S.C.C. File No. 40078

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

ATTORNEY GENERAL FOR ONTARIO

Appellant (Appellant)

- and -

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO and CANADIAN BROADCASTING CORPORATION

Respondents (Respondents)

- and -

ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, CANADIAN CIVIL LIBERTIES ASSOCIATION, BC FREEDOM OF INFORMATION AND PRIVACY ASSOCIATION, CENTRE FOR FREE EXPRESSION, CANADIAN JOURNALISTS FOR FREE EXPRESSION, CANADIAN ASSOCIATION OF JOURNALISTS and ABORIGINAL PEOPLES TELEVISION NETWORK

Interveners

FACTUM OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

BLAKE, CASSELS & GRAYDON LLP
199 Bay Street
Suite 4000, Commerce Court West
Toronto ON M5L 1A9

Iris Fischer (LSO #52762M)
Tel: 416-863-2408
Fax: 416-863-2653
iris.fischer@blakes.com

Gregory Sheppard (LSO #80268O)
Tel: 416-863-2616
gregory.sheppard@blakes.com

Lawyers for the Intervener,
Canadian Civil Liberties Association

BLAKE, CASSELS & GRAYDON LLP
340 Albert Street
Suite 1750, Constitution Square
Ottawa, ON K1R 7Y6

Alison Henderson
Tel: 613-788-2224
Fax: 613-788-2247
alison.henderson@blakes.com

Agent for the Intervener,
Canadian Civil Liberties Association

ORIGINAL TO: THE REGISTRAR

COPIES TO:

MINISTRY OF THE ATTORNEY GENERAL
Crown Law Office - Civil
720 Bay Street, 8th Floor
Toronto ON M7A 2S9

Judie Im
Tel: 416-427-4611
judie.im@ontario.ca

Nadia Laeeque
Tel: 416-910-9196
nadia.laeeque@ontario.ca

Jennifer Boyczuk
Tel: 416-909-6673
jennifer.boyczuk2@ontario.ca

Tel: 416-326-4155
Fax: 416-326-4181

Lawyers for the Appellant

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street
Suite 1300
Ottawa ON K1P 1J9

Nadia Effendi
Tel: 613-670-6289
neffendi@blg.com

Agent for the Appellant

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO
1400 - 2 Bloor Street East
Toronto ON M4W 1A8

William S. Challis
Tel: 416-326-3333
bill.challis@ipc.on.ca

Linda Chen
Tel: 416-326-0017
Fax: 416-325-9195
linda.chen@ipc.on.ca

Lawyers for the Respondent,
Information and Privacy Commissioner of Ontario

STOCKWOODS LLP
Barristers and Solicitors
77 King Street West, Suite 4130
P.O. Box 140
TD North Tower, Toronto-Dominion Centre
Toronto ON M5K 1H1

Justin Safayeni
Tel: 416-593-3494
justins@stockwoods.ca

Spencer Bass
Tel: 416-593-1657
spencerb@stockwoods.ca

Tel: 416-593-7200
Fax: 416-593-9345

Lawyers for the Respondent,
Canadian Broadcasting Corporation

CONWAY BAXTER WILSON LLP
400-411 Roosevelt Avenue
Ottawa ON K2A 3X9

David Taylor
Tel: 613-691-0368
Fax: 613-688-0271
dtaylor@conwaylitigation.ca

Agent for the Respondent,
Canadian Broadcasting Corporation

GOLDBLATT PARTNERS LLP
Barristers and Solicitors
20 Dundas Street West
Suite 1100
Toronto ON M5G 2G8

Jessica Orkin
Tel: 416-979-4381
jorkin@goldblattpartners.com

Adriel Weaver
Tel: 416-979-6415
Fax: 416-591-7333
aweaver@goldblattpartners.com

Lawyers for the Interveners, Centre for Free Expression, Canadian Journalists for Free Expression, and the Canadian Association of Journalists

GOLDBLATT PARTNERS LLP
500-30 Metcalfe St.
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: 613-482-2463
Fax: 613-235-5327
cbauman@goldblattpartners.com

Ottawa Agent for the Interveners, Centre for Free Expression, Canadian Journalists for Free Expression, and the Canadian Association of Journalists

