

CASE LAW UPDATE

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Canada (Information Commissioner) v Canada (Minister of National Defence)

2011 SCC 25 (Released May 13, 2011)

Access to Information Act – Exemptions – Personal Information – Minister’s Records

Four appeals in respect of applications for judicial review of refusals to disclose under the *Access to Information Act* (the "**Act**") by the Information Commissioner of Canada were heard together. Pursuant to section 4 of the Act, a requester has a right to "any record under the control of a government institution", subject to certain exceptions. The court, with Charron J. writing for the majority and LeBel J. concurring in the result, upheld the lower court rulings that the Prime Minister’s Office and the relevant ministerial office do not form part of the "government institution" for which they are responsible for the purposes of the Act. For example, the court found that the office of the Minister of National Defence is not part of the Department of National Defence.

The court then had to determine whether the requested records at the ministerial offices in question were nevertheless "under the control" of the government institution for which they are responsible. "Control" is not defined in the Act. The majority found that to give a meaningful right of access to information, control must be broadly and liberally interpreted. Apart from physical control, a court is to consider: (1) whether the record relates to a departmental matter; and (2) all relevant factors to the determination of whether the government institution could reasonably expect to obtain a copy upon request.

In this case, one of the requests was for the Prime Minister’s agendas, which were in the hands of the RCMP and the Privy Council Office. Those records were found to be in the control of the government institutions. The records constituted "personal information", and while s. 3(j) of the Act permitted disclosure of personal information where such information pertains to an individual who is an officer or employee of the government institution, the majority found that the Prime Minister was not to be treated as an "officer" of the Privy Council Office. Had that result been intended, it would have been expressed explicitly in the Act. The Prime Minister’s agenda thus fell outside the scope of the access to information regime. All four refusals to disclose were upheld.