“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”
- Article 19 of the ICCPR

A Rights Plan for Freedom of Information in Malaysia

A report by
THE CENTER TO COMBAT CORRUPTION AND CRONYISM
A Rights Plan for Freedom of Information in Malaysia
A Rights Plan for Freedom of Information in Malaysia

Contents
Introduction ................................................................................................................................................. 4
International Progress Towards FOI ........................................................................................................ 5
  2.1 United Nations & Human Rights ........................................................................................................ 5
  2.2 UN Convention Against Corruption (UNCAC) .................................................................................. 6
  2.3 Regional Agreements .......................................................................................................................... 6
  2.4 Article 19’s Johannesburg Principles .................................................................................................. 7
  2.5 Open Government Partnership ........................................................................................................... 7
  2.6 Other Notable International Standards ................................................................................................. 8
  2.7 International Implementation ............................................................................................................. 8
  2.8 Empirical Research ............................................................................................................................ 9
Elements of a Robust FOI Law .................................................................................................................. 11
  3.1 Freedom of Information and its Discontents ....................................................................................... 11
  3.2 Assessing Elements of FOI Law ......................................................................................................... 12
  3.3 Elements As Expressed In Selected Countries .................................................................................... 15
Key Elements In FOI Law ........................................................................................................................ 21
  4.1 Public Interest Declassification ........................................................................................................... 21
  4.2 List of Exemptions .............................................................................................................................. 25
  4.3 An Independent Oversight Body ......................................................................................................... 32
Challenging Topical Areas in FOI ............................................................................................................. 36
  5.1 Transparency in Government Procurement .......................................................................................... 36
  5.2 Secrecy in International Trade Agreements Negotiation ................................................................. 38
  5.3 Secrecy in Defence and Arms Deals .................................................................................................. 39
  5.4 Coverage Over State Owned Enterprises ............................................................................................ 41
  5.5 Overlap with Anti-Disinformation & Anti-Fake News Laws ............................................................. 42
The Information Environment in Malaysia ............................................................................................... 44
  6.1 The Official Secrets Act ....................................................................................................................... 45
  6.2 State Freedom of Information Enactments ........................................................................................... 46
  6.3 Procurement and E-Procurement Practices ...................................................................................... 48
  6.4 Open Data under the ETP ................................................................................................................ 49
Conclusion and Recommendations ......................................................................................................... 52
Acknowledgements .................................................................................................................................... 55
References and Endnotes .......................................................................................................................... 56
INTRODUCTION

May 9 was a historic day for Malaysia as Malaysians collectively voted against the incumbent Barisan Nasional government. With the new Pakatan Harapan government that ran on an anti-corruption and good governance ticket, there is now greater space for significant reform in curbing corruption and empowering citizens democratically.

Amongst its electoral promises, Pakatan Harapan (PH) government said that they would enact a freedom of information law, especially under the rubric of the Open Government Partnership framework. Concomitantly, the PH manifesto also promises the review of oppressive laws like the Official Secrets Act.

C4 Center upholds this opportunity to what we see as a realisation of an undeniable key component of democratic governance. This is two-pronged: First, in order to make informed choices, citizens must have a democratic Right to Information and Right to Access Documents which the government collects and holds; Second, the right to access documents opens up opportunities for private citizens to scrutinise government decisions and spending that directly or indirectly affects them, contributing to the reduction of public service corruption.

C4 Center has long advocated for a Federal Freedom of Information (FOI) Law, especially under the oppressive conditions of the Official Secrets Act, which, either by design or implementation, was anathema to the spirit of Freedom of Information.

However, the danger is that in this opportunity to set things right, the eventual FOI law may turn out to be a law in form but not in spirit — its very intention of empowering citizens stymied by overly broad provisions and loopholes that enable the same sort of cover-ups that still prevails under the OSA regime.

The purpose of this paper is to clearly spell out best practices necessary to prevent such loopholes from denying citizens their right to information.

The minutiae of freedom of information laws can be quite daunting, especially at the federal level — such as whether citizens get a confirmation of their request submission or if costs become prohibitively expensive, or whether a specific category of information should be on the exception list. At many points, foot-dragging or actual malfeasance can weigh down the process.

In Malaysia, further substantive critical areas for FOI are general procurement processes, international trade negotiations and defence procurements (which straddle both). Given their history with regards to corruption, more attention must be given to these issues, and some of them have been addressed here.

It is our hope that the eventual FOI law is sufficiently robust to pre-emptively check kleptocratic tendencies, and we recognise historical efforts by fellow Malaysian organisations to fight for a strong, effective FOI law.

We conclude with recommendations for what FOI should look like for Malaysia: a breakdown of its necessary components to ensure sufficient bite such that real freedom of information is within each and every citizen’s reach.
INTERNATIONAL PROGRESS TOWARDS FOI

In order to make the case for a robust freedom of information law in Malaysia, we first must establish that Freedom of Information is indubitably part and parcel of international standards for good governance and human rights. There is an inseparable relationship between an individual’s right to information and their quality of participation in democratic governance of a country. This section intends to outline the historical development of freedom of information, Malaysia’s international commitments towards it, as well as charting the global march towards FOI, with an eye towards developments in empirical research in FOI.

2.1 UNITED NATIONS & HUMAN RIGHTS

Universal Declaration of Human Rights 1948 (UDHR): Malaysia joined the United Nations in 1965. Under the UN rubric, Freedom of Information is explicitly stated in the UDHR, which phrases the right to information as part and parcel of a broader right to freedom of opinion and expression.

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.¹

The statement is in affirmation of an earlier UN resolution that ‘freedom of information is a fundamental right and is the touchstone of all the freedoms to which the United Nations is consecrated’.² However, Malaysia is not a signatory to the UDHR.

The International Covenant on Civil and Political Rights 1966 (ICCPR) forms the international baseline on which political rights should be judged, and is part of the International Bill of Human Rights together with the UDHR. Article 19 of the ICCPR reaffirms principles found in the UNDR. It not only guarantees the right to freedom and opinion, but also the "freedom to seek and receive information":

“2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”³

This right is only balanced against the “respect of the rights or reputations of others” and “For the protection of national security or of public order (ordre public), or of public health or morals.” Malaysia is also not a signatory to the ICCPR.

The UN Special Rapporteur on the Freedom of Opinion and Expression (UNSRFOE) was established in 1993 by the United Nations Commission on Human Rights, with the mandate to support access to information to be implemented in all countries as a matter of human rights.⁴ In 1999, UNSRFOE Mr. Abid Hussain conducted a country visit to Malaysia and noted the following:

51. Furthermore, access to public information or information relating to public interest issues is severely restricted by the Official Secrets Act 1972, which was amended extensively in 1983. Under this Act, departmental heads have broad powers to classify documents as “secret” and therefore inaccessible to the public. […]

52. In view of the above considerations, the Special Rapporteur wishes to recall that under international human rights law, the right to freedom of expression can be restricted only in the most serious cases of threats to national security. He refers in this regard to the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, which offer some guidance on this matter …”⁵
The Johannesburg Principles mentioned are elaborated below, in Section 2.4.

**The United Nations Sustainable Development Goals (SDGs).** The United Nations SDGs are a collection of 17 global goals set by the United Nations General Assembly as a benchmark for social, economic, and governance-related well-being of countries established in 2016. Unlike the Millennium Development Goals (MDGs) which they succeed, SDG Goal 16 “Peace, Justice and Strong Institutions” also includes FOI as an indicator. Indicator 16.10 of the SDGs is to “ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements”, in which Indicator 16.10.2 is the “number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information”.

**2.2 UN Convention Against Corruption (UNCAC)**

Despite not being a signatory of the UDHR or ICCPR, Malaysia has signed the United Nations Convention Against Corruption (UNCAC) on 9 December 2003 and was ratified on 24 September 2008. UNCAC recognises that transparency and public reporting are key to combatting corruption. Article 10 of UNCAC compels member states to:

“...take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia:

(a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public.

(b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and

(c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.”

At ratification, Malaysia only had reservations on Article 66 which deals with arbitration procedures.

**2.3 Regional Agreements**

**The Commonwealth Heads of Government Meeting (CHOGM)** is a biennial summit meeting of the heads of government from all Commonwealth nations (inclusive of Malaysia) to discuss substantive issues of member states. They affirmed such principles of the right to information.

A 1980 meeting of the Law Ministers of the Commonwealth upheld the principles of FOI by declaring that, ‘public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information’. Subsequently, in the 1999 CHOGM, state parties affirmed in a resolution 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.*

As a result of the 1999 CHOGM, a model Freedom of Information Bill was drafted and considered by CHOGM Senior Officials in a November 2001 meeting. Subsequently, a revised version was considered and endorsed by Commonwealth Law Ministers in November 2002.
The ASEAN Human Rights Declaration 2012 (AHRD) was adopted by heads of member states of ASEAN (including Malaysia) on 18 November 2012, which affirmed all the civil and political rights in the UDHR. Article 23 of the AHRD also uses similar language to receive information as a matter of right:

*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.*

### 2.4 Article 19’s Johannesburg Principles

Article 19 is a UK-based human rights organisation founded in 1987 with the mandate to promote freedom of expression and freedom of information worldwide. In the early 90s, Article 19 collaborated to gather a group of experts in international law, national security, and human rights to publish the **Johannesburg Principles on National Security, Freedom of Expression, and Access to Information 1995**. Consequently, Article 19 also published a **Model Freedom of Information Law** in 1999.

