regulator	Information Commissioner	Scottish Information Commissioner
Time limit	20 working days	20 working days, with some modifications for particular bodies and periods
Exemptions	Part II, sections 21 to 44	Part 2, sections 25 to 41
Harm threshold	Prejudice	Substantial prejudice in many exemptions, for example sections 30 and 33
Environmental information	Environmental Information Regulations 2004	Environmental Information (Scotland) Regulations 2004

1. How do the section numbers map?

The table below maps the exemptions covered in this series. Always check the Scottish text before relying on a mapping, and check whether the Scottish exemption is absolute or qualified.

Subject	FOIA	FOISA
Information otherwise accessible	Section 21	Section 25
Information intended for future publication	Section 22	Section 27
Policy formulation	Section 35	Section 29
Effective conduct of public affairs	Section 36	Section 30
Commercial interests	Section 43	Section 33
Investigations	Section 30	Section 34

Subject	FOIA	FOISA
Law enforcement	Section 31	Section 35
Confidentiality and legal privilege	Sections 41 and 42	Section 36
Personal information	Section 40	Section 38
Health, safety and the environment	Section 38	Section 39
Prohibitions on disclosure	Section 44	Section 26
Excessive cost	Section 12	Section 12
Vexatious or repeated requests	Section 14	Section 14
Advice and assistance	Section 16	Section 15

2. What is the substantial prejudice threshold?

Many exemptions in FOISA require substantial prejudice or inhibition, not just prejudice. For example, section 30 (effective conduct of public affairs) applies where disclosure would, or would be likely to, substantially prejudice or substantially inhibit the matters listed, and section 33 (commercial interests and the economy) uses the same threshold. The Scottish Information Commissioner treats this as a higher bar than the English test. You must show that the harm is considerable, not marginal.

If you are applying an exemption across both regimes, do not assume the same evidence will meet both tests.

3. What is different about the Commissioner and appeals?

The Scottish Information Commissioner is a separate office with its own guidance and decisions. Requesters who are dissatisfied can ask for a review by the authority and then appeal to the Scottish Information Commissioner, and further to the Court of Session on a point of law. The route differs from the one in England, where the complaint goes to the Information Commissioner and appeals to the tribunal. Use the Scottish guidance when you cite authority.

4. What is different about the cost limit?

Section 12 FOISA lets an authority refuse where it estimates the cost of compliance would exceed the amount set in regulations made by the Scottish Ministers, who must consult the Commissioner. The regulations can allow aggregation of requests and can specify which costs count and how they are estimated. Scottish rules apply, so do not use the English limits of £600 and £450 and the £25 hourly rate for a Scottish authority without checking the Scottish regulations.

5. What about environmental information?

The Environmental Information (Scotland) Regulations 2004 apply to Scottish public authorities. The structure is similar to the English Regulations. Every exception is subject to the public interest test and there is a presumption in favour of disclosure. Check the Scottish regulation numbers, because they differ from regulations 12 and 13 in the English instrument.

6. What about FOI (Scotland) and CHAIRs (Housing) request types?

ProvePrivacy treats FOI (Scotland), EIR (Scotland) and CHAIRs (Housing) as their own request types alongside FOI and EIR, so each request follows the right regime from the start.

WORKED EXAMPLE (ILLUSTRATIVE)

A Scottish council receives a request for correspondence about the procurement of a new housing management system, and for the supplier's pricing.

- **Commercial interests.** The council considers section 33. It must show substantial prejudice to the commercial interests of the supplier or itself, not just prejudice. It records the evidence that disclosure of unit rates would hand competitors an advantage in a live rebid.
- **Internal advice.** The council considers section 30 for internal emails on the options. It applies the substantial inhibition test, weighs the public interest and releases the factual material.
- **Environmental element.** One email discusses energy use of the proposed hosting. The council identifies that this part may be environmental information, splits it and handles it under the EIRs.

The case record notes which regime applies to each part, the exemption or exception relied on and the reasoning.

7. Handling more than one regime: spreadsheet or structured case workflow

Task	Spreadsheet and email	Structured case workflow
Recording which regime applies	A note on the request	Request type recorded, including FOI (Scotland) and EIR (Scotland)
Fee and public interest delay	Calculated by hand	Fee and public interest delay management for FOIA and FOISA requests
Splitting a mixed request	A new thread	A multi part request split into separately managed cases
Meeting the deadline	Bank holidays counted by hand	Deadline tracking that accounts for bank holidays

Frequently asked questions

Can we use English ICO guidance for a Scottish request?

It can help, but the Scottish Information Commissioner's guidance and decisions carry more weight. Use them first.

Is the harm threshold really different?

In many exemptions, yes. FOISA uses substantial prejudice where the English Act uses prejudice.

Does the time limit differ?

The standard is 20 working days. FOISA allows regulations to vary it, and modifications apply to particular bodies and periods, so check the current rules.

Do the same fees rules apply?

No. Scottish regulations apply.

THE PITFALL

Assuming English guidance and harm thresholds apply to a Scottish request.

THE REMEDY

Use FOISA, the Scottish regulations and Scottish Commissioner guidance, and evidence substantial prejudice where it is required.

KEY TAKEAWAYS

- Use the Scottish Acts, the Scottish Commissioner and Scottish guidance.
- Section numbers differ, and many harm tests are set higher.
- Cost limits and fees come from Scottish regulations.
- Environmental information has its own Scottish regulations.
- Handle mixed regime requests as separate strands.

Conclusion: prioritise the right Act, the right threshold and Scottish guidance

If you work across both regimes, keep a section map beside you and check each threshold. Cite Scottish Commissioner guidance first for Scottish requests.

HOW PROVEPRIVACY HELPS

ProvePrivacy DSAR & FOI (Lite) supports FOI (Scotland) and EIR (Scotland) as request types, with fee and public interest delay management for FOIA and FOISA requests, and the ability to split a multi part request into separately managed cases. The audit log records the exemptions relied on and your reasons, so your evidence is ready if the Scottish Information Commissioner asks for it.

Where this fits in the FOI process

Identifying the regime comes at the start, before you decide how to respond. See our FOI process hub for the whole journey.

Related guides

- EIR Exceptions: How They Differ from FOI Exemptions
- FOI Exemptions: Commercial Interests and Trade Secrets
- FOI Exemptions: Policy, Advice and the Conduct of Public Affairs

Sources

- Freedom of Information (Scotland) Act 2002, sections 10, 12, 25 to 39 (legislation.gov.uk)
- Environmental Information (Scotland) Regulations 2004
- Scottish Information Commissioner guidance and decisions

Talk to someone who has handled FOI

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