Transcript of the Public Hearings of the Statutory Review Committee on Access to Information and Protection of Privacy

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ATIPPA Review Committee Members:
Clyde K. Wells, Chair
Doug Letto, Member
Jennifer Stoddart, Member

C. WELLS:

You are Mr. Karanicolas, I believe.

M. KARANICOLAS:

Correct.

C. WELLS:

Have I expressed it correctly?

M. KARANICOLAS:

Absolutely correct.

C. WELLS:

Okay, thank you very much. Thank you for making the effort to be here and for the submission that you've made. We've read your submission carefully, and we think the way in which we might best or most efficiently deal with it, your report is in sections. Any questions we have at the conclusion of your presentation on each section we should address then, because it would be more cohesive to do it that way and would produce the best material for us to assess in the end, we think. Is that all right with you?

M. KARANICOLAS:

Yes, sounds good.

C. WELLS:

Okay. All right, then, Mr. Karanicolas, perhaps you would just start by briefly putting into the record something of, very briefly, what the Center for Law and Democracy is and what your particular background and credentials are, because that's helpful in terms of when at the end of the day we assess what we hear it is helpful to know the background and experience of the person from whom we've heard it.

M. KARANICOLAS:

Absolutely. And I just have some brief remarks as well, just to contextualize the submission.

C. WELLS:

Oh, by all means.

M. KARANICOLAS:

Sure. So I want to begin by thanking the committee for granting me this opportunity to introduce myself. My name is Michael Karanicolas. I am the legal officer for the Centre for Law and Democracy, and I have a law degree from Dalhousie and a bachelors degree in philosophy and history from Queens. My organization, Centre for Law and Democracy, or CLD, is based in Halifax but we are active in promoting foundation rights for democracy and freedom of

experience and freedom of association and freedom of information, or, as it's referred to internationally, the right to information around the world. And in my time with CLD, I have read and analyzed over 70 RTI laws.

I want to start by relating a story that was told to me by a journalist from Newfoundland a couple of years ago. It is about a minister entering a Cabinet meeting and retrieving an enormous trench of documents from his briefcase, and he places the documents on the conference table and he looks around the room and then he packs them back into his briefcase and under his breath he says, "Good, now I don't have to disclose them".

Although the story may be apocryphal, the official's behaviour would be a perfectly legal way to circumvent his disclosure obligations in this province.

C. WELLS:

Really?

M. KARANICOLAS:

Sorry?

C. WELLS:

Really?

M. KARANICOLAS:

Well, anything presented to Cabinet. What's more, this kind of behavior is broadly in line with the attitude that we see towards openness across Canada where many officials see access to information as a threat to be neutralized rather than a right to be encouraged and nurtured whose effective implementation will improve government for everyone.

As part of our work with Centre Law and Democracy, I have engaged in government employees in Lebanon, Yemen, India, Mongolia, Montenegro, Indonesia, (inaudible) and the Maldives. The level of these interactions has ranged from senior government officials, such as ministers or national level of human rights or information commissioners and information officers and junior civil servants.

And I've spoken with a fair number of people in government here in Canada and, in particular, about a year ago we held an open government event in Halifax which was attended by employees from the provincial

and municipal government and talking to them about their hesitations and concerns about public access to information. If I closed my eyes, I could have been in Indonesia. The concerns expressed are exactly the same all over the world. And all over the world experience has shown us that by and large a lot of these concerns are unfounded.

I've heard concerns that information under request will present a skewed or incomplete picture of a particular program or operation. To which I respond, that public bodies are always free to release more information. If officials are worried about the information being out of context, they can take it upon themselves to provide that context.

I've heard complaints about the time and resources that it takes to respond to requests and that this distracts public officials from their jobs. I generally respond to that, that this a part of their job. It is recognized internationally as a human right and in many countries, including Canada, to a certain degree, as a constitutional right. Responding to access requests should be considered a

core part of an institution's mandate with adequate resources allotted.

I've heard about the inherent conflict between privacy and access which can be legitimate but it's important to remember that the operations of a public body are fundamentally public, not private. A public body does not have an inherent right to privacy. And this is important to stress because there is a misapprehension that privacy and access inherently conflict; whereas, in actuality, the conflict only comes into play where information under request contains personal information and only to the extent of that information. In other words, if the personal information is redacted, the conflict is nullified.

And I bring up the commonalities between concerns I hear in Canada and concerns I hear elsewhere, to reenforce the relevance of the recommendations that we've made. Recommendations that are based on international standards, the same standards that guide our work in the Maldives and Indonesia and everywhere else. However, there is one critical difference between our work in Canada and our work

elsewhere. Just about all the other countries that I listed have recently adopted right to information legislation or have yet to adopt right to information legislation and are considering draft bills. So in that context, this type of apprehension is much more understandable, particularly when we're dealing with emerging democracies with a history of secrecy in government. Part of what I need to convince them of is that the sky won't fall if they open the government up. Obviously, this is not (inaudible) democracy. We have had access to information laws on the books for decades now and clearly the sky hasn't fallen. So, from that perspective, I find it a little odd that I face the same kind of resistance here that I see in the Maldives and Indonesia.

And I was going to go on to talk a little bit more about the sort of commonalities but I think that a lot of the rest of my presentation repeats quite a bit of the substance of my submission. So if you prefer to move directly under that question and answer and that interaction, I'm happy to do so.

C. WELLS:

Well, you surprise me. I had read that story that

you thought may be apocryphal in a paper that I think you prepared in September 2012. I think that's where I read it.

M. KARANICOLAS:

For Nova Scotia?

C. WELLS:

It was done in September 2012, I remember.

J. STODDART:

I believe it's your comparison of all jurisdictions in Canada in terms of access to information performance.

M. KARANICOLAS:

Sure.

C. WELLS:

I believe that's where I read it. And it was an interesting story at the time. But I was a bit surprised to hear your assertion that while it may be apocryphal, that's exactly what could happen here. I'm not quite sure on what you base that but that doesn't accord with my assessment of the law, and I'm not unfamiliar with assessing law. So I wonder if you could tell me on what you base that, because I'd be concerned that the news media would pick up this comment and treat it as having unquestioned validity

because it originates from you. I'd like to know what you base that on.

M. KARANICOLAS:

Well, I can read the specific provision, if you're interested.

C. WELLS:

Yes.

M. KARANICOLAS:

That's on my computer. So section 18, Cabinet Confidences, it defines a Cabinet record as "advice, recommendations or policy considerations submitted or prepared for submission to Cabinet". So something is submitted to Cabinet. "A discussion paper, policy analysis, proposal advice or briefing material, including all factual or background material prepared for Cabinet."

C. WELLS:

Yes. I have to tell you, that any Cabinet minister that pulled a stunt like that would be immediately marked as some kind of a fraud and probably asked to leave Cabinet. I would think any self-respecting premier would do that because that is just a fraudulent representation that this pile of documents was prepared for Cabinet and it doesn't prove that it

was prepared for Cabinet merely by placing it on the table in the Cabinet room and then putting it back. That's an overstatement, surely, of what may well be an unacceptable section 18. I don't question that.

M. KARANICOLAS:

Yes.

C. WELLS:

You may be right in that. But I have difficulty with overstating positions for dramatic effect if there is no real merit to the overstatement.

M. KARANICOLAS:

I wasn't claiming that this is something that happens every week or something that's actually happened. My point is this is something that technically could happen.

C. WELLS:

But this is what you said, that if this happened it would have that effect in Newfoundland.

M. KARANICOLAS:

I'm saying that it is a technically possible way to subvert disclosure obligations. And it is worth noting that Bill 29 has removed the jurisdiction of the Information and Privacy Commissioner in reviewing this kind of stuff.

C. WELLS:

I'm aware of that but that's another matter we have to deal with.

M. KARANICOLAS:

Sure.

C. WELLS:

It's your bald assertion that rather bothered me, having sat in the Cabinet for a great many years and having sat on a bench for a great many years. I can't see that any rational person would ever allow such a fraudulent attempt to gain any credibility or acceptance.

M. KARANICOLAS:

Well, it's again, it is a troubling loophole in the law is what I'm saying.

C. WELLS:

I don't question there may be problems with this but my question is your assertion, that if that occurred in Newfoundland it would be effective to prevent the papers from being disclosed.

M. KARANICOLAS:

So I'll bring up a parallel example, if I may?

C. WELLS:

Sure.

M. KARANICOLAS:

Which is, in the recent whistle blower protection law which was passed in Newfoundland. And I pointed out that the law exempted Cabinet documents from the ambit of whistle blower protection.

Now, the whistle blower protection explicitly applies to extremely severe breaches of public trust. Evidence of criminal activity, grave threat to health and safety. So, in the context of that, I said it's odd to build a specific exemption into that law for Cabinet discussions. Now the response of the government was, come on, obviously we don't have material presented before Cabinet that's evidence of a criminal conspiracy. And I certainly believe that that's the case. I'm not suggesting that's the case. But the fact that that loophole is being built into the law is troubling, even if it's never going to be used.

C. WELLS:

But that's another matter to deal with, but the whistle blower legislation will be another matter that somebody may have to deal with at some time. At the moment, it's not within the jurisdiction that we

have.

M. KARANICOLAS:

Certainly, I'm just bringing it up.

C. WELLS:

And the sole reason, Mr. Karanicolas, for my raising this with you is I'd be concerned if the media just picked up that story and played it because it originated with the Centre for Law and Democracy and gave it credibility, when in my view I don't think it have any credibility.

M. KARANICOLAS:

Well, there is a reason why I list the story as something that I heard from a journalist a few years back and which may well be apocryphal. I'm not in any way saying that it happened. I'm saying that it is a technically possible way to potentially subvert responsibilities under the law.

C. WELLS:

Okay. I accept that and I have no quarrel with your using it in that context. The issue I raise with you is your subsequent assertion then, that if this occurred in Newfoundland it would be effective to prevent the disclosure of that bundle of papers that this fellow tucked into his briefcase.

M. KARANICOLAS:

All right. Well, obviously, I've never been in government in Newfoundland or anywhere. So I'm not in a position to comment on how a premier would react if a minister did that. Certainly, I'm not in a position to comment on that.

C. WELLS:

Or how the law would be applied, it appears.

M. KARANICOLAS:

Well, but I can comment on what the letter of the law says and I can comment on what would technically be possible under the law. And part of what we do in looking at these right to information laws, and, again, you look at the way they're drafted all over the world and you always have to look at them from the perspective of how could this be abused, how could this be exploited, what is the potential way of getting around this law.

C. WELLS:

That's fair enough.

M. KARANICOLAS:

Because overwhelmingly my experience has been that governments use any loophole that they can and the governments, any slack that there is to avoid

disclosure is taken advantage of. Now, if you're saying that this particular case wouldn't happen in Newfoundland, I'm not in a position to disagree with you. But this is the general approach that we take to assessing legislation and I think that it's the correct approach.

C. WELLS:

Okay. Now if you'd continue on, please.

M. KARANICOLAS:

Sure. Well, I had basically finished the presentation aspect, unless you want to start going over ....

C. WELLS:

You're finished? You're not going to deal with the individual subjects?

M. KARANICOLAS:

Certainly.

C. WELLS:

You concluded your opening remarks.

M. KARANICOLAS:

Well, I had a misunderstanding of the way we were proceeding. So let me just say a little bit more about the right to information generally in Newfoundland and general attitudes and what we're

hoping for from this review process.

C. WELLS:

Well, I took what you had just done, Mr. Karanicolas, to be dealing with your introductory marks, setting the stage.

M. KARANICOLAS:

Sure.

C. WELLS:

And now we're going to hear from you on the broader context, item 1. When you finish any comments you wish to make to supplement the written material that you've made, we may have some questions we'd like to deal with and I think it would be best to deal with them at this time, rather than wait till everything had been presented.

M. KARANICOLAS:

Sure, certainly. So you're asking me to move on to the recommendations?

C. WELLS:

No, no. I'm at page 2 of your paper. And it is entitled "The Broader Context".

M. KARANICOLAS:

Okay, yes.

C. WELLS:

Is there anything in those three pages that you want to emphasize?

M. KARANICOLAS:

Sure. I just want to note that in announcing the members of the Review Committee, Newfoundland and Labrador's government noted a desire for the province to have a strong statutory framework for access to information and protection of privacy which, when measured against international standards, will rank among the best. And that is a bold statement that we hope will be backed up by concrete action. And Centre for Law and Democracy wholeheartedly shares this desire to make Newfoundland and Labrador a world leader in terms of the right to information. But to make this a reality, it requires quite a bit more than just repealing Bill 29. It requires root and branch reform of the access to information framework and a core cultural shift within the public sector away from traditionally skeptical attitudes towards openness and transparency.

And I do want to go over some of the comparisons that we make between Newfoundland's access to

information law and other access to information laws around the world, because I do have a little bit of supplemental information to add on that in terms of implementation.

So, the RTI rating, which I think I've mentioned in my submission, is a comparative analysis that Centre for Law and Democracy developed to assess the strength of different legal frameworks. And we've applied that to every access to information law in the world, every national level access to information law in the world. There is a hundred of them at the moment and we found 33 of them which have legal frameworks which is stronger than that of Newfoundland. It is actually probably a little bit higher at the moment because the Maldives dives just passed a law which I think is quite strong.

Of the 61 different indicators which we assess the strength of the right to information law, the access to law in Newfoundland and Labrador lost points on 32 of them, scoring 94 points out of a possible 150. And by comparison, the top scoring countries in the RTI rating - Serbia, India and Slovenia - scored 135,

130 and 129 points, respectively. And I wanted to add those in so you know this is not, the RTI rating obviously represents a model law, the best possible law, but there are countries that score very, very highly on it. So while no law is perfect, it is possible to get a very high score on the law, on the rating.

And on these presentations previously I've been, well, frequently when I make this comparison within Canada the objection that's drawn is people say, well, you're talking about the letter of the law. A lot of these countries, they pass these laws and they don't really implement them. Here we follow the law. The law doesn't mean as much over there, so it's not a fair comparison to make. So I went to take India as a representative example. I viewed their Central Information Commission's last annual report which was for 2013, and I wanted to note in terms of timelines, in particular, because I note that in India there is a 30-day limit on timelines and that's a hard limit. A breach of timelines is a deemed refusal in India. So if you go beyond that 30 days, it's a refusal. You look at that timeline and particularly in the

context and it is easy to say, well, they have that time line but they might not really follow it.

