

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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ACRONYMS

AHRD	ASEAN Human Rights Declaration
ASEAN	Association of Southeast Asian Nations
ATI	Access to Information
BN	Barisan Nasional, a coalition of political parties whose members hold the majority in the Federal Parliament's House of Representatives and have de facto control of the federal government
CGSO	Chief Government Security Office, within the PMO
ETP	Economic Transformation Programme of the Malaysian government, running from 2010 to 2020
FOI	Freedom of Information
GTP	Government Transformation Programme of the Malaysian government, running from 2010 to 2020, broken into 3 phases: GTP1.0, GTP2.0 and GTP3.0
ICCPR	International Covenant on Civil and Political Rights
MACC	Malaysian Anti-Corruption Commission
MCMC	Malaysian Communications and Multimedia Commission
NKRA	National Key Results Areas, under the GTP
OSA	Official Secrets Act 1972
PEMANDU	Performance Management and Delivery Unit, a unit within the PMO that oversees the crafting and implementation of the ETP and the GTP
PMD	Prime Minister's Department
PPPA	Printing Presses and Publications Act 1983
PR	Pakatan Rakyat, a coalition of 3 political parties comprising the Federal Opposition
RTI	Right to Information
SUHAKAM	Human Rights Commission of Malaysia
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNCHR	United Nations Commission on Human Rights

EXECUTIVE SUMMARY

‘The greater the number of temptations to which the exercise of political power is exposed, the more necessary it is to give to those who possess it, the most powerful reasons for resisting them. But there is no reason more constant and more universal than the superintendence of the public.’

Bentham 1816 [1999], p.29

‘Freedom of information is severely restricted in Malaysia both by legislation including the Official Secrets Act and a pervasive culture of secrecy.’

Article 19 and Suaram 2005, p. 82

‘The most valuable asset to the Government is protected information.’

CGSO Briefing¹

The Official Secrets Act was enacted in 1972 (OSA). Over the 42 years it has been in force, it has (together with a coterie of other laws) institutionalised acquiescence, particularly within the public sector, that information relating to the administration of the State belongs to the government and is off limits to the public. The resulting information asymmetry contributes to the imbalance in the power relationship between the citizen and the State, and affects the people’s ability to effectively hold government institutions to account.

The government’s approach to transparency seems to be to control both the type of State information that is publicly accessible and the platforms on which the information can be accessed, while erecting multiple statutory barriers that penalise exposure of any State information falling outside these tightly-controlled parameters. The OSA is one such layer, and the most impermeable. It is a preventive law that harnesses the power of deterrence through broad-spectrum definitions, strict liability offences and extensive enforcement powers that create culpability even where there is no criminal intent or nexus. The OSA is the government’s most effective means of ensuring that public servants keep information on government operations secret. The OSA is fortified by other punitive and preventive laws such as the Sedition Act, section 203A of the Penal Code, the PPPA and the MCMC Act, but also by ostensibly liberalising enactments such as the Whistleblower Protection Act that, by defining and regulating a category of permissible whistleblowing, seems to fortify the illegality of disclosures of public sector information through other channels.

¹ CGSO (undated).

The OSA includes neither a 'harm test' nor public interest exceptions. The wide net of the OSA over all classes of official information means that the Act is not simply a tool to protect national security, but also shields government officials and public servants from public scrutiny and accountability, even in cases of corruption, mismanagement and abuse of power.

While Malaysia remains mired in a culture of secrecy, many nations have moved not simply towards opening up public access to official information but also to imposing a positive obligation on public servants to publish certain categories of official information whether or not there is a public request for it. In the conduct of this study, we have found no reasonable justification for maintaining the current secrecy regime for official information. Information that requires secrecy on grounds of national security and defence, can be protected within a FOI regime. Public sector stakeholders who may legitimately require the protection afforded by the Act, such as enforcement/oversight bodies, already have separate protection under their enabling acts, which can be further fortified if necessary. Stakeholders who are delivery channels or platforms for transparency and accountability mechanisms, such as the media and the political opposition, would benefit from less opacity in government.

The government's position is that it is moving towards transparency of government data in a gradual fashion, but that it nevertheless intends to maintain the safety net of the OSA. However, this method - and the persistence of strict laws protecting access to government information - is counteractive to achieving the stated policy goals of the current administration.

Our recommendations therefore are for a holistic and systemic reform of the government's approach to public sector information. The recommendations include a repeal of the OSA and the enactment of a Freedom of Information Act, along with the dismantling of other laws that stand in the way of government transparency and accountability.

INTRODUCTION

The purpose of this paper is to analyse the historical significance of the OSA and its relevance to modern governance, and to propose policy reforms where necessary. In keeping with the objectives of The Center to Combat Corruption and Cronyism, the focus of the paper

is limited to the impact of secrecy laws that control access to public sector information. The paper begins in the next section with an exploration of salient provisions of the OSA, and of key events in the evolution and use of the OSA. The next two sections look at how Malaysia is placed in a global context vis-à-vis official secrecy and FOI laws: first, within the normative human rights context, where both domestic and international human rights standards and commitments are analysed; second, against the progress of FOI policies both regionally and internationally. The subsequent section sets out observations and conclusions on the practical impact that the OSA has on specific stakeholders in Malaysia. The section that follows analyses whether closed government data policies benefit or hinder the government's stated policy goals. This paper concludes with several policy recommendations.

Data and methods

This study is based on qualitative research comprising documentary analysis and interview data. The documents analysed include international covenants, laws, policy statements, historical analyses, legal reports, news reports, empirical studies and surveys.

Interview data were used to provide a richer context on the impact of the OSA on stakeholders, and to provide perspectives from experts and those directly involved on the topics discussed in this paper. Several of the targeted interviews could not be carried out due to a lack of response/follow-up from the interviewees. A total of 11 interviews were conducted. **Appendix 1** to this paper provides a brief description of the interviewees and the abbreviations used to refer to them in this paper. Where referred to in this paper, the interview data are either paraphrased or quoted, occasionally with minor tidying up of language (where this was done, care was taken to minimise any distortion of meaning).

BREAKING DOWN THE OSA²

The OSA was enacted in 1972 as one of the restrictive measures put in place to prevent a recurrence of the events of May 1969.³ The OSA covers two broad heads of offences: (i)

² An interview was sought with the Attorney-General's chambers to clarify questions regarding the definitions, offences and other provisions in the OSA, and to ascertain what other regulations apply in the implementation of the OSA. No response was received to the interview requests.

³ Padman 2002.

disclosure of 'official secrets'; and (ii) spying. This paper analyses several features of the OSA that impact the right to freedom of information.⁴

Information covered by the OSA

The OSA uses two descriptive terms for classified information – 'official secret' and 'official document' - but does not provide a substantive definition for either. Apart from the Schedule to the Act, there is no description of, or prescribed method to identify, the information that falls under those two terms. The Act simply provides a procedural mechanism for marking official secrets, and makes an 'official secret' of anything that is classified as such by a Minister or appointed public officer.⁵ It does not prescribe procedures or regulations to control the Ministers'/public officers' power to classify. It does not impose seniority or other constraints to limit the class of public officers who can be vested with the power to classify documents.⁶

Figure 1 below summarises how 'official secret' and 'official document' are described in the OSA.⁷

The Act also empowers Ministers and public officers to issue a certificate of conclusive evidence to certify a document as an official secret. Again, the category of public officers who can exercise this power is essentially left open. The certificate of conclusive evidence 'shall not be questioned in any court on any ground whatsoever'.⁸ While the Act provides for the declassification of official secrets,⁹ it does not prescribe a substantive right, or lay out a procedural mechanism, for individuals to apply for such declassification.

⁴ This paper focuses on provisions in the OSA that are salient to the topic at hand. For an in-depth and still relevant analysis of the OSA, refer to the paper by Article 19 and SUARAM (2005).

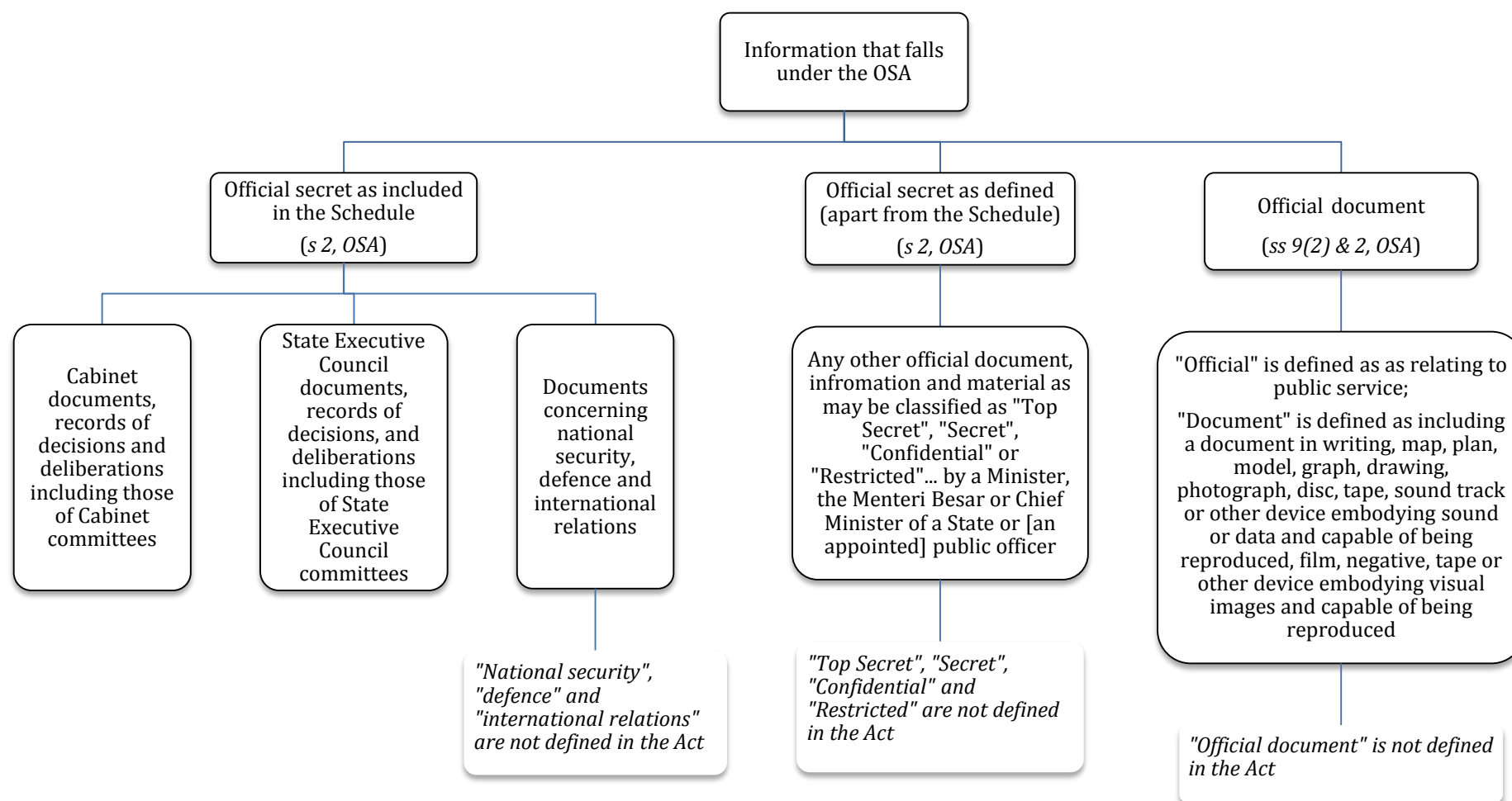
⁵ Official Secrets Act 1972, s. 2.

⁶ Ibid, s. 2B.

⁷ Ibid, ss. 2, 2A and 9(2).

⁸ Ibid, s. 16A.

