SECRET CANADA OPINION
CLOSED CABINET

By Dean Beeby

Dean Beeby is an Ottawa-based independent journalist, author and specialist in freedom of information.

The black hole at the heart of Canadian democracy - cabinet secrecy - has come under sharp scrutiny in the past year.

And just like a collapsed star, not much illumination is escaping into public discourse.

Confidential cabinet documents were delivered last year to Justice Paul Rouleau's commission examining the Ottawa convoy protests. It was just the fourth Canadian commission (of the 371 convened since Confederation) to get a peek at secret documents from the cabinet’s inner sanctum.

Prime Minister Justin Trudeau also agreed last month to provide cabinet papers on foreign interference to two public bodies - a special committee of parliamentarians and an intelligence agency - after having given the same access to David Johnston, his special rapporteur. Neither body previously could inspect cabinet materials.

But these ad-hoc releases, made after pressure from critics, have in no way relaxed the secrecy rules. Narrow exceptions all, the content of these few documents must remain strictly confidential inside these bodies.

And so the status quo for cabinet secrecy remains deeply entrenched, despite any appearance to the contrary.

In fact, Canada has the most restrictive cabinet-secrecy regime of any of our Westminster-style government counterparts - that is, Britain, New Zealand and Australia. Even Canada’s own provinces are less secretive about cabinet records.

Ottawa’s stringent protections can be traced back to the Federal Court Act of 1970, and to the Access to Information Act and the Canada Evidence Act in the mid-1980s, all of which built a brick wall around cabinet papers.

The rationale for keeping cabinet business confidential is to promote candour in discussions by ministers, who might otherwise bite their tongues for fear of looking like fools in the next day’s headlines.

Secrecy also helps preserve government solidarity in Parliament. Opposition members, for example, can’t single out ministers for their dissident views, thereby making the government look weak. Secrecy also helps neuter lobbyists, whose influence is deflated inside a locked cabinet room.

Only the most radical of transparency advocates want to eliminate cabinet secrecy. Experimental cabinet sessions that were opened to the public have been a flop, notably under former premier Gordon Campbell in British Columbia, starting in 2001. As one political columnist put it at the time, “there was zero debate and not much discussion” under the spotlight’s glare.

Putting ministers in a goldfish bowl inevitably changes their behaviour. We humans watch our words when we ourselves are being watched. And yet, no-holds-barred debate is needed now more than ever to wrestle with problems as fraught as health care and climate change.

But if open democracy is to thrive, secrecy itself must be held in check. Instead, Canada has seen a kind of mission creep, as widening circles of documents get caught in the maw of cabinet confidentiality.
Journalists, opposition MPs, public-interest groups and others naturally bristle about official secrecy, and demand to see the goods. No surprise there.

So I asked three staunch defenders of cabinet confidentiality - two former insiders and a law professor who once worked in the Privy Council Office, the home of cabinet - whether the current rules ensure enough transparency. The surprising answer is no.

They say the rules need loosening.

Mel Cappe, former clerk of the Privy Council Office, was guardian of Liberal cabinet secrets from 1999 to 2002, under Jean Chrétien.

Mr. Cappe says a current rule in the Access to Information Act, affording near-absolute protection to cabinet documents for the first 20 years after creation, is appropriate given the longevity of some political players.

He cites Mr. Chrétien and Joe Clark, Progressive Conservative prime minister from 1979 to 1980, as examples of long-lived politicians whose critics should not have had ready access to confidential cabinet discussions.

But Mr. Cappe also says not all cabinet documents are created equal, and that a harms test could be applied to determine whether to release.

"We need a better test. Is this going to cause damage or not?" Any such test would have to be justiciable, that is, subject to adjudication by the courts on appeal, he says.

Michael Wernick, also a former clerk of the PCO, worked for the Justin Trudeau cabinet from 2016 to 2019. He says confidentiality protection for cabinet meetings is "not an optional feature; it's core software, it's firmware" for effective government.

The cabinet table can be a safe venue for ministers to change a prime minister's mind, for example, something Mr. Wernick says he has witnessed. "It's a counterweight to the prime minister's power."

But he says the 20-year rule could well be shortened to 10 years. "I have no problem with earlier release," Mr. Wernick said, noting about half of the 400 former ministers who are still alive served in cabinet for less than two years.

Mr. Wernick says the law should not be crafted for the "statistical outliers," such as Mr. Chrétien or Herb Gray, who both served in cabinet under three Liberal prime ministers.

Mr. Wernick also says the definition of cabinet records is too broad, and should be made narrower so that background documents and other fact-based material can be made public more readily.

Yan Campagnolo, a constitutional law expert at the University of Ottawa, worked as a young lawyer for the Privy Council Office. He wrote a doctoral thesis on cabinet confidentiality, as well as the book Behind Closed Doors: The Law and Politics of Cabinet Secrecy.

Mr. Campagnolo responded to Access to Information Act requests during his stint at the PCO.

His experience showed that the act "is typically applied in a mechanical fashion: If an exemption can be invoked, it will typically be invoked irrespective of the context," he said.

He accepts the 20-year protection rule under the Access to Information Act as "reasonable," but says it should apply only to "core secrets" - that is, ministers' views, opinions and recommendations.

The legislation ensnares too many cabinet records that don't need protection, he says, such as e-mails between public servants, rather than information directly related to collective decisionmaking. And recent Treasury Board statistics show the majority of cabinet confidences being withheld in Access to Information Act requests are not core secrets.

"Now, more than 75 per cent of the documents excluded under Section 69 of the Access to Information Act are unofficial cabinet documents, such as e-mails, that fall within the catch-all provision," he said. "I think it's a problem."

Among Mr. Campagnolo's proposed reforms is to restore "discussion papers": fact-based backgounders that were eliminated from the cabinet paper system in 1984. He also wants an injury test, which would consider the potential harms related to releasing certain information on a case-by-case basis, to determine whether cabinet records should be withheld. The injury test would replace the current class test, which automatically withholds documents based solely on whether they fall into a broad category.

He also wants the Information Commissioner of Canada to be given the authority to independently verify whether a withheld document is a genuine cabinet confidence. She cannot do so now.

Mr. Campagnolo doubts whether any government will act on these proposed reforms. "Why would the government
modify a statutory regime that gives it complete control over the disclosure of its political secrets?" he has written.

The Canada Evidence Act, which restricts access by the courts to evidence that may reside in cabinet papers, could present an opportunity for change. Mr. Campagnolo regards the act's restrictions as unconstitutional because they undermine the independence of courts from the government, limiting judges' control of legal processes in their own courtrooms.

He says the reform logjam might be broken by a constitutional challenge to the Canada Evidence Act's excessive protection of cabinet secrets. Such a challenge would be time-consuming and expensive.

"It's a long shot but I've not lost hope."