The Johannesburg Principles not only upholds the UDHR in its interpretation of the right to information, but also recommends a **high degree of clarity** over the flexibility in designating secrets:

*(d) No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government (Principle 1).*

This means that restrictions on information are prescribed by law such that the law is “accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful” (principle 1.1a). Principle 13 states that “the public interest in knowing the information shall be a primary consideration”, overriding any other interest in the first instance.

Some salient recommendations made by the Johannesburg Principles include: having safeguards against abuse through judicial scrutiny of the restrictions by an independent tribunal (principle 1.1b); individuals have the right to independent review of denial of information (principle 14); restrictions on information must have the genuine and demonstrable effect of protecting a legitimate national security interest, specifically defined as “protecting a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force” (principle 2); secret information should and can be disclosed when it is not likely to harm legitimate national security interests or when the public interest in knowing outweighs the harm from disclosure (principle 15); secret information cannot outlast declared emergencies (principle 3); access to information cannot be discriminatory (principle 4), and; once information is public, it should not be suppressed (principle 17).

### 2.5 Open Government Partnership

The Open Government Partnership (OGP) was launched in 2011 to provide an international platform for domestic reformers committed to making their governments more open, accountable, and responsive to citizens. Mentioned as an aspiration in the Pakatan Harapan Manifesto, eligibility begins when governments demonstrate a minimum level of commitment to open government principles in four key areas: **Fiscal Transparency, Access to Information, Asset Disclosures, and Citizen Engagement**. To participate in the OGP, countries must score 75% of the possible points available to them.

While fiscal transparency and public officials' asset disclosure is inter-related and is synergistic with freedom/access to information, their measurement of the Access to Information scores a maximum of 4 if an access to information law is in place, or 3 if only a constitutional guarantee is in place. Information
is taken from an ongoing survey by Right2Info.org (from the Open Society Institute Justice Initiative) and supplemented by RTI-Rating.org. Malaysia is not present on either survey.

The Open Society Institute does not itself set the criteria for what constitutes a robust access to information law. However, they do consider that Belarus has such a weak law that they “do not consider it a full-fledged FOI law”. This demonstrates that a weak, nominal FOI law is insufficient to qualify for the OGP.

### 2.6 Other Notable International Standards

**Model Law on Access to Information for Africa**, adopted by the African Commission on Human and Peoples’ Rights on 25 February 2013, and launched on April 2013. The model law also has recommendations for a transitional period covering extended periods for dealing with requests in the first two years of the law. It temporarily eases response times for information requests from its target of 21 days to 45 days for the first year of operations, and then 35 days in the second year of operation.


**Council of Europe Convention on Access to Official Documents** (2009). This Convention is the first binding international legal instrument to recognise a general right of access to official documents held by public authorities. It has 9 ratifications and another 6 more signatories without ratification. It defines Official Documents which are subject to disclosure as “all information recorded in any form, drawn up or received and held by public authorities”. This reflects an expansion of the definition and a recognition of the problem that many older “Access to Information” laws only covered formal documentation.

**The Aarhus Convention**, otherwise known as the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, was signed in 25 June 1998 and entered into force on 30 October 2001. It is a multilateral environmental agreement that intends to enhance environmental governance by innovatively adding a mechanism to empower public participation by guaranteeing access to environmental information. 46 of its 47 parties are in Europe and Central Asia. It is also notable for the level of openness to public feedback engendered in its negotiation processes.

**The Extractive Industries Transparency Initiative** (EITI) is another multilateral, multi-stakeholder coalition launched in 2002 focusing on promoting a standard for open and accountable management of oil, gas, and mineral resources. 51 countries implement the EITI, and it openly publishes key information about the governance of oil and mining sector annually to improve sector governance.

### 2.7 International Implementation

The first FOI law was implemented in Sweden in 1766, when the government included in the constitution the right to information for the general public and the press. In 1990, only 13 countries had Freedom of Information laws — all western liberal democracies. However, by 2012, this number had risen to more than 90 countries. The latest September 2018 update of RTI-rating.org lists 123 countries with right to information laws, with Afghanistan at the top of the list. Toby Mendel, Executive Director of the Centre for Law and Democracy, notes that the top 25 countries in the list, except one, are
countries from the global South. However, the UN Secretary-General’s Report does note that implementation remains a challenge for many countries.23

In the Southeast Asian region, four countries have FOI laws: Indonesia (38th on RTI-rating.org), Thailand (81st), Vietnam (100th), and Timor Leste (118th). Additionally, Philippines (120th) has a presidential order on freedom of information that covers only the executive branch of government, and Vietnam also has a constitutional guarantee for freedom of information. Cambodia is in the process of enacting an FOI law as of 2018.24

In the Northeast Asian region, China (84th), South Korea (45th) and Japan (80th) also have implemented FOI laws. In South Asia, Bangladesh (29th), India (6th), Sri Lanka (4th), Nepal (22nd), and Pakistan (33rd) all have FOI laws.

Several reasons have been made on how these FOI laws came to be passed around the world. Some scholars argue that pressure from domestic or international civil society groups on the governments.25 Other times it can be from reform mandates required by international funding agencies. (Shepherd, 2015, p. 716). Political support for an FOI law is a "major driver of effective and sustained implementation".26

However, it is noted as well that many developing countries which have adopted FOI laws have weaker institutional and legal systems and suffer from capacity constraints.27 It is also found that the global average for FOI requests, fewer than 50% were fulfilled, and 36% went unanswered.28 Such FOI request refusals are based on record management problems rather than any legal basis.29 A lack of public awareness also contributes to poor usage statistics.30

### 2.8 Empirical Research

While this report largely deals with principles, it may be necessary to mention a growing body of research on the empirical outcomes of enacting a Freedom of Information law. With more and more countries adopting FOI laws, it is becoming more viable to study the effects of them comparatively. While it is important to note that FOI laws across the world can have varying strengths and weaknesses, recognition of such research gives us better grounding of what to expect when enacting a robust FOI law.

- Increased transparency can lead to political and economic benefits for countries, including fewer conflicts with neighbouring countries, more efficient markets, greater technological innovation, and a more reliable investment climate.31 Overall greater access to information can create a "virtuous cycle" by creating open societies that are better placed to create and share data, which consequentially drives development-related improvements in areas such as food security, agriculture, health infrastructure, and innovation.32 Darch & Underwood (2010) posit that a robust information environment helps to achieve a more efficient economy, better standards for health and food security, and a better environment.33 Berliner (2012) argues that there is a relationship between FOI laws and an increase in foreign direct investment in developing countries.3435

- Motivate improvement of public information systems and practices: Khumalo and Baloyi (2017) argue that “freedom of information legislation could benefit records and archives management in the region by increasing employment opportunities for records and archives
professionals, promoting the development of records management systems, formalization and standardization of records management practices and further training of practitioners”. 36

- **Reducing Corruption and its perceptions:** The literature is somewhat mixed about corruption perception. Costa (2013) finds that FOI laws create an increase in the public perception of corruption, especially countries with a free press.37 Cordis and Warren (2014) find that corruption reduces and probability of detecting FOI laws increases when switching from a weak to strong state-level FOI law.38 Through a panel data of 132 countries, Vadlamannati and Cooray (2017) finds that adoption of an FOI law is associated with a perception of government corruption and an increase in detection of corrupt acts, and that perception of government corruption tends to decrease with the age of FOI law.39 Mungiu-Pippidi (2014), writing for the European Research Centre for Anti-Corruption and State Buildings finds that “the existence of FOIA is positively associated with lower corruption and a significant positive trend in controlling corruption”.40 Early research such as from Bac (2001) argued that increased transparency leads to improved information on who to bribe; Islam (2006) finds that countries with greater transparency do have lower corruption rates.41

- **Necessary for Open Government:** Ingrams (2017) argues that FOI and a robust “information rights environment” are necessary elements required to achieve substantial open government reform.42 Earlier arguments were also made for transparency or FOI laws as facilitating the fulfilment of other rights.43

- **A potential tool for collaborative research by academics:** Theoretically, the greater amount of data released by the government is a goldmine for research by academics who hitherto had no access to such data. In aggregate, this should produce greater capacity to interpret the data for better policy-making in the future.44

These laws also may facilitate the fulfilment of other rights by fostering participation and active citizenship (Roberts 2001; Bovens 2002; Basely and Burgess 2002; Stromberg 2002). Moreover, FOI acts may contribute significantly to government openness and accountability, helping to prevent and combat corruption (Rose-Ackerman 1999; Aderesa, Boix and Payne 2003; Reinikka and Svensson 2003; Peisakhin and Pinto 2010). In keeping with the understanding that transparency supports economic growth, research has related FOI laws to economic growth and development (Kaufmann and Vishwanath 2001; Heinemann and Illing 2002).