⁹ Ibid, s. 2C.

Figure 1: Information that falls under the OSA

Source: Data derived from Official Secrets Act, 1972

The upshot of this is that under the OSA: (i) every piece of information in the public service is an official document; (ii) any official document is liable to be classified as an 'official secret'; and (iii) the executive branch's classification cannot be questioned by the courts where a certificate of conclusive evidence is issued. The OSA therefore vests full possession and control of government information in the hands of the executive. It gives the executive the sole and unfettered discretion to decide which piece of information within the public service to turn into an official secret; but since every document in the public service is nevertheless an 'official document' under the OSA, even the documents that the executive chooses not to expressly mark as an official secret is, by a strict reading of the Act, subject to the restrictions on possession and use imposed on official documents (this is discussed in the sub-section below).

During the interviews with stakeholders, we were informed that public authorities and government departments must manage the classification of all official documents within their departments/agencies in accordance with the regulations set out in a document called the 'Security Orders'.¹⁰ We did not sight a publicly available copy of the Security Orders in our research. However, there are slides and notes publicly available online that seem to provide a brief overview of the Security Orders (we shall refer to them as 'Briefing Notes' in this paper).¹¹ From the Briefing Notes, it appears that the Security Orders may provide amongst others, definitions of key terms in the OSA that are not defined in the Act itself, in particular, for 'Top Secret', 'Secret', 'Confidential' and 'Restricted'. The Briefing Notes also suggest that the Security Orders may prescribe categories of persons who are threats to security. **Appendix 2** to this paper sets out a comparison of three sets of Briefing Notes on their definitions of 'official secrets' and 'threats to security'.¹²

¹⁰ This is the author's English translation of the title of the document, which is entitled in Malay as '*Arahan Keselamatan*'.

¹¹ The author's research online comprised conducting a search using the term '*Arahan Keselamatan*'. This yielded a number of results, including direct links to publicly-accessible documents posted on: (i) government department and public authority websites; and (ii) public file-sharing websites. The Briefing Notes that are cited and referred to in this paper (see: **Appendix 2**) are: (a) one document publicly accessible on a state authority website [CGSO (undated) (<http://suk.terengganu.gov.my/files/ARAHAN%20KESELAMATAN.pdf>)]]; and (b) two documents public accessible on a file-sharing website [Kulaan, 25/06/2009 (<http://www.scribd.com/doc/16771812/Arahan-Keselamatan#scribd>); Eman, 06/12/2009 (<https://www.scribd.com/doc/23740164/Arahan-Keselamatan#scribd>)]].

Since these Briefing Notes could not be compared to a publicly available copy of the Security Orders, the author does not endorse the contents of the Briefing Notes as being an authoritative reflection of what is stated in the Security Orders.

¹² Refer to footnote 11 above.

If these Briefing Notes are substantially based on the Security Orders, they provide a glimpse into how official secrets are defined, categorised and managed by the government, and suggest several factors that are not commonly known. First, the assumption that the 4 categories of official secrets do not have substantive definitions is not wholly accurate. From the Briefing Notes, it appears that the Security Orders may regulate how official secrets are defined and categorised into the 4 sub-categories. However, those regulations create obligations on the public servant that are exercisable by the State. Whether they can be enforced by the public against the State/public servants is unclear, particularly as the Security Orders do not seem to be publicly available.

Second, while the Briefing Notes compared in this paper exhibit a lack of complete uniformity in the definitions of 'official secrets', all of them define 'Confidential' as including information that will embarrass the government, with one going so far as to include information that will simply 'have a negative impact' on the government department concerned.¹³

Third, the Briefing Notes seem to instil perceptions that official documents belong to the government, and that certain groups (by their profession or political affiliation) are antagonistic to the interests and security of the country or the government. In one set of Briefing Notes, official secrets appear to be synonymous with 'government documents' and 'parties who want government documents' are stated to include the 'opposition' and 'members of the public with interests'.¹⁴ In another set of Briefing Notes, one group that is singled out as specifically being denied access to official secrets is the media, with 'investigative journalists' and 'members of the public' being identified as possible groups that pose a threat of espionage.¹⁵

Persons liable under the OSA

The OSA criminalises both primary and secondary disclosures of classified information. This means that the parties involved in the original disclosure as well as subsequent parties who receive, possess and disclose the information are subject to criminal penalties under the Act.

¹³ Appendix 2, Eman, 06/12/2009.

¹⁴ CGSO (undated).

¹⁵ Appendix 2, Eman, 06/12/2009.

However, the Act goes further than criminalising deliberate disclosures and receipts of official secrets. It also imposes an obligation on public servants and private parties involved in contractual dealings with the government to report any requests made to them by others for ‘official secret’ information, but there is no stipulation that the person making the request must be aware that the information is an official secret.¹⁶ Another offence under the Act that does not require intention of wrongdoing is the obligation imposed on individuals who have possession of an official secret to return it to the authorities.¹⁷ The non-inclusion of the element of intent in these offences – both of which carry a minimum prison sentence of one year – makes them perverse. The average member of the public would not know what is or is not an ‘official secret’, particularly given the lack a clear definition within the Act itself and that not all official secrets are required to be stamped with either one of the four labels under the Act.¹⁸ This means that an individual may request or be in possession of documents without knowing that they are automatically classified as official secrets.

Another category of offences, also carrying a minimum sentence of one year’s imprisonment, concerns the retention of official documents by any person without authority ‘for any purpose prejudicial to the safety of Malaysia’.¹⁹ Two factors make this category of offences objectionable. First, in light of the all-encompassing definition of ‘official documents’ under the Act,²⁰ simply possessing a document from the public service opens a person up to potential liability under the OSA. Second, the ‘purpose prejudicial to the safety of Malaysia’ qualifier does not necessarily safeguard the innocent or the unaware, as the Act creates a presumption that possession of an official document means that the accused intends to use it for a purpose prejudicial to the safety of Malaysia, and the burden is on the accused (not the State) to disprove the presumption.²¹

The Act also imposes obligations and penalties on external parties who are not directly involved in the possession or disclosure of classified information. For example, the Act compels telecommunications providers to turn over to the government, their customers’

¹⁶ Official Secrets Act 1972, s. 7A.

¹⁷ Ibid, s. 8(1)(iii)

¹⁸ There is no requirement under s. 2 of the OSA that the “official secrets” in the Schedule to the OSA must be stamped. In addition, the categories of information covered in the Schedule are not fully or comprehensively described, and are open-ended.

¹⁹ Official Secrets Act 1972, s. 9(2).

²⁰ Ibid, s. 2.

²¹ Ibid, s. 16.

telecommunicated messages, and a failure to do so carries penal consequences.²² In addition, where an offender under the Act is a corporation or a member of a partnership, then every director, officer or member of the corporation or partnership is automatically guilty of the same offence, unless they can prove both that the offence took place without their knowledge/consent and that they had exercised due diligence to prevent the commission of the offence.²³ The penalty for both offences is also a minimum sentence of one year's imprisonment.

Powers of the State under the OSA

The powers granted to the State under the OSA are wide-ranging. As stated above, the Act empowers the Minister to compel telecommunications providers to provide their customers' telecommunicated messages, without the necessity of a court order. The Minister is not limited to only exercising this power where there has been a breach of the OSA; the power is at the Minister's discretion to exercise so long as it appears 'expedient' to the Minister to do so.²⁴

The Act allows for the arrest and detention without a warrant of any person 'reasonably suspected' of having committed, who has attempted to commit or who is about to commit an offence under the Act.²⁵ The Act also empowers police officers to carry out a search and seizure of any premises without the necessity of obtaining a court order, so long as the officer has 'reasonable cause' to believe that an offence has been committed and that any delay would frustrate the object of the search.²⁶ This provision obviates two other provisions in the OSA that require the enforcement body to go to court to obtain search and seizure orders, where they would need to satisfy the court that they have reasonable cause.²⁷

Apart from this and as mentioned previously, the OSA substantially shifts the burden of proving an offence from the prosecution (the State) to the accused: (i) through the certificate of conclusive evidence that removes the burden on the prosecution to prove the information concerned is an official secret; and (ii) by creating a presumption that an accused acts for a

²² Ibid, s. 12.

²³ Ibid, s. 28.

²⁴ Ibid, s. 12(1).

²⁵ Ibid, s. 18.

²⁶ Ibid, s. 19(2).

²⁷ Ibid, ss. 6 and 19(1).

‘purpose prejudicial to the safety or interests of Malaysia’ which shifts the burden on the accused to prove otherwise.

Cumulative effect of the OSA’s provisions

There are categories of State information that may be justifiably classified as secret, such as information that may pose a threat to national security and the defence of the State. However, as emphasised by the SUHAKAM Commissioner interviewed, these categories of information must be clearly defined with their classification purposes made clear, and any criminalisation of the disclosure of classified information must relate back to the original purposes of classification.²⁸ Under the OSA however, information that can be classified as ‘official secrets’ or ‘official documents’ are not limited to those that endanger national security, defence or foreign relations. In fact, the Briefing Notes suggest that permissible categories of secrecy include information that may simply embarrass the government of the day. The government is not required to satisfy a harm test to justify secrecy nor does the OSA provide public interest exceptions to the laws against disclosure. The broad range of the offences under the OSA combined with the non-requirement to prove intent of wrongdoing and the reversal of the burden of proof means that the Act completely excludes the rights of others to possession, access and dissemination of government information. Given all these factors, it can fairly be said that proprietorship of public information has been vested in the government of the day, and such unencumbered proprietorship and secrecy provides fertile ground for maladministration and abuse of power to take root. As stated by the SUHAKAM Commissioner interviewed:

When you use [the OSA] for everything and anything – that because it is government policy therefore it is ‘secret’ – then I think it is wrong... [If] you want to classify everything as secret [whether] because you don’t want to be answerable or you don’t want to explain or you don’t want to be accountable, it can lead to abuses.²⁹

The OSA in practise

²⁸ Khaw Lake Tee Interview.

²⁹ Ibid.

A study of reported legal cases and news reports suggested that there were few cases and convictions under the OSA since its enactment in 1972.³⁰ **Appendix 3** provides details of the known criminal convictions under the OSA.³¹

Amendments were made to the OSA in 1984, 1986 and 1995. The amendments in 1986 were particularly significant. It changed the penalties for the major offences under the Act to a mandatory minimum sentence of one year's imprisonment.³² The proposed amendments were opposed by opposition parties, NGOs, lawyers and journalists alike. Even former Prime Minister Tunku Abdul Rahman and the Chief Justice at the time Tan Sri Abdul Hamid weighed in, both cautioning that the proposed amendments would undermine the constitutional right to freedom of speech and expression³³ Nevertheless, the amendments were purportedly 'steamrolled'³⁴ by the government through parliament.

The year leading up to the 1986 amendments saw two major official secrecy crises for the Malaysian government, one involving the disclosure of internal foreign policy discussions and another the disclosure of alleged irregularities in defence procurement.³⁵ It has been suggested that the amendments were the Mahathir administration's attempt to stop the disclosures of public mismanagement and corruption by politicians and journalists who until then were willing to face convictions under the Act because the penalties they faced were monetary fines that could be paid with little jeopardy to their positions and livelihood. Members of parliament who were involved in disclosures of official information did not find their positions jeopardised because the fines, which were determined at the Courts discretion, were always lower than the minimum RM2,000 that would constitutionally disqualify them from continuing as MPs.³⁶ A mandatory minimum one year prison sentence however, removes the Court's

³⁰ It is possible that charges have been brought and convictions obtained under the OSA that have not been reported in the law journals or the media.

³¹ Appendix 3 is compiled from reported legal cases and news reports. It excludes convictions under the OSA of public servants who have taken possession of and/or disclosed question papers for national-level examinations. Several news reports on such cases were sighted from 1989, 1992 and 1998. Appendix 3 also excludes civil cases where the OSA has been raised in a bid to prevent disclosure of documents in civil proceedings.

