

Supreme Court say Access is a Fundamental Right

A few weeks ago, the Chronicle-Herald published an op-ed I wrote about the urgent need to reform our provincial and federal access to information laws. I noted that Canada had fallen far behind countries like Mexico and India, in part because access in those countries is regarded as a fundamental human right.

An important recent development may help Canada catch up. On 17 June 2010, exactly one week after my earlier piece was published, the Supreme Court of Canada issued a decision holding that the Canadian Charter of Rights and Freedoms guarantees a right to access government-held information.

The case arose from a murder trial in which a judge granted a stay of proceedings, after finding “many instances of abusive conduct by state officials.” This led to an investigation into the matter by the Ontario Provincial Police (OPP). In a press release, the OPP completely absolved the police officers involved of any wrongdoing, although they did not release the report of the investigation, or provide any reasons for their conclusions.

The contradiction between the statements by the judge and the treatment of the issue by the OPP prompted the Criminal Lawyers’ Association to investigate the matter. They made a request under Ontario’s Freedom of Information and Protection of Privacy Act for the OPP report and two other documents containing legal advice. The request was refused on the basis that the information was covered by exceptions in the law, and so did not have to be disclosed.

The case eventually came before the Supreme Court of Canada as a constitutional claim that the refusal to grant access to the documents breached the applicants’ right to freedom of expression. An important threshold question for the Court was whether freedom of expression includes a right to access government-held information. The Court held that access is protected as “a derivative right”. Specifically, access is protected where it is “a necessary precondition of meaningful expression on the functioning of government”.

The Court went on to hold that the constitutional guarantee had not been breached in the case before it. It did, however, refer the case back to the Information Commissioner to be reconsidered. The Court noted, in particular, that the blanket refusal to disclose any of the 318-page report, without any reasons having been provided, was a matter of concern.

What is important about the case is that it recognises, at least in a limited sense, a constitutional right to access information held by government. From a global perspective, this is hardly revolutionary. The right is explicitly recognised in the constitutions of Mexico, South Africa, the Philippines, Bulgaria and dozens of other countries. But in the Canadian context, the decision is a significant step forward in terms of promoting transparency.

In practical terms, the decision means that once a citizen demonstrates that information held by government is needed to engage in meaningful democratic debate, the government can no longer simply fall back on the (often overbroad) exceptions in the access to information law to justify a refusal to provide that information. They need to satisfy the constitutional standards for refusing access to information.

In my earlier op-ed, I referred to three recent cases of secrecy in Nova Scotia: the MPs' expenses scandal, the government's refusal to release a study on gambling and the failure to provide Auditor General Jacques Lapointe with information relating to government business loans and financial assistance. In light of the Supreme Court decision, it is doubtful whether any of these secrecy claims would withstand constitutional scrutiny. In each case, the information is needed to engage in debate about the functioning of government. And the fact that other democracies make this sort of information available demonstrates that there is no overriding secrecy interest at play.

Toby Mendel
Executive Director
Centre for Law and Democracy

The Centre for Law and Democracy is an international human rights organisation based in Halifax, which promotes respect for foundational rights for democracy.