**CONCLUSION:** Malaysia may not be a signatory to landmark UN Conventions such as the International Covenant for Civil and Political Rights (ICCPR) or the International Convention on Economic Social and Cultural Rights. These conventions uphold the right and freedom to information, as well as many other democratic principles for good governance sorely lacking in Malaysia. Furthermore, Malaysia is party to other agreements such as CHOGM, ASEAN, and the UNCAC which compels Malaysia to uphold such standards for its citizens. It is due time that Malaysia sets itself on the path to ratifying these conventions and upholding its existing commitments by enacting an FOI law.

Meanwhile, developments in international thinking about FOI are also progressively maturing — Malaysia not only has the opportunity to catch up but also to take the lead. Other mature Asian countries — even in Northeast Asia and Southeast Asia — have implemented their FOI laws, and Malaysia must not be an exception in our new drive in cleaning up our country.
ELEMENTS OF A ROBUST FOI LAW

3.1 FREEDOM OF INFORMATION AND ITS DISCONTENTS

As highlighted by the case of Belarus, the implementation of Freedom of Information laws can be problematic on many fronts. Freedom of information is not perceived by government agencies to be in their direct interest under bureaucratic logic. There are many stereotypical concerns from government viewpoints across the world that the information released might be taken out of context or abused, or put the agency in a bad light. There are cost concerns of funding the service, as well as manpower and informational management system constraints.

In Malaysia, it is highly possible that loopholes will be exploited to curtail freedom of information, allowing critical pieces of information of high public interest to be tucked away — Malaysia itself through the Official Secrets Act 1972 has seen numerous pieces of information being classified under the OSA for extremely dubious reasons. The fear is that, even with a freedom of information law, civil service culture will continue to use any means necessary to continue its impunity without accountability. (See Section 6.2 for discussions on Malaysian state-level implementation.)

These are some international examples in which FOI laws were enacted, failed to be realised, or were curtailed:

- **United States**: The United States enacted a Freedom of Information Act in 1966 which, despite being substantially amended several times, remained problematic. As a result, in the mid-2000s the implementation of the spirit of the act has been undermined by delays in processing requests — sometimes replies come years after the request has been put in. Complete decentralisation of agency FOI operations leading to delay and lack of oversight and inconsistent practices regarding the acceptance of administrative appeals
c
- **Thailand**: The Official Information Act was enacted in 1997, but early criticisms include unrealistic timeframes, difficulty in enforcing the decision of information tribunals due to overlapping laws, and several of the ex-officio members of the Information Commission frequently not attending meetings.
- **Tajikistan** has a 2002 FOI Law, which compels all public organisations to grant access to all non-classified material to the media. However, no sanctions for failures to comply with this obligation were foreseen and government officials frequently refused to provide journalists with the information they requested.
- **India**: Implemented a Right to Information Act (RTIA) in 2005. Two million requests were filed in its first two and half years. However, use of the law has been constrained by uneven public awareness, poor planning by public authorities, and bureaucratic indifference or hostility. Requirements for proactive disclosure of information are often ignored, and mechanisms for enforcing the new law are strained by a growing number of complaints and appeals.

Alistair Roberts (2012) noted that in their survey of four countries, they found that access to information implementation suffered the following problems:

- **Administrative Capacity**: Lack of resources, lack of leadership, bureaucratic culture of secrecy, poor training of civil servants on ATI policy and answering requests, records management inadequate for locating information, crude system for keeping track of requests.
- **Access barriers**: refusal to accept requests, overgenerous use of exemptions, delays in response or extensive backlog, high fees charged for requests, low public awareness of policy and its usage.
- **Enforcement Issues:** appealing to an oversight body is not as time-consuming, costly, and intimidating as going to court to appeal for information; an oversight body also plays a role in providing expertise and support to the administration and requesters, and monitoring implementation.\(^{51}\)

Neuman and Calland (2007) identify common challenges to implementing FOIAs, such as setting up an infrastructure for effective record keeping and processing staff shortage.\(^ {52}\)

However, when FOI does work, there is much anecdotal evidence crucial for the fight against corruption, for human rights, improving service delivery, and good governance. For example:

- **In Brazil,** the government is obliged by law to proactively publishes a series of budgetary information online. Media outlets have used the information to enhance supervision of governmental programmes. Such exposure led to investigations on several politicians and the resignation of several ministers in the last years.\(^ {53}\)

- **In Mexico,** a local NGO used freedom of information requests to investigate the beneficiaries of the largest federal farm subsidy program. The information disclosed helped to review corruption and mismanagement of the programme. The list showed that the main beneficiaries of the programme were not Mexico’s poorest and smallest farmers, but rather rich and productive farmers. The Minister of Agriculture was removed from office and after subsequent denounces the government established ceilings on the eligibility for subsidies (Dokeniya 2013).\(^ {54}\)

- **In USA,** an NGO called Judicial Watch requested documents which found that members of the US Congress were aware — for years! — that the two mortgage giants Fannie Mae and Freddie Mac were “playing fast and loose” with accounting practices and extreme risk assessment practices, leading to the US economic property subprime crisis of 2008.\(^ {55}\)

The above are the stakes for Freedom of Information in Malaysia. But in truth, the basics of a Freedom of Information law is quite straightforward: A law needs to (re)define the overall information environment of the government by enabling the presumption that citizens have a fundamental right to access all of government information. It takes that the relations between the government and the citizen transforms the approach of releasing information from “need-to-know” basis to “should-always-know” basis, regardless of the number of practical users of the information. This is otherwise known as the principle of maximum disclosure.

To put this into practice, a freedom of information law at the very least creates the legal basis for citizens to request for government information. Some of these requests can be quite straightforward, but for more controversial information, there is a need to institute a rules-based appeals process to judge if information should or should not be disclosed. More importantly, an exemption list can be spelled out to delimit what, how, and when the government can rightfully keep a certain portion of information a secret. Furthermore, classified information should, after a stipulated period, be released back into the public.

In many critical junctures, Malaysia could have benefitted from an FOI law which could reveal information that the public deserved to have known. See Section 6 for greater details.

### 3.2 Assessing Elements of FOI Law

In light of the above problems with implementation, the first step is to ensure that the law establishing FOI is sufficiently robust. International researchers and activists in examining comparative FOI implementations have created standards for assessing comparative FOI legislature. Here, we present Article 19’s *The Public’s Right to Know: Principles on Freedom of Information Legislation* which comprises 9 broad principles, as well Access Info Europe and the Center for Law and Democracy’s *Right to
Information Legislation Rating (RTI-rating.org), which rates the strength of FOI laws through 61 indicators.

Overall, the RTI-Rating indicators measure seven out of the nine Article 19 Principles. The two unmeasured principles are: Principle 2, “Obligation to Publish”, which deals with proactive disclosure, i.e. information and categories that the government voluntarily publishes to the public; and Principle 7, “Open Meetings”, which establishes a presumption that all meetings of governing bodies are open to the public.

A few RTI-Rating indicators also measure something that Article 19 Principles do not mention: sanctions. RTI-rating Indicators #49-#52 deal with empowering FOI-related bodies to enforce FOI or give legal protections to bureaucrats who act in good faith with FOI.

