

Practice Memorandum No. 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?

Adopted on January 26, 2018

- 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

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No.

Supreme Court of Nova Scotia

Between:

[name]

Appellant

and

[name of head of public body or,
if it is a corporation, public body itself]

Respondent

**Notice of Appeal of a Refusal
of a request for Access to Information**

To: [name of respondent]

And to: The Information and Privacy Commissioner

And to: The Minister of Justice

Appellant appeals

The appellant appeals under sections 40 and 41 of the *Freedom of Information and Protection of Privacy Act* from the decision of [name of head of public body or the public body], which decision refused a request for access to [describe requested information].

Decision being appealed

The decision was made on _____, 20____. It was made at _____, Nova Scotia. It was communicated to the appellant on _____, 20____. A [copy of/summary of] the decision is attached.

No other review

There is no review of this decision currently before the Office of the Information and Privacy Commissioner for Nova Scotia.

Grounds of appeal

The appellant says that the refusal is in error for the following reasons:

1 [state grounds concisely]

2

3

Order requested

The appellant says that the court should allow the appeal and order that [name] provide the appellant with access to [describe records in contention] .

Record of appellant

The appellant files with this notice an appeal book containing all documents in the possession of the appellant about the request, recommendation, and refusal.

Record of public body

The respondent head, or public body, must deliver copies of the documents for which access has been refused to the prothonotary before the motion for directions is heard. The prothonotary is required by *Civil Procedure Rule 85.07* to keep the documents sealed. The judge who gives directions may make provisions for delivery of the sealed package to the judge who hears the appeal. The judge who hears the appeal may wish to hear argument before deciding whether to examine the record *in camera* under subsection 42(1) of the statute.

Filing and delivering documents

Any documents you file with the court must be filed at the office of the prothonotary
Street, , Nova Scotia (telephone #).

When you file a document you must immediately deliver a copy of it to each other party entitled to notice, unless the document is part of an *ex parte* motion, the parties agree delivery is not required, a judge orders it is not required, or the document is protected by Rule 85.07.

Contact information

The appellant designates the following address:

Documents delivered to this address are considered received by the appellant on delivery. Further contact information is available from the prothonotary.

Motion for directions

At [a.m./p.m.] on _____, 20____, the appellant will appear before a judge in Chambers at the [Law Courts/Courthouse] _____, Street, _____, Nova Scotia to make a motion for an order giving directions for the appeal and setting a date and time for the hearing of it. The judge may make an order or provide directions in your absence if you or your counsel fail to attend, and the court may determine the appeal without further notice to you.

Signature

Signed _____, 20____

Signature of appellant
Print name:

[or]

Signature of counsel
[name] as counsel
for [name]

Prothonotary's certificate

I certify that this notice of appeal was filed with the court on _____, 20____.

Prothonotary

[attach copy of decision under appeal or summary]

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No.

Supreme Court of Nova Scotia

Between: [copy standard heading]

Appellant

and

Respondent

**Order Disposing of Appeal of a Refusal
of a Request for Access to Information**

Before the Honourable Justice [name]

The appellant appealed under the *Freedom of Information and Protection of Privacy Act* the decision of [the respondent / a public body now represented by the Minister of Justice, name of public body / the head of a public body now represented by the Minister of Justice, name of public body] refusing to release information;

The information was delivered to the prothonotary and sealed by the prothonotary and by subsequent orders of the court;

On the motion of [name of moving party or counsel] , the following is ordered:

1. The appeal is dismissed.
2. The prothonotary shall return the sealed information to the [respondent / head of the public body / public body] in thirty days or a later time ordered by a judge of the Nova Scotia Court of Appeal.

OR

1. The appeal is allowed.
2. The [respondent / head of the public body / public body] shall disclose all of the information to the appellant no later than thirty days after the date of this order.
3. The prothonotary shall unseal the sealed information thirty days after the date of this order or at a later time ordered by a judge of the Nova Scotia Court of Appeal.

OR

1. The appeal is allowed in part.
2. The prothonotary shall deliver to the [*respondent / head of public body, public body*] a copy of the sealed information on which the judge has made markings that show which documents are to be disclosed, which documents are not to be disclosed, and the parts of the reasons to which the markings relate.
3. The [*respondent / head of public body / public body*] shall disclose the documents marked to be disclosed.
4. The prothonotary shall deliver the sealed information and the marked copy to the [*respondent / head of public body / public body*] when satisfied that the required disclosure has been made or at a later time ordered by a judge of the Nova Scotia Court of Appeal.

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Prothonotary