GOLDBLATT PARTNERS LLP
Barristers and Solicitors
20 Dundas Street West
Suite 1039
Toronto ON M5G 2C2

Daniel Sheppard
Tel: 416-979-6442
dsheppard@goldblattpartners.com

Lawyers for the Intervener,
Aboriginal Peoples Television Network

ALBERTA JUSTICE AND SOLICITOR GENERAL
9th Floor Peace Hills Trust Tower
10011 - 109 Street
Edmonton, AB T5J 3S8

Sean McDonough
Tel: 780-427-1230
sean.mcdonough@gov.ab.ca

Melissa Burkett
Tel: 780-427-1230
Fax: 780-427-1257
melissa.burkett@gov.ab.ca

Lawyers for the Intervener,
Attorney General of Alberta

SEAN HERN, K.C.
#332, 185 - 911 Yates Street
Victoria, BC V8V 4Y9

Sean Hern, K.C.
Tel: 250-896-1900
Fax: 778-508-3516
sean@seanhernlaw.com

Lawyers for the Intervener,
BC Freedom of Information and Privacy Association

ATTORNEY GENERAL OF BRITISH COLUMBIA
1301-865 Hornby Street
Vancouver, BC V6Z 2G3

Tara Callan
Tel: 604-660-3093
Fax: 604-660-3833
tara.callan@gov.bc.ca

Tamara Saunders
Tel: 250-356-7265
Fax: 250-356-4348
tamara.saunders@gov.bc.ca

Lawyers for the Intervener,
Attorney General of British Columbia

NOËL ET ASSOCIÉS, S.E.N.C.R.L.
225, montée Paiement, 2e étage
Gatineau, QC J8P 6M7

Pierre Landry
Tel: 819-503-2178
Fax: 819-771-5397
p.landry@noelassocies.com

Agent for the Intervener,
Attorney General of British Columbia

TABLE OF CONTENTS

PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal concerns the scope and interpretation of the Cabinet records exemption from disclosure in s. 12(1) of Ontario's *Freedom of Information and Protection of Privacy Act* ("***FIPPA***"). The Canadian Civil Liberties Association ("**CCLA**") has intervened to submit that any exemptions to the public's right to access Cabinet records should be limited and specific as mandated by s. 1 of *FIPPA*, and that s. 12(1) should be interpreted in accordance with the purpose of the Cabinet secrecy convention, from which it arises. Any undue expansion of s. 12(1) would hinder the public's right to access government information and hold government actors to account.

2. The constitutional convention of Cabinet secrecy protects from public disclosure information that would reveal the personal views of Cabinet ministers expressed in deliberations. While the Ontario legislature broadened the scope of s. 12(1) of *FIPPA* to protect certain other Cabinet records that otherwise may not be covered by the Cabinet secrecy convention, it has done so in a limited and specific way that accords with *FIPPA*'s purpose. Section 12(1) should not be expanded further.

B. Statement of Facts

3. The CCLA takes no position on the facts.

PART II - STATEMENT OF POSITION ON ISSUES RAISED BY THE APPELLANT

4. The CCLA makes three submissions. First, s. 12(1) should be interpreted in light of the Cabinet secrecy convention, the primary purpose of which is to shield from disclosure information that would reveal the personal views of Cabinet ministers expressed in deliberations. Second, case law and academic commentary have recognized a distinction between Cabinet secrets that reveal the personal views of Cabinet ministers expressed in deliberations and those that do not. Third, interpreted in light of the purpose of the Cabinet secrecy convention and of *FIPPA* itself, s. 12(1) strikes an appropriate balance between protecting the confidentiality of the substance of Cabinet deliberations and the public's right to access Cabinet records, and its scope should not be expanded.

PART III - STATEMENT OF ARGUMENT

A. Section 12(1) of *FIPPA* should be interpreted in light of the Cabinet secrecy convention

5. A principled approach to understanding the scope and application of s. 12(1) requires a careful consideration of the reasons for the exemption and the traditions that underlie its existence.[1] The CCLA submits that this Court should interpret s. 12(1) in light of the Cabinet secrecy convention, as it has been expressed in case law and academic commentary. The Cabinet secrecy convention is meant to shield from disclosure information that would reveal the personal views of Cabinet ministers expressed in deliberations.