Now the annual report of the Central Information Commissioner of India for 2013, or for any of the previous years, actually, didn't have specific statistics on timeline compliance. Well, what that suggests to me it is a very thorough report, so that suggests to me timeline breaches are not a major problem, but I was able to find their global refusal rate. So the total amount of requests that are refused. And among the national government in India that's seven percent of total requests are refused. And that's out of, in 2013, 900,000 applications. So, obviously, this is a country that has an enormous demand for the right to information. And I realize, of course, India is a big country but still 900,000 requests over the course of a year is strong demand. And the fact that they're only refusing seven percent of them, and that includes any timeline breach as well as any exceptions that are found I think is legitimate I think is an interesting comparison.

Now I wasn't able to find comparable statistics

for Newfoundland and Labrador. Again, I just got back from Myanmar and the internet there is terrible, so I had to do the research on a very slow connection. So it is possible that it's on the Information and Privacy Commissioner's website and I just couldn't find it. But in the absence of that, I used the newspaper survey which is an annual assessment of right to information done by Professor Vallance-Jones of King's College, and of 16 requests that were filed with the Newfoundland government - eight were released in full; three were denied in full; one was denied in part; two had fee estimates of close to a thousand dollars; and two responded by saying that there were no records. One of which actually responded by misreading the question and that's why they said there were no records.

So even if we give them the benefit of the doubt in terms of the one that was denied in part, the two that were fee estimates, and the two there were no records, the fact that three out of 16 were denied in full would make a refusal rate of 18.75 percent. So quite a bit higher than we find in India; although, obviously, this is a much smaller sample size. But I

do think that that's worth noting.

So, again, a lot of what I wanted to say is already in my submissions, so if you don't want me to thread over that ground again.

C. WELLS:

No, you help yourself. You make whatever presentation you want to make. Anything you want to emphasize please feel absolutely free to say whatever you want to say.

M. KARANICOLAS:

Okay. So, again, I note in my submission that there are many ways, specific ways, specific international comparisons we make between ATIPPA and stronger access to information framework. So we see in other countries the $5 requesting fee is one that we note when in many countries it is free to file requests, and it's been considered in certain Canadian jurisdictions that the requesting fee is necessary to deter frivolous requesters. That's just not been the experience elsewhere in the world in many countries where access to information is free to exercise.

Similarly, with timelines, I already mentioned

India there is a 30-day flat limit. Indonesia is another one that I will draw the Commission's, the Committee's attention to, where the initial timeline for responding is ten working days, extendable by additional seven works days at the most. And of course, if you look down through the way exceptions are crafted, a lot of countries craft them far more narrowly than is done in Newfoundland.

So when Premier Marshall says he wants a right to information which will rank among the best, in international standards this is an ambitious goal but we consider it eminently achievable. And we would love to see that happen here in Newfoundland.

It is worth noting that the right to information is recognized as a human right. It has been recognized by the inter-American Court of Human Rights as a human right, the European Court of Human Rights, the UN Human Rights Committee's 2011 general comment on Article 19. In 2010, the Supreme Court of Canada found that the right to information is to a certain degree, a constitutional right. And we see this advance in global recognition of the right to

information as a human right, but, unfortunately, that hasn't really been accompanied by any change in policies here in Canada where, if anything, things are moving backwards and not forwards. So we hope and believe that the ATIPPA Review Committee can play a critical role in spurring Newfoundland to assume a mantle of Canadian and a deep global leadership in government transparency. And we urge the committee to show the leadership that is required, not only to reform and improve RTI in Newfoundland and Labrador but to whole show the whole country the way forward. So we are hoping that with this review process Newfoundland and Labrador can be sort of a breakout jurisdiction within Canada to sort of show the way to a better way to handle government transparency.

C. WELLS:

Do you have a question?

J. STODDART:

Yes, I have. Thank you very much for coming, first of all. Thank you for the work that you put into this presentation. And just on some of your initial comments, I have some general concerns about methodology. I'll start by just asking you one question. When you refer to access requests

generally across the world, do you know or are you referring to access to information held by the government, other than one's personal information? I ask that because under many legislations when the authorities administering the legislation - the commissioner - the commissioner talks about access for requests. They start with a number. Let's say 100,000. Of these, 60 percent - in fact the large majority, I believe, in Canadian provinces - of citizens' access to government, access requests is for their own personal information, my birth certificate. Obviously, there is huge accesses about police records. Police records, you're worrying about your driver's information, et cetera, et cetera.

The minority, I believe, then is access requests to information other than your own personal information. How are you treating this? Are you talking of when you're talking about a seven percent rate for access requests? And maybe I could say, generally governments find it easier to give people their personal information - not always - than sometimes to give them nonpersonal information that

may have perceived negative consequences to the government?

So how do you breakdown these access requests you're talking about? Are these just access to nonpersonal information requests?

M. KARANICOLAS:

No. My experience is that most countries don't make this kind of distinction. Canada is not unique but is, I would say, certainly in the minority and I probably qualify it as an outlier in making this kind of distinction. A lot of right to information laws do include a special provision for requesting personal information and they include specific provisions around requests for personal information. Sometimes it'll be a shorter timeframe, sometimes they'll say there will be no fees of any kind charged for requests for personal information. Where in other circumstances fees for reproduction and postage might be charged, they won't charge that for personal information.

But generally speaking, it is the same process and most countries don't make that kind of a distinction.

So we generally don't, we don't separate it into those two categories of our methodology, no.

J. STODDART:

Okay, but you understand the lack of separating that in countries that you compare to Canada then raises a question of the relevance of comparing these statistics to Canada, where we always do distinguish my right to have my own personal information. My right to have information held by the government in general other than my personal information.

M. KARANICOLAS:

So you're talking about the statistics I just mentioned. You're not talking about the RTI rating, you're talking about the statistics I just mentioned with you?

J. STODDART:

Well, maybe I am talking about the RTI rating, too. I am just raising this as a question of methodology, trying to follow your reasoning.

M. KARANICOLAS:

Okay. So that differential is not relevant at all to the RTI rating, which only measures the law itself and not the implementation. So statistics about refusals wouldn't be measured within the RTI rating.

So that's not relevant to Newfoundland's rating in the world.

In terms of what I just mentioned in terms of India's global refusal rate being seven percent versus the newspaper's audit finding that it is around 18.75 percent, you know, the newspaper's audit was only 18 requests. I would be interested to see what Newfoundland and Labrador's global refusal rate is, because obviously this is based on 16 requests. I would be the first to admit that 16 requests is not enough to ascertain what the total rate of refusal is within Newfoundland and Labrador.

As to whether or not that should be subdivided into requests for personal information and other access requests, I mean it's not something that I've given a lot of thought to because generally we do do on the international context where that's not as much of a consideration. I looked that up sort of in preparation for this presentation only. So I certainly think that if you're asking me which would be the more apt comparison, I would want to look at the numbers and see.

J. STODDART:

Thank you.

D. LETTO:

Thank you, and thanks for coming as well. I wanted to ask a couple of questions about how the RTI ranking works.

M. KARANICOLAS:

Sure.

D. LETTO:

I'm interested in your other stuff too but let's get that out of the way first. You've anticipated a couple of my questions. I was interested in understanding what the RTI ranking is and what it isn't, and I think you alluded to that a minute ago. That it measures only the law itself and not the implementation.

M. KARANICOLAS:

Correct.

D. LETTO:

Have your organization, or any organizations you're associated with, measured the level of implementation in countries that have quite a high ranking? I'm thinking Slovenia, Serbia. I believe Liberia might be fourth.

M. KARANICOLAS:

Okay. So, yes, a lot of these laws are new. In fact, if you look at the top ten the overwhelming number of them is, well, overwhelming. The majority of them are very new legislation. So implementation is sort of just getting off the ground in a lot of these places. Liberia, I believe they just named their information commissioner a few months ago. El Salvador is another one that's very new. The Maldives, they've only just passed the legislation. Last I read it, it was among the best in the world. But, again, it has only just been passed. So, for some of them you can't really measure implementation because they've been in force for such a small amount of time. For India, I can tell you that implementation is solid. Serbia, I haven't looked specifically at it but our partner's access info did as their preparation for the RTI rating.

My understanding is that Serbia and Slovenia have quite strong implementation as well. I have to say my understanding because, generally speaking, the Centre for Law and Democracy doesn't do a lot of work in Europe. Through the RTI rating, there was a

division of labor where CLD handled the non-European countries and a Spanish NGO called Axis Info Europe handled the countries in Europe. So we rely upon them to assess strength of implementation.

In Serbia and Slovenia, partly because we knew that it was going to be a high profile thing with those two countries coming as highly as they did, so we wanted them to look carefully as to how the implementation is to be ready for questions like this. And our understanding is that, yes, implementation is strong in both places.

I think you also had a question about .... Sorry there was another question?

D. LETTO:

No, I was asking if you had measured the implementation at all or any of the organizations you've (inaudible).

M. KARANICOLAS:

Oh yes. Okay. Measuring implementation is much, much more difficult than measuring the letter of the law. So even the newspaper survey, which is a strong survey, it really only submits a small number of

requests. It measures speed, it measures completeness of disclosure, it measures access fees to a certain degree but it's far from a global measure of implementation. In other words, it is a much more difficult challenge in measuring the letter of the law. There is a few organizations that are working on it. We aren't at the moment. I believe the World Bank is developing something. The Carter Center is also trying to develop something to measure implementation but it is a much more difficult challenge because it's such a global idea where you have to measure proactive publication. It is about balancing all these different competing factors. So if government body A responds very quickly but does it incompletely and government body B takes longer but provides a complete assessment, how do you weigh the strength of one against the strength of the other? I mean there is a lot of challenges there.

D. LETTO:

And the reason I ask these questions, I think, is that the rankings that your organization deals with and produces creates a lot of public attention. And I'm wondering if people actually know what's being ranked or rated. The letter of the law is one thing;

the implementation is another.

M. KARANICOLAS:

Yes.

D. LETTO:

And I was puzzled when I saw that Liberia was fourth because the things I hear about Liberia in the news don't really suggest that they're that fond of individual freedoms, even though they have a very good freedom of information law.

M. KARANICOLAS:

Well, in terms of what you hear on the news versus the reality, I mean obviously the news can sometimes paint a misleading picture. What I can tell you is that they have an information commissioner now and that they are moving forward on implementation. It is a new law. So, at this point it is not completely fair to assess where they are because they're still just getting off the ground. So Liberia is a bad example in that regard. But you can look at that (inaudible).

D. LETTO:

But it shows up as fourth on your list.

M. KARANICOLAS:

Right. But, again, we're very clear both on the RTI

rating website and all of our mentions of it, that we're measuring the letter of the law and not the implementation. So I think that we've been as clear as we can be on that. It would be the first thing that I would say.

And the second is that the letter of the law is extremely significant. So, if you're saying weaknesses in the law translate to weaknesses in practice.

D. LETTO:

The gold standard.

M. KARANICOLAS:

Well, if you're saying that Liberia's implementation doesn't follow the law yet, that may be true. I would want to back in in a few years and see where they are, after the law has actually been fully developed. It had a few years to get off the ground.

D. LETTO:

Well, Human Rights Watch, which is a reputable international organization, talks about how other laws can work to defeat, well, let's say in this case freedom of information. They talk about Liberia. Their outdated draconian and defamation laws continue

to pose a serious risk to freedom of expression.

M. KARANICOLAS:

That's a separate issue.

D. LETTO:

Well, it's separate except that it can defeat the goals and objectives of the freedom of information and expression law.

M. KARANICOLAS:

Okay. So the way that defamation interacts with the right to information, problematic defamation laws are extremely harmful to freedom of expression. That is an area that I do, the Centre for Law and Democracy. And I personally do quite a bit of work on and I'm very happy to discuss that but I'm not sure that that's the mandate of this committee.

Now, the way that it interacts with the right to information is that it can create concern among public officials to release information that contains things that might be taken badly about other individuals. If you have an extremely draconian defamation law such that it creates a chilling effect around any speech about other people that are in a position to pursue a claim, pursue a criminal claim,

to advance a criminal claim, rather, then it can lead to a chill among public officials to release information that contains statements, even true statements, statements that shouldn't be considered defamatory under any measure of the law, just because they're worried about getting sued or worried about facing charges. So that can happen.

A much more serious problem in terms of conflicts of laws are much more common problem in terms of conflicts of laws is paramountcy clauses, and that's something that we see, that's something that we allow for in the RTI rating and that's that we do see here in Newfoundland which is a major issue is where you have conflicts of legislation.

D. LETTO:

And you're going to deal with that later as well.

M. KARANICOLAS:

Yes. And that certainly is something that comes up quite a bit in several laws that we've looked at.

D. LETTO:

So, really, what I wanted to do was to kind of understand what RTI rating represents and what it doesn't represent and to make that point. Thank you.

C. WELLS:

Just something that arises out of that exchange, Mr. Karanicolas. You said a weak access to information law usually translates into weak performance and that makes a lot of sense. If you don't have a very strong law you're not likely to have very good performance in terms of provision of information. That does make sense.

M. KARANICOLAS:

I would be a little more nuance than that in that description.

C. WELLS:

But also, I would suggest to you a very strong information law does not necessarily translate into a very strong performance.

M. KARANICOLAS:

Absolutely, it can be ignored.

C. WELLS:

But just let me finish. We're in agreement so far. See if we continue in agreement. Where this goes is I find it a little difficult to accept, therefore, your assertion that merely because Liberia or Slovenia or Serbia or, you mentioned in other papers, Columbia and El Salvador and so on have strong access

to information laws, that somehow Canada or the jurisdictions, the provincial jurisdictions in Canada are very poor performers by comparison. It is hardly fair to make that assertion without saying very clearly there's no indication of how well they're performing.

M. KARANICOLAS:

Well, there are indications because in many countries the Central Information Commission releases an annual report and we have people on the ground. The RTI rating wasn't carried out exclusively from Halifax. We had partners in, I believe, 80 of the member countries who are crosschecking our results. So we have a global network of right to information activists who we work with and we're very aware of the information on the ground in these countries.

What you're saying is that a strong law is not necessarily strong implementation. A weak law is not necessarily weak.

