OPINION CABINET SECRECY

Cabinet documents should be under the scope of the ATIA

The Trudeau government cannot seriously consider modernizing the ATIA without fixing Sec. 69.

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The principles of democracy and the rule of law require that Canada limit the scope of cabinet secrecy and subject its application to independent oversight and review. Let us hope that Prime Minister Justin Trudeau will take the measures needed to improve the regime that we inherited from his father, writes Yan Campagnolo. *The Hill Times photograph by Jake Wright*

OTTAWA—Access to government information is a key component of a vibrant democracy as it enables citizens to meaningfully participate in the democratic process and ensures that public officials remain accountable.

While Canada was among the first states to enact access to information legislation in 1982, the Access to Information Act (ATIA) is now outdated. The Centre for Law and Democracy ranks the ATIA 58th at the global level and 12th (and last) at the national level. The Trudeau government's promise to modernize the ATIA should thus be applauded. But the government has so far remained silent on an important issue: the protection of cabinet documents. Indeed, Sec. 69 completely excludes cabinet documents from the scope of the act for a 20-year period. This controversial provision has been denounced ever since it was introduced as a last-minute amendment to the ATIA just before its adoption. While the need to afford some level of protection to cabinet documents is legitimate in our system of government, Sec. 69 goes beyond what is necessary. No other Westminster jurisdiction in Canada or elsewhere (Australia, New Zealand and the United Kingdom) has excluded cabinet documents from the scope of access to information legislation. Sec. 69 contains three obvious weaknesses.

First, Sec. 69 excludes documents which contain "confidences of the Queen's Privy Council for Canada" without substantively defining the meaning of that phrase. Rather, Sec. 69 provides a non-exhaustive list of documents where such "confidences" can be found, including: cabinet submissions; discussion papers; cabinet agenda, minutes and decisions; communications among ministers on cabinet business; briefing notes to ministers on cabinet business; and draft legislation. In addition, para. 69(1)(g) enables the executive to shield a wide range of "other documents" on the basis that they contain information about the contents of a document listed above. This last, highly ambiguous paragraph, which is used to protect documents that often have a tenuous link to cabinet business, was relied upon to justify an astounding 68 per cent of all the exclusions under Sec. 69 in 2014-2015 (TBS Info Source Bulletin 38B).

One possible way to fix this problem would be to limit the protection to documents which "reveal the substance of cabinet deliberations." This approach, supported by the information commissioner, is similar to that adopted in eight provinces (Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario and Prince Edward Island) and Australia. The problem, however, is that it is based on a "class test," as opposed to an "injury test," and tends to be applied broadly. A better approach would be to limit the protection to documents the disclosure of which would injure the convention of collective ministerial responsibility, the free and frank exchange of opinions between ministers, or the effective conduct of cabinet business, as is done in New Zealand and the United Kingdom. This is, after all, what cabinet secrecy is meant to protect. Under this approach, public officials would not be required to assess whether a given document falls within the ambiguous class of "cabinet documents"; rather, they would be required to assess whether the disclosure of a given document, at a given time, would truly injure the public interest.

No independent oversight and review

Second, as cabinet documents are excluded from the scope of the ATIA, the reliance on Sec. 69 by the executive is not subject to the oversight and review power of an independent third party. This means that a person who is refused access to documents under Sec. 69 cannot meaningfully challenge the decision. Without the power to inspect cabinet documents, no one can verify that Sec. 69 has been claimed properly and in good faith. This gives rise to a rule of law problem as State action is left unchecked. The problem was exacerbated in 2013 when the Executive decided to decentralize the authority to claim Sec. 69 from the Privy Council Office to each department. The same year, the total number of exclusions under Sec. 69 surged by 49 per cent (TBS Info Source Bulletin 37B). That decision, along with the broad scope of Sec. 69 and the absence of independent oversight and review, enables cabinet secrecy to be overclaimed.