<table>
<thead>
<tr>
<th>Article 19</th>
<th>RTI-RATING INDICATORS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Maximum Disclosure</strong></td>
<td>#1: The legal framework (including jurisprudence) recognises a fundamental right of access to information.</td>
</tr>
<tr>
<td>“that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances”</td>
<td>#2: The legal framework creates a specific presumption in favour of access to all information held by public authorities, subject only to limited exceptions.</td>
</tr>
<tr>
<td></td>
<td>#3: The legal framework contains a specific statement of principles calling for a broad interpretation of the RTI law. The legal framework emphasises the benefits of the right to information.</td>
</tr>
<tr>
<td></td>
<td>#4 Everyone (including non-citizens and legal entities) has the right to file requests for information.</td>
</tr>
<tr>
<td></td>
<td>#5: The right of access applies to all material held by or on behalf of public authorities which is recorded in any format, regardless of who produced it.</td>
</tr>
<tr>
<td></td>
<td>#6 Requesters have a right to access both information and records/documents.</td>
</tr>
<tr>
<td></td>
<td>#7: The right of access applies to the executive branch with no bodies or classes of information excluded.</td>
</tr>
<tr>
<td></td>
<td>#8: The right of access applies to the legislature, including both administrative and other information, with no bodies excluded.</td>
</tr>
<tr>
<td></td>
<td>#9: The right of access applies to the judicial branch, including both administrative and other information, with no bodies excluded.</td>
</tr>
<tr>
<td></td>
<td>#10: The right of access applies to other public authorities, including constitutional, statutory and oversight bodies.</td>
</tr>
<tr>
<td></td>
<td>#12: The right of access applies to a) private bodies that perform a public function and b) private bodies that receive significant public funding.</td>
</tr>
<tr>
<td><strong>Promotion of an Open Government</strong></td>
<td>#54: Public authorities are required to appoint officials or units with dedicated responsibilities for ensuring that they comply with their information disclosure obligations.</td>
</tr>
<tr>
<td>“As a minimum, the law should make provision for public education and the dissemination of information regarding the right to access information ... The law should provide for a number of mechanisms to address the problem of a culture of secrecy within government.”</td>
<td>#55: A central body, such as an information commission(er) or government department, is given overall responsibility for promoting the right to information.</td>
</tr>
<tr>
<td></td>
<td>#56: Public awareness-raising efforts [e.g. producing a guide for the public or introducing RTI awareness into schools] are required to be undertaken by law.</td>
</tr>
<tr>
<td></td>
<td>#57: A system is in place whereby minimum standards regarding the management of records are set and applied.</td>
</tr>
<tr>
<td></td>
<td>#58: Public authorities are required to create and update lists or registers of the documents in their possession, and to make these public.</td>
</tr>
<tr>
<td></td>
<td>#59: Training programs for officials are required to be put in place.</td>
</tr>
<tr>
<td></td>
<td>#60: Public authorities are required to report annually on the actions they have taken to implement their disclosure obligations.</td>
</tr>
<tr>
<td></td>
<td>#61: A central body, such as an information commission(er) or government department, has an obligation to present a consolidated report to the legislature on implementation of the law.</td>
</tr>
<tr>
<td><strong>Limited Scope of Exceptions</strong></td>
<td>#29: The exceptions to the right of access are consistent with international standards.</td>
</tr>
<tr>
<td>“All individual requests for information from public bodies should be met unless the public body can show that the information falls within the scope of the limited regime of exceptions.”</td>
<td>#30: A harm test applies to all exceptions, so that it is only where disclosure poses a risk of actual harm to a protected interest that it may be refused.</td>
</tr>
<tr>
<td></td>
<td>#31: There is a mandatory public interest override so that information must be disclosed where this is in the overall public interest, even if this may harm a protected interest. There are ‘hard’ overrides (which apply absolutely).</td>
</tr>
<tr>
<td></td>
<td>#32: Information must be released as soon as an exception ceases to apply. The law contains a clause stating that exceptions to protect public interests do not apply to information which is over 20 years old.</td>
</tr>
<tr>
<td></td>
<td>#33: Clear and appropriate procedures are in place for consulting with third parties who provided information which is the subject of a request on a confidential basis.</td>
</tr>
<tr>
<td></td>
<td>#34: There is a severability clause so that where only part of a record is covered by an exception the remainder must be disclosed.</td>
</tr>
<tr>
<td>Processes to Facilitate Access</td>
<td></td>
</tr>
<tr>
<td>--------------------------------</td>
<td></td>
</tr>
<tr>
<td>&quot;All public bodies should be required to establish open, accessible internal systems for ensuring the public’s right to receive information.&quot; [Includes Appeals]</td>
<td></td>
</tr>
<tr>
<td></td>
<td>#13: Requesters are not required to provide reasons for their requests.</td>
</tr>
<tr>
<td></td>
<td>#14: Requesters are only required to provide the details necessary for identifying and delivering the information.</td>
</tr>
<tr>
<td></td>
<td>#15: There are clear and relatively simple procedures for making requests. Requests may be submitted by any means of communication, with no requirement to use official forms.</td>
</tr>
<tr>
<td></td>
<td>#16: Public officials are required to provide assistance to help requesters formulate their requests, or to contact and assist requesters where requests that have been made are vague, unduly broad or otherwise need clarification.</td>
</tr>
<tr>
<td></td>
<td>#17: Public officials are required to provide assistance to requesters who require it because of special needs.</td>
</tr>
<tr>
<td></td>
<td>#18: Requesters are provided with a receipt or acknowledgement upon lodging a request within a reasonable timeframe, which should not exceed 5 working days.</td>
</tr>
<tr>
<td></td>
<td>#19: Clear and appropriate procedures are in place for situations where the authority to which a request is directed does not have the requested information.</td>
</tr>
<tr>
<td></td>
<td>#20: Public authorities are required to comply with requesters’ preferences regarding how they access information, subject only to clear and limited overrides.</td>
</tr>
<tr>
<td></td>
<td>#21: Public authorities are required to respond to requests as soon as possible.</td>
</tr>
<tr>
<td></td>
<td>#22: There are clear and reasonable maximum timelines (20 working days or less) for responding to requests.</td>
</tr>
<tr>
<td></td>
<td>#23: There are clear limits on timeline extensions.</td>
</tr>
<tr>
<td></td>
<td>#24: It is free to file requests.</td>
</tr>
<tr>
<td></td>
<td>#25: There are clear rules relating to access fees, which are set centrally, rather than being determined by individual public authorities. These include a requirement that fees be limited to the cost of reproducing and sending the information.</td>
</tr>
<tr>
<td></td>
<td>#26: There are fee waivers for imppecunious requesters.</td>
</tr>
<tr>
<td></td>
<td>#27: There are no limitations on or charges for reuse of information received from public bodies.</td>
</tr>
<tr>
<td></td>
<td>#28: The standards in the RTI Law trump restrictions on information disclosure (secrecy provisions) in other legislation to the extent of any conflict.</td>
</tr>
<tr>
<td>Costs</td>
<td></td>
</tr>
<tr>
<td>&quot;Individuals should not be deterred from making requests for information by excessive costs&quot;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>#24: It is free to file requests.</td>
</tr>
<tr>
<td></td>
<td>#25: There are clear rules relating to access fees, which are set centrally, rather than being determined by individual public authorities. These include a requirement that fees be limited to the cost of reproducing and sending the information.</td>
</tr>
<tr>
<td></td>
<td>#26: There are fee waivers for imppecunious requesters.</td>
</tr>
<tr>
<td></td>
<td>#27: There are no limitations on or charges for reuse of information received from public bodies.</td>
</tr>
<tr>
<td></td>
<td>#28: The standards in the RTI Law trump restrictions on information disclosure (secrecy provisions) in other legislation to the extent of any conflict.</td>
</tr>
<tr>
<td>Disclosure Takes Precedence</td>
<td></td>
</tr>
<tr>
<td>&quot;secrecy laws should not make it illegal for officials to divulge information which they are required to disclose... Over the longer term, a commitment should be made to bring all laws relating to information into line with the principles underpinning FOL.&quot;</td>
<td></td>
</tr>
</tbody>
</table>
Protection for Whistleblowers

“Individuals who release information on wrongdoing must be protected from retaliation and where the problem is unlikely to be resolved through formal mechanisms.”

#53: There are legal protections against imposing sanctions on those who, in good faith, release information which discloses wrongdoing (i.e. whistleblowers).

#49: The external appellate body has the power to impose appropriate structural measures on the public authority.

#50: Sanctions may be imposed on those who wilfully act to undermine the right to information, including through the unauthorised destruction of information.

#51: There is a system for redressing the problem of public authorities which systematically fail to disclose information or underperform.

#52: The independent oversight body and its staff are granted legal immunity for acts undertaken in good faith in the exercise or performance of any power, duty or function under the RTI Law. Others are granted similar immunity for the good faith release of information pursuant to the RTI Law.

These indicators represent the best practices from across the world. It is possible to aspire to be the best in the world: in the latest September 2018 revision of RTI-rating, the Afghanistan Freedom of Information Law passed in 2015, took the first-place ranking, surpassing the previous leader in the field, Mexico.

It must be noted that RTI-rating.org rankings only consider the strength of legislature — there can be obstructions in implementation, such as the lack of awareness of bureaucrats of the law, or judges interpreting the law in an extremely strict manner that does not privilege the right to information. Even from the surveyed countries, typical weaknesses of legislature include “limited scope (of access), over-broad exceptions regimes, shortcomings in oversight and appeals mechanisms, and lack of legal requirements to promote awareness of the public’s right of access to information”.

Nevertheless, as a starting point, the law itself must enable the expression of the principle of maximum disclosure as far as possible.

3.3 ELEMENTS AS EXPRESSED IN SELECTED COUNTRIES

Given the above principles, C4 Center surveyed the laws of several states to give a more concrete idea of the elements of an FOI law. We chose to examine the development, strengths and weaknesses of six countries: the UK and the US as the most well-known English-speaking countries with FOI laws, the neighbouring Southeast Asian countries of Indonesia and Philippines (the latter which only has a Presidential order), as well as two examples topping the RTI-rating leader board, India and Mexico. The table on the last page of this section presents a summary of findings which show the presence and levels of FOI features to demonstrate comparable global best practices. In Section 4.2, we present how these countries construct their exemptions lists.

The percentage of occurrence of a particular FOI feature does not mean that it is the best practice. Best practices are when the rights of an individual citizen to request for information trumps that of the state’s ability to unjustly deny them of information.
PHILIPPINES: Ranking 120th and scoring 46 of 150 points in the RTI-rating.org September 2018 revision, Philippines’s FOI environment is considered weak. Historically, a bill was filed in 1992 but was never passed. Only recently in 2016, President Duterte ordered a Freedom of Information Executive Order (EO), which allows the public to request for documents and records, but it only covers the executive branch. Filipino civil society also has reported their tests on FOI requests were often met with implementation failures, and a controversy brewed in August 2017 as the public asset declaration forms (Statutory Assets, Liabilities and Net Worth declarations, or SALN) of cabinet officials were heavily redacted. Foundation for Media Alternatives highlighted that public officials redacted it unjustly on data privacy concerns.

