

Cabinet mandate letters protected from disclosure (Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner))

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Democracy is a delicate form of government because it constantly tests the outer limits on multiple policies and engenders vigorous debate. A policy issue that has occupied the interests of media involves the ability of a government to keep instructions on various matters and deliberations free from disclosure. Although some might believe that there should be no secrets in a democracy and that a government should be required to disclose everything related to public policy, including initial thoughts and deliberations, a strong democracy requires governments and elected representatives to be able to operate in a zone of privilege, privacy and confidentiality.

In *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 (CanLII), the Supreme Court of Canada agreed that mandate letters delivered by Ontario Premier Doug Ford to each of his ministers shortly after his election in 2018 were exempt from disclosure under the Cabinet records exemption found in section 12(1) of the *Freedom of Information and Privacy Act* ("FIPPA") because their disclosure would actually be contrary to principles of democracy.

In this case, a CBC journalist had sought access to the mandate letters and had obtained successful rulings before the Information and Privacy Commissioner ("IPC"), the Ontario Superior Court of Justice (Divisional Court) and the Court of Appeal for Ontario.

However, while noting that access to information promotes transparency, accountability, and meaningful public participation, the Supreme Court of Canada reversed these decisions on the grounds that the initial decision of the IPC was unreasonable. The decision from the IPC failed to engage meaningfully with the legal and factual context against which section 12(1) of FIPPA operated. The legal and factual context was comprised of constitutional conventions and traditions surrounding Cabinet confidentiality and Cabinet's decision-making process, including the role of the Premier within that process.

On the appeal to the Supreme Court of Canada, the government attacked the IPC's ruling on the following grounds: (i) that the IPC's interpretation of section 12(1) was inconsistent with the purpose of the exemption to broadly protect Cabinet confidentiality; (ii) that the ruling established a heightened evidentiary test which had required Cabinet Office to show a link between items in the mandate letters to a specific Cabinet meeting in order to be exempt; and (iii) that the ruling found improperly that the letters were simply "topics" and "subjects" of Cabinet meetings.

The thrust of CBC's argument was that the IPC's decision should be upheld because public access to government-held information was vital to Canada's democratic process. The CBC also argued that the government led no evidence that disclosure of the mandate letters would reveal the substance of any deliberations at any Cabinet meeting.

However, the Supreme Court of Canada found that section 12(1) of FIPPA created an exemption for Cabinet records and that this exemption represented a critical balance between public access to information and necessary spheres of confidentiality that permit our government to properly function and make decisions.

Furthermore, the court held that Cabinet confidentiality was protected as a matter of constitutional convention. Cabinet confidentiality was a pre-condition for responsible government because it allowed for collective ministerial responsibility. The Supreme Court of Canada agreed that disclosure of the mandate letters would increase public pressure on ministers, give rise to partisan criticism and ultimately paralyze the decision-making process.

The Supreme Court of Canada accepted that:

- a. collective ministerial responsibility required ministers to be able to speak freely when deliberating;
- b. responsible government was a cornerstone of Canada's system of government, and
- c. Cabinet secrecy promoted candour, solidarity and efficiency, all in the aid of effective government.

In the court's view, the IPC, in its ruling, ignored the function of Cabinet and the bounds of confidentiality necessary for it to discharge that function effectively. This negatively impacted the IPC's interpretation of the scope of [section 12\(1\)](#), with the IPC adjudicator treating the mandate letters as an end point to the Premier's deliberative process, instead of appreciating that the Cabinet's deliberative process consisted of discussion, consultation, and policy formulation between the Premier, individual ministers and Cabinet as a whole.

The Supreme Court of Canada explained that the role and activities of the Premier were inseparable from Cabinet and its deliberations, and that the agenda-setting contained in the mandate letters was a crucial part of the decision-making process. However, the IPC drew an artificial distinction between the Premier's deliberative process and the rest of Cabinet's.

With respect to evidence, the Supreme Court of Canada found that the IPC established too high of a threshold. It was unreasonable for the IPC to require the government to lead evidence linking the mandate letters to actual deliberations at a specific Cabinet meeting. The IPC's reasoning failed to appropriately consider the realities of the deliberative process.

Lastly, the IPC erred in finding that the mandate letters contained mere "topics". This conclusion misapprehended the legal and factual context of the decision-making process, was counter to the text of the mandate letters and was unreasonable.

The key take-away of this decision is that [FIPPA](#) and all other freedom of information legislation was enacted to strike a balance between access to government information and the protection of spheres of confidentiality. In order to fulfill their roles, Premiers and Cabinet ministers are entitled to zones of confidentiality so that they may individually and collectively fulfill their roles. If the balance is tilted too far one way or another, the fundamental underpinnings of our democracy can be threatened. Accordingly, it is sometimes necessary to carefully assess criticism whenever a government refuses to disclose records or information under a freedom for information request. Although the media or a requester might wrap themselves in the flag of democracy to support their position, rather than fostering democracy, the disclosure that is sought can sometimes negatively impact well-established legal principles and conventions that have been developed and designed to deliver effective, efficient, and responsible government. A PDF version is available to download [here](#).

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