³² Official Secrets (Amendment) Act 1986.

³³ Lim (17/11/1986).

³⁴ Khoo 2013, p. 12.

³⁵ Refer to Appendix 3.

³⁶ Lim (16/03/1986).

discretion and disqualifies an MP from continuing his existing term and from qualifying to stand for elections for 5 years subsequent to his release from custody.³⁷

Almost 30 years after the amendment to the OSA, the mandatory prison sentence continues to have a significant effect on the media practitioners interviewed. As one interviewee stated, prior to the 1986 amendments, if a reporter were to be found guilty under the OSA with the conviction of a fine 'it was a small issue, because [the] boss should pay the fine and you become a hero.' After the amendment was passed, 'I [as the boss] have no position to ask my journalists to take the risk, because if the judge sentences them to one year's imprisonment, I cannot go to jail for them.'³⁸ Echoing similar sentiments, another media practitioner said:

*Paying a fine is easy, but not spending one year in prison, maybe more. I think the amendment to the OSA had a chilling effect [when] they strengthened it by [imposing] a mandatory prison sentence. And I think that is basically what Mahathir intended, just to really scare off everybody. And it worked.*³⁹

THE OSA AND FREEDOM OF INFORMATION

Malaysia

The upshot of the official secrecy regime in Malaysia is that any interested party who wants information regarding government management of public assets and resources has no legal right to obtain the information; any attempt to obtain or any actual receipt of the information is a crime under the OSA. By its scope, the OSA has therefore completely excluded the right to freedom of information in Malaysia. The Court of Appeal recently held as much in a civil case where an interested party had sought the disclosure of water concession agreements and audit reports involving the federal government.⁴⁰ In denying the application for disclosure on the basis that the audit report was an official secret under the OSA, the Court of Appeal stated that:

³⁷ Federal Constitution, Article 48.

³⁸ Chang Teck Peng Interview.

³⁹ Steven Gan Interview.

⁴⁰ *Minister of Energy, Water and Communication & Anor v Malaysian Trade Union Congress & Ors* [2013] 1 MLJ 61.

In Malaysia, members of the public had no right to access documents relating to the operation of government departments and documents that were in the possession of government Ministers or agencies.⁴¹

While Article 10 of the Federal Constitution guarantees the freedom of speech and expression (subject to certain conditions),⁴² the right to freedom of information is not expressly protected under the Federal Constitution or in domestic laws. However, legal and human rights experts argue that the right of access to information becomes a recognised human right in Malaysia through the operation of Articles 5, 10 and 12 of the Constitution:

The right to life under 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. And if you have a right to continuous education, you have a right to information. So these 3 articles of our Federal Constitution guarantee a right to information.⁴³

Therefore, the right to seek, impart and receive information is central to the freedom of speech and expression but also necessary to effectualise other rights under the Constitution. Malaysia's acceptance of this position should be undeniable given its participation in international and regional associations and its concurrence to their edicts, where the individual's right to freedom of information is viewed as part of the protected bundle of human rights. This is discussed below.

International

'Freedom of information is a fundamental right and is the touchstone of all the freedoms to which the United Nations is consecrated.'

United Nations General Assembly 1946, Res 59(I)⁴⁴

⁴¹ Ibid, pp. 62 - 63. On further appeal, the Federal Court upheld the decision of the majority in the Court of Appeal. When quoting this passage from the reported Court of Appeal decision in its own judgment, the Federal Court did not offer any corrections or caveats to the majority's stated position of the law (*Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145 (FC), p. 154).

⁴² Federal Constitution, Article 10.

⁴³ Christopher Leong Interview.

⁴⁴ United Nations General Assembly 1946.

The right of access to information has long been accepted as an integral element of the bundle of human rights protected within the framework of the UN. Article 19 of the UDHR⁴⁵ adopted in 1948 by the UN General Assembly states that:

*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* (emphasis added).

Article 19 of the ICCPR⁴⁶ adopted by the UN General Assembly in 1966 also guarantees the right to freedom of opinion and expression, in similar terms to Article 19 of the UDHR. The express right to seek, receive and impart information necessarily includes a right to freedom to information.⁴⁷

Freedom of information as a democratic tenet is relevant in itself and for the fulfilment of other rights. Public bodies do not hold information on their own behalf, but for the benefit of the public.⁴⁸ The corollary of this is that laws that deny the right of access to public information or that turn public information into the private property of the State, such as the OSA, do not merely negate the individual's right to freedom of information but also impede the proper fulfilment of the individual's other rights.

These principles have been consistently emphasised in the UN. In 1995, the UN Special Rapporteur on Freedom of Opinion and Expression (UNSRFOE) stated that, 'Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked.'⁴⁹

In 1999, the UNSRFOE stated that the individual's right to seek, receive and impart information 'imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval

⁴⁵ United Nations General Assembly 1948.

⁴⁶ Malaysia has not acceded to the ICCPR.

⁴⁷ Mendel 2003, Banisar 2006.

⁴⁸ Mendel 2003.

⁴⁹ United Nations Commission on Human Rights 1995, para. 35.

systems... subject only to such restrictions as referred to in article 19, paragraph 3 of the International Covenant on Civil and Political Rights.⁵⁰

In 2014, the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association, pointed out that the freedoms of peaceful assembly, association, opinion and expression, and information are ‘inextricably intertwined’ with the right to take part in the conduct of public affairs, and that UN member states are obliged to ratify and uphold these human rights in all their activities.⁵¹

Commonwealth

The individual’s right of access to information is also a protected principle within the Commonwealth. In 1980, a meeting of the Law Ministers of the Commonwealth declared that, ‘public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information.’⁵² Almost two decades later in 1999, a resolution endorsed by the Commonwealth Law Ministers and subsequently the Commonwealth Heads of Government (including Malaysia’s) declared that:

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.⁵³ (emphasis added)

ASEAN

The ASEAN Human Rights Declaration (AHRD), which affirmed all the civil and political rights in the UDHR and which was adopted by heads of member states of ASEAN (including Malaysia) on 18 November 2012, states in Article 23 that:

Every person has the right to freedom of 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.⁵⁴

⁵⁰ United Nations Commission on Human Rights 1999, para. 12.

⁵¹ United Nations General Assembly 2014, paras. 15 and 16.

⁵² Quoted in Mendel 2008, p. 12.

⁵³ Commonwealth Heads of Government Meeting 1999, para. 20.

⁵⁴ ASEAN 2012.

(emphasis added)

Conclusions

By its continued association with these international and regional bodies and having acceded to several of their covenants, Malaysia must accept that the right to freedom of information, that forms part of international and regional human rights standards, must also be reflected in the interpretation of the scope of fundamental rights in Malaysia. In any event, Malaysia's preservation of official secrets legislation, particularly without parallel right to information laws, is antithetic to the human rights standards and democratic norms of its international and regional partnerships.

THE GLOBAL PROGRESS TOWARDS FOI

FOI around the world

Malaysia's preservation of official secrecy policies and its lack of FOI laws is also out of sync with the progress towards FOI in other parts of the world. Nations around the world are moving in the direction of open governance, following the momentum towards more deliberative democracies under which an informed electorate is integral. The right to access and disclose information is a key ingredient of transparent and accountable governance, as it enables citizens to see what is going on within government and to expose corruption and mismanagement in public office. From the 1990s, there has been an acceleration in the adoption of domestic FOI laws. In January 2015, the number of countries with FOI laws stood at 103 (Table 1).

Table 1: Number of countries with FOI laws

YEAR	Countries with (national-level) FOI laws
1990	15
2000	42
2010	86
2012	93
2015 (January)	103

Source: Data derived from Mungiu-Pippidi 2014, freedominfo.org

FOI in the Commonwealth

Of the 53 member countries of the Commonwealth, 21 have some form of legal protection for FOI. Malaysia is one of only 9 countries that do not have FOI laws either in the form of statute, regulations or constitutional provisions (Table 2).

Table 2: Commonwealth countries with FOI related laws and constitutional provisions

Countries with FOI Acts or ATI Regulations (date)	Countries with express constitutional guarantees		Countries without FOI laws or express constitutional guarantees
	Specific FOI guarantee (date)	FOI guarantee part of free speech & expression (date)	
Antigua and Barbuda (2004)	Ghana (1992)	The Bahamas	Brunei
Australia (1982)	Kenya (2010)	Barbados (1966)	The Gambia
Bangladesh (2008)	Malawi (1994)	Botswana (1966)	Malaysia
Belize (1994)	Papua New Guinea (1975)	Cameroon (1996)	Namibia
Canada (1983)	Tanzania (1977)	Cyprus (1960)	Samoa
Guyana (2011)		Dominica (1978)	Singapore
India (2005)		Fiji Islands (1997)	Swaziland
Jamaica (2002)		Grenada	Tonga
Maldives (2014)		Kiribati (1979)	Vanuatu
Malta (2008)		Lesotho (1993)	
Mozambique (2015)		Mauritius (1968)	
New Zealand (1982)		Seychelles (1993)	
Nigeria (2011)		Solomon Islands (1978)	
Pakistan (2002)		Sri Lanka (1978)	
Rwanda (2013)		St Kitts and Nevis (1983)	
Sierra Leone (2013)		St Lucia (1978)	
South Africa (2000)		Tuvalu	
St Vincent and The Grenadines (2003)		Zambia	
Trinidad & Tobago (1999)			
Uganda (2005)			
United Kingdom (2000)			

Source: Data derived from humanrightsinitiative.org, freedominfo.org, Right2INFO.org

FOI in ASEAN

Currently, only 3 member states of ASEAN (Indonesia, Philippines and Thailand) have FOI / ATI laws, although one member state (Vietnam) does have an express FOI constitutional guarantee (Table 3).

Table 3: ASEAN countries with FOI related laws and constitutional provisions

Countries with FOI Acts or ATI Regulations (date)	Countries with constitutional FOI guarantee as part of free speech & expression (date)	Countries without ATI laws or express constitutional guarantees
Indonesia (2008) Philippines (1987) ⁵⁵ Thailand (1997)	Vietnam (2013)	Brunei Cambodia Laos Malaysia Myanmar Singapore

Source: Data derived from humanrightsinitiative.org, freedomInfo.org, Right2INFO.org

Malaysia sits with 5 other States without any form of FOI laws. However, the 3 states with FOI / ATI laws are some of the more democratically progressive states within the ASEAN partnership. In global surveys, all three countries are on a positive trajectory towards greater adherence to political rights while Malaysia lags behind.⁵⁶

Situating FOI laws within official secrecy policies

A few nations continue to have official secrecy laws alongside FOI laws; notable examples are the United Kingdom and India. Before FOI laws were introduced, the official secrecy laws in both countries saw a liberalisation, and the push for FOI policies was driven by civil society.⁵⁷ Although conflicts occasionally crop up, these countries demonstrate that RTI and official secrecy laws can be harmonised, for example, by incorporating exemptions to disclosure within the former, and harm test and public interest overrides in the latter.⁵⁸

THE STAKEHOLDERS' EXPERIENCE

Apart from examining the normative and prescriptive reasons for official secrecy and FOI reforms, this study also examined whether the OSA is relevant to governance in Malaysia. This issue was addressed from two perspectives: (i) whether the OSA positively or negatively

⁵⁵ *The Philippines Code of Conduct and Ethical Standards for Public Officials and Employees* obliges public officials to disclose certain official documents, but does not contain an access to information mechanism. An FOI bill is currently on its 2nd reading in The Philippines House of Representatives.

⁵⁶ This analysis is based on Freedom House's 'Freedom in the World' Political Rights scores for each country from 1973 to 2014 (Freedom House 2015).

⁵⁷ Mendel 2008.

⁵⁸ Ibid, pp. 58 and 122-123.

impacts the activities of stakeholders (which is addressed in this section); and (ii) whether information transparency would positively or negatively impact the government's policy agenda (which is addressed in the next section).