(i) The purpose of the Cabinet secrecy convention

6. The Cabinet secrecy convention in Canada is inherited from the British democratic tradition, which has "long affirmed" the confidentiality of Cabinet deliberations.[2] The convention dates back to the time when the English sovereign was an active decision-maker in government and privy councillors were bound under oath to support all of the sovereign's decisions.[3] This oath, according to Professor Yan Campagnolo, was the primary source of the privy councillor's duty of secrecy which, over time, expanded to become not just a duty owed to the sovereign, but also a duty owed to other Cabinet ministers as part of the United Kingdom's system of responsible government.[4]

7. Professor Campagnolo has identified three rationales for the Cabinet secrecy convention. First, the convention fosters candour in ministerial deliberations. Second, the convention promotes

---

[1] See *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42 at paras 34-35; Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada, 2022) at § 16.02[2], Book of Authorities of the Intervener, the Canadian Civil Liberties Association [**CCLA BOA**], **Tab 2**.

[2] *Babcock v Canada (Attorney General)*, 2002 SCC 57 at para 18 [*Babcock*]. See also *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 at para 95 [*Provincial Court Judges' Association*].

[3] See Yan Campagnolo, *Behind Closed Doors: The Law and Politics of Cabinet Secrecy* (Vancouver: UBC Press, 2021) at 22 [Campagnolo, *Behind Closed Doors*] [**CCLA BOA, Tab 1**].

[4] Campagnolo, *Behind Closed Doors* at 22 [**CCLA BOA, Tab 1**]. See also Yan Campagnolo, "The Political Legitimacy of Cabinet Secrecy" (2017) 51:1 RJTUM 51 at 62 [Campagnolo, "Political Legitimacy"].

efficiency in the collective decision-making process. Third, the convention allows ministers to disagree in private while expressing solidarity in public.[5]

8. These rationales for the Cabinet secrecy convention have been accepted by this Court. In *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, Justice Karakatsanis recognized the value of candour in ministerial deliberations by noting that the "confidentiality of Cabinet deliberations helps ensure that [ministers] are candid and frank".[6] Underlining the importance of Cabinet solidarity, Justice Karakatsanis also wrote that "[i]f Cabinet deliberations were made public, ministers could be criticized for publicly defending a policy inconsistent with their private views, which would risk distracting ministers and undermining public confidence in government".[7] In *Carey v. Ontario*, Justice La Forest recognized the efficiency rationale in noting that the potential for "harassment" of Cabinet ministers arising from disclosures would make Cabinet government "unmanageable".[8]

9. The rationales identified by Professor Campagnolo and accepted by this Court support the primary purpose of the Cabinet secrecy convention: to shield from disclosure personal views of Cabinet ministers expressed in deliberations.[9] This Court has consistently recognized the convention's primary purpose. In *Smallwood v. Sparling*, Justice Wilson stated that the purpose of the Cabinet secrecy convention is "to maintain the confidentiality of the views of individual cabinet ministers in reaching joint decisions".[10] Chief Justice McLachlin echoed this statement in *Babcock v. Canada (Attorney General)*, writing that Cabinet members must be "free to express themselves around the Cabinet table unreservedly", warning that "if Cabinet members' statements were subject to disclosure, Cabinet members might censor their words…shy away from stating unpopular positions, or from making comments that might be considered politically incorrect".[11]

---

[5] Campagnolo, "Political Legitimacy" at 66-72.
[6] *Provincial Court Judges' Association* at para 96.
[7] *Provincial Court Judges' Association* at para 96.
[8] *Carey v Ontario*, [1986] 2 SCR 637, 1986 CanLII 7 (SCC) at para 50. See also para 84 (recognizing "the proper functioning of the executive branch of government" as justification for withholding Cabinet records).
[9] Campagnolo, *Behind Closed Doors* at 24 [**CCLA BOA, Tab 1**].
[10] *Smallwood v Sparling*, [1982] 2 SCR 686 at 706, 1982 CanLII 215 (SCC).
[11] *Babcock* at para 18.