C. WELLS:

It is more probable though. If you have a weak law, you're likely to have weak implementation.

M. KARANICOLAS:

It depends on how you define the terms. So there can be countries which are ahead of Canada but where the implementation is worse. And there can be countries where Canada's implementation creates a stronger functioning system of access. I certainly agree that that can be the case. And for Liberia is a good example of one that doesn't really have a functioning, the system is not really up and running yet. Again, El Salvador is another. Curiastan (phonetic) which is another country that ranks quite highly and that implementation on that is very, very poor.

But a lot of the countries that are ahead of Canada, implementation is actually quite strong. So again, I point to India. I point to Slovenia. I point to Serbia. I point to Finland. I point to the UK. There is a lot of countries which we do monitor them. We don't assess implementation the same way that we do with the RTI rating but we know enough about the country to know that the implementation is fairly strong, and where I can confidently say that it is a better RTI system than Canada. It is a

better functioning system. And India is case on point.

C. WELLS:

One other thing, the comment you just made, and I noted it in your paper that you submitted to us and I note it in your September RTI rating. The assertion that the right to access information from public bodies is a human right.

M. KARANICOLAS:

Yes.

C. WELLS:

And on what do you base that?

M. KARANICOLAS:

The International Covenant on Civil and Political Rights.

C. WELLS:

Really? Then show me in that covenant where it is.

M. KARANICOLAS:

I mean the references are in the paper. But if you refer to the UN Human Rights Committee's 2011 general comment on Article 19, the International Covenant on Civil and Political Rights, which Canada is a party, they include mention of the right to public information as a human right.

C. WELLS:

Just a moment, I've got the International Convention on Civil and Political Rights here.

M. KARANICOLAS:

Yes.

C. WELLS:

I've got Article 19, and Article 19 says, "Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media." That's to express ideas and thoughts, that's not accessing publicly-controlled information.

M. KARANICOLAS:

So you have the Covenant. Do you have the general comment which explains what the Covenant means?

C. WELLS:

Where are the general comments? I haven't seen the general comments.

M. KARANICOLAS:

Okay. So that's cited in my paper. General Comment No. 34, by the UN Human Rights Committee which is an interpreted document for how the international

Covenant should be interpreted.

C. WELLS:

And what does it say?

M. KARANICOLAS:

So I can bring it up online but that will take a while or I can tell you the broad reasoning.

C. WELLS:

Well, I'd sooner have it reliable here.

M. KARANICOLAS:

Sure. All right. I have to find the link. So this is a quote then. Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body regardless of the form in which the information is stored, its source and date of publication. Public bodies are as indicated in paragraph 7 of this general comment. So it's any governments, et cetera, as we point out in our standards. The designation of such bodies -- I mean, do you want me to keep going?

C. WELLS:

No, I'd be interested in obtaining a copy of it, because I would like to examine it.

M. KARANICOLAS:

Sure.

C. WELLS:

The ordinary definition of "human rights" is the right to life, the right to security of the person, the right to security of your family, the right not to be tortured, and the right to be free from slavery and enslavement and servitude. Those are human rights.

M. KARANICOLAS:

Yes.

C. WELLS:

The right you're talking about is what's referred to as a participation right. The right that you get by reason of participating in a society. The right to have information provided from the governing bodies of that society. Those are participation rights, not human rights. Human rights are rights that exist solely on the basis of the humanity of the person. And how does that get to be the humanity of the person?

M. KARANICOLAS:

Well, respectfully the UN Human Rights Committee disagrees. And the human Human Rights Committee is the global leading ....

C. WELLS:

Well, I would like to see it. I'll take a look at it.

M. KARANICOLAS:

Sure. So it is cited back in our document, that the right to information. There is a number of key benefits to the right to information that it's inherent within the right to freedom of expression is basically the rationale. And I can flush out the rationale for it a little further.

C. WELLS:

They say it is a derivative, not inherent. It is a derivative of the right of freedom of expression is what the Supreme Court said.

M. KARANICOLAS:

The Canadian Supreme Court has said that.

C. WELLS:

Yes, that's right.

M. KARANICOLAS:

The UN Human Rights Committee has recognized that the right to access public information is within Article 19(2) of the international Covenant on civil and political rights. So that means that it is a human right. And it has also been recognized as such by

the inter-American Court of Human Rights in Claude Reyes and others v. Chile. That's a black letter statement of law, of human rights law as it applies throughout the Americas including within Canada.

C. WELLS:

Are you familiar with the Icelandic Human Rights Center?

M. KARANICOLAS:

I've never really worked with them, if that's what you're asking.

C. WELLS:

Here's their description of it and a concern that they expressed is there's concern that a broad definition of human rights may lead to the notion of violation of human rights losing some of its significance and that's generated a need to distinguish a separate group within the broad category of human rights. Increasingly the terms "elementary", "essential", "core" and "fundamental" human rights are being used. And these are, they refer to as basic rights, and they describe them as the right to life, a minimum level of security, the inviolability of the person, freedom from slavery and servitude, freedom from torture, unlawful declaration

of liberty, discrimination and other acts which impinge on human dignity. Participation rights are the rights to participate in public life through elections, which is also a political right, or to take part in the cultural life. Now, those are the kinds of rights that are granted by governments, a right to receive. They are not of the same category as the right to be free from slavery or servitude, or the right to the security of the body of the person. You don't put them in that category, do you?

M. KARANICOLAS:

Well, so that's the opinion of the Icelandic Human Rights Commission?

C. WELLS:

No, but I haven't seen it anywhere else other than the one you've referred to, in all the other references I've looked.

M. KARANICOLAS:

Well, there a number of references here. So, and you're mentioning the Icelandic Human Rights Commission which is that's their opinion. That's fair. But I would note that Iceland is a party to the European Convention of Human Rights which would make them subject to the European Court of Human

Rights which has recognized the right to information within freedom of expression as a human right in the same way.

C. WELLS:

As a derivative of.

M. KARANICOLAS:

As a part. Not as a derivative, as a part of the right to freedom of expression. So contained within freedom of expression is the right to information. It is inherent within freedom of expression.

C. WELLS:

I'll tell you, Mr. Karanicolas, why I raise this issue with you. When I read your paper, and it covered all the areas very well and there's some very good ideas in it and a great deal of it I like very much, I have to say that to you, but I had the sense that you tend to overstate the thing. And when you place any diminution of rights to access of information in the same category as a human right like the right to life, to freedom from slavery and servitude, that tends to overstate it and diminish the effect of this of what you say, does it not?

M. KARANICOLAS:

So you've brought that same idea up twice.

C. WELLS:

Yes. Well, that was my reaction to your paper.

M. KARANICOLAS:

The story about the minister, that's a rhetorical effect and I could see where you're coming from there. But this is the international jurisprudence, so this is international human rights law. It is very strongly recognized within the right to freedom of expression. There is a right to information and it is considered a human right. And I mean you've brought up one human rights.

C. WELLS:

Freedom of expression, yes.

M. KARANICOLAS:

Okay, but a part of that is the right to information.

C. WELLS:

That's what I mean by derivative.

M. KARANICOLAS:

This is not an overstatement of the case whatsoever because the citations are all there. The fact that the Inter-American Court of Human Rights, the European Court of Human Rights and the UN Human Rights Committee are all in agreement on this makes it fairly strong black letter international law.

C. WELLS:

Black letter, maybe.

M. KARANICOLAS:

Customary.

C. WELLS:

Customary. Okay, would you continue on with your next part?

M. KARANICOLAS:

Sure. So the next aspect of the discussion is exceptions.

C. WELLS:

Just before you do, Ms. Stoddart would like to raise further questions about the broader context.

J. STODDART:

Thank you. I tried to find in your presentation any mention of the concept of privacy or there is certainly no discussion of it. Is that because you think there's no problem with the personal information protection sections of this Act or because your centre focuses on access to information of a nonpersonal information kind?

M. KARANICOLAS:

Privacy is a little bit outside of our wheelhouse. Not entirely so. So we do look at the right to

privacy as it impacts the right to information which that can be a significant balancing when there's information that's personally identifiable or that violates any sort of privacy right. So we do look at it in that context.

We also researched right to privacy to the extent that it impacts freedom of expression. So particularly around privacy online and the way invasions of privacy can inhibit freedom of expression. So that is an area that we look at a little bit but sort of tangential to freedom of expression. So it's not an oversight so much that it is just not really an area that we focus on as much. So it is not an area that we're as comfortable commenting on.

J. STODDART:

Okay. So, the fact that you don't comment on that in this particular piece of legislation doesn't mean that you think there's no problem with the personal information protection sections of the Act? Or do you think they're all fine as they stand?

M. KARANICOLAS:

I haven't looked at them that closely because in this

submission we're dealing with the access side.

J. STODDART:

Okay. I just want to clarify that was the reason.

M. KARANICOLAS:

I'm certain that there are issues there that I just didn't really ....

J. STODDART:

Okay. Well, that's very helpful to know. Secondly, I was intrigued in your international references and also in some of the other work that your centre has done in documents that one can read on your website, that there is very little discussion of the American experience in freedom of information generally. I would have thought that the American experience to us in North America is one that is culturally close and perhaps helpful in that we share so much of certainly American general culture and a lot of their culture of rights as well. Can you comment on the silence on the American experience and its latest manifestations; for example, President Obama's initiatives in trying to put more information online and so on. I'm not asking you to comment on open government, that's another issue, but just in freedom of information.

M. KARANICOLAS:

Sure. So, Centre for Law and Democracy tends to use its resources where they'll be best placed and the reason why we don't look at the US very much is because there is a number of excellent groups within the United States to focus on this, and, so, generally speaking, we tend to look more at Canada because we're a Canadian organization, but we tend to be more focused on the developing world because that's where our expertise is more needed.

In terms of comparing the US to the Canadian experience, you're right in that countries everywhere seem to be more focused on their peer group than anywhere else. And I've had this experience in, so we've been working in the Philippines to pass right to information legislation there, and the Philippines came out with a draft RTI law and we applied RTI rating to it and we found that it scored just a little bit below Indonesia's. And they weren't really interested in the broad international comparison so much as they wanted to say, well, we need to get a few more points. We need to be better than Indonesia.

So it is natural to compare yourself to your peer group, if you want to think of it that way. And so in Canada, if you want to compare us, our law to, I wouldn't say just the US, I would say our peer group would probably be the US, the UK, New Zealand and Australia. I believe that Canada would rank last within that peer group. I would need to go back and check where Newfoundland would come. But the American experience, it may be interesting to look at but it's not the be all in all of information practice. We don't look to the US for better best practices on this issue because you actually do find better standards coming out of elsewhere.

J. STODDART:

Thank you. And one other, I guess, methodological question. When you say that you look at the law, it seems to me that you do what you say. You look at *the* law. Therefore, in a jurisdiction if the one law is accompanied by another law and they have to be read together, or that law is subject to an interpretive statute or a constitutional or quasi constitutional statute, you do not look at that.

M. KARANICOLAS:

No, we do look at the legislative framework. So we

do look at the surrounding legislation as well. So, for example, if there is an Official Secrets Act which severely curtails aspects of the right to information or adds additional exceptions, then we will take that into consideration. We have a specific indicator within the RTI rating about whether or not the RTI law trumps other legislation to the extent of any conflict and whether there is conflicting legislation. We have an indicator on whether or not there is a constitutional protection of the right to information, whether RTI is recognized constitutionally. So we do consider the surrounding legislative framework. That said, it can be tricky in some countries. So, this is where that network of 80 or so experts that we have around the world in all the different local jurisdictions comes in handy because we might not necessarily be able to find the Bangladeshi laws, the Bangladeshi officials. Well, Bangladesh is a bad example. We might not necessarily be able to find the Ethiopian Official Secrets Act that curtails certain aspects of the right to information law, where our local experts will help us do that. We do look at the global legislative context. We certainly look at the

constitution. We certainly look at the regulations. Whether or not we always look at the interpretive provisions is a little more tricky because sometimes that can be a bit of a gray area. Where we can find them, we'll consider them. But oftentimes those can be much more difficult to track down. And there can also be more of a gray area between where the legislation, the letter of the law ends and where the implementation begins on an issue like that. So, we've had instances where in terms of access fees, we've had instances where the law itself says that they can charge an access fee but we've had local experts come back and say but I've made hundreds of access to information requests and they've never charged me an access fee. In that case, I think we still docked them the points because of what's in the letter of the law and we can't really take one guy's experience. But generally speaking, we do consider that as broadly as possible where we can find them.

J. STODDART:

Okay, thank you. Well, I raise that question because in your failing to measure up your latest analysis of access to information legislation across Canada which you published in September of 2012, some two months

after the adoption of Bill 29, and I was rather surprised to read that you, which is I think wonderful but it kind of contradicts what we've been hearing recently, what many witnesses have told us, and indeed what one would conclude from the rest of your paper, that is there are severe problems with Newfoundland's access to information. You rated it third in Canadian provinces and you rated Quebec 10. One of Quebec's failings seemed to be what was in its law. And perhaps alone of all the Canadian provinces, Quebec also has its own charter and it has an interpretive provision. So I just wondered, that led me to question what your methodology was and led me to question what is changed between this rating on Newfoundland as third once Bill 29 was passed. And the kind of shared, I guess, denunciation by most of those who have come before us on the rather drastic initiative contained in Bill 29, so.

M. KARANICOLAS:

Okay. So there is two different questions there. One is the impact of Bill 29 on the RTI rating, and the other is about that specific paper which compares a Canadian context of access to information.

J. STODDART:

Well, that was the example that led me to question what is your methodology.

M. KARANICOLAS:

So that's not so much about the implementation letter of the law division as it is about the fact that Newfoundland's law remains one of the stronger. We rated it third in Canada. That, as far as I know, remains the case. There may have been a few minor changes to the other laws because, again, I haven't reviewed the Canadian ratings.

J. STODDART:

Okay, so it is still third in Canada.

M. KARANICOLAS:

One of the things that we're trying to point out, I would say one of the main things we're trying to point out with our submission is that the Canadian context is a bit narrow and we are encouraging people to look at things from the global context where all Canadian jurisdictions are weak. The national law is weak and all of the provincial laws are weak in a global comparison. So, we are hoping that with this committee Newfoundland and Labrador wouldn't be satisfied to be the strongest in this very weak peer

group. That they would want, as the premier said, a strong law by international standards. So, yes, Newfoundland's law, Newfoundland's legal framework is stronger than Quebec and it is stronger than Alberta, but it is still very weak in terms of the international standards of the right to information. And what we're hoping to see is that this committee will take a global context and a broader context and what to make recommendations that will make Newfoundland and Labrador an actual global leader on this, rather than just doing well within the Canadian context which is rather dismal all around.