To understand the impact of the OSA on the activities of stakeholders, we conducted case studies of selected non-government and government political actors who require access to State information in order to discharge their political roles. For non-government actors, we selected the media and the political opposition. For government actors, we chose constitutional and statutory oversight/enforcement bodies, and in the end narrowed it down to two bodies⁵⁹ – the Malaysian Anti-Corruption Agency (MACC) and the Auditor General. The assessments were carried out through a combination of documentary analysis and stakeholder interviews.

Media

'The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring.'

*McCartan Turkington Breen v Times Newspapers Ltd*⁶⁰

'The role of the press in exposing abuses and miscarriages of justice has been a potent and honourable one. But the press cannot expose that of which it is denied knowledge.'

*R v Shayler*⁶¹

The media functions in society as a conduit for the pooling and dispersion of information. Consequently, it can play a vital role in exposing abuse of power, corruption and mismanagement in public office. Press freedom has been found to positively influence control of corruption,⁶² and public perception in Malaysia accords with these empirical findings. In a 2009 survey, Malaysians overwhelmingly (83%) considering the media's role in the improvement of transparency and integrity in the country as important.⁶³ The survey also

⁵⁹ The study originally intended to include two other enforcement/oversight bodies: the Parliamentary Public Accounts Committee (PAC) and the Malaysian Communications and Multimedia Commission (MCMC). However these lines of inquiry could not be pursued as interviews with representatives of the bodies could not be secured. In respect of the PAC, an interview with the Chairman was cancelled and could not be rescheduled within the research period, despite best attempts. In respect of the MCMC, no response was received to requests for an interview.

⁶⁰ [2001] 2 AC 277, para. 1.

⁶¹ [2003] 1 AC 247, para. 21.

⁶² Brunetti and Weder 2003, Grimes 2008, Mungiu-Pippidi 2012.

⁶³ CIJ and Merdeka Center 2009.

found that 63% of respondents receive news about corruption from newspapers and television. However, approximately half of the respondents were not satisfied with media reporting on corruption cases, and an overwhelming majority wanting to see more media coverage on corruption (75%).⁶⁴

Effective reportage requires a free and independent media, and Malaysians overwhelmingly agree (76%) that media independence and reporting freedom is key in fighting corruption.⁶⁵ Two key factors have been identified as affecting the media's freedom to determine media content: (i) self-censorship predominantly within the mainstream media that is directly or indirectly controlled by the ruling coalition; and (ii) government censorship imposed through preventive laws such as the OSA, the PPPA and the Sedition Act.

The mainstream media is substantially, and either directly or indirectly, owned by the ruling coalition's political parties.⁶⁶ Media licensing laws like the PPPA place the power to grant and cancel printing and publishing licences in the hands of the ruling coalition. The Sedition Act and the OSA also allow the government to check media content. Through the imposition of statutory constraints and media ownership, the print and broadcast media is largely compliant to the interests of the ruling coalition, resulting in an entrenched pro-regime bias and self-censorship in favour of the ruling coalition that has been both empirically proven in the mainstream press⁶⁷ and admitted by their editors and reporters.⁶⁸ The *de facto* pro-regime bias in the mainstream media is also a perception commonly shared by Malaysians,⁶⁹ and the media practitioners interviewed in this study spoke to this.⁷⁰

Malaysia's media as a whole also falls far short of international standards and practices. Not only is it consistently ranked very low in global press freedom rankings, such as the Reporters Without Borders and Freedom House indices (**Appendix 4**); the rankings exhibit a downward trend (**Appendix 5**).

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Abbott 2011, CIJ 2008.

⁶⁷ Ibid.

⁶⁸ Malaysiakini (14/07/2012), Malaysiakini (13/08/2012), TheEdgeMalaysia.com (19/02/2014).

⁶⁹ CIJ and Merdeka Center 2008, CIJ and Merdeka Center 2009.

⁷⁰ Nadeswaran Interview, Jahabar Sadiq Interview, Steven Gan Interview and Chang Teck Peng Interview.

The interviews conducted with media practitioners opened up some interesting perspectives on how the media operates around the official secrecy regime under the OSA. The media practitioners interviewed were attached to online news organisations and print media organisations that were not directly owned by or linked to the ruling coalition. All the interviewees expressed an understanding of the scope of the OSA. When it comes to approaching information-sensitive reporting, the interviewees spoke to a difference in the practices and standard operations of online media versus print media, with the latter being far more conservative in their approach to potentially OSA-sensitive stories, due to concerns that their publishing and printing licences would be at risk and of negative reactions from their regime-friendly media owners.⁷¹

In respect of seeking proactive access to State information, official requests for information from government ministries and departments (where the information is not part of an pre-approved class of publicly accessible information) is almost always unsuccessful.⁷² Said one media practitioner, 'The issue of asking for information does not arise. Don't waste your time.'⁷³ Another described attempts to obtain such data as 'almost impossible':

*If you want to look for data, information and all that, it's not there, because everything is so opaque. Number two, nobody would want to talk to you. That's because they are afraid of the OSA, of General Orders, especially the civil service - definitely, you will find it very hard to talk to the civil servants.*⁷⁴

The use of the OSA as a shield by public servants, whether as a result of genuine fear, over-cautiousness or simply to avoid the disclosure of information, sometimes results in absurdity. There is the example of the secondary school principal who, after the results of a national-level examination were released, refused to provide details of the school's results and the names of the top students to a reporter who wanted to interview the students. The principal's explanation: that she was a public servant and the results were covered by the OSA so she could not disclose them, even though (as pointed out by the reporter) the results were no longer 'secret' as the Minister of Education had already publicly announced the overall results and the students had been given their results.⁷⁵ The next example reveals the

⁷¹ However, this study does not draw definitive conclusions on the nature of the differences between online and print/broadcast media, given the limited selection of media practitioners interviewed.

⁷² Nadeswaran Interview, Steven Gan Interview and Chang Teck Peng Interview.

⁷³ Nadeswaran Interview.

⁷⁴ Steven Gan Interview.

⁷⁵ Chang Teck Peng Interview.

arbitrariness and possible abuse in the OSA-classification process: An audit report on the actions of a legal officer of a city council that revealed misconduct was classified by the president of the council as an OSA document, and on that basis the council members were refused access to the report and barred from discussing the findings in their meetings. Yet the report was disclosed by the state body in documents filed in court pursuant to a legal suit, and a copy was obtained by the media practitioner through the simple act of conducting a file search at the court registry.⁷⁶

As a consequence, most of the reportage on mismanagement, corruption or abuse of power by public officers springs from leads and sources, i.e. where people come forward to the media with information and documents. In such situations, the fact that the information contained in the story might be classified under the OSA is a factor, but not the primary concern of the media practitioners. Whether they would take the risk of publishing a story with sensitive political information more often than not depended on the content of the information and whether it was true/verifiable. In most cases, the content and accuracy of the information seems to trump concerns of its secrecy. While the protection of their reporters from legal prosecution remains an underlying concern, media organisations try to find a work-around rather than avoid publication. Where documents provided by sources were or were most likely to be OSA-classified, attempts would be made to avoid direct reference to the document by getting confirmation of the information from other sources. The media organisations would then proceed to publish the reports in a manner that does not require revelation of the documents themselves or the identities of OSA-bound whistleblowers.

The risk calculation by these media organisations appears to include the fact that the government of the day does not seem to pursue action under the OSA against the media on reports that clearly involve or are likely to involve the disclosure of OSA-classified information. None of the media practitioners interviewed had been investigated under the OSA, and none could name a reporter who had been convicted under the OSA after Sabry Sharif in 1986.⁷⁷ However, three of the interviewees had been called up for questioning by the enforcement authorities under other laws such as the Sedition Act and the MCMC Act. One media practitioner opined that the government was not likely to go after the media on reports of public mismanagement or corruption even on the back of classified information because to do so would implicitly acknowledge government wrongdoing.⁷⁸ Another media practitioner noted that

⁷⁶ Nadeswaran Interview.

⁷⁷ Refer to Appendix 3.

⁷⁸ Steven Gan Interview.

where leaks of official information occur, the government clamps down internally (within the government departments themselves) rather than publicly going after the perpetrators:

Our access or our ability to get government documents which are restricted or OSA [classified] is harder today than it was, say 5 years ago. Fewer people know what is going on... Most of the people who are in charge of these kinds of documents or these kinds of decision-making are trusted people.⁷⁹

During investigations by enforcement bodies, and although not ostensibly conducted under the OSA, the media practitioners are invariably asked to disclose the identities of their sources. For the media, the protection of the identity of sources and informants – where known – is imperative. Information and documents from them are received ‘on pain of death’.⁸⁰ All the media practitioners interviewed stated that they have never revealed the identity of their sources or informants to enforcement bodies, although all also believe that their sources and informants are well aware when the information they are providing is or is potentially OSA protected.

When asked whether the OSA has had a lasting impact on the media, several of the media practitioners pointed to the insidious impact of the OSA in perpetuating the culture of fear, particularly amongst public servants. One media practitioner remarked, ‘Even though no one has been threatened under the OSA, all feel threatened by the OSA.’⁸¹ Another media practitioner stated as follows:

The OSA is in a sense a much feared law, much worse than the Sedition Act or criminal defamation because [the government] does not need to use it. The OSA is so effective in creating fear, not just among journalists but especially among civil servants. The OSA is basically... to stop civil servants from releasing government information.⁸²

As a result, public servants are less likely to leak information of government mismanagement and corruption to the media. ‘If these leaks happen now,’ said one interviewee, ‘they happen through opposition politicians, people like Rafizi [Ramli] or Tony

⁷⁹ Jahabar Sadiq Interview.

⁸⁰ Jahabar Sadiq Interview.

⁸¹ Chang Teck Peng Interview.

⁸² Steven Gan Interview.

Pua.⁸³ Echoing the same sentiment, another said, 'A lot of the whistleblowers go and talk to the politicians, and then we get the information from the politicians.'⁸⁴

Opposition politicians

'I would say that the primary role of the Opposition Parties is to give meaning [to] and to keep alive the system of Parliamentary democracy... This battle is finally a political battle, and in its struggle to keep up the people's faith in the parliamentary democratic system, the Opposition in Malaysia have played an indispensable role... In discharging this role, the Opposition ...also acts as a guardian of the people to check the abuses and misuses of power, malpractices, corruption... Without the Opposition, the Government would have found it easier to hush up scandals... Without an Opposition, there would be very little government accountability to the public for their stewardship of public finances as well as the ship of the state.'

Lim Kit Siang, 17 July 1984⁸⁵

The roles of parliamentary opposition are widely conceived to mirror those of legislatures in general, which are predominantly to oversee law-making, to scrutinise government administration and policy execution and to represent the polity.⁸⁶ However, at a macro level, political opposition also works to preserve and reinforce contestation and participation in democratic political systems.⁸⁷

Pursuing more open and transparent governance is in the interests of the political opposition, particularly in illiberal democracies, hybrid regimes and competitive authoritarian regimes. In such political systems, political opposition can contribute to the larger goal of eroding authoritarianism and democratising such regimes.⁸⁸ The focus of the functions of political opposition should be on building or reinforcing procedural mechanisms for democratic contestation, and to weaken authoritarian institutional structures.⁸⁹

The political opposition in Malaysia has pursued these objectives zealously, and with greater intensity since the 12th general elections in 2008. Freer access to State information is

⁸³ Jahabar Sadiq Interview.

⁸⁴ Steven Gan Interview.

⁸⁵ Lim (17/07/1984).

⁸⁶ Norton 2008.

⁸⁷ Dahl 1971.

⁸⁸ Stepan 1997. Eisenstadt 2000.

⁸⁹ Stepan 1997, p, 662.

an objective that is relevant to the political opposition, for its potential to expose abuse of power or mismanagement of public assets by the ruling regime, and also in providing resources to push forward its own political and policy agendas.

