



Policy on seeking legal expenses

Introduction

1. This document sets out the Scottish Information Commissioner's policy on when legal expenses will be sought following the successful defence of an appeal to the courts. The courts may be involved in a matter involving the Commissioner in the following cases (this is not an exhaustive list):
 - (i) a public authority which, or an applicant who, is unhappy with a decision (including a determination under section 49(2) of FOISA) issued by the Commissioner may appeal the decision to the courts.
 - (ii) a public authority which is unhappy with an information or enforcement notice issued by the Commissioner may appeal the notice to the courts.
 - (iii) where the Commissioner considers that a public authority has failed to comply with a formal notice (decision, information or enforcement) . The courts may investigate and may treat the failure by the public authority as contempt of court.
2. The Commissioner is a public official publicly funded through the Scottish Parliament. The Commissioner has finite resources and as the accountable officer must ensure they are managed efficiently, in accordance with public accounting rules and principles.
3. The resources required to defend an appeal or to make a referral to the Court of Session come from taxpayers' money. It is therefore important for the Commissioner to take this into account when determining whether to raise or defend a court action, and whether to seek expenses when appeals are defended successfully.
4. It is normal practice for expenses to follow success. In other words, the successful party will be able to claim their expenses back from the losing side (albeit, in practice, only a proportion of the expenses can be claimed).

Policy

5. The Commissioner's policy is to follow normal practice by pursuing expenses if an appeal is successfully defended. The Commissioner will decide on a case-by-case basis whether to follow this normal practice and whether to seek only a proportion of the expenses, by balancing a number of factors.

6. Factors supporting following normal practice include:
 - (i) The applicant is a public authority, company or other entity
 - (ii) The Court concluded that there was no point of law stated in the grounds of appeal
 - (iii) The Commissioner did not agree the appeal was required to clarify interpretation of legislation
 - (iv) The applicant is not legally aided
7. Factors against following normal practice
 - (i) The applicant is legally aided
 - (ii) The Commissioner agreed the appeal was required to determine a legal point at issue
 - (iii) The Commissioner agreed the appeal was required to clarify interpretation of legislation
8. The Commissioner may choose to depart from this policy at any time where the Commissioner considers it reasonable to do so. If the Commissioner does depart from this policy, the reasons for doing so will be recorded.

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