Now in terms of Bill 29 specifically and the effect that it had on the RTI rating, that's a bit of a methodological, I don't want to say a cork. There is an aspect of the RTI rating where one major weakness can totally undermine a law and can only cost them one point. So one weakness of the law that's really designed to completely undermine it can sometimes have a very narrow impact on their HRA (phonetic) rating score, while having a much stronger impact on the law itself.

C. WELLS:

Doesn't that raise questions about the reliability of the score? If that law can be so unacceptable and disastrous, and let's just assume for the moment that it is, it can only have that insignificant. What does that say about the reliability of the rating system?

M. KARANICOLAS:

Well, we caught this very early on and the reason why we're so confident in the rating is that hasn't happened really. Bill 29, when I talk about a major weakness, Bill 29 is extremely problematic but it was costing points that most of which Newfoundland and Labrador had already lost. So basically it took a small problem and turned it into a big problem, which is why it is not reflected as much on the RTI rating.

Now we caught that issue early on and the reason why we're still confident in the rating is because what that means if you wanted to design your changes according to the RTI rating. So if a government had an RTI law and they wanted to design it in a way that would dupe (phonetic) the rating, they could do that. But we haven't seen that done. And broadly speaking,

when you look at how strong the law is globally, read through the law and how strong you think it is and then look at what comes out on the RTI rating, the countries are where they should be, so.

C. WELLS:

Why would government pass a law based on achieving a rating than pass a law based on what's necessary to implement the desired policy? Why would they pay any consideration to the RTI rating?

M. KARANICOLAS:

I don't think a government would pass a law specifically to dupe the RTI rating, which is why I think it remains reliable.

C. WELLS:

Not to dupe it but do we even give it, why would they be guided by anticipated RTI rating rather than by the agreed-upon policy sought to be implemented?

M. KARANICOLAS:

Well, that's essentially why we think that it's still reliable is because we don't think that governments are reading through this and trying to guide the legislation in a way that .... Well, that said, I mean we work with governments around the world and part of that advocacy is using the RTI rating to find

problems in the law and solutions to how those problems can be corrected. So I don't want to say that the RTI rating doesn't have a role within strengthening legislation but at the same time, like I agree with you that I don't see governments guiding their global policy by the RTI rating. My point is, the potential weakness we're talking about could be a weakness if governments were doing that, but I agree with you, I don't think they're going to be doing that which is why it is more of a theoretical weakness than a practical one.

C. WELLS:

Okay. Now then, that pretty well covers the broader context. Did you want to move on to your next item, which is "Exception"?

M. KARANICOLAS:

Certainly. Well, how are we doing on time? The most significant problem that we found with the access to information law is its regime of exceptions. According to the RTI rating, there are 30 possible points for an exceptions regime and ATIPPA's framework scored 14. So less than 50 percent on that particular category.

Under international standards, exceptions to the right to information should be crafted as narrowly as possible. So the only information, the disclosure of which would create a real risk of harm to a legitimate interest may be withheld. While a precise formulation of exceptions varies around the world, the harm test is a uniform feature of the RTI legislation. And this is also intuitive to the notion of the right to information as a human right which should not be infringed without a pressing reason.

And it also, it makes sense, if information would not cause harm to its disclosure there is no reason not to release it. In many cases, ATIPPA stipulates class exceptions which apply to categories of information rather than just against harms. And this is not justified according to international standards.

During the debate over Newfoundland and Labrador's whistle blower protection legislation, Steve Kent, the minister responsible for the Office of Public Engagement, was quoted as saying that "Cabinet

secrecy is a fundamental pillar of our system of government". This is false. Unlike the right to information which is a fundamental pillar of democratic accountability, Cabinet secrecy exists to serve a particular function, namely to protect promote candor among public officials. This is a legitimate interest and worthy of protection. However, it should only be protected to the extent that it is necessary to protect effective and candid government deliberations or other exceptions. It is not a value to be protected for its own sake. There is no inherent right to secrecy in an official conversation between two public servants. The legitimacy of keeping official conversation confidential depends wholly on the necessity of secrecy to smooth and effective governance.

From this perspective, the language of sections 18, 19 ands 20 of ATIPPA are clearly overbroad. It may be legitimate to withhold records of actual Cabinet conversations between ministers. Supporting documents, proposals, research and background material, on the other hand, should only be subject to harm-based redaction is necessary to protect the

legitimate interest, including candor within government. For the same reason, section 7(4), 7(5), 7(6) are legitimate as they provide an exception for all briefing records created for an executive council member with respect to assuming responsibility for a department, secretariat or agency. Sections 18, 19 and 20 should be rewritten to allow for nondisclosure only of actual Cabinet conversations between ministers and material the disclosure of which would cause tangible harm to a legitimate interest. And section 7(4), 7(5) and 7(6) should be deleted.

In terms the specific interests here, better practices to limit these to the effective formulation and development of government policy, the success of a policy (i.e. where this would be undermined by premature disclosure of that policy) and the deliberative process (i.e. the candid or free and frank provision of advice or exchange of views). It is also important to ensure that the principle of severability, whereby documents should be redacted and released rather than withhold in their entirety, should apply to all exceptions, including those related to Cabinet confidences.

C. WELLS:

If you don't want to read your paper, which is what you're doing now, don't feel that you have to. I want to make sure that you had an opportunity to expand on it and elaborate on any point that you want to make but don't feel that it is necessary for you to read through it in this way.

M. KARANICOLAS:

No. Well, I'm happy to just discuss it because I think that the additional material that I had was I think I basically said that already.

C. WELLS:

Okay. I just, I noted your comment made by Minister Kent.

M. KARANICOLAS:

Yes.

C. WELLS:

"Cabinet secrecy is a fundamental pillar of our system of government", and your assertion that this is false. On what do you base that assertion?

M. KARANICOLAS:

Well, what we're trying to say is that it is not a value in its own right. The right to information is a fundamental value which has its own benefit. That

is, a benefit within its own right. That it is a freestanding right. That Cabinet secrecy is a means to an end.

C. WELLS:

That's the same argument that would say right to information is not a human right. It is not an inherent right that stands on its own. It is a right that's derived from being a participant in a society and a democratic system of government. But merely by being a human being you don't have the right if you travel to Liberia to access the information as to the cost of their building roads that their taxpayers pay for. That is not a human right. That is a participatory right.

M. KARANICOLAS:

I would argue that participating in the system of government and democratic participation is also a human right.

C. WELLS:

Okay, all right. But just to get back to the Cabinet secrecy. The Cabinet system of government, which we've inherited from Britain, has evolved over the centuries, depends very much on maintaining Cabinet confidentiality. Now that doesn't mean that you can

designate anything to be a Cabinet document and thereby prevent its disclosure. It's got to be genuinely for the purpose of discussing policy and informing ministers and allowing those who advise ministers and draw matters to their attention and provide the information on which the members of the Cabinet make a decision, they've got to be free to say, Minister, you should consider this and you should take this into account and you considered the views expressed by this person. We don't think very much of his views, rather you should give priority to the views of this other person when you're making your decision. Or this appears to be an expression of a personal interest of somebody. They have to be free to say these things that might get them in great difficulty if they said them outside. Cabinet system wouldn't function properly if the advisers weren't free to express those views and the Cabinet ministers free to discuss them without fear of their being disclosed.

M. KARANICOLAS:

Yes, and I agree that it is a legitimate interest which warrants a different protection.

C. WELLS:

You agree with it?

M. KARANICOLAS:

Yes.

C. WELLS:

Okay. And that seems to me that that's ....

M. KARANICOLAS:

What I object to is describing it as a pillar of democratic government, when, again, I see it as it is ....

C. WELLS:

Well, a great political scientist like Ivor Jennings and Dicey, they would all agree that that's a pillar of the Cabinet system of government.

M. KARANICOLAS:

A fundamental pillar. What I have a problem with is the language of calling it a fundamental pillar of democratic accountability.

C. WELLS:

You think that's an overstatement?

M. KARANICOLAS:

I would call that an overstatement.

C. WELLS:

I've expressed that view to you this morning.

M. KARANICOLAS:

Sure.

C. WELLS:

I understand your view.

D. LETTO:

I'd like to ask a question about or a couple of questions about section 18 with Cabinet confidences. There is a long list of Cabinet confidences defined by document type and so on. In your view, given the test that you think should be applied to whether, you know, Cabinet documents should be made public or not, is that list valid or should what is now almost a page and a half of rules about access to what cabinet deals with be just a few lines?

M. KARANICOLAS:

That's a really tricky question to answer because internationally the practice really there is it's not. So on the one hand, stronger laws tend to be more brief in the way that they list out their exceptions, generally speaking.

So to jump ahead a little bit in terms of the law enforcement exception is a really good example of this, where it can really cut both ways. On the one

hand, generally speaking, a lot of countries will just simply say information that is harmful to this interest should not be disclosed and then they'll provide a public interest test after that.

In terms of spelling out the specifics of it, on the one hand, as long as the specifics are legitimate, as long as they're all instances which will cause real harm to the process, that can be helpful, but the problem is that when we see these long lists they tend to bury in exceptions which are not legitimate within that.

C. WELLS:

And that makes a lot of sense, if you have the list and they're genuine.

M. KARANICOLAS:

Yes.

C. WELLS:

They're not full of loopholes. That can make its implementation far more effective and far more reliable and far more efficient.

M. KARANICOLAS:

Yes. So I'd hesitate to say that the long list or the short list is better.

C. WELLS:

Fair enough.

M. KARANICOLAS:

What's important is that the exceptions be legitimate.

D. LETTO:

Well, you know, 18(1)(a)(8), "A record created during the process of developing or preparing a submission for Cabinet." So the implication would be that it is related but it may not be related but it could still be expected.

M. KARANICOLAS:

Right. I think that in its current formulation there is a lot of aspects of this that wouldn't necessarily need to be protected. I think that I certainly understand the importance that the Cabinet secrecy needs to be protected but I think that it's important to craft the exception in as restrictive way as possible to protect the ability of ministers, the ability of these kinds of deliberations to go on, and to help the functioning of government. But everything outside of that should be made public. I mean a cardinal principle of the right to information is that exceptions should be crafted in as limited a

manner as possible to protect the interest that's at stake. So you find the formula which protects, which is absolutely necessary, and everything that's not should be public.

D. LETTO:

At the outset you said that your organization looks at a law which respect to, I guess you're looking through the other end of the binoculars in a way.

M. KARANICOLAS:

Yes.

D. LETTO:

What in this law could one use to be able to withhold something? When you look then and you characterize the exceptions as overly broad, do you think there was an attempt here to include basically everything but the kitchen sink?

M. KARANICOLAS:

I think that's almost a quote from our executive director, that they've included everything but the kitchen sink, as I vaguely recall the debate in 2012. Yes, I think that there is a tendency to expand exceptions and particularly around government deliberations. You take this legitimate core of an interest which was, again, eloquently expressed that,

yes, we need to protect the ability of government to deliberate with a degree of candor. And then you also exempt records that are related to that and then you exempt records that are related to the records that are related to that. And it is tempting to spread it out and spread it out and spread it out because ultimately there can be a fundamental resistance to making things public and a fundamental reticence to having transparency to allow the public a view into the process. And so I think the challenge is that's sort of a natural inclination of government and I think that a good RTI law should be pushing back on that as much as possible.

D. LETTO:

At the risk of forcing you to jump ahead in your presentation, but it would seem that certainly a section of this, and this is the ability of the clerk to certify a Cabinet document as an official Cabinet document and that becomes conclusive of the matter, and if somebody wants to appeal that, they have to go to the Trial Division. I'm interested to know your take on that and should there be a process beyond that for somebody who is requesting such a document?

M. KARANICOLAS:

Well, that's, I imagine, what the review process is for. The review process with the Information and Privacy Commissioner is to see. And this is one of the issues with these categorical exceptions where you say, well, it is a record therefore it is exempt from disclosure. What we want to see and the reason why we want to see a harm test there in addition to the intuitive fact that, yes, you shouldn't be withholding information unless it would cause .... If there is no harm to releasing the information, the information should be released. I mean that's a fundamental principle of access. But beyond that, the reason why you have the review process and the reason why harm tests are useful to the review process is that after the government has made that, after the public body has made that assessment you can then go to the Information Commissioner for an independent third party who has expertise in this issue to look at the information themselves and say yes or no, will it cause that kind of harm.

So the idea that you are hiving off a portion of the exception from the Information and Privacy

Commissioner's oversight is extremely problematic because it removes that fundamental check on the system.

D. LETTO:

And you're creating another barrier, I presume, by forcing people into legal action with already tended (phonetic) costs and duties.

M. KARANICOLAS:

Yes. Well, an information oversight officer, a nonjudicial option is of fundamental importance to a well-functioned right to information system because it allows applicants to avoid the cost and the time of taking an issue to trial. There is very few applicants that will have the persistence to actually go through a long trial to get this kind of documentation. It is very few and it creates a huge barrier to access. So that's why we want to see a strong Information and Privacy Commissioner and that's forcing people in any circumstance to go directly to court is problematic.

D. LETTO:

Just one other question. Section 8(a) talks about the exceptions don't apply to documents that are in existence for 20 years or more. What do you think

about that timeline for keeping the lid on Cabinet documents?

M. KARANICOLAS:

So broadly speaking, we want to see a sunset clause like that apply to all sections. In terms of the actual timeframe, internationally it really varies from place to place. It can be 15 years. It can be 20 years. I think there is a few jurisdictions that have it as low as 10 and a few that go as high as 25. The major problem that we see in terms of that sunset clause is that it doesn't apply universally. So that's the major change we would want in respect to that.

In terms of how it should specifically apply to Cabinet deliberations, 15 years seems somewhat reasonable but it's difficult to see because that's in some ways, that's something that different countries have different approaches to.

C. WELLS:

In your paper you tend to suggest 20 years as more or less a generally-acceptable standard.

M. KARANICOLAS:

Yes, 20 years is not bad.

