POSITION PAPER ON THE OFFICIAL SECRETS ACT

REPEAL, REVIEW OR STAY?
MOVING FROM SECRECY TO
OPEN GOVERNANCE

The Center to Combat Corruption and Cronyism
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- BREAKING DOWN THE OSA
- THE OSA AND FREEDOM OF INFORMATION
- THE GLOBAL PROGRESS TOWARDS FOI
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BREAKING DOWN THE OSA

Information that falls under the OSA:

Official secret as included in the Schedule (s 2, OSA):
- Cabinet documents, records of decisions and deliberations including those of Cabinet committees
- State Executive Council documents, records of decisions, and deliberations including those of State Executive Council committees

Official secret as defined (apart from the Schedule) (s 2, OSA):
- Documents concerning national security, defence and international relations
  - "National security", "defence" and "international relations" are not defined in the Act
- Any other official document, information and material as may be classified as "Top Secret", "Secret", "Confidential" or "Restricted"... by a Minister, the Menteri Besar or Chief Minister of a State or [an appointed] public officer

Official document (ss 9(2) & 2, OSA):
- "Official" is defined as as relating to public service;
- "Document" is defined as including a document in writing, map, plan, model, graph, drawing, photograph, disc, tape, sound track or other device embodying sound or data and capable of being reproduced, film, negative, tape or other device embodying visual images and capable of being reproduced
- "Official document" is not defined in the Act
<table>
<thead>
<tr>
<th>Categories</th>
<th>CGSO (undated)</th>
<th>Kulaan, 25/06/2009</th>
<th>Eman, 06/12/2009</th>
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<tbody>
<tr>
<td><strong>Top Secret</strong></td>
<td>If disclosed will cause grave damage to Malaysia. Examples: Cabinet papers, troop movements and placements, correspondence with foreign nations regarding important trade and security matters.</td>
<td>Official document / information / material that if disclosed without authority will cause grave damage to the country.</td>
<td>Official document, information and material regarding government’s main policies that cannot be disclosed either directly or indirectly to the media or any unauthorised person. If exposed, it will threatened the security of the country and cause grave damage to Malaysia.</td>
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<td><strong>Secret</strong></td>
<td>If disclosed with endanger the security of the State and will cause grave danger to the interests and integrity of Malaysia or will be of great benefit to a foreign power. Examples: important orders for Malaysia’s dealings with foreign countries, important information on troop placements, important information on subversive activities.</td>
<td>Official document / information / material that if disclosed without authority will endanger the country or (cause) grave danger to the interests and integrity of Malaysia or benefit a foreign nation.</td>
<td>Official document, information and material regarding government’s policies that cannot be disclosed either directly or indirectly to the media or any unauthorised person. If exposed, it will endanger the security of the country and benefit foreign powers.</td>
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<td><strong>Confidential</strong></td>
<td>If disclosed may not endanger the security of the State, but will prejudice the interests or integrity or the activities of the Government or individual or will cause embarrassment to or difficulties for the administration or will greatly benefit a foreign power. Examples: regular intelligence reports, information that provides financial benefits if disclosed prematurely.</td>
<td>Official documents / information / materials that if disclosed will prejudice the interests of the government or embarrass the country’s administration.</td>
<td>Official document, information and material that cannot be disclosed either directly or indirectly to the media or any unauthorised person. If disclosed, although it will not threatened the security of the country, can be prejudicial to the interest and integrity of Malaysia and have a negative impact on the department.</td>
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<td><strong>Restricted</strong></td>
<td>Official information, documents and materials apart from those classified with a higher classification but also require security protection. Examples: department instruction manuals, regular department orders and regulations.</td>
<td>Official document / information / material apart from those that are Top Secret, Secret, Confidential if required should be given the necessary protection.</td>
<td>Official document, information and material apart from those that are Top Secret, Secret and Confidential but require to be given a level of security protection that cannot be disclosed either directly or indirectly to the media or any unauthorised person so long as it is not gazetted.</td>
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<td>Kulaan, 25/06/2009</td>
<td>Eman, 06/12/2009</td>
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<td><strong>Subversive</strong></td>
<td>An attempt by an individual or organisation to use unlawful or unconstitutional means in efforts to change or poison the public’s mind to overthrow the government of a country.</td>
<td>Activities by organisations or individuals in or outside Malaysia that fall short of an act of war that intend to destroy order through unlawful means.</td>
<td>A movement by enemies to take over power from the government unlawfully that will cause the disintegration of a citizen’s loyalty to his country.</td>
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<td><strong>Espionage</strong></td>
<td>Intelligence activities is for the purpose of unlawfully obtaining secrets or classified information on the political, economy, social, scientific, industrial, military and trade (matters) of another country.</td>
<td>Activities to obtain classified matters through hidden means.</td>
<td>Activities to obtain classified matters through hidden or unlawful means for a purpose prejudicial to the security or interests of Malaysia. Examples: foreign spies, investigative journalists, members of the public.</td>
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<td><strong>Sabotage</strong></td>
<td>An act or omission intended to cause physical damage to installations, buildings, equipment or other targets whether public or military, to assist a foreign power or for a political purpose.</td>
<td>Actions for the purpose of causing physical damage to the interests of a foreign power or for a subversive political purpose. Can occur during peace or war. An organised campaign as the precursor to a larger plan to paralyse the country’s defences.</td>
<td>An act for the purpose of causing physical damage to the interests of a foreign power or for a political purpose. May occur during times of peace or war. Examples: sabotage between nations, physical sabotage, political sabotage, economic sabotage.</td>
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<td>Actions that cause breaches of security and cause official matters to be known by unauthorised parties.</td>
<td>Those who are indiscrete, like to debate, boast, easily trusting, like to consume alcohol or drugs, take bribes, discuss classified matters on the telephone and disclose information to reporters.</td>
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<td><strong>Human Weakness</strong></td>
<td>Intentions to show off, negligence in following security orders, carelessness on the telephone or in public places or negligence due to overindulgence with alcohol or drugs, or where an individual allows himself to become a target of extortion due to debts, corruption.</td>
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<td><strong>Extremism</strong></td>
<td>Individuals or organisations whose views exceed constitutional limits on politics, religion and ethnicity, and in fighting for those interests, they are willing to carry out unlawful acts to create defiance among the populace, divide racial unity and threaten the peace of the nation. Comprises political, racial and religious extremism.</td>
<td>Actions or conduct by an individual or group if exceeds normal values or is against the laws and can cause security problems or disrupt the stability of public order or the security of the country.</td>
<td>- Radical activities that are extreme. - Actions by individuals / groups that are against the laws and create security problems and disturbs the stability of public order and the security of the country. Examples: racial, political &amp;religious extremists and extremist pressure groups ('pelampau kumpulan pendesak').</td>
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THE OSA AND FREEDOM OF INFORMATION