More recently, in *Provincial Court Judges' Association of British Columbia*, Justice Karakatsanis affirmed that "[a]s a matter of constitutional convention, Cabinet deliberations are confidential"[12] and the convention extends "not only to records of Cabinet deliberations, but also to documents that reflect on the content of those deliberations".[13]

10. The constant thread running through these decisions is that the Cabinet secrecy convention creates a zone of confidentiality encompassing what is said or debated by Cabinet ministers in the course of their deliberations to encourage the robust exchange of ideas without undue external interference.[14] This understanding of the Cabinet secrecy convention is essential to interpreting and applying s. 12(1) of *FIPPA*, particularly as *FIPPA* was drafted with the convention in mind.

(ii) The Williams Commission Report and *FIPPA*

11. *FIPPA* was adopted following a multi-year process of expert consultation and deliberation by the Ontario legislature. The genesis of *FIPPA* lies in the Report on the Commission on Freedom of Information and Individual Privacy by D. Carlton Williams, commonly referred to as the "Williams Commission Report".

12. From the outset, the Williams Commission Report recognized that any access of information law addressing Cabinet records must be consonant with the long-standing Cabinet secrecy convention. The Report's assessment of the proposed exemption from disclosure for certain Cabinet records – which would become s. 12(1) of *FIPPA* – noted that "deliberations and decision-making processes of the Ontario Cabinet have traditionally been shielded by public view, as they have been in all other parliamentary jurisdictions".[15] The Report found that the "preservation of the confidentiality of Cabinet discussions would appear to be a necessary feature of a freedom of information scheme 'compatible with the parliamentary traditions of Government of Ontario'".[16]

---

[12] *Provincial Court Judges' Association* at para 95.
[13] *Provincial Court Judges' Association* at para 97.
[14] See e.g. *Provincial Court Judges' Association* at para 96.
[15] Carlton D Williams, *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy*, vol 2 (Toronto: Ministry of Government Services, 1980) at 284 [Williams].
[16] Williams at 85.

13. The CCLA therefore submits that this Court should affirm the central importance of the Cabinet secrecy convention, as it has been defined by this Court, in the interpretation and application of s. 12(1) of *FIPPA*.

B. A distinction exists between Cabinet secrets that reveal ministers' personal views expressed in deliberations and those that do not

14. Not all Cabinet secrets are alike. Case law and academic commentary have recognized a distinction between Cabinet secrets that reveal the personal views of ministers expressed in Cabinet deliberations and those that do not. These two categories of secrets are referred to by Professor Campagnolo as "core" and "non-core" secrets, respectively. As the primary purpose of the Cabinet secrecy convention is to protect core secrets from disclosure, s. 12(1) of *FIPPA* should be interpreted with this distinction in mind.

(i) Core and non-core secrets

15. According to Professor Campagnolo, core secrets refer to information that reveals the personal views of ministers expressed in deliberations. Non-core secrets, in contrast, refer to information about the decision-making process that does not reveal such views.[17] While governments may wish to shield certain non-core secrets from disclosure, the Cabinet secrecy convention "protects the views and opinions of ministers [from disclosure], not the substance of the matters deliberated or decided".[18]

16. Canadian courts have also recognized a distinction between core and non-core secrets. In particular, courts have been receptive to ordering disclosure of Cabinet records where they do not divulge the personal views of Cabinet ministers expressed during deliberations. For example, this Court in *Nova Scotia (Attorney General) v. Nova Scotia (Royal Commission into Marshall Prosecution)* unanimously affirmed a Royal Commission's jurisdiction to decide that Cabinet ministers may be asked questions on the general nature of Cabinet discussions on the basis that

---

[17] Campagnolo, *Behind Closed Doors* at 24 [**CCLA BOA, Tab 1**].
[18] Nicholas d'Ombrain, "Cabinet Secrecy" (2004) 47:3 Can Public Administration 332 at 333 [d'Ombrain] (emphasis added), Book of Authorities of the Appellant, Attorney General for Ontario [**Ontario BOA**], **Tab 8**.

such questions would not require witnesses to divulge the opinions expressed by individual ministers (i.e., core secrets).[19]