C. WELLS:

Not bad. Yes.

M. KARANICOLAS:

But again, as long as it's applied to all. The more important thing is that it is applied across the board. That's more of our focus.

J. STODDART:

I'm not sure I understand. You talked about sunset clauses applying universally. Can you just explain "universally" in the legislation.

M. KARANICOLAS:

To all exceptions but I should mention privacy is problematic from that perspective.

J. STODDART:

Well, I wonder should there be a sunset clause on the article protecting personal information?

M. KARANICOLAS:

No. I mean, well, personal information remains personal information. So, yes. So I certainly wouldn't say that someone's medical records, they're 20 years old, should be released. Like, that's certainly not.

J. STODDART:

Thanks for the clarification.

C. WELLS:

On page 6 of this part of your paper, you talk about section 22.

M. KARANICOLAS:

Law enforcement?

C. WELLS:

Law enforcement, yes. And you cite an example. I'm not sure your example is right but that's neither here nor there. I'm not sure you're right when you assert that they couldn't get the information. I think they probably could. But the more important thing is your recommendation is "A requirement for harm should be added to all clauses in section 2 which protect law enforcement".

M. KARANICOLAS:

Yes.

C. WELLS:

Isn't that present in 22(1)?

M. KARANICOLAS:

No.

C. WELLS:

"The head of a public body may refuse to disclose information to an applicant where disclosure could reasonably be expected to interfere with or harm law

enforcement."

M. KARANICOLAS:

Well, that's right. So we have 22(1)(a) which has a harm test.

C. WELLS:

Has a harm's test, yes.

M. KARANICOLAS:

And then you have a whole bunch of exceptions which elaborate on that which don't have a harm test.

C. WELLS:

The one you mentioned, (l), "review your arrangement for security of property or a system, including a building, a vehicle, a computer system." Isn't that harm's test in itself? I mean, I would be a bit concerned if the police were required to disclose the details of their arrangements for security that would allow those who wished to breach it then avoid the police.

M. KARANICOLAS:

I am absolutely not suggesting that any information which is harmful to law enforcement should not be covered by 22(1)(a) but my point is that once you have 22(1)(1), so the one you just listed, 22(1)(l), information about security systems, any information

within that category which is harmful to law enforcement, including the example that you had just given, is already exempted from disclosure under 22(1)(a). So if you have 22(1)(a), why do you need 22(1)(l)?

C. WELLS:

"Review the arrangements for the security of property or a system." It's more expansive and puts beyond doubt that that issue would be covered and could be reasonably expected to interfere with or harm law enforcement. Law enforcement and security, well maybe they're the same. I'm not sure they're the same.

M. KARANICOLAS:

If these subsequent clauses are about clarification, then it's fine. If they are about expansion then it can be a bit problematic. So, yes, for 22(1)(l), information about security systems.

C. WELLS:

I chose that because that was your example.

M. KARANICOLAS:

Right. We would like to see that change to, for example, information whose disclosure would cause harm to security systems or would undermine the

effectiveness of security systems. That would be a way to rewrite that, so there was harm built into that and it wasn't just exempting the whole category.

C. WELLS:

Okay. I have your point.

J. STODDART:

Could I also ask you about your evaluation of (inaudible), and I understand your idea. If there is a general harm test for law enforcement police activities then we don't need the examples, but I was a bit intrigued and had difficulty understanding your statement that a journalist writing a story about IT spending across different government departments would be interested to know the total police expenditure on antivirus software for a given period. Although there would be no conceivable harm to releasing this figure, the information would be exempt. That's one of your examples of the overbroad interpretations of the exceptions to access.

Could I say that I disagree with you? I think that's exactly one of the things that we have to be very careful about and that specific information on what kind of antivirus protections of government,

particularly law enforcement, is using is crucial in terms of protecting the integrity of IT systems.

M. KARANICOLAS:

I don't mention specific mention. I mention budget information. So if you say over the course of 2012 the police department spent $4,000 on antivirus protection, or whatever the figure is, that sort of number would be relevant to journalists looking into IT spending and various aspects of how governments approach security issues or how budgets are treated, but it wouldn't -- and again, I'm not an expert on that issue but I can't imagine that just the number of $4,000 would facilitate any harm to the security.

J. STODDART:

I would think that if I were trying to pierce the government's IT systems, and we know, we read every day, I presume you read, the general public, let alone a specialized public, reads every day about some new breach in factual information and personal information which is extremely valuable for fraudulent reasons. And the fact that government spends $4,000 or $400,000 would tell a specialist, in my opinion, how much it is spending on not only buying antivirus software but in updating and

renewing it and patching it and so on. So, I was surprised at that example personally and wondered how you arrived at that conclusion, there would be no harm. Because I would think that potentially you'd have to look at the circumstances but I would think if I wanted to attack the Government of Newfoundland's computer systems I would first go to access to information and try and get as much information about it to try and surmise then what kind of, exactly what kind of protection it had and how strong it was.

M. KARANICOLAS:

So while I do a fair bit of work on digital rights and not so much digital security but about privacy in the digital context, I'm certainly not a tech guy and I am certainly not an expert on how --

J. STODDART:

Neither am I.

M. KARANICOLAS:

Right. But that sort of assessment of whether or not it should be .... So, again, I'm not necessarily saying, that if you disagree on that specific on that specific example then that's fine.

J. STODDART:

I don't disagree on a harm's test at all. I only wondered how you got to that example.

M. KARANICOLAS:

But right. My only point is that that should be assessed on a case-by-case basis. Right now, the way it is structured is it says anything that falls within this broad category is going to be tossed out without any assessment of whether it would be harmful and that's where that would come from.

C. WELLS:

Would having the assessment by the Commissioner resolve that? Having the ability of the Commissioner to say this is bunkum. This should be released. It can't cause harm. Would that resolve that problem for you?

M. KARANICOLAS:

Which problem? Oh.

C. WELLS:

Of access and that kind of information.

M. KARANICOLAS:

Well, it needs to be built into the law for the Commissioner to assess to that. The Commissioner applies the law.

C. WELLS:

Oh agree, I agree. I agree it needs to be built in with the Commissioner having the right to make the determination and to see the documents and assess it.

M. KARANICOLAS:

Right. What we would like to see is a harm test built into the law. If the public body determines that it would be harmful the person can appeal to the Commissioner. The Commissioner can look at the information and make their own determination as to whether or not there's harm.

C. WELLS:

I want to ask you about your comments about solicitor-client privilege.

M. KARANICOLAS:

Yes.

C. WELLS:

But before I do, maybe you could explain a sentence that caused me not any great consternation but I couldn't understand it. It appears on page 7 and it's in your third paragraph. You were making a statement: "While it is legitimate to wish to promote good relations between and among governments within Canada, at the same time it is of the greatest

importance that such relations be conducted transparently." I think that that's sound. "Given that every jurisdiction in Canada is subject to its own RTI rules, there is no need for special protection provided in section 23." I don't understand that.

M. KARANICOLAS:

Yes. So this is about interprovincial. This isn't solicitor-client privilege.

C. WELLS:

No, no. As I say, I wanted to ask you about solicitor-client privilege but before I do I wanted you to explain this to me. I couldn't follow you.

M. KARANICOLAS:

So, partly that's because of the framework that we're coming from. The exception in section 23 is sort of an incorporation of an exception that you see in a lot of national level laws.

C. WELLS:

International relations.

M. KARANICOLAS:

Right. Information that would cause harm to the relations of this government with any other government or international body and which is

legitimate. So that's recognized as a legitimate interest. And basically, the argument is that what we're saying is that relations between different provinces don't have the same necessity for protection.

C. WELLS:

Don't tell that to the government or the provinces or the premier.

J. STODDART:

Yes. Could I ask you on what you base that rather amazing assertion in a federated state? One of the world's few successful federated states which is federated for an historical reason.

M. KARANICOLAS:

Well, the international context for that exception is that different governments have different standards of secrecy and you wouldn't want deliberations that are coming out within a particular -- well, within every province in Canada there needs to be a degree of transparency within the process itself. There is an understandable need to withhold information to which commercial exemptions apply which would harm the province's negotiating position with one another, but there isn't the same level of adversarialness

between the provinces.

C. WELLS:

Depends on what provinces you're talking about.

M. KARANICOLAS:

Yes. As I'm saying that I keep thinking of ..., right.

J. STODDART:

I'm just wondering on what analysis you're basing this because we do, we have had very conflictual relationships between provinces.

M. KARANICOLAS:

Between provinces?

J. STODDART:

But we also have, because we are a federated state, ongoing negotiations in all areas. Sharing of standards is one, common standards across Canada. Sharing of services, cooperating on common goals and so on. And all these, my opinion, have their own proponents and detractors. So I could imagine, I've never done this, negotiating them is a rather delicate matter and the immediate publication of what was at stake might not held the furtherance of common and positive goals, let's say sharing information and law enforcement. So I was just intrigued as to how

you got to this conclusion that interprovincial discussions or negotiations or sharing of information is worthy of no protection, at least for a certain period.

M. KARANICOLAS:

Sure. I mean it is a little bit tricky because on the other hand we're applying particular standards. I hadn't considered it from the perspective of Canada's somewhat unique federated status. So we're sort of taking standards that we've applied to different countries at the federal and provincial level and applying it to Canada. So I would allow that Canada has more of a raucous history between its provinces than most places.

J. STODDART:

Most places are not federated states. If you look at the European union, the only federated state so far, we'll see what happens, in the UK I think the major federated state is Germany. And all the rest are unitary states because they have a history of ....

C. WELLS:

Switzerland. Well, it's not in the union.

J. STODDART:

That's right, it is not in the European union but

they have a history of centralized top down rule.

M. KARANICOLAS:

Sure. I don't want to make too strong a stand on that particular point.

C. WELLS:

Okay. Thank you. Now, Mr. Karanicolas, I think I'm directed to take a break.

M. KARANICOLAS:

Sure.

C. WELLS:

And you would probably like one, too.

M. KARANICOLAS:

Sure.

C. WELLS:

So we'll take say 10 minutes. We'll try 10 to 15 minutes.

(Morning Recess)

C. WELLS:

Okay, Mr. Karanicolas, I think we can get started again. Just as we broke, I was about to ask you about your comments on solicitor-client confidentiality. And as I read your paper, the

submission is that the exception should be confined to, really, litigation. Solicitor-client confidences in connection with litigation.

M. KARANICOLAS:

Sure.

C. WELLS:

I just wanted to affirm that that's your submission?

M. KARANICOLAS:

Sure.

C. WELLS:

Yes. Are you extensively familiar with the principles and the underlying principles and the reasoning for it? As a lawyer you would be.

M. KARANICOLAS:

I've been trained in it, yes.

C. WELLS:

Yes, a basic familiarity. But the assertion that you make, you write on page 7 that, "Furthermore, government council often play a range of roles in policy development and planning ...".

M. KARANICOLAS:

Yes.

C. WELLS:

And that's quite true, quite accurate, "... which are

functionally similar to those of non-legally-trained colleagues. This advice should not be covered by a veil of secrecy just because it happens to come from a lawyer. The solicitor-client privilege exception, as it is currently worded, also provides tremendous potential for abuse since if government officials want particular discussions to be exempt from disclosure under ATIPPA, they need only bring a lawyer into the room." Now, on what do you base that assertion?

M. KARANICOLAS:

Which assertion?

C. WELLS:

"If government officials want particular discussions to be exempt from disclosure under ATIPPA they need only bring a lawyer into the room." Do you think that that's a matter of law that's correct? Because it is not my understanding of the law.

M. KARANICOLAS:

Again, there is more (inaudible) to it than that. I would rather have a substantive discussion about the extent of solicitor-client privilege and the public sector and the appropriate extent to it, than to parse through.

C. WELLS:

Well, you can do that after we deal with this issue, because this is the assertion that you made and this is in the public domain and people will accept that, unless it's clarified.

M. KARANICOLAS:

My point is that I don't think that there is adequate clarification between the legal roles that government employers can make, the legal roles that government lawyers can play, and the policymaking and other surrounding clause.

C. WELLS:

But you don't clarify that. That's the role that arises or it doesn't arise, depending on the kind of work. Whether there is a genuine solicitor-client relationship is the issue.

M. KARANICOLAS:

Yes.

C. WELLS:

And our law doesn't have it at the moment, the Commissioner could take a look at it and say, well, it is or it isn't. Now the law has been changed as a result of Bill 29 to deprive the Commissioner of that right, but if, for example, we wanted to deal with

the weakness that you're talking about, restoring that might well serve the problem, because that assertion there is totally contrary to the law. It doesn't reflect the laws of solicitor-client relationship.

M. KARANICOLAS:

Again, what I'm trying to do is to have a conversation about the proper extent of solicitor-client privilege in the public sector and to parse out the differences between how solicitor-client privilege was originally designed and how it applies to government lawyers. Now, I think that there is a wider degree of confidentiality. If a public employer is speaking to a government lawyer than if they're speaking to another public employee, even if the substance of the conversation is the same.

C. WELLS:

There is a wider degree of?

M. KARANICOLAS:

There is a wider scope for withholding the information.

C. WELLS:

Why?

M. KARANICOLAS:

Because there are protections for solicitor-client privilege.

C. WELLS:

Do you know the decision of the Supreme Court of Canada -

M. KARANICOLAS:

Campbell.

C. WELLS:

- in *R. v. Campbell* and the comments of Justice Binnie?

M. KARANICOLAS:

Yes.

C. WELLS:

And he very clearly says that that's not the case.

M. KARANICOLAS:

Well, I'm not sure how clear it is because you still need to distinguish. You're talking about the difference between policymaking and legal advice but I think that a lot of that legal advice is essentially policy advice. That there can be legal advice which is fundamentally about crafting policy rather than preparing for litigation or anything that happens ....

C. WELLS:

And if it is advice, it is legal advice. If it isn't, if it's policy advice, it's policy advice and it shouldn't be protected. The mere fact that it comes from a lawyer doesn't mean it's protected. And my concern is about the overstatement that if government officials want particular discussions to be exempt from disclosure under ATIPPA, they need only bring a lawyer into the room. That's patently wrong.

M. KARANICOLAS:

Okay, so the government is considering different implications of a particular law. They bring an economist in to talk about the different economic implications of it. They bring a government lawyer in to talk about the legal implications of it and also to talk about the potential constitutionality of the law. Why is the lawyer's assessment of whether or not a particular law could withstand a constitutional challenge? Do you think that that's worthy of protection?