ASEAN
Human Rights Declaration Article 23

“Every person has the right to opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person’s choice”

COMMONWEALTH
Heads of Government Declarations 1999

“Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions.”

INTERNATIONAL
Article 19 United Nations 1948

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”

MALAYSIA
Article 5, Article 10 and Article 12

“Article 5 is not merely a question of the right to subsistence; it is a right to quality of life and dignity. In order to achieve [this] we must have a right to inform ourselves… in order to feed into our decision-making process. Article 10(1)(a) is the right of freedom of speech and expression. It is a right to say something and to convey information; it is also a right to receive information in the form of speech and expression. Article 12, which is the right to education… is not just the right to formative education, it is a right to continuous education.”
THE GLOBAL PROGRESS TOWARDS FOI

TOTAL COUNTRIES WITH FOI

<table>
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<tr>
<th>Year</th>
<th>Total</th>
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<tr>
<td>1990</td>
<td>15</td>
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<tr>
<td>2000</td>
<td>42</td>
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<tr>
<td>2010</td>
<td>86</td>
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<td>2012</td>
<td>93</td>
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<td>2015</td>
<td>103</td>
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COMMONWEALTH COUNTRIES WITH FOI

ONLY 3 ASEAN COUNTRIES HAS FOI
Indonesia, Thailand, Philippines

MALAYSIA = ???

Vietnam (Constitutional Guarantee)
75% Malaysians wanted media to cover more on corruption

Self-censorship of government-linked media.
Government Censorship through OSA, PPDA & Sedition Act
OSA used as a shield by government officials
The Culture of Fear

Only 31% viewed government’s anti-corruption as effective

What is impact of OSA on MACC?
Government officials reluctant to surrender information

Can transparency help MACC in their work? Whistleblower Protection and other laws sufficient

Freer access to State information allows opposition to expose abuse of power or mismanagement

OSA is seen as a hindrance to exposing government but does not prevent it

Whistleblowers feel that politicians are more likely to protect their identity. Opposition gain political currency in the exposures

Many do not think government take AG Report Seriously

OSA does not hinder the NAD’s audit investigations. Audit Act 1957 (Sec 7 and 8) empowers NAD to access documents including OSA-classified information.

NAD’s reports exclude OSA-related audit findings. Only reported in management letter but not to the public.
THE LINK BETWEEN TRANSPARENCY AND GOVERNMENT GOALS

GTP → Fighting Corruption

ETP

In 2014 Malaysia ranked 50 out of 175 countries, a slight improvement of 3 notches as compared with 2013

Countries with FOI Laws

Perform better in controlling corruption

Total = 103 Countries with improved corruption

Control of Corruption → FDI

Research by Aye Mengistu Alemu, 2012
Reduce Corruption by 1% may resulted in increased of FDI by 9.1%

Transparency → Mismanagement In Procurement

Malaysia government spend more than RM150 Billion per year. 25% in procuring goods and service. More than RM40 Billion lost due to leakages and mismanagement

Transparency → National Resource Revenue

RWI Resource Governance Index 2013, Malaysia ranked 34th out of 58 countries for oil, gas, and mining industry.

