



## Policy on seeking legal expenses

### Introduction

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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

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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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# Document control sheet

Document Information	
Full name of current version: Class, Title, Version No and Status. <i>E.g. C5 Key Documents Handbook v01 CURRENT ISSUE</i>	C2 Policy on seeking legal expenses v03 CURRENT ISSUE
VC Fileld	150675
Type	Policy
Approver	SIC
Responsible Manager	HOE
Date of next planned review	May 2024
Approval & Publication	
Approval Date (major version)	04/05/2021
For publication (Y/N)	Y
Date published	05/05/2021
Name of document in website file library	PolicySeekingLegalExpenses
Corrections / Unplanned or Ad hoc reviews (see Summary of changes below for details)	
Date of last update	

Summary of changes to document				
Date	Action by <i>(initials)</i>	Version updated <i>(e.g. v01.25-36)</i>	New version number <i>(e.g. v01.27, or 02.03)</i>	Brief description <i>(e.g. updated paras 1-8, updated HOPI to HOOM, reviewed whole section on PI test, whole document updated, corrected typos, reformatted to new branding)</i>
05/05/21	BOW	03.00	03.01	New document created following approval of draft
05/05/21	BOW	03.01	03.02	DCS updated, published on website