Case In Point

Supreme Court Affirms Broad Public Sector Decision-Making Privilege

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Below is a post I wrote for All About Information regarding a significant decision rendered by the Supreme Court of Canada last Friday on the scope of the "advice and recommendations" exemption from disclosure found in the *Freedom of Information and Protection of Privacy Act*:

"Yesterday the Supreme Court of Canada held that the "advice and recommendations" exemption in Ontario's freedom of information legislation exempts both suggested courses of action and evaluative analysis from the right of public access.

The advice and recommendations exemption provides public servants with a zone of privacy in which to make good decisions that are free from the pressures of partisan politics. Justice John Evans of the Federal Court of Appeal has described the purpose the exemption as follows:

It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness.

The Supreme Court of Canada held that the IPC/Ontario's interpretation of the advice and recommendations exemption as shielding only the recording of a "suggested course of action that will ultimately be accepted or rejected by the person being advised" was unreasonable. It said that the IPC's interpretation gave insufficient meaning to the word "advice," which has a broader meaning than the word "recommendation." It also said the IPC's interpretation unduly limited the protective purpose of the exemption.

The Supreme Court of Canada's ruling applies equally to government ministries and other Ontario FOI institutions. It means that recordings of decision-supportive "evaluative analysis" made by public servants, employees, consultants and others will generally be exempt from the right of public access. This may include, for example, lists of alternatives with comments about advantages and disadvantages or simply lists of alternatives. It may also include, according to the Court, drafts of the same kind of recordings."

John Doe v Ontario (Finance), 2014 SCC 36 (CanLII).