Additionally, RTI-rating notes that many of its exemption categories against disclosure are “overbroad or illegitimate” and some exemptions do not have harm tests or public interest tests. It also scores very weakly in its appeals process (being only an executive order and therefore its independence is questionable and has no legislated strength to sanction, conduct training or order a disclosure) and promotional measures (while it mandates manuals to be published by each agency, it does not need to report to parliament).

UNITED STATES: The USA was the forerunner in enacting a modern FOI law as its 1970 enactment triggered many other governments to follow suit. However, the USA law is slowly falling behind newer laws as it now ranks 69th and scores 83 out of 150 points, a decidedly middle-of-the-road score and ranking. Despite that, RTI-rating notes that "the USA is a good example of a country where practice outstrips the legislative framework", which means that implementation favours the public more than what the laws provide. Nevertheless, they highlight that "many exceptions are not harm tested and there is only a very limited public interest override. The United States also lacks a specialised appeals body and, while American courts have been somewhat good in defending the right to information, they cannot do the job as effectively or expeditiously as an independent appeals body.”

Mendel also notes that "weaknesses include rules on timely processing of information which may be circumvented, permission to classify documents, which has expanded significantly in recent years, and the lack of an independent administrative oversight mechanism, including with the power to hear complaints about failures by public bodies to apply the rules properly", although it is balanced by "good provisions on fees, strong rules on the electronic provision of information and a number of good promotional measures”.

---

UNITED KINGDOM: As a case study, the UK is particularly interesting for Malaysia as we inherit our judicial system practices and laws from the UK. In 1911, the UK passed their Official Secrets Act which dealt with espionage, and its Section 2 made the unauthorised disclosure of any information on any subject an offence. Eventually, in 1989, section 2 was abolished to narrow it down to certain categories. Despite a robust and independent media industry campaigning for freedom of information, its civil service still clung on to its secrecy privileges. An eventual FOI law was passed in 2000, coming into force in 2005 (delayed by the 11 September terrorist attacks).62

Toby Mendel notes that the UK law has a “very broad regime of exceptions” (exemptions), and “go beyond what has been considered necessary in other countries”. Furthermore, the majority of exemptions are not subject to harm tests, and there is a long list of “absolute exemptions” not subject to public interest overrides. Additionally, while it does mandate government agencies to proactively publish data, it leaves the schedule of publications up to the agency itself to develop.63

In balance, there are several positive developments since the passing of the 2000 law. The maximum duration for exemption was reduced from 30 years to 20 years, coverage of the act was extended to a greater number of agencies, inclusive of companies wholly owned by the public sector.64 A 2016 Independent Commission on Freedom of Information Report also made recommendations, amongst others, to harmonise and marginally liberalise requests for information on government policy formulation, Cabinet material and inter-ministerial communications.65 MPs are also pushing for government contractors to also be included in the coverage of the law.66

INDONESIA: The source of Indonesia’s FOI laws comes from civil society actors that had been pushing for a law since 2000. Eventually, a Public Information Disclosure Act was adopted in 2008, coming into force in 2010. Another two laws were also passed to supplement and clarify the law. RTI-rating.org notes that Indonesia has the “potential to rank among the strongest in Asia” with its biggest weaknesses in that the Information Commissioner’s decisions are not legally enforceable, and that information can be classified through other laws.67 Specifically, a more recent State Intelligence Law 2011 is in contradiction with their FOI Law, as it criminalises “revealing or communicating state secrets” without strict definitions of national security. A constitutional court challenge of the law has been unsuccessful.68 FreedomInfo.org highlighted four main challenges from two reports:

- The culture of secrecy still has not been addressed as “most officials have continued to take more-or-less the same approach to confidentiality”
- exceptions are understood differently in different public authorities and more training is required;
- the law conflicts with other pre-existing laws; and,

<table>
<thead>
<tr>
<th>Section</th>
<th>Points</th>
<th>Max score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right of access</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>Scope</td>
<td>25</td>
<td>30</td>
</tr>
<tr>
<td>Requesting procedures</td>
<td>20</td>
<td>30</td>
</tr>
<tr>
<td>Exceptions &amp; refusal</td>
<td>13</td>
<td>30</td>
</tr>
<tr>
<td>Appeals</td>
<td>23</td>
<td>30</td>
</tr>
<tr>
<td>Sanctions &amp; protections</td>
<td>7</td>
<td>6</td>
</tr>
<tr>
<td>Promotional measures</td>
<td>10</td>
<td>10</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Points</th>
<th>Max score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right of access</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td>Scope</td>
<td>28</td>
<td>30</td>
</tr>
<tr>
<td>Requesting procedures</td>
<td>13</td>
<td>30</td>
</tr>
<tr>
<td>Exceptions &amp; refusal</td>
<td>16</td>
<td>30</td>
</tr>
<tr>
<td>Appeals</td>
<td>25</td>
<td>30</td>
</tr>
<tr>
<td>Sanctions &amp; protections</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>Promotional measures</td>
<td>10</td>
<td>10</td>
</tr>
</tbody>
</table>

Σ = 100  Σ = 150

\[
\begin{array}{|c|c|c|}
\hline
\text{Section} & \text{Points} & \text{Max score} \\
\hline
\text{Right of access} & 2 & 6 \\
\text{Scope} & 25 & 30 \\
\text{Requesting procedures} & 20 & 30 \\
\text{Exceptions & refusal} & 13 & 30 \\
\text{Appeals} & 23 & 30 \\
\text{Sanctions & protections} & 7 & 6 \\
\text{Promotional measures} & 10 & 10 \\
\hline
\sum = 100 & \sum = 150 \\
\hline
\end{array}
\]
• limited opportunities for Indonesian oversight bodies to develop a detailed jurisprudence interpreting the exceptions.\textsuperscript{69}

**INDIA:** India also presents an interesting case study for Malaysia because its laws derive from Commonwealth traditions and it maintains its own Official Secrets Act, but is in the top 10 of the RTI-ratings rankings. Its Right to Information Act (2005) law comes from a lengthy activist campaign to push for a stronger Freedom of Information Act (2002). There have been recent attempts to pass bills which add more exemptions to the law, but activists are staunchly campaigning to resist the erosion of their rights.

While comparatively one of the strongest laws in the world, RTI-rating offers commentary that their main issues are “blanket exceptions” in Schedule 2 for various security, intelligence, research, and economic institutes. Instead of such broad and sweeping exclusions, these interests should be protected by individual and harm-tested exceptions. The Indian legal framework also does not allow access to information held by private entities which perform a public function, and several of the law’s exclusions, including for information received in confidence from a foreign government, cabinet papers and parliamentary privilege, are also problematic.\textsuperscript{70} Toby Mendel in his analysis also notes that “the Law fails to [… ] provide for a locus of responsibility for the more general promotional measures, such as public education and training. As a result, these are currently provided for only in very general and discretionary terms”, and that two non-standard exemptions are present: “disclosure of information which would incite to an offence” and “information available to a person in his/her fiduciary duty”.\textsuperscript{71}

Nevertheless, their Official Secrets Act 1923 (which suffers from the same problem of lack of definition of ‘secret information’) is considered outdated and inconsistent with modern standards of governance. The RTI law explicitly overrides the OSA, being specifically mention, pursuant to Section 22. The de facto standard is now the *Manual of Departmental Security Instructions*.\textsuperscript{72}

Otherwise, Mendel notes that the Indian law has “extensive and progressive” proactive publication rules. Most, if not all of their exceptions do include a form of harm test and a strong public interest override, inclusive of anything in their Official Secrets Act. He also notes that in practice, the standard of harm is very high: “most cases requiring that the harm would in fact occur as a result of disclosure”.\textsuperscript{73}
Mexico: Previously the top-ranked country in the world under RTI-rating.org, Mexico passed the Federal Transparency and Access to Public Government Information Law in June 2002 under the Fox administration; it was unanimously adopted by both chambers of the Mexican Congress as part of a commitment by a new administration to fight corruption as well as a 1998 US declassification of the 1968 Tlatelolco Massacre files, which pressured Mexico to do the same. With the passage of the law, Mexico was the first Latin American to oblige the government to open information relating to human rights abuse. In 2007, the Mexican constitution was amended to explicitly include the right to access information. Consequently, all 31 local states of Mexico enacted their own FOI laws by 2008. At that time, Article 14 was unique in that it expressly prohibits the government from withholding information about crimes against humanity or gross human rights violations under any circumstance.74

However, civil society organisations still had reservations on the 2002 federal law and the 2007 constitutional amendment. There was no “independent oversight for FOI compliance for the legislative and judicial powers”, and “the distinctions between laws at the federal and local level diminished transparency in the country”.75 In 2014, an amendment was made to the 2002 law that:

“made labor unions, independent agencies, individuals, and corporations that receive public funds subject to transparency and access to information regulations. It required every public entity to document every action resulting from the exercise of its legal powers. It established the obligation to justify denials of requests. It established that every public entity must publish complete and updated information regarding the use of public resources and accountability indicators in their websites”.76

In 2015, the Mexican Congress passed a General Transparency Law to further enhance access to information by standardising legal frameworks and institutional capacities across jurisdictions which differed from each other. In consultation, civil society actors held reservations on:

negative effects on economic stability as a cause to classify information; the existence of perpetual classification; the classification of banking, financial, and tax information that involves public resources; the lack of protection for whistleblowers; the imposition of sanctions on public servants who release confidential information; and the possibility of establishing exceptions to publicity through other laws.77

All but the last of these concerns were addressed in the final bill, which then lead to Mexico’s high ratings on RTI-rating.org.