C. WELLS:

Well, not necessarily unless it is a solicitor-client relationship. As Justice Binnie says in the *Campbell*

decision, that it has to be a solicitor-client relationship and it has to be advice given in the context of a confidentiality situation. The mere fact that it comes from a lawyer doesn't give it automatic protection.

M. KARANICOLAS:

But there's more leeway because of the way the law is crafted.

C. WELLS:

I don't know. And so there should be more leeway if there is a genuine solicitor-client issue, and it is only if there's a genuine solicitor-client issue that it arises. The mere fact that it's a lawyer, doesn't give it solicitor-client privilege.

M. KARANICOLAS:

Well, but, again, the fact that this is being hived off from the Information Commissioner's purview makes it more difficult to make that assessment, doesn't it?

C. WELLS:

The mere fact that it's what?

M. KARANICOLAS:

The point is that solicitor-client privilege should apply. Understandings of the solicitor-client

relationship within the private sector are not, which is how the law has generally evolved and how understandings that have evolved, are not always appropriately applied to the public sector is the overall point that I'm trying to make.

C. WELLS:

There's a school of thought in the law that there's less protection in a government situation.

M. KARANICOLAS:

There should be less protection.

C. WELLS:

That there is in fact less protection because seldom, and there is in fact, now this is what Justice Binnie's comments indicate. So that's why I raise that issue with you. But what flows out of it is you can't just arbitrarily confine it to litigation matters. There are genuinely other matters where clients are seeking legal advice on potential positions they can take to further their legal interests or to protect their legal position that is genuinely solicitor-client advice, not in the litigation context.

M. KARANICOLAS:

Right. But my question for you is, why that advice

would need to be protected when if it was coming from an economist, a parallel type of advice wouldn't need that kind of protection.

C. WELLS:

But it is not that kind of advice. It is the legal position. Because the legal position may arise in a case later on and the discussion of it may provoke a case or it may not.

M. KARANICOLAS:

If there is pending litigation and if there is strategic aspects to it.

C. WELLS:

No, there is not pending litigation.

M. KARANICOLAS:

Or if there is consideration of litigation.

C. WELLS:

There is a possibility of it.

M. KARANICOLAS:

If there is a possibility of litigation, then certainly ....

C. WELLS:

Well, that's when it's protected. It is not protected merely because it is a lawyer giving the advice on the same issue that the economist ....

M. KARANICOLAS:

I think you're drawing a clear line than exists in the law and then certainly that I would expect such existent practice.

C. WELLS:

As Justice Binnie says, whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter. And the subject matter is critically important of the advice and the circumstances in which it is sought to be rendered. So if a lawyer is giving advice on the same issue that an economist is giving advice on, it's not protected solicitor-client privilege. It is not protected. It is only protected if it's given in the context of giving solicitor-client advice. The mere fact that it's a lawyer carries no protection with it. This is one of the example where I think you overstate the position.

M. KARANICOLAS:

Well, look, I'm more interested in talking about the substance of what the law should be than about whether or not in that particular .... I mean I'll concede that that's poorly phrased.

C. WELLS:

Yes, okay. All right, then. In terms of, to get back to the bases, do you still retain your view that solicitor-client privilege should only attach to litigation matters?

M. KARANICOLAS:

To litigation matters, again, is applying a framework of solicitor-client privilege that's not .... I think that there needs to be more conceptual discussion of this and a more developed ....

C. WELLS:

Well, you say specifically ATIPPA should be amended to provide an exception only for litigation purpose.

M. KARANICOLAS:

Sure. What I mean is, if there is what we're talking about, is if there is pending litigation or consideration of litigation.

C. WELLS:

Well, in a great many circumstances when clients ask for advice there is no pending litigation, there is no threat of litigation, and say I want to avoid it, how do I structure it to do this? That's solicitor-client privilege in the ordinary course.

M. KARANICOLAS:

And why does that need to be withheld?

C. WELLS:

Because it is solicitor-client privilege and it can affect the rights of parties.

M. KARANICOLAS:

Right. But part of the discussion I'm trying to stimulate is the proper nature and the proper interest that we're trying to protect through the solicitor-client privilege exemption. So to say, well, because it's solicitor-client privilege on it, because we're trying to foster discussions, I think that you have separate exceptions that are meant to foster candor of government deliberations, and we already talked about those, and the legitimate expanse of those. And I think that to say that advice from lawyers requires additional protection because it has a legal nature. In the absence of an interest in terms of pending litigation and an overriding need to keep it secret, the idea of promoting candor between government lawyers, between the government and their lawyers is not the same kind of interest, not the same kind of need that you see within the private sector.

When an individual goes to a lawyer, there is a very personal nature to the consultations. They're dealing with issues of their freedom. They are dealing with issues of their children being taken away. They are dealing with potentially financial issues that could bankrupt them, that could ruin them. Those sort of issues don't really come into play in the same way when the government calls for lawyers and to discuss legal issues. So that's the different understanding that I think needs to be reflected.

C. WELLS:

Well, I'm not sure you're right on that. There are circumstances where corporations or governments may well consult with a lawyer. We had this, we can take this course, we can take course B, we can take course C. The lawyer says to them, if you take course C, you're almost certainly inviting action against you. And government decides, for a variety of reasons, that that's the course they're going to follow. The mere fact that a government lawyer had said that they're inviting action may well provoke action. The government doesn't want that information. It's not

in their legal interest to have that information out there that they got this advice. So there are circumstances. It's not just litigation.

M. KARANICOLAS:

I mean, again, I think that's absolutely parallel to an economist who gives the government the advice. If you take this course of action ....

C. WELLS:

You'll make money and if you don't, you'll lose money.

M. KARANICOLAS:

If you take this course of action the province could lose a whole lot of money and the government takes that course of action and they lose a whole lot of money. Wouldn't it be in the public interest for that information to come out?

C. WELLS:

I don't share your view when it's expressing a view with respect to the prospects of success of an action against the government. That's a privileged advice, so.

M. KARANICOLAS:

But if you're talking about the success of an action against the government, I mean that's involving

litigation.

C. WELLS:

No, it isn't. It isn't pending litigation. It is dealing with a legal situation. There is no litigation and none in prospect.

M. KARANICOLAS:

Well, but it's certainly being considered because the government is asking what are the chances of us being ....

C. WELLS:

Well, then, that's what you mean by litigation?

M. KARANICOLAS:

Yes.

C. WELLS:

Anything that could, okay. All right. I have nothing else. We can move on to your next item, Oversight.

D. LETTO:

Could I ask just one small question on section 20 which is Policy Advice and Recommendations, and that's come in for a fair amount of discussion in the wake of Bill 29?

M. KARANICOLAS:

Sure.

D. LETTO:

And we know that officials provide lots of written and oral advice to ministers on all kinds of issues, some of them very sensitive. And I'm interested to know, would any of that advice find protection under your sense of what ought to be protected and what ought not to be protected when it comes to advice given to ministers?

M. KARANICOLAS:

Section 29, Policy Advice and Recommendations?

D. LETTO:

Yes.

M. KARANICOLAS:

We would recommend the harm test come into play for that. So that's, again, something that should be done, I think, on a case-by-case basis rather than a categorical basis. It would be our recommendation there.

D. LETTO:

So right now, all of that advice is withheld? Advice, proposals, recommendations, policy options. Yes.

M. KARANICOLAS:

Well, again, it's about seeing a consideration of

harm coming into there. I'm not saying anything that falls within this particular box shouldn't be disclosed.

D. LETTO:

Okay.

C. WELLS:

Okay, Mr. Karanicolas, if you want to go on to the next thing?

M. KARANICOLAS:

Sure. And, again, the remainder of my presentation is actually what's in my submission, so.

C. WELLS:

Is there any aspect of it that you would want to emphasize? This one deals with oversight and appeals.

M. KARANICOLAS:

Sure. There is no other questions about exceptions?

C. WELLS:

Sorry, my apologies.

J. STODDART:

Yes. I'm interested in your suggested definition of the "public interest override". I believe this is section 24.

M. KARANICOLAS:

Are you going to ask me if that should apply to the privacy exemption?

J. STODDART:

No, I'm not because I think you answered that question.

M. KARANICOLAS:

Sure.

J. STODDART:

Yes. I'm just going to ask you about your proposed definition and I think a public interest override is a very interesting mechanism. So this is where I'm coming from. That laws should always be interpreted in the public interest with very few exceptions, I guess, when there is a conflict with personal information. And, where is it that you .... Just looking at your definition of it, and I wondered if you would explain that. Oh yes, here we are, page 8. "Better practice is to apply the public interest override wherever unbalanced the public interest would be served by disclosure." I'm just concerned that there would be nothing that would not be overridden by the public interest override, including my own personal information, my personal

circumstances.

M. KARANICOLAS:

Certainly not, so let me clarify that.

J. STODDART:

Because there is no balance within that test that you propose between competing values.

M. KARANICOLAS:

No. Okay, so a lot of countries exempt. The reason why that sentence is in there is specifically applying to the fact that certain exceptions, I think for Cabinet deliberations are exempted from the public interest override. That's the general focus of that.

Now in terms of the relationship between the public interest override and personal privacy, there are several countries that exempt personal privacy from the public interest override, and I think that that can be legitimate. Where the public interest override applies to personal information there is a very, very strong public interest in withholding and protecting personal privacy. So, in the application of the public interest override it is not about should everybody get to see your records. It is not

about the interest of everybody seeing your records versus your interest in withholding your records. That's not the way that we're talking about applying the test. And what we're talking about is the interest that would be if someone's personal records were under request, a request involved personal information, the interest would be the broad interest in protecting privacy. And that is a very, very strong public interest. So it is not about the interest of one person versus the interest of everybody. So I don't agree with that assessment and I don't think that's generally not the way it is applied.

J. STODDART:

So, I'm confused. Is your position this last sentence or is it something different than that? The sentence on page 8.

M. KARANICOLAS:

The main focus of that sentence is on the exceptions. The fact that public interest override applies to certain exceptions but not others. So I would put that in one category and then I would say - which I should have expressed in the paper but didn't - that personal information can be a separate category for

that. So some countries exempt personal information from the public interest override and I would say that's the only potentially legitimate area to exempt from the public interest override. And where the public interest override does apply to personal information, it's recognized that there is a very, very high public interest in protecting personal privacy.

J. STODDART:

Okay. And that's the only exception to the public interest override that you would see?

M. KARANICOLAS:

Generally. I mean, we prefer to have the public interest override apply to all exceptions, recognizing that personal privacy will very, very rarely, if ever, be overridden by a public interest. But several countries do exempt personal information from the public interest override. And that's not necessarily a weakness in the law.

J. STODDART:

Okay, thank you.

C. WELLS:

Is there any other aspect of the exception that you wanted to comment on before we moved on to the next

part?

M. KARANICOLAS:

No, I'm happy to move on to Oversight and Access. Or Oversight and Appeals.

C. WELLS:

Okay, if you would. Is there any aspect of that that you would wish to emphasize?

M. KARANICOLAS:

I'm happy to move straight to questions and then take sort of the material I've submitted as read.

D. LETTO:

I'm interested in the whole order making power (inaudible) decisions as it relates to the Commissioner and how you would see that work in practice.

M. KARANICOLAS:

So this is an area of some debate. Work in practice or should there be order making power?

D. LETTO:

Well, you've said there, I think you've said there should, so I've accepted that.

M. KARANICOLAS:

Yes.

D. LETTO:

So just how it would work, because I'm trying to understand that myself.

M. KARANICOLAS:

Well, generally, there are several jurisdictions in Canada and a lot of jurisdictions around the world where the information commissioner or other equivalent oversight body has the power to issue legally binding orders. And essentially what that means is it is what it says. It is an order rather than a recommendation.

There is different mechanisms by which that can actually be enforced. You could make it certifiable. So once the order is handed down the personal can go directly to court and certify it as a court order, so that disobedience with a decision of the information commissioner is the equivalent to contempt of court. There is some jurisdictions where the information commissioner themselves are given the power to fine public bodies or more draconian measures, depending on how, as necessary. Generally speaking, the jurisdictions that do that kind of thing, they give their information commissioners very strong coercive

power. The hope is that that wouldn't be necessary in jurisdictions like Canada, where, if the information commissioner issued something that you call a legally binding order, that the public body would comply with the law. Unfortunately, where we draw the line between the order and the recommendations is that if you explicitly give the public body the option of refusing the order or ignoring the order, they do take that a significant amount of the time. That's what we've seen in Nova Scotia. That's, I think, what we see here in Newfoundland and Labrador as well.

D. LETTO:

So that leads then to my question, best practices that you've seen. You said this is in place in various places. If you had to pick elements that do work and you had to confine them into one system, what would your recommendation be?

M. KARANICOLAS:

Well, the first thing is to remove the option of public bodies, to remove the legal option of public bodies to ignore the law. In terms of best practices, I mean it is worth noting that we work in a lot of places where the rule of law is not as

strong. So in places where the bureaucracy is not as respected and where you do need to have a significant amount of coercive power to back up the decisions of an information commissioner, which hopefully wouldn't be the case here. So a lot depends on this. In terms of the international better practices, a lot of it depends on the specific local context. So I would say that international better practice is to make it legal binding, but there isn't a single formula that I would necessarily point to, beyond making it legally binding and legally enforceable.

C. WELLS:

Would it be an acceptable alternative that would provide reasonably quick and efficient access, at the same time protect any legitimate interests the public body may have if you permitted the applicant to file the Commissioner's order as a court order, if the statute permitted it to be filed as a court order within five days after it being made, unless the public body took steps, filed an appeal in the meantime and the public body would have the obligation to take the appeal to the court and the Commissioner would be the respondent to support it?

M. KARANICOLAS:

So I understand it, the Commissioner makes the decision?

C. WELLS:

Yes.

M. KARANICOLAS:

The applicant has the option of certifying it with the court?

C. WELLS:

Yes.

M. KARANICOLAS:

And then if it's disobeyed?

C. WELLS:

No, has the option of certifying it with the Court, unless in that intervening five days or four days or ten days, or whatever is appropriate, in that intervening period the public body files an appeal against the order of that.

M. KARANICOLAS:

Yes.

