

Cabinet records: the Acts simply do not apply to them. Consequently, there can be no review by the Commissioners or the Federal Court of decisions to deny requests for records or personal information when this exclusion is invoked. No examination of such documents can be undertaken either by the Commissioners or by the Federal Court. The Information Commissioner, however, has used the authority of section 36.3(1) of the *Canada Evidence Act* to obtain a Ministerial Certificate to the effect that a record or a portion of a record constitutes a confidence of the Queen's Privy Council for Canada. Such Certificates are issued when a complaint involves excluded information and the Information Commissioner seeks confirmation that the document is in fact a Cabinet confidence.

What does the exclusion of Cabinet confidences contained in the two Acts entail? For ease of reference, section 69 of the *Access to Information Act* will be considered; section 70 of the *Privacy Act* is virtually identical. The provision begins with a blanket exclusion for "confidences of the Queen's Privy Council for Canada". The Council is defined as including the Cabinet and Committees of Cabinet (section 69(2)). Without restricting the generality of the term "confidences" of the Cabinet—and nowhere defining this amorphous concept—the provision goes on to list several specific categories of documents which are to be excluded from the ambit of the legislation. These categories are as follows:

- (a) "memoranda" designed to present recommendations to Cabinet;
- (b) "discussion papers" designed to explain or analyze policy choices to be made by Cabinet;
- (c) Cabinet "agenda" or records recording deliberations or decisions of Cabinet;
- (d) records used for interministerial communications leading up to government policy determinations or records reflecting these communications or discussions;
- (e) records created to brief Ministers concerning matters on which Cabinet decisions are to be taken;
- (f) draft legislation;
- (g) "records that contain information about the contents of any record within a class of records referred to in paragraphs (a) to (f)".

None of the key terms used in the provision excluding Cabinet records—"memoranda", "discussion papers", and so forth—is defined in the Act. The only refinement contained in the legislation concerns discussion papers. Under section 69(3) of the *Access to Information Act*, those discussion papers relating to decisions which have been made public or which relate to decisions that are more than four years old are not covered by the exclusion. Nevertheless, this category of discussion papers may still be withheld if they contain records which may otherwise be withheld under the exemptions in the *Access to Information Act*.

The Committee recognizes several important justifications for withholding records coming within many of the categories listed in the provision concerning Cabinet confidences. Firstly, the important convention of collective ministerial responsibility requires that each Cabinet member be held personally responsible for government policy. Therefore, all members of a Government in a parliamentary system can be held publicly accountable and, accordingly, frank exchanges among Ministers are to be expected and encouraged. Section 69(1)(d), which protects interministerial communications, can be explained on this basis.

A second justification for some degree of Cabinet confidentiality is the desire for Ministers of the Crown to receive candid advice from their officials. The Committee agrees that it is clearly in the public interest for candid and confidential advice to be offered to Ministers by senior public servants. Section 69(1)(e) is designed to protect this interest. However, this clause appears to be largely redundant in light of the policy advice exemption contained in section 21 of the *Access to Information*