

## INSIGHT

### Recovery of evidence for claims in Scotland

There is no automatic entitlement to relevant information in litigation in Scotland, and the procedure for recovery of documents is very different to other jurisdictions

In Scotland there is no general duty of disclosure before litigation, so the simple rule of thumb is that if you want information, you have to ask for it. You need to know how to ask, and what to do if your request is refused.

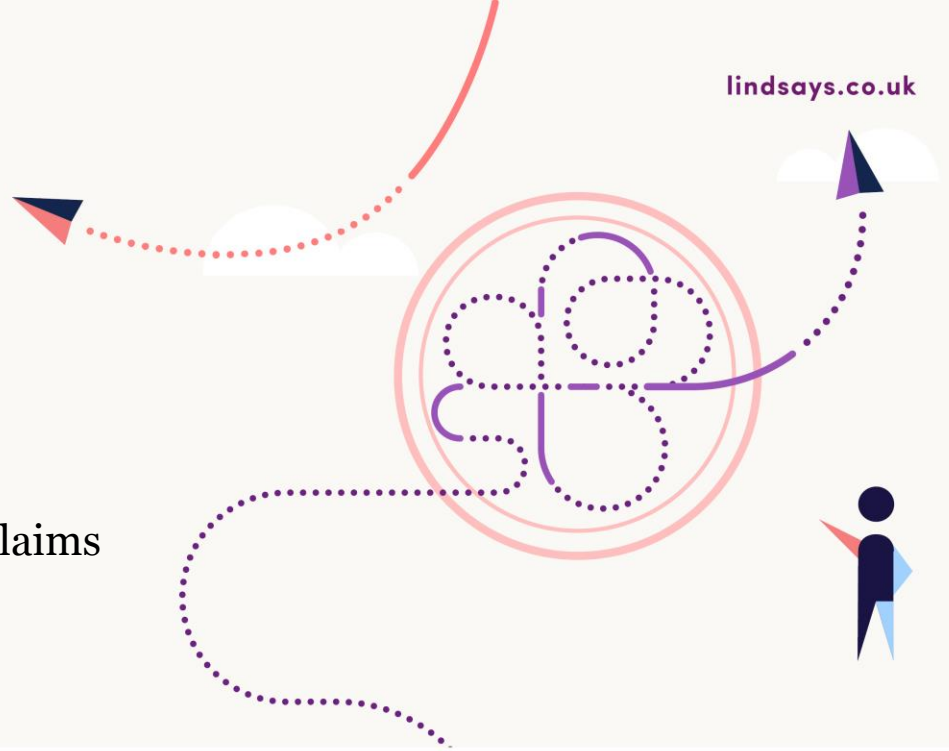
Our experienced Litigation team can guide you through all the avenues available for recovering evidence.

#### Applying for a Court Order

If you ask for material and are refused, you can apply to the Court (the [Sheriff Court](#) or the [Court of Session](#)) for an Order for what you believe you need. However, before doing that, there are other routes to explore:

- If information is held by a public authority, you can request it under the terms of the Freedom of Information (Scotland) Act 2002. If you are refused under this legislation, there is a right of appeal to the Scottish Information Commissioner.
- It may be possible to make a Subject Access Request under Data Protection legislation; this may help you recover information such as medical records, police records, or employment information.

If these options do not work, you can apply to the Court, as explained below.



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### Applications before court proceedings are raised

Applications for an Order to obtain material you need for a case are made under the Administration of Justice (Scotland) Act 1972.

Applications can be made against the person or agency who has the papers or information required. Certain information, such as an indication that once you have the material you need, you will be proceeding with a court action, must be included.

### What if the material might be concealed or destroyed?

Where there is a real risk of someone concealing or destroying material if you ask for it by consent, it is possible to seek a "dawn raid".

This requires an Order from the Court, granting recovery without the holder of the material having an opportunity to argue against it. The process is detailed, and costs include the appointment of an officer of the Court who will oversee the recovery action in a manner compliant with human rights law.

Whilst the process is by no means simple, it can be very effective in securing evidence that is easily hidden or destroyed, such as a computer hard drive.

### Inspections and photography requests

Sometimes it is necessary to inspect or photograph items or objects to determine whether you can proceed with litigation, and it is possible to obtain an Order for this from the Court.

If you are concerned that asking for photography/inspection consent risks the item being concealed or destroyed, you can apply for a "dawn raid" Order, as above.

### Disclosure of witnesses

It may be necessary to speak with witnesses in order to know if you can proceed with a Court action, and it is

possible to apply for an Order obliging disclosure of the witnesses' names and contact details.

The procedures for doing this are set out in the Administration of Justice (Scotland) Act 1972, and we can guide you through all the steps required.

### Procedures for recovery of documents after Court action is underway

It is common to find out that you need access to certain documents or material, only after a Court action has begun.

In general, it is easier to recover papers, or inspect and photograph objects, in the context of an existing Court action, and the applications can be made by way of motion.

### Failure to release material

Once an Order has been granted obliging disclosure of documents or objects, the person responsible (the "haver") has a timeframe in which to comply. If they fail to do this, you can take the matter to a Commission.

This is effectively a hearing before a Court-appointed commissioner (an independent advocate or solicitor) where either the material is produced, or a recorded explanation is given as to why the papers are not available and what enquiries and efforts have been made to trace the papers.

### Navigating the Scottish system

To those more accustomed to jurisdictions where there is a duty of disclosure, the need to ask for information is alien, and these procedures are unfamiliar. We can clarify the best steps for recovery of documents in Scotland and take you seamlessly through the processes required.

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