C. WELLS:

And that way that would rest the enforcement of it but it puts the issue immediately before the court without any delay and the statute could provide for a

speedy summary appeal process.

M. KARANICOLAS:

And the OIPC is the party, so the applicant doesn't have the legal fees.

C. WELLS:

So the applicant doesn't have the legal fees.

M. KARANICOLAS:

Yes.

C. WELLS:

And that protects the government's interest or protects potential interest of the government at the same time as it provides for an expeditious review by the court without expense to the applicant.

M. KARANICOLAS:

Yes. The one potential issue with that kind of a system is that the OIPC, I imagine, would need significant more resources to be able to handle that kind of legal load.

C. WELLS:

Yes, that's understood. If he has that responsibility the OIPC would need the resources to deal with it.

M. KARANICOLAS:

But, yes, that sounds like a good system.

C. WELLS:

That system should work, I would think.

M. KARANICOLAS:

Yes.

J. STODDART:

On the RTI index, I believe the UK ranked seven which was the highest of, I'd say, the proved access to information laws, both in contents and in application. I believe the UK commissioner, he certainly has fining power for breaches of personal information. Does he have them for refusal to comply with the access to information dispositions of that Act. And if so, would you think that a Commissioner needs fining power like the UK Commissioner?

M. KARANICOLAS:

Okay. Well, I think we just need to back up a second. So the UK is not seventh in the world.

J. STODDART:

Oh. I thought it was in your indexes I looked at.

M. KARANICOLAS:

No, they're not in the top ten. They are the strongest among, I think either the UK or New Zealand would be the strongest among what I would call our peer group. UK is certainly above Canada. I would

need to check back again to see exactly what their score was but they're not in the top ten. And in terms of proven systems, I would put India and Serbia both. I would refer to both of them as proven systems.

J. STODDART:

I guess my issue is not where they are in the ranking, it was just to say you seem to think the UK system is better than some other ones we're more familiar with. And my understanding is the UK Commissioner has fining power.

M. KARANICOLAS:

Sure.

J. STODDART:

Are you in favor of fining power?

M. KARANICOLAS:

Yes. I would say I'm in favor of that with the hope that expanding the powers of the OIPC would be sufficient to ensure broad respect for the office and for their decisions.

J. STODDART:

Okay, thanks.

C. WELLS:

Do you want to add any further comment on this area?

If not, we can move on to time limits.

M. KARANICOLAS:

No, I'm happy to move on to time limits.

D. LETTO:

I guess the question of time limits has come up numerous times. In the current law there are limits in some respects but they are more guidelines. How do you put in time limits so that they're observed? What kind of suggestions do you have? Do you make absolute time limits? Do you state them more forcefully in the Act? Give us a sense.

M. KARANICOLAS:

Well, I mean, they need to be legally binding. Our specific recommendation is it is 30 days. In exceptional circumstances you can extend it by an additional 30 days, but there is certainly no reason why any access to information request should go beyond 60 days in total. And again, we point to India as the example. If the public body is there, that certainly don't have the level, they have a much higher demand for information requests, they don't have the level of digitalization, don't have the level of resources and information management, I don't think, than the public bodies here. If they

can respond to access to information requests within a flat 30 days and have good implementation on that, I don't see any reason why public authorities here can't do it in 60 at the most.

D. LETTO:

Yes. I don't want to steal the Chair's thunder because he has some views on timelines.

M. KARANICOLAS:

Sure.

D. LETTO:

We've had people come here before the committee and say that it's either their experience or their perception that a 30-day time limit for the public body essentially means that at day 25 or day 27 they get around to dealing with your request. And that 30 days in that respect is too much. Your thoughts?

M. KARANICOLAS:

So it already (inaudible) that public authority should respond to requests without delay. I mean generally one of the things that we look for in good legislation is it will say as soon as possible or no later than X; 10 working days, two weeks, 30 days. I do want to mention, there are a lot of jurisdictions. We mentioned, I think that saying 30 days, expendable

by 30 days is actually fairly generous on international standards. There are a lot of jurisdictions that cut it down quite a bit. And I mention Indonesia as saying two weeks. They're not alone in having the initial response timeline as being two weeks. There are several jurisdictions that do that.

In terms of the actual guidelines for making public bodies respond, again it would be great to see a culture shift. It would be great to see public bodies. See this as a core part of their mandate rather than something that they have to fulfill in the minimum requirements for. But that's, I think, something that needs to come from the shift in the culture and the attitude towards transparency and the idea that it is a fundamental aspect of government rather than an obligation that needs to be fulfilled to the bare minimum.

C. WELLS:

What's wrong with having a system whereby within 10 days or two weeks the public body either delivered the material requested or delivered to the requester a notice explaining why it wasn't available within

that time and how much more time it will take?

M. KARANICOLAS:

There is no strict time limit there.

C. WELLS:

No, they still had the 30 days. You still have your 30 days but this is an interim response of 10 days.

M. KARANICOLAS:

Sure.

C. WELLS:

If you don't provide it within ten days, you file an explanation as to why it is going to take another 20.

M. KARANICOLAS:

Sure. The main thing that we want to see is an elimination of any possibility to go beyond 60 days. That's our main recommendation. Initial 30-day time limit with a requirement to respond within ten days and basically as a status update on what's happening, I think that that would be a good addition. Hopefully, that would prompt more initial action rather than waiting till day 25 or 26, as is mentioned.

C. WELLS:

I would think that most of the information requested could be provided within 10 days. If a minister

requested it, it would certainly be provided within 24 hours. Now, admittedly, they have to look at it to see that there is no good reason not to release it and make sure that they are not breaching any law by releasing it, but a week to do that simple few pages document, you don't have to wait till the 29th day to go and dig it out and send it on. And when people request information, it's usually important to them to get it expeditiously.

M. KARANICOLAS:

I mean, and we note the example of journalists writing a story. Often 30 days or 60 days would be too long. I absolutely agree and I think that the question of prioritization, the question of fundamental attitudes towards transparency is a really key part of turning the system around.

D. LETTO:

I just have one other thought about fees and you've talked about it, it is not appropriate to charge users a fee to file. As I'm sure you're aware, so many people have talked about this and there are some people who suggest that, well, having a fee to put in the request keeps out nuisance requests. But that can be dealt with in other parts of the legislation,

I realize.

M. KARANICOLAS:

Yes.

D. LETTO:

What is your thought about the idea that, it is a bit of a prevailing idea in a lot of the literature, that there needs to be some kind of a fee as a price of admission to get into the system?

M. KARANICOLAS:

Well, again, some members of the Committee might not like this but it comes down to the idea of being a human right. Meaning that you shouldn't be charged to exercise a human right. You know, we don't charge people to vote. We don't charge people to practice their religion. We shouldn't charge people to get access to information, other than actual costs that are incurred by the public body. So that's the fundamental problem we have with it. And more practically speaking, all over the world we see systems that don't charge users for access. And that includes, as I note in my paper, I mean I noted Liberia and El Salvador, so those are bad examples because those are both systems that are getting off the ground but. Mexico is another example of a place

where they don't charge fees for access, and you don't see this sort of overwhelming flood of access requests coming in. You don't see the system being overwhelmed by frivolous requests, just because it's free to do so. It takes time, it takes effort and people generally don't apply unless they have a reason to do so.

Again, I list Nepal in there which if the Nepali government can afford to do it without access fees and can handle that administrative burden, I expect that the government here can.

D. LETTO:

And we've had two examples given to us here where requesters have given up on their request because of the costs associated with obtaining the information.

M. KARANICOLAS:

Yes. So in terms of the broader costs, that is a problem. In the newspaper's audit, they mentioned that one of the fees to the City of St. John's came back with a fee estimate, I believe, of $62,500 which seems too much to me.

D. LETTO:

What were they asking for?

M. KARANICOLAS:

They were asking for records of building deficiency orders and there was no consolidated register of those. So the City came back and said it would cost 62,000 to bring everything together.

C. WELLS:

The $5 application fee, I've been thinking, it is not very much. It is not likely to deter anybody from seeking information if they genuinely want it and need it. So, it's not a horrendous amount, but by the same token I don't see how it serves to prevent people who want to be mischievous for making a request anyway. It is equally not very much. So if somebody wanted to make a frivolous or vexatious request, $5 is not likely to stop them. So I don't know what $5, the use it really serves.

M. KARANICOLAS:

The idea of access fees, so that is an international standard and that's something that we take to a lot of different countries. And it is much more relevant in a place like India or Nepal than it is here where you do have very poor people that are using the right to information law as a way to exercise their rights or safeguard their rights. Or, you know, a

particular subsidy from government that was meant to come to the province isn't coming through and the local activist wants to know why it hasn't come through. So we start filing access to information requests and these are people that don't have a lot of resources.

C. WELLS:

In the Canadian context?

M. KARANICOLAS:

Right. It is mostly an issue of principle that you shouldn't have to pay to exercise, to make an access request. And it is of more relevance in the developing world than it is in the Canadian context. Because I do agree, and it is more a matter of principle than a functional deterrent.

C. WELLS:

Yes, I don't see the benefit to government to having it because I don't think it's a practical deterrent to deter people who want to make frivolous and vexatious requests.

M. KARANICOLAS:

Yes, I broadly agree with that. And the bigger problem that I would see would be on charging fees for time and the fact that these fees can add up and

add up and add up. The other requests for the Newfoundland and Labrador government, the received fee estimates, were for $862 and $982 under newspaper's audit. And I would say, like, again, that's too much money to have to spend to get this kind of information. The better practice is not to charge for time, to only charge for actual costs incurred. So that's postage and then that's photocopying, basically.

C. WELLS:

Okay.

J. STODDART:

Quickly, then, on this issue of fees, do you have any insight as to why in Ireland apparently the access to information fees have shot up dramatically?

M. KARANICOLAS:

Sorry?

J. STODDART:

In Ireland?

M. KARANICOLAS:

The access to information fees?

J. STODDART:

Yes.

M. KARANICOLAS:

The fees for access or the cost associated with delivery?

J. STODDART:

I understand fees for access but if you're not familiar with it we can move on.

M. KARANICOLAS:

Well, the Irish government has abandoned their fees, I believe.

J. STODDART:

Perhaps I'm misinformed.

M. KARANICOLAS:

The Irish government, right. Ireland recently made a commitment to do away with its fee charges. Now that was a campaign that we were involved in, actually.

J. STODDART:

Okay, so they're going to disappear?

M. KARANICOLAS:

Yes.

J. STODDART:

These expensive fees? Okay, five.

M. KARANICOLAS:

But that's the fees for access. I can't comment on what the Irish attitude towards fees for time

preparing requests is. I'm not sure about that.

J. STODDART:

Thanks.

C. WELLS:

I think that sort of covers. Is there anything else that you wanted to emphasize?

M. KARANICOLAS:

No.

C. WELLS:

Okay. There's one matter that you haven't mentioned that the Committee would like to have your thoughts on, and that is the term of office of the Commissioner. I don't know whether you're aware of it or not but under the legislation here the Commissioner is appointed for a two-year term subject to renewal.

Now, there's two things about that. Judges who exercise judicial authority or appointed for life or till 75, which is deemed to be judge's life, to give them independence to make decisions contrary to the interests of government and without fear of favor or other consequence. Where a commissioner is reappointed every two years and has to make decisions

that bear on the government that's going to do the reappointing, that places that commissioner in a rather difficult position and it has to be a very strong commissioner that says, damn, the torpedo is full steam ahead. By the same token, a term, any period of any possibility of reappointment if it were a longer term with a possibility of reappointment might well have the same effect on a commissioner. We've had a variety of recommendations suggesting five years with reappointment, others 10 or 12 years with no possibility of reappointment. And that eliminates any inducement to make decisions that might result in reappointment and it also places the Commissioner in a position where the Commissioner knows beforehand that whatever he or she does, it doesn't matter. They can't be removed unless they misbehave but whatever decision they make will not cause removal. Do you have any thoughts on what's preferable?

M. KARANICOLAS:

Sure, absolutely. So, you're absolutely correct to note that the information commissioner is a mechanism of accountability within government and so independence is vital. Two years is a very short

term. One of the core aspects of independence that we'd look for in judging the strength of an access framework - and the oversight body in particular - is that they have security of tenure. That they cannot be summarily dismissed. So having a term that is just two years kind of undermines that because essentially, right, it allows the government a pretty big stick to wield over the information commissioner, the information and privacy commissioner.

In terms of the actual timeframe itself, international standards from the gamut, we would want to see at least four years. You see four years, five years, six years. Sometimes there is one possibility of a renewal. Sometimes it'll be six years with no possibility of renewal. I would suggest that 10 to 12 years is a little bit long. Security of tenure is important but you also need to be able to judge their performance and to replace somebody who is not doing a good job. There is the issue of independence but there is also the issue of efficacy and you want somebody that's competent.

Some states will have particularly strong

mechanisms in place to protect the independence of the information commissioner through the appointments process, and these will include requirements that the commissioner will be appointed by, sometimes they'll spell out a various type of committee that will be required within the law. So they say there will be a committee composed of the head of the ruling party, the head of the opposition, a high court judge, something like that. You have particularly strict mechanisms that are in place to protect independence. Generally, those kinds of things are not as important or as vital in Canada because we have a stronger tradition of independence within our civil service. Then you'll see in places where institutions can be more easily corrupted. That being said, two years is still too short. So what I would suggest is at least four to six years.

In terms of renewals, if you get a good information commissioner I certainly think there should be a chance to renew their service. I mean, when you get somebody good in the job I mean you're going to want to keep them on, I think. If you do have somebody that is respected by government,

respected by the people, is known to make the right decisions, I mean it is good to keep them on in doing the job.

D. LETTO:

Section 46 of ATIPPA provides for, informal resolution is one of the ways to bring parties together. Can that coexist in the law with a commissioner who's got order-making powers?

M. KARANICOLAS:

Yes, absolutely. It exists all over the world, including in Indonesia where you have a mediation process at the outset. Basically, the idea is that a lot of the time if you sit down with a mediator and actually talk about why do you want the information, what are you looking for and what specifically are you trying to find out and you put the person in a room with the government, with a representative from government, sometimes a mutually agreeable way forward can be found, where the government can still withhold the information that they are reluctant to disclose, while the requester gets the information that they're interested in.