17. Lower courts have taken a similar approach. In 2014, the Supreme Court of Nova Scotia ruled that Cabinet documents that reflect "the single conclusion of Cabinet on the subject in the spirit [of] the doctrine of joint responsibility" and that do not engage the opinions of individual ministers may be disclosed in the litigation discovery context if relevant.[20] Similarly, the Supreme Court of British Columbia affirmed that there is a distinction between documents that merely emanate from Cabinet or contain information that may have been presented and discussed at cabinet (i.e., non-core secrets), and documents or notes that provide a record of "who said what around the Cabinet table".[21] The Court ordered the production of documents containing non-core secrets on the basis that their disclosure "should in no way impede the active debate that one would expect at the Cabinet table".[22]

18. Section 12(1) of *FIPPA* reflects the distinction between core and non-core secrets recognized by Canadian courts: the legislature's use of "substance of deliberations" refers to core secrets. *FIPPA* can be distinguished in this regard from other statutes which have a wider scope.

(ii) Federal legislation extends beyond the scope of the Cabinet secrecy convention

19. Federal legislation addressing the disclosure of Cabinet records is broadly drafted to shield both core and non-core secrets from disclosure, vastly expanding upon the scope of the Cabinet secrecy convention. Each of the *Canada Evidence Act*, the *Access to Information Act*, and the *Privacy Act* shield "confidences of the [King's] Privy Council for Canada" from disclosure, with such confidences being given a general and non-exhaustive definition.[23]

---

[19] *Nova Scotia (Attorney General) v Nova Scotia (Royal Commission into Marshall Prosecution)*, [1989] 2 SCR 788 at 790-91, 1989 CanLII 39 (SCC).
[20] *Anderson v Nova Scotia (Attorney General)*, 2014 NSSC 71 at para 26.
[21] *British Columbia Teachers' Federation v British Columbia*, 2013 BCSC 1216 at para 74 [*BCTF*].
[22] *BCTF* at para 75.
[23] *Canada Evidence Act*, RSC 1985, c C-5, s 39(1)-(2); *Access to Information Act*, RSC 1985, c A-1, s 69(1) [*ATIA*]; *Privacy Act*, RSC 1985, c P-21, s 70(1). Despite its overall broader scope, even the *ATIA* recognizes that mandate letters should be disclosed: *ATIA*, s 73.

20. Academic commentators have been critical of the breadth of the Cabinet confidence provisions in federal statutes. Both Professor Campagnolo and Nicholas d'Ombrain, a public law scholar, have written that the lack of a clear definition of a Cabinet confidence and the protection afforded to documents that would not otherwise reveal the opinions of ministers expressed during Cabinet deliberations has created an open-ended and overly restrictive scheme.[24]

21. A white paper published by the Department of Justice in 2005 also noted the differences in scope between federal and provincial legislation, ultimately proposing that the current Cabinet confidences exemptions in the *Canada Evidence Act*, the *Access to Information Act*, and the *Privacy Act* be narrowed to "focus on information or communications that reveal the substance of Cabinet's deliberations, decisions, and submissions" in order to "reduce the amount of documents protected as Cabinet confidences", thereby promoting "greater accessibility" and "greater transparency".[25]

22. Section 12(1) of *FIPPA*, by contrast, reflects a different legislative choice and offers an important counterweight to a tendency to expand the scope of the Cabinet secrecy convention, making government less open and impeding the public's ability to scrutinize government decisions and policy. In fact, the Department of Justice expressly referenced the narrowed ambit of Cabinet secrecy in provincial legislation (such as *FIPPA*) as a model to be emulated by Parliament.[26]

C. The scope of s. 12(1) should not be expanded

23. While s. 12(1) of *FIPPA* also extends beyond the Cabinet secrecy convention to protect certain Cabinet records containing non-core secrets from disclosure, it does so in a specific and clearly defined way. This Court should avoid unduly expanding the scope of s. 12(1), which would impede the public's right to access government information and hold government officials to account.

---

[24] See Campagnolo, *Behind Closed Doors* at 135-136, 138 [**CCLA BOA, Tab 1**]; d'Ombrain at 344 [**Ontario BOA, Tab 8**].

[25] Canada, Department of Justice, *A Comprehensive Framework for* Access to Information *Reform* (white paper) (April 2005) at 14 [Canada, Department of Justice]. However, Parliament did not act on this recommendation with legislative amendments.

[26] Canada, Department of Justice at 14.

