

Supreme Court of Nova Scotia Practice Memorandum No. 12

#12 Freedom of Information and Protection of Privacy Appeals

Introduction

With some changes necessitated by provisions in the *Freedom of Information and Protection of Privacy Act*, the Freedom of Information and Protection of Privacy Regulations, and Part 20 of the *Municipal Government Act*, appeals under these statutes now follow the appeal procedures in Rule 7 - Judicial Review and Appeal. This includes the notice of appeal and the motion for directions.

Notice of Appeal

Before procedural provisions were modified by the Rules, the *Freedom of Information and Protection of Privacy Act* contemplated an appeal without parties. Notice had to be given to the Minister of Justice, but the Crown did not become a party until the minister filed a notice to that effect. The modifications provide for the head of the public body to be a respondent. Alternatively, the public body itself may be named if it is a corporation. See, Rule 7.20(1).

The minister must still be notified or "[the] appeal is deemed not to have been taken": s. 41(1A). Rule 7.20(2) allows a judge to recognize the status of the minister who files a notice and to continue the status of the named respondent or substitute the minister. In cases in which the public body is not a Crown ministry or agency, such as a university, substitution will not usually be desirable.

Rule 7.20(4) requires that notice also be given to the Information and Privacy Commissioner. (The commissioner is the review officer referred to in the statute.) The commissioner is not a party. See, s. 41(5). However, the Rule allows a watching brief.

The attached "Notice of Appeal of a Refusal under the *Freedom of Information and Protection of Privacy Act*" is suitable to appeals by an applicant whose request is refused under that statute.

Protection of Record

An appeal of this kind is one instance in which a judge may make a ruling when at least one party does not see all of the record. The determination of a claim for

privilege is an example from the common law. An application for production of personal records is an example from the criminal law.

Subsection 42(1) of the statute permits the judge who hears the appeal to examine records *in camera*. The Rules provide protection in the lead-up to such an examination. Rule 7.20(5) requires delivery to the prothonotary of copies of the documents that are the subject of the appeal, and Rule 85.07(2) requires the prothonotary to seal them. The judge who hears the motion for directions may direct that the sealed package be given to the judge who hears the appeal. See, Rule 85.07(1).

The practice is for the appeal judge to hear argument before deciding whether to unseal the documents in private. So, it is possible for the judge to make a decision without examining the documents. In cases that go to the next step, the judge may return with a decision or request further submissions.

When the court allows an appeal from a refusal or dismisses an appeal from a grant of access, some steps will be taken in the wording of the decision and the order to try to protect claims of confidentiality pending a stay on appeal. The draft order attached to this practice memorandum is designed with that purpose in mind.

The attached form of Notice of Appeal of a Refusal covers the usual kind of appeal, a refusal of a *Freedom of Information and Protection of Privacy Act* request for access to information. The form would have to be adapted for a refusal to correct a record or a decision within the failure to act and omission provisions in Rule 7.01. For example, "Record of public body" would be changed or removed. Also, the notice would have to be adapted for appeals under Part 20 of the *Municipal Government Act*.

The attached "Order Disposing of Appeal of a Refusal of a Request for Access to Information" is suitable for *Freedom of Information and Protection of Privacy Act* appeals in which the decision provides for disclosure of some or all of the information sought. The form would have to be adapted for appeals about correction requests and other kinds of appeal, and for appeals under Part 20 of the *Municipal Government Act*.

Directions

Checklists and the following list of subjects for a motion for directions on a *Freedom of Information and Protection of Privacy Act* appeal should not be allowed to obscure the nuances inherent in litigation:

- Is the Minister of Justice becoming a party?
- If so, is the minister to be added as a respondent or substituted for the respondent?
- Have third parties been notified and, if so, do any wish to participate?
- Are there any problems with the record delivered by the head or public body to the prothonotary?
- What are the issues for the appeal judge?
- Are there any motions to be heard before the appeal hearing?
- Set date for motion.
- Set date for the appeal hearing.
- Set deadlines for motion materials and the appeal briefs.
- Confirm that the record has been sealed and will remain sealed until the appeal judge takes possession of it, as the appeal judge directs after taking possession, or as another judge directs in the absence of the appeal judge.

Adopted by the court on January 26, 2018.

Joseph P. Kennedy
Chief Justice of the Supreme Court of Nova Scotia