In this regard, while the OSA is seen as a hindrance to the political opposition's efforts, it does not fully prevent them. There are a few opposition politicians who are prominent in their efforts to expose maladministration and mismanagement by the government. One of them, Rafizi Ramli, was interviewed for this study. According to him, the OSA does not stop him from pursuing allegations of government corruption or abuse of power. While claiming awareness of the wide net cast by the OSA, he stated:

My first consideration is not [the] OSA, it is not risk, it is not politics, it is whether the issue is of public interest or not. And I think once you go through that thought process, whether or not it is OSA is of little material value. My view is that if the law is wrong and unjust, I don't feel the need or obligation to follow it. Of course, a lot of people disagree with that, but that's how I look at it. And I think [that] public interest should always take precedence. I receive a lot of tip-offs and so on. 90% of them I do not act, because they are not in the public interest.⁹⁰

Disclosures by whistleblowers to politicians more often than not are made under a cloak of secrecy / confidentiality. Some openly identify themselves to the politician while others provide information anonymously. But regardless of their approach, more often than not the whistleblowers are aware of the OSA and ask for their identities to be concealed. Great care is taken to conceal and keep confidential the dealings with whistleblowers and informants. As with the media practitioners interviewed, Rafizi Ramli stated that he has never disclosed the identity of a source or whistleblower when questioned by enforcement bodies.⁹¹

Also like the media practitioners interviewed, Rafizi Ramli has never been charged under the OSA, despite the many exposés of government mismanagement and abuse of power under his belt.⁹² However, the politician has been investigated by the police under the Sedition Act and has had civil defamation cases brought or threatened against him over such exposés. Rafizi Ramli views the use of draconian laws like the Sedition Act against him as an abuse of power, as he believes it is targeted not simply at trying to stop him, but to stop

⁹⁰ Rafizi Ramli Interview.

⁹¹ Ibid.

⁹² The one exception was that Rafizi Ramli was questioned about 3 years ago under the OSA in relation to the disclosure of tender documents classified as official secrets under the OSA, but no charges have been brought against any party to date.

members of the public, particularly public servants, from providing information of government maladministration that put the ruling coalition in a bad light. In his words:

The first time I got into trouble with the law, obviously it bothered me, the first time I received the summons, the first time I spent almost a day in the lockup. Of course it [would] bother you. But once is too many, and it doesn't have an impact anymore. But if such a draconian approach were used against other people [like] a senior civil servant who really needed to provide the information for the public interest [sic], it would have worked. So, although [the legal cases] didn't really have an impact on me, I think that it will continue to frighten the public. Because those people who genuinely have something to highlight in the interest of the public will always remember that guy who got charged 7 times. So while it did not stop me, I think it does have an impact on many other people and society at large, so... I don't think it's so much about trying to frighten me but trying to frighten other people that, 'If you do this, this could happen to you'.⁹³

There are similarities between the media and opposition politicians in how they view and approach potential OSA-related disclosures of public mismanagement. However, opposition politicians are perceived to have more opportunity to obtain State information. Whistleblowers tend to approach opposition politicians over the media with inside information. The Media practitioners interviewed postulated that the reason for this is that politicians are more visible, and their disclosures of public mismanagement receive wide and detailed coverage. Whistleblowers may also feel that politicians are more likely to protect their identity.⁹⁴

Opposition politicians are also more likely to take greater risks in receiving and using classified documents than the media. Opposition politicians are likely to gain political currency if the authorities pursue them for disclosing classified information that suggests corruption or abuse of power by the government, and such actions are therefore likely to backfire against the government. The media on the other hand, have the survival of their business and the welfare of their staff to weigh in the balance. As one media practitioner put it, 'I don't want to risk 10 of my guys going to jail, my sub-editors going to jail. So it's a choice. A choice and a decision to be made – how far do we go before we risk it all.'⁹⁵

⁹³ Rafizi Ramli Interview.

⁹⁴ Steven Gan Interview, Chang Teck Peng Interview.

⁹⁵ Jahabar Sadiq Interview.

Asked why he thought that public servants and private individuals would approach him with potentially classified information at the risk of being charged under the OSA, Rafizi Ramli said:

My assessment is that people who come forward with really sensitive and public interest information usually are conscientious and very responsible citizens to begin with... And by the time they cross the line... they have fully checked what are the consequences and they are willing to go through with it.⁹⁶

Asked further about the government's reaction (or lack thereof) under the OSA following all the disclosures he has made, Rafizi Ramli said:

I think the authorities understand that you can't really tighten the noose through enforcement, because enforcement is always a past event when it comes to whistleblowing, in the sense that, it has happened anyway, the damage is done, then enforcement is about trying to find out and make an example of him or her. So what they are doing now is to make [the laws] more draconian and more preventive. It's really about telling the civil servants especially that if you dare do it and if we find out, you will pay a heavy price, heavier than what it was before, and hoping that if this is hammered over and over again and it is filtered in their codes of conduct and terms of employment and so on, it may have the desired effect.⁹⁷

The inclusion of new criminal offences for disclosure of information under section 203A of the Penal Code is one example of the government tightening its grip on information. The offences under section 203A allow the courts to impose a fine of up to RM1 million or a maximum prison sentence of 1 year, or both. The exposure of information revealing corrupt practices within the public sector to either the politicians or the media would infringe section 203A. Section 203A, along with the OSA and the Whistleblower Protection Act therefore block disclosures of official information containing evidence of corrupt practices or public mismanagement to any party other than the enforcement bodies within the State machinery.

MACC

The efforts of the enforcement bodies in addressing the mismanagement of public funds and corruption are widely perceived as ineffective by Malaysians. A majority of

⁹⁶ Rafizi Ramli Interview.

⁹⁷ Ibid.

Malaysians are of the view that the government does not spend public money prudently.⁹⁸ A 2009 survey found that 74% of respondents are not satisfied with the federal government's measures to combat corruption and abuse of power.⁹⁹ The national anti-corruption agency was reinvented and given added powers in 2009, and corruption eradication initiatives were made an NKRA under the GTP1.0 and the GTP2.0. Yet the public remains far from satisfied with the measures taken by the government to fight corruption and mismanagement of public funds. In the Global Corruption Barometer 2013, only 14% of Malaysians polled felt that the level of corruption in the country had decreased and only 31% viewed the government's anti-corruption measures as effective.¹⁰⁰ In another survey conducted in 2014, 56% of those polled found the government ineffective in fighting corruption.¹⁰¹ Corruption continues to be the main issue that Malaysians want the government to address, and a majority of Malaysians are dissatisfied with the current Prime Minister's performance in fighting corruption in government and in reducing wastage in government expenditure.¹⁰² Therefore, the MACC and the government are battling against public sentiment with regard to their effectiveness.

In this study, the relationship between the OSA and the MACC was explored from two angles. First, whether the OSA impacts the work of the MACC by restricting investigators' access to government information that is classified under the OSA. Second, whether making government data more transparent and accessible would facilitate the work of the MACC.

When asked whether MACC investigations in a corruption case are ever impeded by a denial of access to information, the MACC Deputy Chief Commissioner who was interviewed answered with an unequivocal 'No'.¹⁰³ He stated that the MACC could and would ask for whatever documents they require or anticipate that they may require from government departments and public authorities, 'to the extent of Cabinet papers'.¹⁰⁴ MACC is entitled to do so on two grounds: (i) the MACC acts in good faith in requesting the information, and (ii) the MACC has powers under the MACC Act to conduct raids, searches and confiscation.¹⁰⁵ Arguments by public officers unwilling to turn over OSA-classified information are defeated by

⁹⁸ Merdeka Center 2010.

⁹⁹ CIJ and Merdeka Center 2009.

¹⁰⁰ Transparency International 2013.

¹⁰¹ Merdeka Center 2014b.

¹⁰² Merdeka Center 2014a.

¹⁰³ This was also confirmed by the Han Chee Rull, speaking from his personal experience as an investigator (Han Chee Rull Interview).

¹⁰⁴ Mustafar Ali Interview.

¹⁰⁵ Ibid.

the assertion of the MACC officers' authority and the threat of bringing the brunt of the enforcement body's powers down on the department or the public officer concerned:

The head of department may sometimes say, 'This is confidential, this is top secret.' ...[C]ompliance of the other party... is a must. [U]sually they have difficulties. [They say] 'I want to co-operate with you, but I am bound by the OSA. Can I give it to you?' Of course, because he is giving to an authority [sic]. We show our authority card. [I]n our case, because we act under the umbrella of the [MACC] Act, we are authorised to receive.¹⁰⁶

In giving an example of how the MACC responds when faced with public servants in government departments who are reluctant to allow the MACC officers access to OSA-classified documents kept in safes, the Deputy Chief Commissioner recounted :

I used to ask them to open [safes]. They say, oh, the key is not here.... I say whether you open now, or I am going to break it [sic]. That is the power, you know. Not to say that I'm going to break it, it's not easy right? But that is the power that we have.¹⁰⁷

Those denying MACC investigators access to government documents are warned that they may be charged with obstructions of justice.¹⁰⁸

When asked further for specific provisions that empower the MACC to seize or compel the production of classified government records or information deemed relevant to their investigations, another senior MACC officer pointed to sections 30 and 31 of the MACC Act¹⁰⁹

On the second issue of whether making government data more transparent and accessible would facilitate the work of the MACC, we were informed that de-criminalisation of disclosure of State information and measures that allow the public more access to State information are not priorities for the MACC, as such transparency measures are not seen as integral in the fight to reduce and control corruption. This position is contrary to both public perception and empirical data, which we have referred to above and also in the next section of this paper. The Deputy Chief Commissioner did not see any potential in a media that is able

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Han Chee Rull Interview. Speaking from his personal opinion as an MACC investigator, Han Chee Rull said that the powers to seize and compel the production of information under sections 30 and 31 of the MACC Act is exercisable 'notwithstanding any written law', which in his opinion was a supersession of the OSA.

to access and publicise State information on alleged corrupt practices in the public sector. In his estimation, de-criminalisation of disclosure of State information is not necessary to unlock such information because the Whistleblower Protection Act and other laws already provide them with sufficient powers to receive and protect whistleblowers and informants with information on public sector corruption.¹¹⁰

Auditor General

The National Audit Department (NAD) under the aegis of the Auditor General, conducts financial audits of both the federal and state governments, and of public bodies in Malaysia.¹¹¹ Despite the commendations that the Auditor General's yearly audit garners from both sides of the political divide, many do not believe that the government takes the audit reports seriously.¹¹²

The Auditor General is a constitutional office (Federal Constitution, Arts. 105-107). The NAD has access to financial records and information of ministries, government departments and agencies, statutory bodies and government-linked companies. According to the Auditor General, the OSA does not hinder the NAD's audit investigations. The Audit Act 1957 (sections 7 and 8) empowers the NAD to access documents and information from government departments and statutory bodies, including OSA-classified information, in the course of their audit investigations.¹¹³

However, the NAD's reports do exclude audit findings that are based on OSA-classified information, for audits 'involving highly sensitive issues that have impact on the nation'. In those cases, the audit findings are reported in management letters to the relevant government departments / public bodies, with follow-up audits will be conducted until the weaknesses are rectified.¹¹⁴

¹¹⁰ Mustafar Ali Interview.

¹¹¹ Audit Act 1957.

¹¹² Merdeka Center 2014b.

¹¹³ Audit Act 1957, Ambrin Buang Interview.

¹¹⁴ Ambrin Buang Interview.