Transparency → Competitiveness & HDI Indicators

Kaufmann & Bellver (2005) finds relationship between Competitiveness and HDI such as life expectancy, and female literacy
1. **Scope of accessible information.** FOI laws must start with the presumption that all information relating to government administration should be available for public access. The policy premise is that information held by public authorities is acquired for the public as a whole and not for the benefit of public officials or politicians. Therefore, unless everyone should be able to access, unless there are good reasons for withholding the information (Mendel 2003).

2. **Open data mechanisms** must be incorporated into various public sector activities including public revenues, public expenditures, awarding of contracts/licences, public procurement, ownership interests of public officials, awarding of positions and promotions in the public sector and regulations and facilitation of private sector activities ("Permitted Disclosures") (Kolstad & Wig 2009).

3. **Exceptions to accessible information.** Exceptions to the presumption of full access to information should be clearly defined, narrow in scope and be strictly related to the protection of a legitimate State interest such as the endangerment of the national security, defence and foreign relations ("Exempted Disclosures").

4. Any Exempted Disclosures for the reasons stated above should only operate for so long as the information continues to hold that characteristic or quality of a legitimate protected interest.

5. **Extraction of accessible information.** Political transparency has two facets: transparency that is controlled by the political agent (i.e. the government institution or government official) and transparency that is not under the political agent’s immediate control. Agent-controlled transparency cover information released by the agent in response to freedom of information laws and other requirements on the agent to make information about its activities available. It is possible with agent-controlled transparency that ‘the specific content of the information released will always be determined by the agent itself’ and is therefore less likely to include any direct indicators of corruption.

6. On the other hand, **non-agent controlled transparency** include free and independent media willing and able to investigate and report on abuse of power, corruption and mismanagement by government officials, and whistleblowing / imparting of information by public officials. The release of this type of information, which could include information that fall outside freedom of information laws and the categories of information public authorities are obliged to disclose, results in the exposure of government information that the agents do not wish to disclose and did not anticipate would be disclosed (Lindstedt & Naurin 2010).

7. Therefore, FOI laws should create **active disclosure mechanisms** that impose obligations on public officials to publish Permitted Disclosures, as well as passive disclosure mechanisms that empower the public to seek specific information within Permitted Disclosures. However, there should additionally be public interest exceptions in place to de-criminalise the disclosure of official information that do not fall within Permitted Disclosures or that fall within Exempted Disclosures, where in can be shown that the information does not pose a danger to national security, defence and foreign relations and/or that disclosure is in the public interest.

8. **Oversight.** There should be mechanisms in place to allow for members of the public to challenge the failure to disclose or provide information under FOI laws through an independently-constituted appeal or review board. In addition, the right to seek judicial review in the Malaysian courts should be preserved.

9. **Linking information access to accountability.** In order for transparency to drive accountability for abuses of power, corruption and public mismanagement, the information made available through transparency measures must have channels for release and dispersion to the public ("the publicity condition"), and the public must equally have fair access to independent conduits to translate the information into sanctions against political agents ("the accountability condition") (Lindstedt & Naurin 2010).

10. In this regard, a **free and independent press** is a necessary component, as is the ability of citizens (whether public servants or private individuals) to communicate information publicly without penal sanctions. Therefore, there should be a repeal of laws that facilitate government-imposed censorship and control of information such as section 203A of the Penal Code, the PPPA and the Sedition Act.
RECOMMENDATIONS: AMMENDMENTS TO OSA

1. The overriding premise should be for citizens to have maximum access to information related to public administration, and that any exceptions should be clearly articulated. Therefore, “official secrets” should be substantively defined within the Act itself, and should be precise so that only information whose disclosure would pose a serious and demonstrable threat to a legitimate protected interest such as national security, defence and foreign relations, can be classified. Such classification should remain only as long as the information continues poses a threat to that legitimate protected interest.

2. Cabinet and State Executive Council papers should not remain classified as “official secrets” once the decisions are adopted, or alternatively there should be a fixed-term moratorium on the secrecy of the documents, after which they should be declassified.

3. The Act should also be amended to include a public interest exception, so that information, even if otherwise classified as an “official secrets”, should nevertheless be released if there exists an overriding public interest in disclosure.

4. Only Ministers and designated senior public officers should be given the power to classify information, and any wilful misclassification should be penalised.

5. The government’s power to issue certificates of conclusive evidence for OSA-classified information should be revoked.

6. The Act should include a right for members of the public to request the declassification of information, and a procedure set up for doing so.

7. The Act should be amended to impose a review period to ensure that information classified as “official secrets” are periodically reviewed to ascertain if the classification remains valid and justifiable.

8. All official information that is not classified as “official secrets” or that has been declassified should be published / made accessible to the public, and a procedure set up to allow the public to request the release of information.

9. The Act should specifically allow judicial review of any decision to classify information, or any refusal to declassify or release information.

10. Any offences relating to the possession or disclosure of official secrets should include the element of intention of wrongdoing.

11. Powers of ancillary enforcement given to the authorities to carry out investigations under the Act must be subject to judicial scrutiny / review, either prior to the exercise of the power or subsequent to it (in exceptional circumstances where urgent action and the element of surprise are necessary).