(i) Section 12(1) should be interpreted in accordance with *FIPPA*'s purpose and the distinction between core and non-core secrets

24. Section 12(1) of *FIPPA* is not a standalone provision – it exists within a statutory access to information scheme whose purpose is to promote public access to government information, subject only to necessary, limited, and specific exemptions.[27] Time and time again, courts have affirmed that *FIPPA* "establishes a presumption in favour of granting access",[28] that the right of access to government information should be "liberally construed",[29] and that exemptions should be "limited and specific".[30] As then-Chief Justice McLachlin and Justice Abella explained, "[a]ccess to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society".[31]

25. Section 12(1) – like all access exemptions in *FIPPA* – must be interpreted in accordance with the Act's stated purpose. It should also be interpreted with regard to the distinction between core and non-core secrets reflected in the wording of s. 12(1).

26. While s. 12(1) is explicitly focused on exempting the "substance of deliberations" of Cabinet from disclosure, the legislature chose to extend the exemption beyond core secrets to encompass certain specifically defined categories of documents, which are enumerated in subparagraphs 12(1)(a) to (f).

27. The result is that s. 12(1) already extends beyond the scope of the Cabinet secrecy convention to exempt certain documents containing non-core secrets from disclosure. However, it is done in a limited and specific way, in accordance with *FIPPA*'s purpose. Any further expansion of the scope of s. 12(1) would unduly impede the public's right to access government information.

---

[27] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s 1.
[28] *John Doe v Ontario (Finance)*, 2014 SCC 36 at para 41. See also *Ontario Medical Association v Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div Ct) at para 11, aff'd 2018 ONCA 673, leave to appeal to SCC refused, 38343 (11 April 2019).
[29] *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2011 ONCA 32 at para 61 [*Community Safety*].
[30] *Community Safety* at para 61; *Liquor Control Board of Ontario v Magnotta Winery Corp*, 2009 CanLII 92118 (ON SCDC) at paras 74-75.
[31] *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para 1.

(ii) The "expansive approach" to statutory interpretation should be used to interpret s. 12(1)

28. Having regard to *FIPPA*'s purpose and the distinction between core and non-core secrets reflected in s. 12(1), the CCLA submits that the "expansive approach" should be used to interpret s. 12(1). Under the expansive approach, the word "including" in s. 12(1) means that the categories of documents described in subparagraphs (a) to (f) expand upon the reference to "substance of deliberations" – they are documents that would not necessarily be captured by that wording.[32]

29. Using the expansive approach to interpret s. 12(1) aligns with *FIPPA*'s purpose, as opposed to the alternative "illustrative approach". Under the illustrative approach, the word "including" would be taken to mean that the categories of documents set out in subparagraphs (a) to (f) illustrate the types of documents whose disclosure would reveal the "substance of deliberations".[33] Such an approach ignores the core/non-core secret distinction and the historical basis for s. 12(1). For instance, an agenda of a meeting, or draft legislation, would not necessarily reveal the substance of deliberations or the personal views of Cabinet ministers expressed during deliberations.

30. An illustrative approach would not only expand the s. 12(1) exemption beyond its intended scope but also unjustifiably broaden the definition of "substance of deliberations" so that it no longer reflects core secrets. In addition to an improper expansion of s. 12(1) far beyond the Cabinet secrecy convention, this approach would inject needless uncertainty into s. 12(1)'s interpretation. A decision-maker would be required to determine, in each instance, whether the Cabinet record sought to be disclosed is analogous to the records described in subparagraphs (a) to (f). The expansive approach, by contrast, is narrower and more specific, protects the public's right to access government information, and avoids broadening the scope of s. 12(1) in a way that the legislature did not intend.

---

[32] *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2022 ONCA 74 at para 43 [ONCA Decision].
[33] ONCA Decision at para 42.

(iii) A suggested approach to interpreting s. 12(1)

31. Having regard to the scope of the Cabinet secrecy convention, the distinction between core and non-core secrets, and *FIPPA*'s purpose, the CCLA submits that an appropriate approach to deciding whether a Cabinet record should be disclosed pursuant to s. 12(1) involves two main inquiries:

(a) First, the decision-maker should determine whether the requested Cabinet record reveals the personal views of a minister expressed in deliberations either directly or by inference – i.e., whether it contains core secrets protected by the Cabinet secrecy convention that reveal the "substance of deliberations" of Cabinet. If the record reveals such views, then it must be withheld.

