

Torys on Privacy

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Canada's Supreme Court Says There Is No Constitutional Right to Access All Government Records

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In *Ontario (Public Safety) v. CLA*, the Supreme Court of Canada was asked to find that the *Canadian Charter of Rights and Freedoms* guarantees public access to all government records. After an unusual delay of 18 months, the Court decided against an unrestricted constitutional right.

The case arose from a murder. Criminal charges against two accused were stayed because a court found “many instances of abusive conduct by state officials” including deliberate misconduct. In contrast, a later police investigation exonerated the police in question, without further explanation. Given the disparity between these two findings, the Criminal Lawyers' Association (CLA) made a request under the Ontario *Freedom of Information and Protection of Privacy Act* (FIPPA) for access to government documents about the police investigation and the prosecution. The Minister refused to disclose these documents, relying on exemptions in FIPPA relating to law enforcement and solicitor–client privilege.

The Public Interest Override

The Supreme Court decision focused on FIPPA's public interest override. Like other access legislation, FIPPA provides for access to information held by government, subject only to very specific exemptions. However, FIPPA also provides that some exemptions do not apply “where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.” When the Assistant Information and Privacy Commissioner reviewed the decision not to disclose the documents in this case, he found that the public interest in disclosure clearly outweighed the purpose of the exceptions to disclosure. However, the override did not apply to the exemptions for law enforcement and solicitor–client privilege, so the documents were not disclosed.

The CLA contended that the FIPPA regime was unconstitutional because the public interest override did not apply to the law enforcement and privilege exemptions.

Supreme Court Decision

The Supreme Court ruled that the *Charter*, specifically the right to freedom of expression, does not guarantee access to government information. In turn, the Court found that the limited availability of the public interest override in FIPPA does not violate the right to free expression.

The Court acknowledged that access to government information can increase transparency, contribute to an informed public and enhance an open and democratic society. It held, however, that some information in the hands of government should be

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protected to prevent those very principles from being impaired and to promote good governance.

The Court held that the law enforcement exemption already provides for adequate consideration of the public interest, but the Court ordered that the Privacy Commissioner reconsider the decision not to disclose on this basis. Without pronouncing on the propriety of the Minister's original decision, the Court held that the circumstances should have been investigated by the Commissioner.

With respect to solicitor–client privilege, the Court confirmed its well-established record of protection. It held that given the near-absolute nature of solicitor–client privilege, it was difficult to see how the public interest could ever operate to require disclosure of a privileged document.

The Court was not convinced that access to the documents was “necessary to permit meaningful debate and discussion on a matter of public interest.” Had the CLA established necessity, the next step would be to demonstrate that the access to those documents “would not impinge on privileges or impair the proper functioning of relevant government institutions.” The Court concluded that these are the very reasons why the exemptions from disclosure of records in respect of law enforcement and privilege are in place. **11**