



## Should I use FOISA or the EIRs?

### A quick guide to help Scottish public authorities

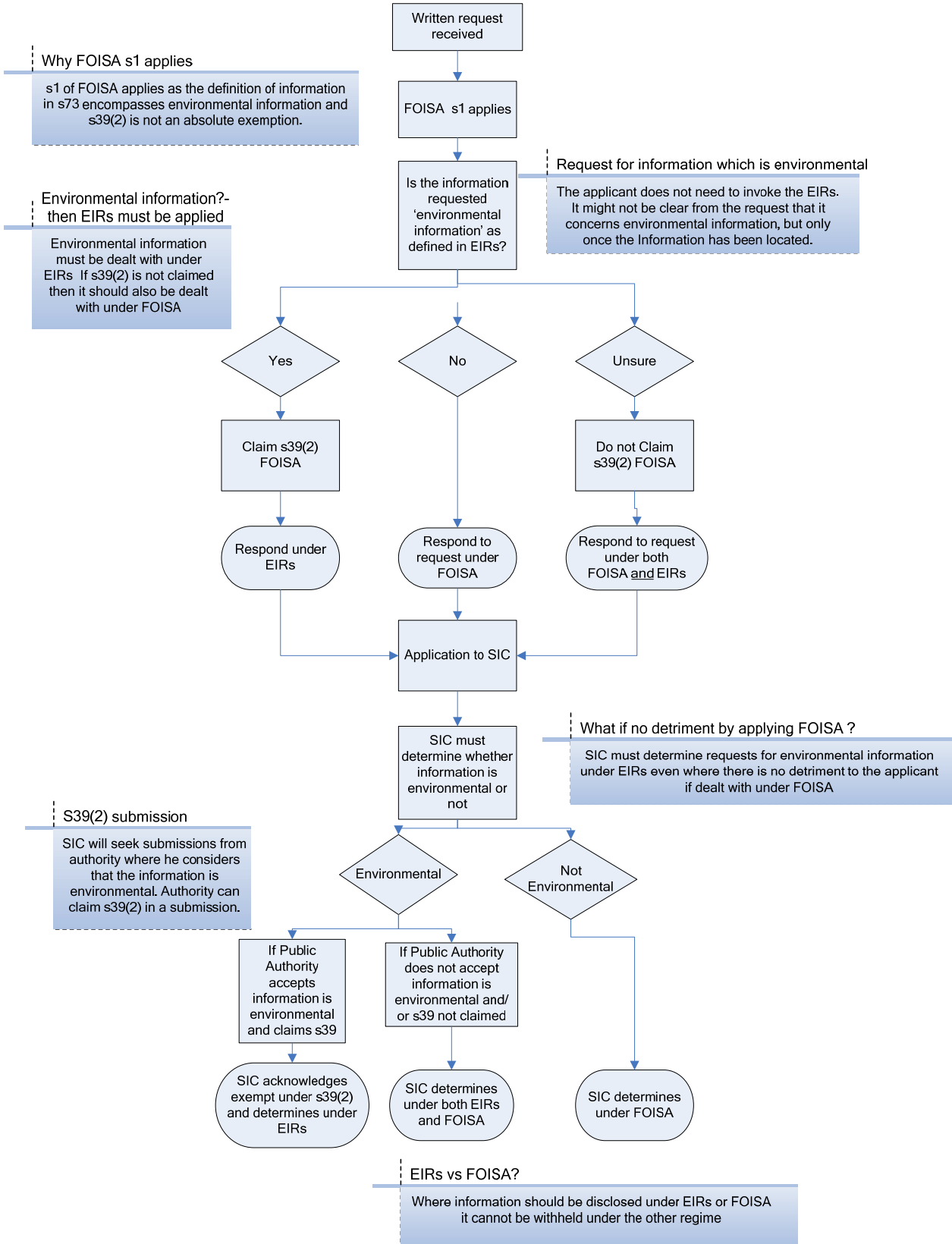
1. It is not always easy to decide whether information is “environmental information”. This quick guide should help you decide. For more detailed guidance on the EIRs go to our website <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/Briefings.aspx>
2. The full text of the EIRs, including the full text of Regulation 2, can be viewed at [www.hmso.gov.uk/legislation/scotland/ssi2004/20040520.htm](http://www.hmso.gov.uk/legislation/scotland/ssi2004/20040520.htm).

#### **Environmental information definition**

3. The definition of “environmental information” can be found within Regulation 2 of the Environmental Information (Scotland) Regulations 2004 (the EIRs). The definition is broad, and includes information which relates to:
  - (i) The state of elements of the environment – such as air, water, soil, land, landscape and natural sites, biological diversity and genetically modified organisms – and it includes any interaction between them;
  - (ii) The state of human health and safety, conditions of human life, the food chain, cultural sites and built structures, which are, or are likely to be, affected by the state of elements of the environment or any interaction between them;
  - (iii) Any factor such as substances, energy, noise, radiation or waste, including radioactive waste, emissions discharges and other releases affecting, or likely to affect, the state of the elements of the environment or any interaction between them;
  - (iv) Measures and activities affecting, likely to affect, or intended to protect the state of the elements of the environment or any interaction between them. This includes administrative measures, policies, legislation, plans, programmes and environmental agreements;
  - (v) Reports on the implementation of environmental legislation;
  - (vi) Cost benefits and other economic analyses used in environmental decision making.

# EIRS or FOISA: flowchart

## FOISA and EIRs Dealing with written requests for environmental information



## **EIRs requests: key points**

4. Whenever requested information falls within the definition of environmental information contained within regulation 2 of the EIRs, it must be processed in accordance with the EIRs. Where only part of any requested information falls within this definition, that part of the information must be processed in accordance with the EIRs.
5. An authority must disclose all the information it holds that falls within the scope of a request for environmental information. Information can only be withheld where non-disclosure is expressly permitted by law (e.g. by the EIRs).
6. Requests for environmental information must be processed in accordance with the EIRs regardless of whether or not the requester makes reference to the EIRs in the request.
7. Whenever a request for environmental information is made in writing, the authority must also process the request under the Freedom of Information (Scotland) Act 2002 (FOISA). This is because FOISA requires that all written requests for information received by authorities are processed in accordance with the FOISA legislation.
8. In most cases, the processing of a request for environmental information under FOISA will involve only the simple application of the exemption under section 39(2) of FOISA. Section 39(2) sets out that information is exempt where that information falls within the scope of the EIRs. Section 39(2) is subject to the public interest test, but the Commissioner's view is that because a separate regime exists for the consideration of requests for environmental information, the public interest will normally lie in the exemption being upheld. Following the application of section 39(2), the authority should go on to consider the request fully under the EIRs.
9. If an authority is unsure whether the information requested is environmental, it should respond to all of the request under both FOISA and the EIRs, applying any relevant EIR exceptions and FOISA exemptions (other than section 39(2)), if information is to be withheld. Should the Commissioner subsequently receive a formal application in relation to the case, the first stage of the investigation will involve an assessment of whether the requested information falls within the definition of environmental information.
10. Where a request for environmental information is made verbally only, there will be no requirement to deal with that request under FOISA. In order for a request under FOISA to be valid, it must be in writing or in some other recordable format. In cases where only a verbal request is received, the request can be processed under the EIRs alone.

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