Essentially, what you're trying to do is in that

kind of process, the idea behind it, as I would see is, would be to reduce the workload among the OIPC as well as to make it an easier and quicker process for requesters. It is the same as any mediation process where you try to do things informally to save the formality of an appeal. So, yes, absolutely that can and does coexist and we think that that's a positive aspect to the access system. As long as it's done expeditiously and it is done in a way so that you don't allow governments to unreasonably stall the resolution of the claims.

D. LETTO:

Should the Commissioner's office have any role in training and educating the coordinators within the public bodies so that you get a consistent approach? We've had, I guess, questions raised at various points that you may get inconsistent application of the law and that's not a good thing either. Is that the way to do it? Is there some other way to train people so that they're all on that equal level of understanding?

M. KARANICOLAS:

The information officers playing that kind of role is absolutely an aspect to a positive system. Strong

information commissioners can play an extremely broad role in promoting public information, promoting public awareness, that their ability to get documents from the government, encouraging education around the right to information, encouraging better information management among public bodies, encouraging understanding of the value of transparency in government. So, particularly we've seen this in places like India and in places like Indonesia where when you have a strong information commissioner there they can really transform the attitudes of government and the understanding of the population as a whole. So, yes, we would certainly want to see the information commissioner be given a stronger mandate to promote the right to information, to promote standards for information management and promote understanding of the information law.

J. STODDART:

Thank you. I have several questions as we're concluding, I believe, your testimony. First of all, on page 12 under other issues of your presentation, towards the end of the first paragraph you say, "ATIPPA" - that is the Information and Privacy law of Newfoundland - "also excludes the constituency

offices of Members of the House of Assembly. All of these should be brought within the ambit of the law." Could you explain your position? I believe it is rather unusual and certainly in terms of Canadian experience.

M. KARANICOLAS:

Sure. The international standard, stated briefly, is that the right to information should apply to any organization, any body that performs a public function or receives public funding to the extent of that funding or function. I'm a little unclear of how the constituency offices actually work, so I will say that it is possible that I'm not completely understanding it. But if there is public funds going towards them, then the public has a right to know where that money is going and what's being done with it.

C. WELLS:

I can give you some indication of how constituency offices work, and your suggestion is not really very practical. And the reason for that is politics in all of the provinces of Canada and on the national level is, as you're very much aware, a competitive, some call it a blood sport, but it is certainly

competitive. And it is not very practical to require the constituency member for a particular district to have to disclose to his potential opponent in the next election his views and the detail of what he's got prepared and the policy positions he's going to take and whatever approach he's going to take in the next election. It is just not practical. It can't work.

M. KARANICOLAS:

Sure. I mean, more than anything else, it is about following the funding more than anything else.

C. WELLS:

I think everybody would agree with you, that where public funds are involved maximum disclosure should occur but there are certain circumstances, I mean there is a way of exposing how much money the opposition offices are spending on the constituency offices. That's all there in the records anyway.

M. KARANICOLAS:

Sure. I know, that's the only specific one. I think that it's specifically excluded by ATIPPA.

C. WELLS:

It is, yes.

M. KARANICOLAS:

Right. So that's sort of the approach that we take is, generally speaking, we don't like to see exclusions. We don't like to see broad exclusions with particular arms of government.

C. WELLS:

So do you want to see the exclusion or protection in another statute?

M. KARANICOLAS:

No, I mean, not necessarily. And I wouldn't, talking it out now, I wouldn't necessarily stand very strongly towards that.

C. WELLS:

I want you to think it through and see where it could lead. You can see the potential problem with that (phonetic).

M. KARANICOLAS:

I wouldn't phrase it that way. But I mean it's more along the lines of, I'm not as familiar with how constituency offices work. So whenever you see in an access to information law this particular office is excluded, 99 percent of the time that's illegitimate and that shouldn't be done. I think that the fact that you sort of have this weird overlap between the

political role and the personal role, the political role and the public role, makes it a little difficult. But I certainly understand the need to keep political strategies a secret.

C. WELLS:

Now, there's one other area that is not mentioned in this paper but it was certainly mentioned in your other paper, your September paper, and that is your suggest that the judiciary should be included.

M. KARANICOLAS:

So judicial records -- sorry.

C. WELLS:

Over and above judicial and court administration, judicial administration positions, that understandably should be included. But the judiciary? You can access a judge's notes and his thoughts on pending cases and that?

M. KARANICOLAS:

No, generally speaking, that will be, in countries that's subject the judiciary to the access to information law, they have an exception for personal and0 judicial records. More than anything else, our position on that is still sort of evolving in terms of a Canadian contexts and that's one of the reasons

why I didn't include it in this.

C. WELLS:

So we won't get too carried away with that recommendation?

M. KARANICOLAS:

Well, that's not in this submission.

C. WELLS:

No, it is not in this. I agree. I agree.

M. KARANICOLAS:

And there is a reason why it's not in this.

C. WELLS:

Right. Okay.

M. KARANICOLAS:

It's because our understanding on that is sort of evolving in a sense that on the one hand, yes, that's absolutely an important interest to be respected. And particularly, the integrity of the judicial process certainly requires a degree of secrecy. But it's a little problematic. I think that there is scope to open up the process a little bit more and to allow greater access to that information. And I will give you an example of something that we're going through at the moment, actually, with CLD as an example of why it can get a little frustrating.

So, this is a federal issue but it's relevant to what you just asked. So R. v, I believe it was Karagianis. It was resolved a few months back. And that was the first prosecution under the Corrupt Foreign Practices Act. And it was a person who was convicted of bribing a bunch of ministers related to, people within Air India which is a state-controlled company within India. So the guy was convicted of having paid a bunch of bribes to Air India officials. Now, those officials have never been brought to task within India. So, a right to information activist within India contacted us and said apparently your courts have this conclusive evidence of bribes being paid to Indian officials. I would be really interested in seeing this conclusive evidence about who was getting bribes so that I can deliver them to the police stations here in India. And, you know, demand that action be taken on the Indian side as well. And we've been trying for quite a while to get access to this evidence and it's been a kind of frustrating, so.

C. WELLS:

And do you not simply go to the court and review the record? Courts are open public. You can review

records, can you not?

M. KARANICOLAS:

So the problem is it's in Ottawa.

C. WELLS:

Oh, okay. Well, that's a travel and cost problem.

J. STODDART:

That's something that access to information will solve.

M. KARANICOLAS:

Well, if we can make an access to information request to the federal government. We wouldn't necessarily need to go to Ottawa to make an access to information request. You should be able to do it online.

C. WELLS:

You mean you want to alter the system.

M. KARANICOLAS:

There is a lot of room for improvement within the system. But I mean to go back to the issue of judicial information. Like, I realize that that's a very complicated, a more complicated issue.

C. WELLS:

And that's why it didn't appear in your submission to us.

M. KARANICOLAS:

Basically.

J. STODDART:

Has this information been refused to you yet?

M. KARANICOLAS:

Sorry?

J. STODDART:

I'm not sure I understand the problem. Has this information which is accessible or for which you made an application through the federal system, has it been refused?

M. KARANICOLAS:

We got access to a small part of it which didn't really give us the information that we needed. So we've followed up and we haven't heard. We're still waiting to hear back.

J. STODDART:

Okay, thanks. I have, perhaps, the last question.

M. KARANICOLAS:

Sure.

J. STODDART:

And that is, you make some very, what shall we say, determined statements the beginning of your presentation about bringing Newfoundland legislation

into the 21st century. I was rather then surprised to read the rest of your presentation which basically involves tweaking the present law, whereas, you and people who follow these developments around the world increasingly think that the baseline should be open government and that access to information legislation in that covers that information which is not open. And indeed, you yourself refer to this as a standard beyond RTI, in your paper of March 2014.

I'm just wondering why an organization as avant-garde as you are doesn't say to us, recommend that Newfoundland move to a position of open government which in fact it amounts to about the same type (inaudible) of this committee, and rewrite the access to information parts of your law - I'm leaving aside the privacy issues - as functioning with a fully blown open government. Not open data, open government.

M. KARANICOLAS:

Which paper are you citing in March 2014?

J. STODDART:

I'm citing one that I downloaded from your website which is entitled "International Standards on

Transparency and Accountability", and just before the conclusion you talk about this new movement that's emerged - open data.

M. KARANICOLAS:

I think our director wrote that, not me. But, so it is a little bit difficult for me to comment. Well the reason why, I'm not saying that I don't --

J. STODDART:

Well, I mean, without reading it, it is known open data, open government. Open government particularly is known and I was surprised that you tell us just makes some good tweaks to the existing law.

M. KARANICOLAS:

So, the relationship between open data and the right to information is one that I'm very happy to speak about.

J. STODDART:

No, open government.

M. KARANICOLAS:

Sure, open government.

J. STODDART:

Because open data is just data set.

M. KARANICOLAS:

Right.

J. STODDART:

Okay, open government goes beyond that.

M. KARANICOLAS:

Right. It is about proactive publication and putting everything out there. Sure.

J. STODDART:

Exactly.

M. KARANICOLAS:

On which we obviously support.

J. STODDART:

Why aren't you telling us to do this in Newfoundland? That's what I'm intrigued with.

M. KARANICOLAS:

I think that that's a fantastic idea. We absolutely support that. Our specialization is more on the access side than how to implement open government. That being said, we do some work on open government but it hasn't particularly been strongly within our wheelhouse and it certainly has been within my specific wheelhouse. As I said that, I don't think I wrote that one which is why it's difficult for me to comment on it.

J. STODDART:

But conceptually, whatever you're specialized in, I'm

just amazed that conceptually you don't say to us, if you're going to try and make this legislation a world leader, go beyond right to information. Go well beyond. And the government is already shown its openness to this.

M. KARANICOLAS:

I support that but open government is not a replacement for RTI. And I can tell you why. Because this is something that we see at the federal level and this is something that we see in a lot of different jurisdictions, particularly with the open government partnership. Open government is a great development and it brings people into the system. It allows for greater incite into the system but it doesn't allow a full accountability because you will never see the government proactively putting out their documents that are a little bit sensitive or a little bit embarrassing. Documents that should still be disclosed under international standards of a proper exceptions regime but would be a little bit embarrassing. So, for example, the disclosures around helicopter travel by Peter Mackay that caused the kerfuffle a little while back, right. Those were accessed under an access to information framework.

You would never see that kind of stuff going out under open government because, generally speaking, open government is where governments put out the information that's easy for them to put out and they tend to still withhold information where there is any potential for embarrassment or sensitivity, so.

C. WELLS:

And what I understand from that is you support open government and that would be great to have it but you still need access to information to give it real oomph.

M. KARANICOLAS:

Absolutely. And to provide the kind of accountability for information that is a little more difficult to get to.

J. STODDART:

Okay, thank you.

D. LETTO:

Yes, we're not quite at 12:30, are we? We are close to it? If you could give us a couple of minutes on a recommendation in section 8, "ATIPPA applies to every law except" and then in the schedule to the Act it lists 24 sections of particular Acts to which ATIPPA doesn't apply. You've made some suggestions about

how those ought to be treated.

M. KARANICOLAS:

Right. Well, the better practice is generally to consolidate exceptions to the access to information law within a single law and that way you can have harm tests that go down the line and you can have a single public interest override that applies to those exceptions. And that's why generally it is the better practice.

C. WELLS:

So what you're saying, they are in effect consolidated in the regulation. It is not part of the ATIPPA Act. It is part of the regulation made under the Act. And it can be added to or deleted from by order of the lieutenant governor-in-council?

M. KARANICOLAS:

Right. So the problem with those kinds of paramountcy clauses is it makes it a little bit too easy for the government to build new exceptions into the right to information law because they can pass new legislation that contains a clause which is an exception to the right to information law.

C. WELLS:

Have you looked at the particular sections?

M. KARANICOLAS:

Regulation clause?

C. WELLS:

No, no. Of the wording of the sections that are listed. It is not all those statutes. It is just two or three sections in each of the statutes.

M. KARANICOLAS:

Right. No, I understand that. And no, we didn't look carefully at those and this why we say, generally speaking, they may legitimate, the exceptions within them.

C. WELLS:

That's the way they appear, generally. But now there is some question (inaudible) too.

M. KARANICOLAS:

Well, but there's also the fact that did they have a public interest override? Is there an appeal to the information commissioner in the way that there would be with the other exceptions? You have a centralized framework which provides for access and when you build out these exceptions in other legislation the framework generally won't carry through in the way that it's supposed to.

C. WELLS:

Well, the exceptions in ATIPPA could be made subject to review by the Commissioner because this is an exception in the ATIPPA. The legislation provides for these to be accepted. So that exception is contained within ATIPPA.

M. KARANICOLAS:

If you stated that all the exceptions within other legislation are subject to same rules on fees, well, that's an exception so that's a bad example. The same rules around oversight. The same rules around timelines for response. The same rules around the public interest override which is a critical one. Then it wouldn't necessarily be a bad aspect of the legislation. That would be an alternative way to solve it but the simpler way to solve that is to just consolidate the exceptions.

C. WELLS:

Well, (inaudible) the Adoption Act, for example. It is hard to take that out of the adoption context. That's better dealt with in the adoption context. Information respecting school children in the possession of the school board or the school office and the principal's office, that's best dealt with in

the education context rather than access to information.

M. KARANICOLAS:

Sure. The bottom line is whether the key values of the right to information are respected and if they are respected (inaudible) legislation it is more difficult to do but as long as they are two different avenues of getting to the same place.

C. WELLS:

Mr. Karanicolas, may I thank you for doing a very thorough presentation and notwithstanding the fact that we had some comments and criticism on it we're very appreciative of the effort that your organization made and of the effort that you personally made to be here to make the presentation and make yourself available for this discussion with us. We do very much appreciate it.

M. KARANICOLAS:

Absolutely. Thanks so much for giving me the opportunity.

D. LETTO:

Thank you.

J. STODDART:

Thank you.

C. WELLS:

We are adjourned until 2:00 p.m.

C E R T I F I C A T E

I, Beverly Guest, of Elite Transcription, of Goulds in the Province of Newfoundland and Labrador, hereby certify that the foregoing, numbered 1 to 155, dated July 24, 2014, is a true and correct transcript of the proceedings which has been transcribed by me to the best of my knowledge, skill and ability.

Certified By:

Beverly Guest
Beverly Guest