Conclusions

For enforcement/oversight bodies such as the MACC and the NAD, the OSA is superfluous for protecting the confidentiality and integrity of their investigations, as their enabling acts vest the bodies with independent powers to compel secrecy from its officers and from other parties involved in their investigations. These enforcement/oversight bodies also have powers to investigate matters involving official information, and the OSA is not meant to and in fact does not deter them from discharging their constitutional or statutory roles. Both the MACC and NAD take the position that they have powers to compel all bodies including government departments and public authorities to disclose any information they deem necessary for their investigations. Therefore, the OSA is not crucial to their functioning. A repeal or large reforms of the OSA should not impact the work that these enforcement and oversight bodies do. In any event, should such bodies require further statutory protections to ensure that the course of their investigations remain confidential, amendments can be made to their enabling acts to bolster secrecy provisions.

THE LINK BETWEEN TRANSPARENCY AND GOVERNMENT GOALS

The government's policy goals

The present administration's Government Transformation Programme (GTP) has several targets (NKRAs), which include fighting corruption.¹¹⁵ The government's Economic Transformation Programme (ETP) focuses on a number of economic sectors including natural resources sectors such as oil, gas and energy.¹¹⁶ The ETP also has several initiatives to 'drive Malaysia's global competitiveness'¹¹⁷ in those sectors (SRIs), including improving business

¹¹⁵ Pemandu. 'NKRAs Overview'. http://www.pemandu.gov.my/gtp/What_Are_NKRAs%5E-@-NKRAs_Overview.aspx. Accessed on 03/03/2015.

¹¹⁶ Pemandu. 'Overview of the ETP'. http://etp.pemandu.gov.my/About_ETP-@-Overview_of_ETP.aspx. Accessed on 03/03/2015.

¹¹⁷ Ibid.

competition, standards and liberalisation, public finance reform that includes more transparency in public procurement, and human capital development.¹¹⁸

The question therefore is whether more government transparency – involving dismantling the OSA and/or enacting freedom of information laws – would benefit or hinder the achievement of the government's policy goals. The data and findings extrapolated from various studies point to the former, and these studies are discussed below.

Transparency and corruption

The correlation between increased government transparency and a reduction in corruption is well documented.¹¹⁹ The introduction of FOI laws improves a country's control of corruption.¹²⁰ The establishment of internal transparency measures within government agencies is significant in preventing the purchase of public positions, thus discouraging corrupt practices.¹²¹ Transparency can reduce bureaucratic corruption by making corrupt acts more risky, making it easier to provide good incentives to public officials, and easing the selection of honest and efficient people for public service. Transparency can reduce political corruption by helping make politicians more accountable to the public.¹²²

A recent quantitative study (Mungiu-Pippidi 2014) to analyse why some societies manage to establish control of corruption and other not, found that while countries with FOI laws seem to perform better in controlling corruption, the presence of an anti-corruption agency or ombudsman in the country does not seem to have the same effect. An explanation proposed for this finding is that 'an anti-corruption agency works only if the rule of law already

¹¹⁸ Ibid.

¹¹⁹ Kolstad and Wiig 2009, Lindstedt and Naurin 2010. However, transparency has an effect on corruption only under certain circumstances. Its effect is reduced where education, media circulation and free and fair elections are weak. Agents whose access to information is increased must also have an ability to process the information, and the ability and incentives to act on that information. The impact of transparency therefore depends on the level of education of an electorate, channels of publicly disseminating and receiving information and the extent to which key stakeholders have the power to hold a government to account (Kolstad and Wiig 2009, Lindstedt and Naurin 2010).

¹²⁰ Mungiu-Pippidi 2014.

¹²¹ Kaufmann and Bellver 2005.

¹²² Kolstad and Wiig, 2009.

exists in a given country – otherwise the agency will be either inefficient or used against political opponents by whoever is ruling the country.’¹²³

Increasing transparency of, and access to, government data would also be in keeping with Malaysia’s obligations under the UNCAC, which has numerous provisions requiring State parties to incorporate increased transparency and openness mechanisms within their governance systems. Article 10 of the UNCAC requires State Parties to ‘take such measures as may be necessary to enhance transparency in its public administration’ which should include the adoption of mechanisms ‘allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration.’ Article 13(1) requires States Parties to increase the participation of civil society in the efforts to combat corruption, and promotes effective public access to information.

Corruption and FDI

Corruption can also negatively affect the probability of foreign direct investment (FDI) into a country, because corruption in the host country will increase the costs of foreign investors, thereby discouraging FDI.¹²⁴ The negative effect of high corruption levels is particularly significant for efforts to attract new FDI stock.¹²⁵

Transparency and mismanagement in public procurement

Transparency may also address a number of the failings within the government’s procurement process. Malaysia spends more than RM150 billion a year, or approximately a quarter of its nominal GDP in procuring goods, works and service.¹²⁶ Although the government stipulates that the principles for any procurement shall include adherence to public accountability and transparency, the actual processes and system demonstrate little observance of these principles. An analysis by Jones (2013) concludes that many of the failings in the government procurement system persist through a lack of transparency in the process, including the continued use of negotiated procurement without open bidding and conducted behind the scenes, and the opaque final evaluation and awarding of contracts in

¹²³ Mungiu-Pippidi 2014, p. 39. The second significant finding from this study is that the capacity of FOI laws to positively control corruption levels is optimised when there is a robust, active civil society.

¹²⁴ Ibid.

¹²⁵ Barassi and Zhou 2012.

¹²⁶ Jones 2013.

open bidding procurement processes. The lack of transparency in the procurement processes allows political interference to occur.

Transparency and natural resource revenues

Transparency, in terms of access to information, is essential not only in relation to government expenditure of public monies, but also in relation to the collection of the revenues of the State. 'Increasing transparency opens up the decision-making process to public debate and moves the process towards more prudent and equitable management of extractive industry resources.'¹²⁷ A quantitative study by Williams (2011) concluded that a lack of transparency is at least partly responsible for the less rapid economic growth in natural resource-rich countries.¹²⁸ There are a number of ways that a lack of transparency can create or exacerbate the problems associated with resource-rich economies, including: (i) by making corruption more attractive, in that it can reduce the probability of discovery; (ii) by making it easier to capture rents; and (iii) by increasing spending on patronage, and/or increasing spending on the direct oppression of dissenting voices.¹²⁹

In the Revenue Watch Institute's Resource Governance Index 2013, Malaysia is ranked 34th out of 58 countries assessed on the quality of their governance in the oil, gas, and mining industry. Malaysia's composite score of 46/100 was below the average of 51. Under the index, Malaysia received a 'failing' score of 39 on the Institutional and Legal Setting component (which assess the degree to which the laws, regulations and institutional arrangements facilitate transparency, accountability and open/fair competition), along with the observation that Malaysia has 'no freedom of information law and the Official Secrets Act restricts disclosure of information.'¹³⁰

Correlation between transparency and human development indicators

Studies have also documented the positive association between increased government transparency and improved human development indicators.¹³¹ Transparency is associated with better economic and human development indicators. In the Kaufmann and

¹²⁷ The Bank Information Center and Global Witness 2008, p. 5.

¹²⁸ The phenomenon of how often countries with natural resource wealth have failed to grow more rapidly than those without is commonly known as the "resource curse".

¹²⁹ Kolstad and Wiig, 2009; Williams, 2011.

¹³⁰ Natural Resource Governance Institute 2013.

¹³¹ Kaufmann and Bellver 2005.

Bellver (2005) study, it was found that countries ranking higher on the transparency index were more competitive in international markets, and had higher life expectancy in the population, higher rates of female literacy and higher rates of child immunisation.

Conclusions, and the government's response¹³²

Empirical research therefore demonstrates that many of the Malaysian government's policy measures and targets are highly likely to be aided by replacing the government culture of secrecy with more open government data policies and practices. Government transparency facilitates the achievement of the goals sought by the present administration. Access to information as a transparency tool or mechanism should be incorporated within government processes, because transparency initiatives that are built into government policies and systems will improve the efficiency of the delivery systems, reduce information asymmetries and facilitate accountability mechanisms. However, the opening up of access to government data is not a policy objective of the present administration.¹³³

The Malaysian government faces competing priorities in efforts to increase transparency and accountability and reduce corruption and mismanagement of public assets. Although the government has taken several steps to make government data more open, particularly in government procurement processes, such initiatives are tightly controlled, and most of its decisions and decision-making processes continue to be zealously shielded. The PMD Minister interviewed in this study point to recent mechanisms that have been put in place within government departments to increase consultation and provision of information to NGOs in the policy-making process.¹³⁴ However, such piecemeal and controlled mechanisms are at best quick-fixes and at worst yield no real benefits,¹³⁵ particularly if the consultations are themselves done on a confidential basis. In short, the *ad hoc* 'transparency' measures that

¹³² Attempts were made to obtain the current administration's response on the impact of the government's data transparency policies has on the government's policy goals. The author's request for an interview with PEMANDU (the unit within the PMD that oversees the crafting and implementation of the ETP and GTP), was declined. The author's requests for an interview with the Minister in the PMO in charge of Law, did not receive a response. An interview with the Minister in the PMD in charge of Governance and Integrity was conducted, but he would only speak on the broader policy considerations, not on specific policies and programmes.

¹³³ Paul Low Interview. The non-prioritisation of opening up access to government data is also reflected in the ETP, and GTP1.0 and GTP2.0 initiatives. There are no stated plans to dismantle official secrecy laws or to enact RTI or ATI laws or mechanisms within the public sector. The focus remains on the limited active transparency mechanism created for government procurement processes.

¹³⁴ Paul Low Interview.

¹³⁵ Lindstedt and Naurin 2010.

are currently in place do not seem geared towards yielding long-term or systemic benefits, nor do they seem intended to institutionalise public transparency and accountability within all facets of public administration.

The PMD Minister interviewed stated that the country lacks the proper infrastructure and resources to facilitate ATI and open government data initiatives. Such considerations however, are no answer to the failure to craft and implement FOI laws and to dismantle official secrecy policies where such changes in policies have been shown to likely benefit the government's goals of controlling corruption, improving economic yields and accelerating development goals. The current administration's ETP and GTP goals were planned with mid-term and long-term policy objectives, and open government data initiatives could have been crafted into those policy objectives.

Instead of making government more transparent by pursuing vertical accountability measures such as increasing public rights of access to government data, the government's policies seemed geared towards increasing horizontal accountability measures. However, simply increasing the powers of institutional bodies like enforcement agencies is not effective in controlling corruption, as the recent Mungiu-Pippidi (2014) study demonstrates. Increasing internal horizontal accountability measures within government departments and public bodies would also be counteractive, because further regulations may only:

*...increase their discretionary power and create resources for their own further spoiling... In corrupt countries bureaucracies are entirely part of the problem through politicization, nepotism or patronage... A bureaucracy, regardless of how it is organized, exists to implement a government's will, so in the end it is prevented from being truly 'autonomous'.*¹³⁶

Another reason provided for the maintenance of current policies on access to government data is the lack of political will within the ruling regime:

The government firstly must have the political will. And secondly, they must be confident that they can handle a much more information-free [government]. It's true, if it's more transparent, then the decision-maker is always more accountable of how he decides, because ultimately, he will have to tell the public. ...I suppose sometimes government is still not used to open government especially if you release [information] then there is a debate outside and spinning starts to occur, then they have to answer all the accusations rightly or wrongly. People read into that [information], they may not understand why government does certain things. So it's not just access to it, they

¹³⁶ Mungiu-Pippidi 2014, pp. 51-52.

*have to deal with public image and of course they have to deal with some of the mis-management and inefficiency.*¹³⁷

However, the push for freedom of information laws need not and cannot wait for the government's 'readiness' because transparency and accountability mechanisms may be antithetic to the individual and collective intentions and interests of those in government.