(b) Second, if the record does not reveal such views, then the decision-maker should determine whether the requested record falls within the specific categories set out in subparagraphs (a) to (f) – i.e., whether the record, although it may not contain core secrets, should still be exempted from disclosure because the legislature has extended the exemption to categories of documents that may contain non-core secrets. If the record does not fall within one of these categories, then it must be released.

32. The approach outlined above is clear, well-defined, and ensures that the public can exercise appropriate and meaningful oversight of government actors in accordance with *FIPPA*'s purpose. Following this approach, a decision-maker need not determine whether a Cabinet record represents the product or outcome of deliberations – it must determine only whether the record reveals ministers' views expressed in deliberations or whether it otherwise falls into the exempt categories.

PART IV - SUBMISSIONS CONCERNING COSTS

33. The CCLA seeks no costs and asks that no costs be awarded against it.

PART V - ORDER SOUGHT

34. The CCLA takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of November, 2022.

Iris Fischer / Gregory Sheppard

PART VI - SUBMISSIONS ON CASE SENSITIVITY

Not applicable.

PART VII - TABLE OF AUTHORITIES

	Authority	**Paragraph(s)**
	Case Law	
1.	*Anderson v Nova Scotia (Attorney General)*, 2014 NSSC 71	17
2.	*Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42	5
3.	*Babcock v Canada (Attorney General)*, 2002 SCC 57	6, 9
4.	*British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*, 2020 SCC 20	6, 8, 9, 10
5.	*British Columbia Teachers' Federation v British Columbia*, 2013 BCSC 1216	17
6.	*Carey v Ontario*, [1986] 2 SCR 637, 1986 CanLII 7 (SCC)	8
7.	*John Doe v Ontario (Finance)*, 2014 SCC 36	24
8.	*Liquor Control Board of Ontario v Magnotta Winery Corp*, 2009 CanLII 92118 (ON SCDC)	24
9.	*Nova Scotia (Attorney General) v Nova Scotia (Royal Commission into Marshall Prosecution)*, [1989] 2 SCR 788, 1989 CanLII 39 (SCC)	16
10.	*Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2022 ONCA 74	28, 29
11.	*Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2011 ONCA 32	24
12.	*Ontario Medical Association v Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div Ct)	24
13.	*Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23	24
14.	*Smallwood v Sparling*, [1982] 2 SCR 686, 1982 CanLII 215 (SCC)	9
	Legislation	
15.	*Access to Information Act*, RSC 1985, c A-1, ss 69(1), 73 *Loi sur l'accès à l'information*, LRC 1985, c A-1, arts 69(1), 73	19

	Authority	**Paragraph(s)**
16.	*Canada Evidence Act*, RSC 1985, c C-5, s 39(1)-(2) *Loi sur la preuve au Canada*, LRC 1985, c C-5, art 39(1)-(2)	19
17.	*Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s 1 *Loi sur l'accès à l'information et la protection de la vie privée*, LRO 1990, c F.31, art 1	24
18.	*Privacy Act*, RSC 1985, c P-21, s 70(1) *Loi sur la protection des renseignements personnels*, LRC 1985, c P-21, art 70(1)	19
	Secondary Sources	
19.	Campagnolo, Yan, *Behind Closed Doors: The Law and Politics of Cabinet Secrecy* (Vancouver: UBC Press, 2021) [**CCLA BOA, Tab 1**]	6, 9, 15, 20
20.	Campagnolo, Yan, "The Political Legitimacy of Cabinet Secrecy" (2017) 51:1 RJTUM 51	6, 7
21.	Canada, Department of Justice, *A Comprehensive Framework for Access to Information Reform* (white paper) (April 2005)	21, 22
22.	d'Ombrain, Nicholas, "Cabinet Secrecy" (2004) 47:3 Can Public Administration 332 [**Ontario BOA, Tab 8**]	15, 20
23.	Sullivan, Ruth, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada, 2022) [**CCLA BOA, Tab 2**]	5
24.	Williams, Carlton D, *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy*, vol 2 (Toronto: Ministry of Government Services, 1980)	12