**FOI Central Policy Unit**

**Notice 17**

**Freedom of Information Act**

**Appeals to the High Court and Supreme Court**

**1. Appeals to the High Court**

Appeals to the High Court are dealt with in section 24 of the Freedom of Information Act. This provides that

“(1) A party to an application under section 22 or any other person affected by the decision of the Commissioner following a review under that section may appeal to the High Court –

1. on a point of law from the decision, or
2. where a party or person concerned contends that the release of a record concerned would contravene a requirement imposed by European Union law, on a finding of fact set out or inherent in the decision ”

This suggests that an appeal on a point of law may be made in the following circumstances:-

in relation to a case where a requester has made a request under the Act, where the FOI body’s decision on that request has been appealed to the Information Commissioner, and where the Information Commissioner has overturned, varied or affirmed the FOI body’s decision,

*or*

in relation to a case where the Information Commissioner’s decision will affect the FOI body concerned

*or*

in relation to a case, where the outcome will affect any other person.

In other words, any person affected by an Information Commissioner decision has a right to appeal such a decision on a point of law. However, if the FOI body which might wish to lodge an appeal is neither the requester, nor the FOI body which received the request or if a third party wishes to lodge an appeal, the question arises as to how they are to know of the Information Commissioner’s decision. Under section 22(10) of the Act, the Commissioner is required to notify of his decision only to:

(*a*) the head concerned,  
(*b*) the relevant person concerned, and  
(*c*) any other person to whom, in the opinion of the Commissioner, such notice should be given.

It follows that any person or body, other than the FOI body directly involved in the case, who/which expects to be affected by an Information Commissioner decision, should ask to be informed of the decision concerned, either by the other FOI body involved or by the Information Commissioner.

The best point at which to address an actual or potential disagreement on a point of law between the Office of the Information Commissioner and an FOI body is before the Information Commissioner has made a final decision in a particular case. In most cases where difficult legal issues arise, the Office of the Information Commissioner is likely to engage in discussions and/or seek submissions with/from both parties concerned. If the Office of the Information Commissioner is raising legal issues which would be likely to give rise to real difficulty for the FOI body concerned, or for FOI bodies generally, then a strong, well-considered submission to the Office of the Information Commissioner, at this stage, might avert the need for an appeal later. The Act generally applies a burden of proof to the FOI body, so an indication from the Office of the Information Commissioner that it is considering a particular line in relation to a legal issue arising should be viewed as an opportunity to meet this burden of proof.

Section 24(4)(a) of the FOI Act 2014 provides that an appeal must generally be initiated not later than **4 weeks** after notice of the decision concerned was given to the person bringing the appeal. However, where the decision of the Information Commissioner is to grant access to some records (including parts of records) but not all records requested, section 24(4)(b)(i) provides that the requester shall have 8 weeks after the date of the notification of the decision to initiate an appeal to the High Court.

This means that the following steps require to be taken, within that four week time frame - early action is essential:

* + 1. *Consideration of whether an appeal is appropriate* - appeals should not be taken merely because the FOI body disagrees with the finding. The finding should be appealed only if there are important negative implications arising from it, either in relation to the particular records concerned, or in relation to the impact in FOI bodies more generally of wider application of some principle set out in the finding. FOI bodies are advised to notify the Central Policy Unit where an issue of general principle in relation to the FOI Act is considered to be at stake.
    2. *Seek legal assistance -* it is essential that legal advice be sought as early as possible in the process. In the case of Government Departments, this advice should be sought through the Office of the Attorney General, who will arrange outside counsel and advise the Office of the Chief State Solicitor as appropriate. Other FOI bodies or affected parties should enter into discussions with their usual legal advisors.
    3. *Reconsider the question of appeal in the light of the advice received*
    4. *Ensure the appeal is lodged -* it is not intended to go into this procedure in detail here. This is a matter for the legal advisors concerned to advise on. The principal requirements are set out in the relevant rules of court (see courts rule section of [www.courts.ie](http://www.courts.ie)). It is not necessary, at this stage, that the whole case should be prepared, but the appellant will be required to make an affidavit and do the following:

a) state the nature of the decision against which the appeal is brought;  
(b) exhibit a copy of the decision, if any;  
(c) state the grounds of the appeal and the point of law, where appropriate;  
(d) state the nature of the discretion or order sought from the Court;  
(e) exhibit all relevant documentation; and  
(f) specify whether the appellant is requesting that the appeal be heard otherwise than in public

Of course, an appeal should not be lodged unless there is a reasonable prospect of success.

1. *Pursue the case in accordance with legal advice received -* again, the wider picture should always be borne in mind. It might be possible to make legal arguments which would, if accepted by the Court, assist in the present case, but set undesirable legal precedents in relation to other cases which might arise.
2. *Consider whether some of the records concerned can be released in the interim -*  where a legal point arises in relation to only some of the records which were the subject of the Information Commissioner’s original decision, consideration should be given to release of those records which are not in contention, subject always to legal advice.

Issues of Fact are not subject to appeal - where the Information Commissioner is considered by an FOI body to have erred in making a decision, on the basis of a misinterpretation of the facts surrounding a case, this is not subject to appeal to the High Court. Only points of law are subject to such appeal. In practice however, issues of fact and law may be heavily intertwined.

An FOI body may not appeal a decision where the Information Commissioner has ruled in its favour - it could arise that, while a decision of the Information Commissioner is entirely in favour of the FOI body concerned, some aspect of the way in which the Information Commissioner arrives at the decision is regarded as undesirable by the FOI body concerned. However, in such a case, there would be no right of appeal.

It may be important to ensure that the process of taking an appeal to the High Court does not give rise, in itself, to the outcome which it is desired to avoid - i.e. release or publication of records which should properly be exempt from release: section 25 of the Act requires the High Court to take measures to guard against this outcome, and the relevant rules of Court provide a party to an appeal may request that the Court take precautions to prevent disclosure to the public or, if appropriate, to a party, of information which should properly be withheld, and that the Court shall take all such reasonable precautions as it thinks fit. Again, legal advice should be sought by the FOI body concerned on this point.

**2. Appeals to the Supreme Court:**

A decision of the High Court under section 24 of the FOI Act may be appealed to the Supreme Court.

FOI bodies considering an appeal to the Supreme Court are advised to familiarise themselves with the relevant requirements, including the timescales that apply.

In view of the tight time frame for preparing an appeal to the Supreme Court, immediate action is essential. As in the case of High Court appeals, FOI bodies should firstly considerwhether an appeal is appropriate and should carefully consider, in conjunction with their legal advisors, the likely chances of success*.*  The Supreme Court is the final Court of appeal and it is very important that the wider picture should always be borne in mind as regards the setting of undesirable legal precedents in relation to other cases that might arise.

Central Policy Unit

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