Nevertheless, there is still some discontent that the exemptions list exceed what was recommended by the OAS Model Law, and that expanded legislative discretion by establishing new grounds for reservation or confidentiality.78 A recent 2018 study making 307 test requests shows that the FOIA system is nominally working as requests were rarely ignored, although 62% of requests of state contracts were denied despite it being specifically obligated to be public. They also highlight barriers in lengthening delays and rising cost factors.79 There is an urban and education bias in FOI requests made, as most come from Mexico City, and three-quarters were made by college graduates.80

The Mexican case demonstrates that a strong political will in government and deep civil society partnership in the creation and amendment of the law can lead to strong legal outcomes.
<table>
<thead>
<tr>
<th>Item</th>
<th>Philippines</th>
<th>US</th>
<th>UK</th>
<th>Indonesia</th>
<th>India</th>
<th>Mexico</th>
</tr>
</thead>
<tbody>
<tr>
<td>RTI-rating.org Ranking (123 countries ranked)</td>
<td>120th</td>
<td>69th</td>
<td>42th</td>
<td>38th</td>
<td>6th</td>
<td>2nd</td>
</tr>
<tr>
<td>Time to response</td>
<td>15 days</td>
<td>20 working days</td>
<td>20 days</td>
<td>10 days</td>
<td>30 days</td>
<td>20 working days</td>
</tr>
<tr>
<td>Extension Possible?</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Mandates Civic Engagement</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Citizen Access</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Non-Citizen Access</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Can Request without stating reason</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Automatic referral to other agencies</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Fees</td>
<td>Free + necessary costs</td>
<td>Free + necessary costs</td>
<td>TBD by the Minister of the Cabinet Office</td>
<td>Free + necessary costs</td>
<td>&quot;Reasonable&quot; fee, Free if below poverty line</td>
<td>Free + material costs (no search fee)</td>
</tr>
<tr>
<td>Must State Reasons for Denial</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Appeals Process</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Appeal Window</td>
<td>15 days</td>
<td>90 days</td>
<td>21 days</td>
<td>30 days</td>
<td>30 days</td>
<td>15 working days</td>
</tr>
<tr>
<td>Explicit Categories of Proactive Disclosure</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Explicit Categories for Exemptions</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Explicit Automatic Declassification</td>
<td>No</td>
<td>Yes – generally 10 years</td>
<td>Yes – archived after 30 years</td>
<td>No</td>
<td>Yes – archived after 25 years</td>
<td>Yes – 12 years</td>
</tr>
<tr>
<td>Severability/Partial Disclosure Clause</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Punishable Offence</td>
<td>Disciplinary sanctions</td>
<td>*172</td>
<td>Level 5 on standard scale</td>
<td>Max 1 yr jail or 5 million rupiah</td>
<td>250 Rp each day, &lt; 25,000 Rp</td>
<td>Yes – Subject to a Federal Law</td>
</tr>
<tr>
<td>Mandated Annual Report</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Commission has right to ask</td>
<td>Yes</td>
</tr>
</tbody>
</table>
4.1 Public Interest Declassification

Generally speaking, a freedom of information law enables members of the public to request information held by government bodies. However, there are some cases where government information which falls within the schedule of exceptions (an official secret) becomes critical for public interest, especially when the exemption list falls to abuse in hiding corruption or in covering up mismanagement.

A public interest declassification clause allows for members of the public to apply for an override of secrecy provisions and compels government agencies to declassify and expose such information. Such a clause is critical because it extends the passive right to ask for necessary information regardless of how long and broad the eventual exemption list may be. After all, government agencies are likely to want a generous exemption list against information requests. A public interest declassification preserves the right for the public to receive information through mediation and review.

Note that this is not simply just an FOI request, but an appeal to declassify a piece of information that already has some aspect of legitimate grounds for exemption and secrecy. Some countries also have a mandatory public interest override, which is an absolute mandate for declassification when certain issues are involved, such as gross human rights violations and crimes against humanity.

Effectively, the public interest declassification clause balances the need for secrecy with public interest by allowing the judiciary to review the status of classified information, and to weigh the benefits against any harm of releasing such information.

To illustrate this, Article 19 gives a hypothetical example of an information request about malfunctioning rifles in the army. Would it be in the benefit of the public interest to reveal such information?

In this example, it could be argued that, even though an enemy would benefit from learning about the malfunctioning rifles (a “substantial harm” to national security), there are various other reasons why it would be in the public interest for the information to be disclosed. These reasons could include:

- Generating public pressure to have the rifles replaced.
- Exposing weaknesses in the procurement system that led to the army buying defective weapons.
- Holding incompetent or corrupt officials to account.

There are examples where public interest has intersected with non-disclosed government information, and where a robust public interest declassification clause made or would have made the difference:

- **United States**: The US Courts decided to release an internal investigation report from the Department of Homeland Security containing the identities of agents and third parties interviewed or mentioned in connection with an agency immigration raid that allegedly involved racial profiling, given the public interest in knowing whether such improprieties had occurred. To support the allegation of potential wrongdoing, the requester submitted affidavits from arrestees, declarations of [Immigration and Customs Enforcement] agents, and statements in an [Immigration and Customs Enforcement] report — all which suggested racial profiling had occurred.182
- **Australia**: Michael McKinnon (National FOI Editor of the Australian) sought access to policy documents relating to potential fraud under the First Homeowner’s Scheme. On the eve of the trial, the government issued a series of certificates claiming that the information being sought
are exempt and would not be in the public interest to release the information on seven grounds, such “interference with public servants capacity”, “tentative advice”, “ongoing sensitivity”, and “likely to be taken out of context”. He was unsuccessful in persuading the High Court that all of the grounds were unreasonable, and thus did not receive his information. A similar request in New Zealand by The Australian was processed within 24 hours.  

**South Africa:** The South African History Archive Trust (SAHA) requested access to evidence obtained by South African Reserve Bank (SARB) related to corruption during apartheid, with the suspicion of “fraud through the manipulation of the financial rand dual currency, foreign exchange or forging Eskom bonds, gold smuggling or smuggling of other precious metals” in relation to certain persons. SARB argued that they should be able to refuse, inclusive of grounds that the exemptions under the South African FOI Law justified non-disclosure of the records. The court ruled against SAHA, although for the reason of absence of the joinder of the listed individuals and that the scope of their request was impossibly vague.

Closer to home, The Selangor Freedom of Information Enactment 2011 actually does contain a public interest declassification provision in Section 15 as “Exceptions to Exemptions”:

**15. EXCEPTIONS TO EXEMPTIONS:**

(1) Notwithstanding section 14—

(a) a department shall grant access to exemption information to an applicant if public interest in disclosure outweights the harm of disclosure;

(b) The State Government shall have the power to disclose or allow the disclosure of the exempted information or to remove the classification of confidentiality assigned to any information or document and to disclose or allow access to the same at its discretion;

(c) The Information Officer may grant access to the exempted information if the information is required for an investigation of an offence or misconduct.

The Commonwealth Human Rights Initiative’s "Draft Model Freedom of Information Bill” contains the following section recommending a public interest declassification clause with a mandatory public interest override:

**DISCLOSURE OF EXEMPT DOCUMENT IN THE PUBLIC INTEREST**

35. Notwithstanding any law to the contrary, a public authority shall give access to an exempt document where there is reasonable evidence that significant—

(a) abuse of authority or neglect in the performance of official duty;

(b) injustice to an individual;

(c) danger to the health or safety of an individual or of the public; or

(d) unauthorised use of public funds,

has or is likely to have occurred or in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so.

Similarly, Article 19’s "Model Freedom of Information Law” and African Commission on Human and Peoples’ Rights “Model Law for African States on Access to Information” have a public interest override clause: 185
22. Notwithstanding any provision in this Part, a body may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless the harm to the protected interest outweighs the public interest in disclosure.

25. PUBLIC INTEREST OVERRIDE

(1) Notwithstanding any of the exemptions in this Part, an information holder may only refuse a requester access to information if the harm to the interest protected under the relevant exemption that would result from the release of the information demonstrably outweighs the public interest in the release of the information.

(2) An information officer must consider whether subsection (1) applies in relation to any information requested before refusing access on the basis of an exemption stated in this Part.

The test of public interest and its definition depends from country to country. In many jurisdictions, the definition of ‘Public Interest’ is left open to interpretation on a case-by-case basis. The logic of this to allow a broad definition depending on the context of each request for information (given a context of maximum disclosure). However, some jurisdictions do provide legal guidelines, especially when interpretation may err on the side of non-disclosure.

Broadly speaking, public interest should refer to the public good, or the best interests of society at large, rather than simply what is interesting to the public. The UK’s Information Commissioner’s Office does explain that “there is a public interest in good decision-making by public bodies, in upholding standards of integrity, in ensuring justice and fair treatment for all, in securing the best use of public resources and in ensuring fair commercial competition in a mixed economy”. Another definition that comes from the Supreme Court of Australia in an FOI context is that “it has at its core a notion of communal good, embracing matters…tacitly accepted and acknowledged to be for the good order of society and for the wellbeing of its members”.