In that regard, while there may not be political will within government, there appears to be political will among the populace. First, government policy approaches thus far, particularly in relation to corruption and mismanagement of public resources, are not working. Malaysians continue to see a serious prevalence in corruption in Malaysia, with a majority of Malaysians across social, economic, ethnic, age and gender divides perceiving the corruption level to be increasing rather than decreasing or remaining unchanged.¹³⁸

Second, the government is out of sync with the public on the policies the public wants to see on economic development, public management and corruption. Public satisfaction with the performance of the Prime Minister and the government has steadily declined, and in October 2014, stood at 48% and 38% respectively.¹³⁹ In the context of corruption, the public wants to see less power exerted by the regime and more involvement of extra-governmental institutions and believe that they (the public) can also contribute to the fight. 56% of Malaysians polled in November-December 2014 found the government ineffective in fighting corruption.¹⁴⁰ Malaysians overwhelmingly believe that ordinary people can make a difference in the fight against corruption¹⁴¹ and in the Global Corruption Barometer 2013, 79% of Malaysians stated a willingness to be involved in the fight.¹⁴² Malaysians also overwhelmingly feel that the media play an important role in the fight against corruption and should not be censored on its reportage. The Malaysian public also appears to be confident in the pressure the power of their opinion can exert, and would advance public opinion and peer pressure as tools to regulate the media over restrictive laws.¹⁴³

¹³⁷ Paul Low Interview.

¹³⁸ Merdeka Center 2014c, Transparency International 2013.

¹³⁹ Merdeka Center 2014b.

¹⁴⁰ Merdeka Center 2014c.

¹⁴¹ Merdeka Center 2014c, Transparency International 2013.

¹⁴² Transparency International 2013.

¹⁴³ CIJ and Merdeka Center 2008.

Despite a more activated civil society, there are few institutionalised mechanisms for democratic participation within governance, and on this issue, Malaysia has consistently ranked low compared to other nations on the World Bank's Voice and Accountability index (**Appendix 6**). Malaysia is also ranked 49 out of 99 countries (behind Singapore, Indonesia and the Philippines) in terms of its constraints on government powers on the World Justice Project's 2014 Rule of Law index.¹⁴⁴

In short, trust in government institutions is missing; and it will not be built by solely focusing on increasing the powers of the very institutions in which the public reposes so little confidence; nor will trust increase by denying power to non-government actors and a civil society that is increasingly confident in its ability to check government excess.

¹⁴⁴ World Justice Project 2014.

THE CASE FOR REFORM

‘Sometimes, inevitably, those involved in the conduct of government, as in any other walk of life, are guilty of error, incompetence, misbehaviour, dereliction of duty, even dishonesty and malpractice. Those concerned may very strongly wish that the facts relating to such matters are not made public. Publicity may reflect discredit on them or their predecessors. It may embarrass the authorities. It may impede the process of administration. Experience however shows, in this country and elsewhere, that publicity is a powerful disinfectant. Where abuses are exposed, they can be remedied. Even where abuses have already been remedied, the public may be entitled to know that they occurred.’

*R v Shayler*¹⁴⁵

‘Deep-seated problems require thorough-going and radical solutions. In significant parts of the world, the lack of trust in government is chronic and deep-seated... Until state power is subjected to effective limits under law, and incumbents of state office are made accountable to the law and to resourceful agents of vertical and horizontal accountability, not much is going to change.’

Diamond 2007¹⁴⁶

Recommendations

The rationale for the right of access to information lies at the very foundation of democratic governance. Democracy rests on the principle that the power of the people is conferred to political institutions and political representatives, and the people are entitled to access information collected and held by government in the exercise of those powers, in order to hold their representatives to account. The right to access information is therefore an essential component for the maintenance of democratic governance. On that basis, the restrictions that the OSA imposes on freedom of expression and information and the powers it grants to the government to police these restrictions are a disproportionate response to any possible national security risks facing Malaysia. It is therefore recommended that the OSA should be repealed and replaced with a comprehensive FOI mechanism. We set out specific reform proposals in Box 1 below.

¹⁴⁵ [2003] 1 AC 247, para. 21.

¹⁴⁶ Diamond 2007, p. 20.

Notwithstanding our primary recommendation but for the sake of completeness, we make alternative proposals to amend the OSA itself. These are set out in Box 2 below.¹⁴⁷

Box 1: A new FOI regime

Article 19 has published a Model Freedom of Information Law (Article 19), which we would recommend to be used as a guideline in enacting FOI laws. New FOI laws should be formulated along the principles recommended by Article 19 (Article 19 1999) and also the following policy premises:

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, everyone should be able to access such information, 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 and Wiig 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 covers 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 (Lindstedt and Naurin 2010).
6. On the other hand, non-agent controlled transparency includes 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 and 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

¹⁴⁷ Some of these reforms have been recommended by Article 19 (2004).

Permitted Disclosures. In addition, there should 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 it 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 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 to release and disperse the information 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 and 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.

Box 2: Amendments to the 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 (Article 19 2004). 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 (Article 19 2004), or alternatively there should be a fixed-term moratorium on the secrecy of the documents, after which they should be declassified.
3. The classification of 'official document' should be removed, in that there should not be criminal sanctions attached to the disclosure and possession of information from the public services that have not been labelled as 'official secrets'.
4. 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.
5. Only Ministers and designated senior public officers should be given the power to classify information, and any wilful misclassification should be penalised (Article 19 2004).
6. The government's power to issue certificates of conclusive evidence for OSA-classified information should be revoked.

7. 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.
8. 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.
9. 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.
10. The Act should specifically allow judicial review of any decision to classify information, or any refusal to declassify or release information.
11. Any offences relating to the possession or disclosure of official secrets should include the element of intention of wrongdoing.
12. 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).

APPENDIX 1

List of Interviewees

Abbreviation	Description
Nadeswaran	R. Nadeswaran , media practitioner with approximately 40 years' experience and currently the Editor, Special and Investigative Reporting at <i>theSun</i> .
Jahabar Sadiq	Jahabar Sadiq , media practitioner with approximately 26 years' experience and currently the CEO and Editor of <i>The Malaysian Insider</i> .
Steven Gan	Steven Gan , media practitioner with approximately 24 years' experience and currently Editor-in-Chief of <i>Malaysiakini</i> .
Chang Teck Peng	Chang Teck Peng , media practitioner with approximately 26 years' experience in vernacular print and online news publications.
Rafizi Ramli	Rafizi Ramli , Member of Parliament for Pandan and member of <i>Parti Keadilan Rakyat</i> , a political party within the PR coalition.
Mustafar Ali	Datuk Hj. Mustafar bin Ali , Deputy Chief Commissioner (Prevention) of the MACC.
Han Chee Rull	Dato' Han Chee Rull , Deputy Director (Investigations) of the MACC.
Ambrin Buang	Tan Sri Dato' Setia Haji Ambrin Bin Buang , Auditor General, Malaysia.
Paul Low	Datuk Paul Low Seng Kuan , Minister in the Prime Minister's Department in charge of Governance and Integrity.
Khaw Lake Tee	Datuk Dr Khaw Lake Tee , Commissioner and Vice Chairman of the Human Rights Commission of Malaysia (SUHAKAM)
Christopher Leong	Christopher Leong , immediate past President of the Malaysian Bar.

APPENDIX 2

Extracts from Briefing Notes on the Security Order regarding categories of information under the OSA

Categories of information under the OSA	CGSO (undated)	Kulaan, 25/06/2009	Eman, 06/12/2009
Top Secret	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.	Official document / information / material that if disclosed without authority will cause grave damage to the country.	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.
Secret	If disclosed will 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.	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.	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.
Confidential	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.	Official documents / information / materials that if disclosed will prejudice the interests of the government or embarrass the country's administration.	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.
Restricted	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.	Official document / information / material apart from those that are Top Secret, Secret, Confidential if required should be given the necessary protection.	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.

Source: Data derived from CGSO (undated), Kulaan (26/06/2009) and Eman (06/12/2009), and translated from Bahasa Malaysia into English by the author. Emphasis added by the author

Extracts from Briefing Notes on the Security Order regarding threats to security under the OSA

Categories of threats to security	CGSO (undated)	Kulaan, 25/06/2009	Eman, 06/12/2009
Subversive	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.	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.	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.
Espionage	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.	Activities to obtain classified matters through hidden means.	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.
Sabotage	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.	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.	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.
Human Weakness	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.	Actions that cause breaches of security and cause official matters to be known by unauthorised parties.	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.
Extremism	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	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.	- 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 and religious extremists and extremist pressure groups (' <i>pelampau kumpulan pendesak</i> ').

Source: Data derived from CGSO (undated), Kulaan (26/06/2009) and Eman (06/12/2009), and translated from Bahasa Malaysia into English by the author. Emphasis added by the author.

APPENDIX 3

Details of convictions under the OSA*

Year	Person Position	Summary
1978	Lim, Kit Siang Opposition politician, DAP	In 1978, MP and Parliamentary Leader of the Opposition Lim Kit Siang was charged under 5 charges of the OSA with receiving, possessing and disclosing tender documents for the purchase of sea craft by the Ministry of Defence. He was convicted on 5 charges and fined a total of RM5,500 (which was the reduced total after appeal).
1978	P Patto Opposition politician, DAP	In 1978, P. Patto was charged under the OSA with possessing and disclosing tender documents for the purchase of sea craft by the Ministry of Defence. He was convicted and fined.
1978	Datuk Hj Dzul kifli bin Datuk Abdul Hamid Opposition politician, USNO	On 11 January 1978, an article was published in the <i>Kinabalu Sabah Times</i> that contained contents of a letter dated 11 May 1976 written by the previous Chief Minister of the state of Sabah to the Federal Minister of External Affairs, on the government's policy on Philippine refugees in Sabah. The newspaper obtained the letter from Datuk Haji Dzul kifli bin Datuk Abdul Hamid, who was part of the state government at the time. He was convicted on 4 charges under the OSA and fined a total of RM5,000 (which was the reduced total after appeal).
1985	James Clovis Clad Journalist, <i>Far Eastern Economic Review</i>	On 14 October 1985, James Clovis Clad pleaded guilty to receiving, possessing and divulging information from a cabinet paper on the government's policies on engagement with China, in an article he wrote on Malaysia's relations with China. The cabinet paper was found in his house. He was fined RM10,000.
1986	Sabry Sharif Journalist, <i>The New Straits Times</i>	On 24 January 1986, Sabry Sharif was charged and pleaded guilty to a charge of possessing documents relating to a proposed purchase of 4 planes by the Malaysian Air Force, which he had used as the basis for a news report written in <i>The New Straits Times</i> . He was fined RM7,000.
1989	Phang, Ah Hee Lawyer	On 25 October 1986, lawyer and former Deputy Public Prosecutor Phang Ah Hee was found to have official police investigation papers in his office. He was charged under the OSA and in 1987, after pleading guilty, was given a 6 months' jail sentence and fined RM1,000.
1999	Ezam Mohd Nor Opposition politician, PKR	On 6 November 1999, Ezam Mohd Nor disclosed in a press conference the contents of the anti-corruption agency's corruption investigations against 2 government officials at the time – the International Trade and Industry Minister and the Chief Minister of the state of Malacca. He was charged under section 8(1) of the OSA and almost 3 years later on 7 August 2002, he was convicted and sentenced to 2 years' imprisonment.

Source: Data derived from law journal case reports and news reports.