A simple way to fix this problem would be to give the information commissioner and the Federal Court the power to inspect cabinet documents. This would be similar to the approach adopted at the provincial level, as well as in Australia, New Zealand, and the United Kingdom. While it has been argued that the power to inspect cabinet documents should only be given to a senior judge, there is no reason to leave the commissioner out of the equation. In fact, it is faster and more efficient to enable the commissioner to deal with complaints, and try to settle them, prior to initiating an action before the court. If complainants could go directly to the court, it may add an unnecessary strain on judicial resources. Moreover, the commissioner is legally required under the ATIA to preserve the confidentiality of the documents. A controversial question is whether the commissioner should be given the power to compel the disclosure of cabinet documents or whether that power should be reserved to the court. To grant this power to the commissioner would change his or her role from that of "ombudsperson" to that of "quasi-judicial tribunal." This would limit the commissioner's capacity to publicly advocate for access to information and criticize the executive. Hence, it may be advisable to reserve the power to compel the disclosure of cabinet documents to the court.

Limited exceptions

Third, the executive has misapplied an important exception to Sec. 69, the "discussion paper exception." Discussion papers are documents the purpose of which is to "present background explanations, analyses of problems or policy options" to cabinet. Under para. 69(3)(b), they become subject to the ATIA once cabinet has made the underlying decision public, or four years have passed since the decision was made. When discussion papers were first introduced, they were meant, in part, to educate the public by disclosing the background information underpinning cabinet decisions. Yet, in 1984, shortly after the entry into force of the ATIA, the executive stopped producing discussion papers and transferred the information they contained to the "analysis section" of memoranda to cabinet (MCs). The executive then took the position that the "discussion paper exception" no longer applied. It took nearly twenty years before that position was overruled. In the Ethyl case (2003 FCA 68), the Federal Court of Appeal confirmed that the executive could not thwart the will of Parliament by transferring background information from a document that is subject to the ATIA (the discussion paper) to a document that is not (the MC). Following that decision, the executive was forced to disclose the "analysis section" of MCs under the "discussion paper exception." But that was until it decided to get rid of the "analysis section" altogether in 2012. Given that the background information is now intertwined with ministerial recommendations and opinions, can one expect that the "discussion paper exception" is applied as it was initially intended?

Access to information legislation in Alberta, British Columbia, Nova Scotia, Ontario, Yukon and Australia contain exceptions to cabinet secrecy similar to the "discussion paper exception." These exceptions seek to facilitate the early disclosure of background information once Cabinet has made its decision public on a given matter. However, for this kind of exception to work in practice, the format of Cabinet documents must be such that "background information" can easily be "severed" from "ministerial recommendations and opinions." To the extent possible, the ATIA should thus require that public officials keep "facts" segregated from "opinions" when drafting Cabinet documents.

Final considerations

Finally, consideration should be given to reviewing the temporal scope of cabinet secrecy. At the federal level, cabinet documents are protected for 20 years. At the provincial level, the period of protection varies from 10 to 25 years. Is the choice of a period of time purely arbitrary? How should it be determined? The relevant criterion is the expected duration of a minister's political career. A minister should be able to expect that the opinions he or she voiced in cabinet will not be made public before he or she retires from active politics. Empirical studies must be conducted to determine what that optimal period of time is. But any period of time should be seen as a ceiling rather than a floor. The ATIA should enable the disclosure of cabinet documents, in the public interest, before the expiry of the chosen period of time. This entails that the ATIA should contain a general "public interest override" for cabinet documents (as is the case in Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, New Zealand and the United Kingdom). Such an override would compel the executive to disclose cabinet documents when the public interest demands it, for example, when serious allegations of fraud or mismanagement are made against public officials.

To conclude, the Trudeau government cannot seriously consider modernizing the ATIA without fixing Sec. 69. The experience of the Canadian provinces and other Westminster states suggests that it is not necessary to confer a near-absolute protection to cabinet documents to ensure the proper functioning of our system of government. The principles of democracy and the rule of law require that Canada limit the scope of cabinet secrecy and subject its application to independent oversight and review. Let us hope that the current prime minister will take the measures needed to improve the regime that we inherited from his father.

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The Hill Times