

McGill Law Journal accessible summary:

Secret, not sacred: constitutional limitations on the protection of cabinet confidences under the access to information act

By Yan Campagnolo and Vincent Kazmierski

Published in Volume 71, Issue 3, at pages 907–965

Topic and importance

This article addresses the federal government's power to hide a vast amount of information from the public by claiming it is a Cabinet confidence. Currently, section 69 of the Access to Information Act (ATIA) allows the government to keep documents secret for 20 years if they relate to Cabinet proceedings, without any independent oversight. This power is controversial because section 69 is overbroad and unnecessarily limits citizens' ability to understand and criticize government actions or to be informed voters.

The goal of this article is to demonstrate that section 69 violates the Canadian Charter of Rights and Freedoms. The article is primarily supported by Supreme Court of Canada decisions and secondary sources that discuss sections 2(b) and 3 of the Charter and unwritten

constitutional principles, as well as comparisons with other common law jurisdictions.

Main arguments

Having access to government information is a constitutionally protected right under the Charter. This article first discusses the sources of the constitutional protection of access to information and reviews the Court's past approaches to protecting access to information and other so-called positive rights under section 2(b), namely, the "hybrid Irwin Toy approach" and the "simplified Dunmore/Baier approach." This review shows that the Court has created uncertainty in determining what information qualifies as a form of expression protected under section 2(b). The article then proposes a new "holistic approach" supported by sections 2(b) and 3 as well as the unwritten constitutional principle of democracy to protect citizens' rights to meaningfully participate in the democratic process.

The article proceeds to argue that section 69 of the ATIA could be found unconstitutional under each of the three approaches identified in the previous paragraph because it substantially impedes meaningful commentary on matters of public or political importance and there are no factors that can justify excluding constitutional protection.

Section 69 of the ATIA infringes on constitutional rights because it excludes an entire category of information from public view without a valid mechanism for review. The authors argue that the current total ban is not necessary for the government to function; other Westminster-style governments, such as Australia, the United Kingdom, New Zealand, and the Canadian provinces, allow independent commissioners or judges to review documents alleged to contain Cabinet confidences to ensure their

secrecy is justified. Unlike other sensitive information (like national security information), which can be reviewed by a court, Cabinet confidences are completely off-limits to judges and the Information Commissioner. The definition of “Cabinet confidence” is so wide that it allows the government to hide background facts and statistics that are not actually sensitive. Because no independent body is allowed to check these documents, the government can, and does, use section 69 to hide information that should be public, effectively controlling access to information without any further checks.

Conclusion and additional considerations

This article concludes that section 69 of the ATIA must be changed because it currently treats Cabinet confidences as sacrosanct materials, rather than simply sensitive information that requires temporary protection. The law should be modified to allow for independent oversight, meaning a judge or commissioner could review these documents and order them to be released in appropriate circumstances.

The exclusion of Cabinet confidences from the scope of the ATIA is a significant limitation on access to government information—which is essential for democracy—and represents a critical gap in government accountability. Without changes to this law, the public may be denied the facts needed to evaluate political controversies, whether they relate to foreign interference in elections or government spending scandals, making it difficult to hold elected officials responsible during elections.