Given definitions should remain circumstantial to each case, at a practical level, one can conduct a “Harm Test” and a “Public Interest test” to consider if disclosure is truly in the best interest of society. The Open Society Justice Initiative considers the following as a harm test:

[A] public authority must demonstrate that a disclosure threatens to cause harm to a protected interest to justify withholding. The harm test requires that the state shows a risk of a substantial and demonstrable harm to the legitimate interest. It must be demonstrated that the limitation is related to the identified legitimate aim, the disclosure would cause substantial harm to the aim and harm is sufficiently specific, concrete, imminent and direct and not speculative or remote.

Paterson also notes that there is a reference to weighing or balancing that can be found in many public interest tests. For example, in South Africa and Canada, access must be given to otherwise exempt records where the public interest in the disclosure of the record ‘outweighs the harm’.

Additionally, the Rwandan FOI law considers the following public interest:

a) promoting in public and private organs ‘the culture of informing the public about their activities’;
b) ensuring that the expenditure of public funds is subject to effective management and oversight;
c) to promote founded [sic] public debate;
d) keeping the public regularly and adequately informed about the existence of any danger to public health or safety or to the environment; and

e) ensuring that any public authority with [sic] regulatory mission properly discharges its functions.
Article 19 itself recommends the definition of public interest by citing The Ethics Committee of the British National Union of Journalists (NUJ):

a) Detecting or exposing crime or a serious misdemeanour;
b) Protecting public health or safety;
c) Preventing the public from being misled by some statement or action by an individual or organisation;
d) Exposing misuse of public funds or other forms of corruption by public bodies;
e) Revealing potential conflicts of interest by those in positions of power and influence;
f) Exposing corporate greed;
g) Exposing hypocritical behaviour by those holding high office.

The USA also has a list of harms for consideration:

a) Interfering with enforcement proceedings;
b) Depriving a person of the right to fair trial (disclosure gives one party an unfair advantage);
c) Disclosing the identity of a confidential source;
d) Disclosing law enforcement techniques that risks circumvention of the law; or
e) Endangering the life or safety of an individual.

Other countries also allow their oversight body to set the exact factors that would favour or not favour disclosure.

What should not constitute public interest?

Public interest does not simply mean that the public is merely ‘interested’ in it, similar to the latest gossip about celebrities. However, the government should not use the following grounds as reasons for non-disclosure:

a) that the information might be misunderstood or result in confusion;
b) the author of the document holds high seniority in the government agency;
c) that the requested information is overly technical in nature; or
d) disclosure would result in embarrassment to the government or to officials.
e) Disclosure would set (an unwelcome) precedent for similar requests in the future.

McDonagh also points out that certain FOI laws do construe public interest as one that restricts information from being released, on the presumption that disclosure ‘jeopardises public interests’, although these go in the spirit of the presumptive maximum disclosure of FOI.

‘Hard’ mandatory disclosures:

However, there are some jurisdictions that have ruled that there are some issues that are always in the public interest, and cannot be exempted, which can be labelled a mandatory public interest override. The most common are when information is likely to expose corruption or crimes against humanity. For example, The OAS model law recommends that exceptions do not apply in cases of serious violations of human rights or crimes against humanity. (article 44)

But more specifically, in South Africa and Uganda FOI Law, exemptions can be overridden in the case where “the requested record would reveal evidence of a substantial contravention of, or failure to comply with, the law, or an imminent and serious public safety or environmental risk”. In Trinidad and Tobago, St Vincent and the Grenadines, and Guyana, their exceptions are when “there is reasonable evidence that significant abuse of authority or neglect in the performance of official duty, injustice to an individual, danger to the health or safety of an individual or of the public or unauthorised use of public funds has or is likely to have occurred”.

Georgia also has very specific items that cannot be declassified: “Information relating to the environment and hazards to heath, structures and objectives of agencies, election results, results of
audits and inspections, registers of information and any other information that is not state, commercial, or personal secrets cannot be classified”.

4.2 LIST OF EXEMPTIONS

An FOI law needs to clarify specifically what areas are designated as exemptions to disclosure. (Some jurisdictions use exceptions which are effectively interchangeable.) This section is particularly important because if an FOI law intends to replace a national secrecy law such as the Official Secrets Act 1972, it must redefine holistically and comprehensively what rightfully should not be released to the wider public. The exemptions list ensures an "appropriate balance between the protected interests" of the state and "the need for openness".

However, from a rights-based perspective, the exemptions list threads a fine line in defining whether information is shared on a "need to know" basis or actually transforms government to view the dissemination of information through a “responsibility to share” lens. The intention of such lists is to create an environment where public servants can be confident that releasing information is both desirable for the execution of their duties and justifiable to their colleagues and superiors, unless clearly stated in a list of exceptions — and even so, is not mandatorily classified but released on discretion.

Nevertheless, as CLD and ICEL point out:

"no matter how carefully a regime of exceptions is crafted, it cannot manage to capture all cases where the larger public interest would be served by the disclosure of the information. In other words, it is not possible to draft exceptions so as to take into account all overriding public interests".194

Overall, the guiding principle on what can be exempted from disclosure is articulated in Article 19's The Public Right to Know, which postulates a three-part test to determine legitimate exemptions:

a) The information must relate to a legitimate aim listed in the law;
b) Disclosure must threaten to cause substantial harm to that aim;
c) The harm to the aim must be greater than the public interest in having that exemption.

Based on different international human rights standards, inclusive of Article 19’s own considerations, the categories of exemptions that are considered legitimate are:

<table>
<thead>
<tr>
<th>Categories</th>
<th>RTI Rating</th>
<th>Article 19</th>
<th>OAS Model Law</th>
<th>African Model Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 National Security and/or defence</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>2 public health and safety</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>3 Prevention, investigation, prosecution of crime</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>4 Third party privacy</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>5 Commercial and other economic interests</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>6 International Relations</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>7 legitimate policy making</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>8 Management of the economy</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>9 Tests and Audits and their procedures</td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>10 fair administration of justice and legal advice privilege</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>11 operations of public authorities</td>
<td>✓</td>
<td></td>
<td></td>
<td>✓ 195</td>
</tr>
<tr>
<td>12 conservation of the environment</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
All surveyed human rights standards unanimously agree on categories for **national security and defence, public health and safety, crime prevention, privacy, and commercial and economic interest**. These are relatively uncontroversial categories of information that should be withheld as not to jeopardise the position and interests of the state as a whole.

However, the recommendations do not cover certain categories. For example, Article 19 in their model law/principles, do not recommend **international relations** as a category for exemptions. For us, there are some reservations with regards to international trade negotiations (see section 5.2), and defence (see section 5.3). Historically, state-level negotiations have always been done in secret so as not to give away negotiation advantages due to information asymmetry. However, negotiations may be captured by narrow interests that may not reflect the wider citizen's interest. Some finer balancing may be required.

**Legitimate policy making** is not mentioned in the OAS model law. There exists a tradition that cabinets need to have open and free discussions of policy with the possibility of disagreement, but present a united front for support of their policies after decisions have been made.\(^{196}\) RTI rating and Article 19 may have deprioritised this as the content is seen to be a necessary feature of parliamentary democracy and the information may not be as immediately empowering to the average citizen.

**Tests and Audit.** This category turns up in the OAS and African model law as they are model laws in finer granularity than the RTI-rating.org recommendations or the Article 19 model law. These exist to prevent examination candidates in making FOI requests to release information about the subject of examinations or professional testing prior to the exams. This should be an entirely reasonable category to include as an exempted category, although the OAS notes that examinations should be accessible after the examination has been conducted.

**Management of the Economy.** There is some legitimacy in preventing the disclosure of information relating to portions of the national economy where economic policies undertaken by the government are not undermined through premature disclosure. For example, a document released prematurely on upcoming banking regulations or certain critical segments of the economy may cause a banking run (a sudden withdrawal of funds of one bank in particular). Potential government plans for Land or property sales are a cause for concern that would cause property speculation.\(^{197}\) However, because the most issues have an economic dimension, care must be taken such that exemptions are defined and interpreted narrowly.

**Fair Administration of Justice.** There is also legitimacy where confidentiality is required in law enforcement and parties involved in legal cases. Information regarding identities of investigating officers, witnesses, and informants need to be withheld in order to protect them from harm; non-disclosure is also justified if it obstructs the observation and investigation process of a criminal act, or reveals criminal intelligence data and plans to prevent transnational crime. Legal privilege must also be upheld. However, the following should remain accessible: judgement grounds of courts of law; circulars of law enforcement agencies; warrants to discontinue investigation; annual expenditure plans of law enforcement institutions; and reports of restitutions of corrupt funds.\(^{198}\)

**Operations of Public Authorities.** Indonesia’s example also may prove pivotal here. In their law, they afford a provision to classify memoranda or letters between public bodies or within public bodies so that those involved in forming government policy have an environment of free and frank exchange of ideas, or if it impedes the success of the policy due to premature disclosure, or obstructs the accomplishment of a negotiation being carried out. ICEL and CLD give the example that a government employee may not offer an honest assessment of a co-worker’s performance out of fear that they may be found out.\(^{199}\) However, there is some overlap with the need in public contracting and procurement as is it a primary source of corruption in many countries. This topical area is handled in greater depth in section 5.1.
Conservation of the Environment. Most model laws do not recommend protection for environmental information because citizens need access to environmental information in achieving sustainable development. The poor and minority groups are particularly vulnerable as they tend to rely more heavily on natural resources and the environment. Overall, the 1993 Rio Declaration recognises a right of access to environmental information. The Indonesian experience is that they do have an exemption for natural resources, which includes forests and fisheries, and their Law No 22 of 2001 on Oil and Gas bars the disclosure of information obtained from surveying and exploration activities. Their ostensible justification is state sovereignty, which itself is a weak argument. In practice, the Indonesian house of representatives does not consider there to be much need for classification in this area, and that the wide availability of satellite imagery technology makes classification a losing prospect. The only modestly reasonable justification is information relevant to uranium ore exploration, which may have some national security implications.