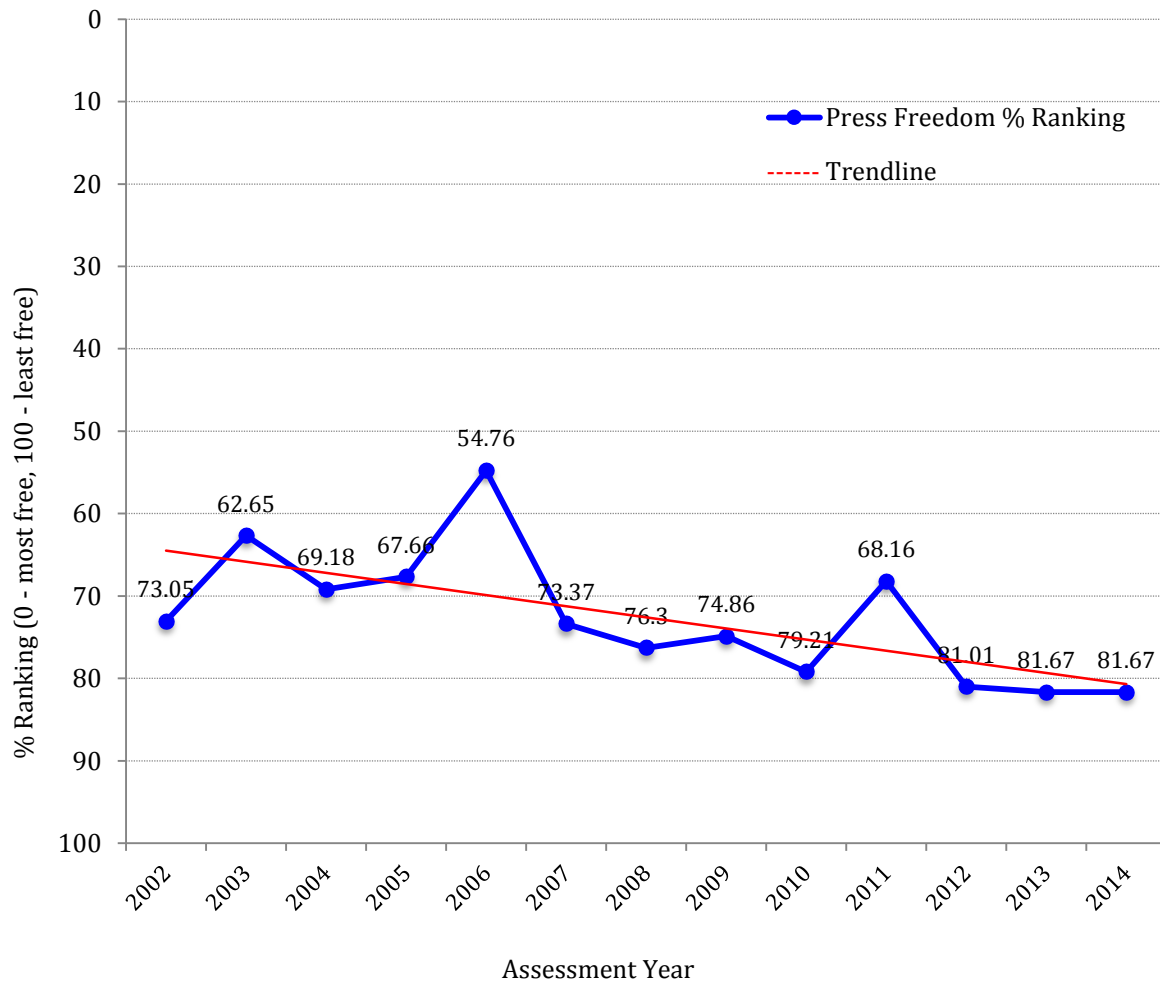
* Excluded from this list are OSA convictions of public servants who have obtained and/or disclosed question papers for national-level examinations. Several news reports on such cases were sighted from 1974, 1989 and 1998. There are pending charges against several public servants for the alleged leaking of UPSR examination papers in 2014.

APPENDIX 4**Press freedom scores and rankings, Malaysia**

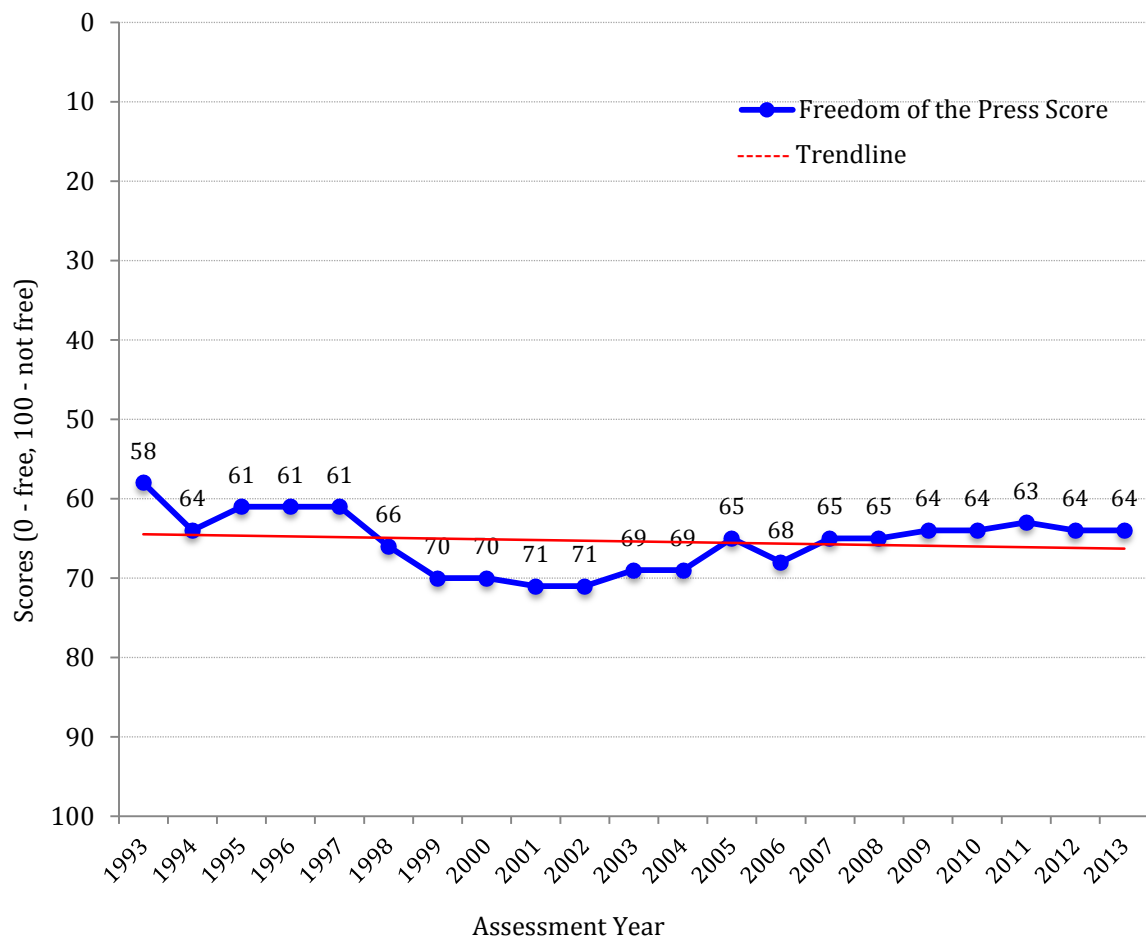
Year	Freedom House			Reporters Without Borders	
	Score	Rank / Total countries surveyed	Status	Rank / Total countries surveyed	Percentile Ranking
1993	58		Partly Free		
1994	64		Not Free		
1995	61		Not Free		
1996	61		Not Free		
1997	61		Not Free		
1998	66		Not Free		
1999	70		Not Free		
2000	70		Not Free		
2001	71	138/175	Not Free	122/167	73.05
2002	71	155/193	Not Free		
2003	69	154/193	Not Free		
2004	69	152/194	Not Free		
2005	65	141/194	Not Free		
2006	68	150/195	Not Free		
2007	65	141/195	Not Free		
2008	65	143/195	Not Free		
2009	64	141/196	Not Free		
2010	64	143/196	Not Free		
2011	63	144/197	Not Free		
2012	64	146/197	Not Free		
2013	64	141/197	Not Free		
2014				147/180	81.67

Source: Data derived from Freedom House 2015, Reporters Without Borders 2014.

APPENDIX 5

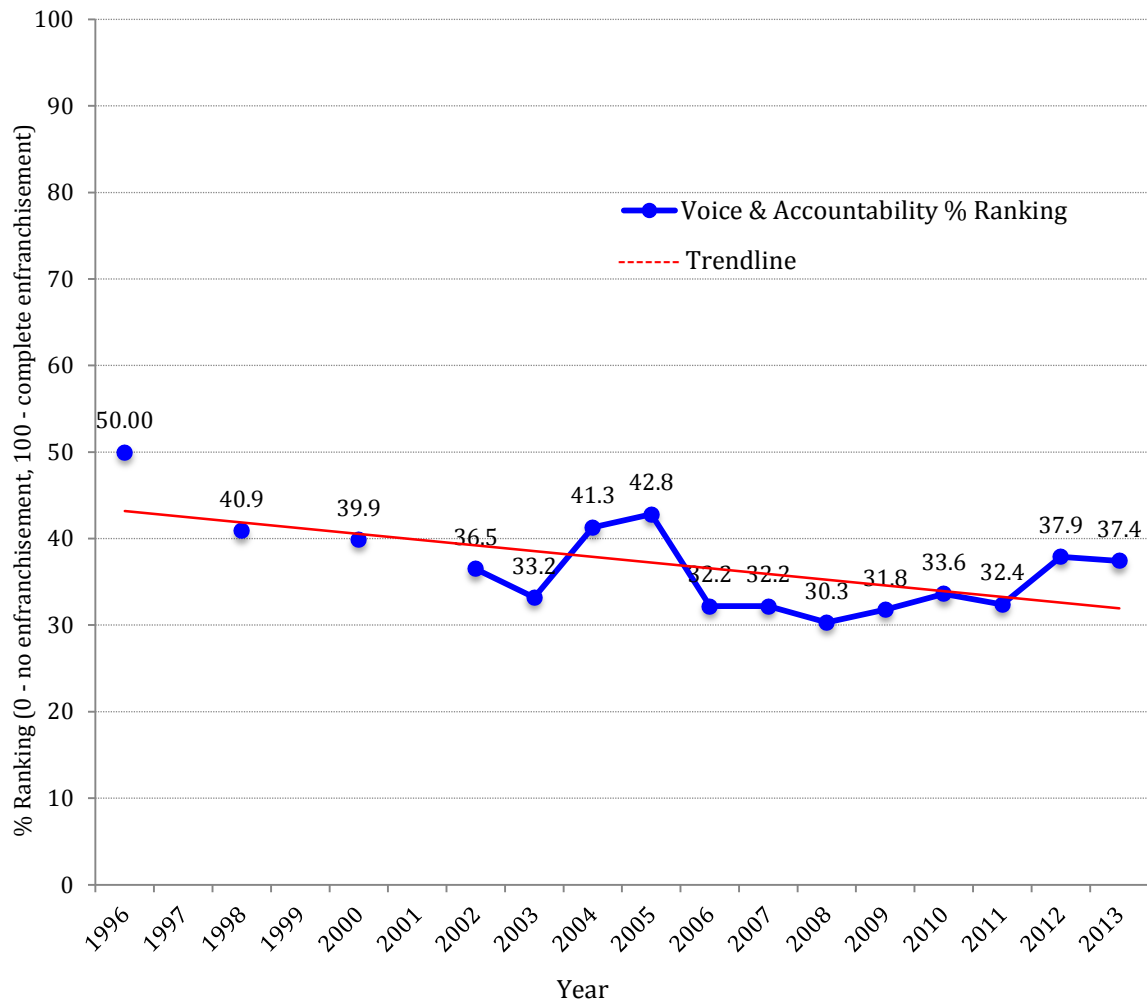
Figure 2: Reporters Without Borders Press Freedom Percentile Ranking, Malaysia: 1993-2013

Source: Data derived from Reporters Without Borders 2014.

Figure 3: Freedom House Freedom of the Press Scores, Malaysia: 1993-2013

Source: Data derived from Freedom House 2015.

APPENDIX 6

Figure 4: World Bank Voice & Accountability Percentile Ranking, Malaysia: 1996-2013

Source: Data derived from The World Bank 2014.

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