



The ability of Canadian administrative tribunals to keep their deliberations secret is fundamental to their independence and impartiality.

Deliberative secrecy – sometimes referred to as deliberative privilege – generally protects the finality of decisions and the process of debate, discussion and compromise inherent in collegial decision-making. Secrecy is the rule although it may be lifted when a party can present valid reasons for believing that the decision-making process followed did not comply with the rules of natural justice and procedural fairness.

To these ends, deliberative secrecy protects members of administrative tribunals from being compelled to disclose how or why they reached a particular decision in the exercise of their adjudicative functions.

The following list contains examples of aspects of the adjudicative process that are secret in the administrative tribunal setting:

- Communications between a tribunal member and support staff, including memos and reports prepared by tribunal counsel and non-legal staff, discussions with tribunal counsel and non-legal staff, and the member’s instructions to staff, as long as the communications directly relate to the deliberative process as opposed to purely administrative matters;
- The tribunal members’ thinking and any records reflecting their decision-making process;
- Notes taken by tribunal members during hearings;
- Minutes of deliberation meetings;
- Drafts of decisions and reasons, whether or not including questions, comments or revisions by other members or staff, and any correspondence pertaining thereto.

Administrative aspects of the adjudicative process may also be secret when they directly affect the decision-making process. This may include documents and correspondence explaining the reasoning behind why cases are assigned to tribunal members.

Because of its importance, an administrative tribunal's deliberative secrecy may not be lifted except in limited circumstances. The person seeking the information must clearly show there are valid reasons to believe that a breach of natural justice or procedural fairness occurred, absent which the process will be presumed to have been fair. For example, there would have to be specific passages in the tribunal's reasons from which it could be reasonably inferred that the tribunal based its decision on material not available to the parties or reason to believe that management or staff had inappropriately influenced the decision-making process.

Decisions-makers should ensure that they consistently protect the confidentiality of their deliberative process in order to avoid any risk of being considered to have waived the deliberative secrecy.

In conclusion, reaching the appropriate determination requires frank deliberations among decision-makers. The courts recognize that deliberative secrecy is essential to maintain the integrity of the decision-making process of administrative tribunals.