Exemptions in Malaysian State enactments: So far, the Selangor state FOI enactment has an extremely minimal exception list, covering only national security, breaches of confidence, trade secrets, information prejudicial to relations with another state, and information prejudicial to effective formulation of government policy. Penang has a longer list:

- a document that has been submitted to the State Executive Council for its consideration, is proposed by an Assemblyman to be so submitted, or is a document that was brought into existence for the purpose of submission for consideration by the State Executive Council;
- an official document of any deliberation or decision of the State Executive Council;
- information in court proceedings a document is an exempt document if it is of such a nature that it would be privileged from production in court proceedings on the ground of legal professional privilege;
- disclosure of Information which would be in contempt of the State Legislative Assembly;
- the information was obtained from a third party and to communicate it would constitute an actionable breach of confidence;
- to communicate it would, or would be likely to, seriously prejudice the commercial or financial interests of that third party; or
- information affecting the State economy;
- an Information Officer may refuse to disclose whether or not it holds a document, or refuse to communicate information, where to do so would, or would be likely to endanger the life, health or safety of any individual;
- information affecting enforcement or administration of the law;
- breach of copyright.

However, both state enactments are still subject to the federal-level Official Secrets Act.
<table>
<thead>
<tr>
<th>Exemptions</th>
<th>Philippines</th>
<th>USA</th>
<th>UK</th>
<th>Indonesia</th>
<th>India</th>
<th>Mexico</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>RTI-Rating Ranking</strong></td>
<td>#108 previously, #120 now score: 46/150</td>
<td>#56 previously, #69 now score: 83/140</td>
<td>#35 previously, #42 now score: 100/140</td>
<td>#31 previously, #38 now score: 101/140</td>
<td>#5 previously, #6 now score: 128/140</td>
<td>#1 previously, #2 now score: 136/140</td>
</tr>
<tr>
<td><strong>Intersections with other laws</strong></td>
<td>Section 4 – Denied access if the information falls under any of the exceptions enshrined in the Constitution, existing law. Item 9 Exceptions to EON2 – Other exceptions to the right to information under laws, jurisprudence, rules and regulations.</td>
<td>Subject to Data Protection Act 1998. Section 44 – Information is exempt if its disclosure is prohibited under any enactment or incompatible with any EU regulation. None found</td>
<td>Subject to Data Protection Act 1998. Section 44 – Information is exempt if its disclosure is prohibited under any enactment or incompatible with any EU regulation. None found</td>
<td></td>
<td>Article 14(I) – Information which may be treated as confidential, privileged, privileged commercial information or governmental confidential information under a specific legal provision.</td>
<td>Article 14(II) – Commercial, industrial, fiscal, bank or fiduciary secrets pursuant to a legal provision.</td>
</tr>
<tr>
<td><strong>Exemptions to disclosure based on cost</strong></td>
<td>None</td>
<td>None</td>
<td>Section 12 – Government can be exempt from providing information if compliance costs more than a £450 “appropriate limit” of £450 as stated in the The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td><strong>Vexatious Requests</strong></td>
<td>Section 11 EON2 – Not required to act upon an unreasonable subsequent identical or from the same requesting party whose request has already been previously granted or denied</td>
<td>None</td>
<td>Section 14 – Request may be refused if it is vexatious or a similar request has already been made by the same party and that request has already been complied</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td><strong>Foreign Relations / Defence /</strong></td>
<td>Item 2 – Privileged information relating to 5 U.S.C. § 552(b)(1) – National defence or foreign policy</td>
<td>Section 26 – Prejudicial to Defence/effectiveness of armed forces</td>
<td>Art. 17 (C) Public Information that if disclosed and provided to Public Information</td>
<td>Section 8(a) – Information, disclosure of which would prejudicially affect the sovereignty and integrity</td>
<td>Article 13(I) – National security or defence</td>
<td></td>
</tr>
<tr>
<td><strong>International Security</strong></td>
<td>security, defence or international relations</td>
<td>(c)(3) Exclusion: Existence of FBI foreign intelligence or international terrorism records are classified fact 5 U.S.C. § 552(b)(4) - Documents which would reveal “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”</td>
<td>Section 27 – Prejudicial to International Relations containing confidential information obtained from other states, courts or international organisations.</td>
<td>Requester could endanger state defence and security; (F) Public Information that if disclosed and provided to Public Information Requester could impose harm to international relations; of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence.</td>
<td>Section 28 – Prejudicial to International Relations containing confidential information obtained from other states, courts or international organisations.</td>
<td>Requester could endanger state defence and security; (F) Public Information that if disclosed and provided to Public Information Requester could impose harm to international relations; of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence.</td>
</tr>
<tr>
<td><strong>Internal Security &amp; Law Enforcement</strong></td>
<td>Item 6 of the Exception 6 – Information of premature disclosure</td>
<td>(c)(1) Exclusion: Subject of a criminal investigation or proceeding is unaware of the existence of records concerning the pending investigation or proceeding and disclosure of such records would interfere with the investigation or proceeding. (c)(2) Exclusion: Informant records maintained by a criminal law enforcement agency and the individual’s status as an informant is not known.</td>
<td>Section 23 - Security Bodies</td>
<td>Section 24 - National Security</td>
<td>Art. 17 (E) Public Information that if disclosed and provided to Public Information Requester could impose harm to national economic resilience;</td>
<td>Section 8(g) - information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes.</td>
</tr>
<tr>
<td><strong>Future Publication</strong></td>
<td>Item 7 Exceptions to EON2–Records of proceedings or information from proceedings which, pursuant to law or relevant rules and regulations, are treated</td>
<td>5 U.S.C. § 552(b)(5) – Documents which are “inter-agency or intra-agency memorandum or letters” which would be privileged in civil litigation</td>
<td>Section 34 - Parliamentary privilege</td>
<td>Section 35 - Information held by a government department relation to the formulation of government policy</td>
<td>Art. 17 (I)–memorandum or letters between Public Bodies or within Public Bodies, which in nature classified, unless determined otherwise by the verdict of Information Commission or court of law; and; (J) Information</td>
<td>Article 14(VI) – Opinions that are not part of the deliberation process of government officials, as long as a final decision has not been issued</td>
</tr>
<tr>
<td><strong>Information likely to cause prejudice to policy formulation</strong></td>
<td>Item 6 of the Exception 6 – Information of premature disclosure</td>
<td>Item 6 of the Exception 6 – Information of premature disclosure</td>
<td>5 U.S.C. § 552(b)(5) – Documents which are “inter-agency or intra-agency memorandum or letters” which would be privileged in civil litigation</td>
<td>Section 34 - Parliamentary privilege</td>
<td>Section 35 - Information held by a government department relation to the formulation of government policy</td>
<td>Art. 17 (I)–memorandum or letters between Public Bodies or within Public Bodies, which in nature classified, unless determined otherwise by the verdict of Information Commission or court of law; and; (J) Information</td>
</tr>
<tr>
<td>Personal/third party information</td>
<td>as confidential or privileged&quot;</td>
<td>Section 7 – The responsible officials shall afford full protection to the right to privacy of the individual unless: (i) if it is material or relevant to the subject-matter of the request and its disclosure is permissible under this order or existing law (ii) making reasonable security arrangements against leaks or premature disclosure of personal information. Item 4 – Information deemed confidential for the protection of the privacy of persons and certain individuals such as minors, victims of crimes, or the accused. 5 U.S.C. § 552(b)(6) – Documents which are &quot;personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.&quot; This exemption protects the privacy interests of individuals by allowing an agency to withhold personal data kept in government files. Section 40(1) – Personal data of the applicant is exempted. Section 40(2) – Any information is exempt if it does not fall under 40(1) and it satisfies the conditions of (3A), (3B), and (4A). Section 41 – Information is exempt if it was obtained from a third party in confidence and disclosure would constitute a breach of confidence. Art. 17 (H) Exemptions for Public Information that if disclosed and provided to Public Information Requester could reveal personal secrecy;</td>
<td>Secretaries and other officers.</td>
<td>Article 21 – Personal data may not be disclosed unless with express written consent.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Disclosure which would be in contempt of court proceedings</td>
<td></td>
<td>Section 32 – Court records. Section 42 – A document is exempt from production in court proceedings on the ground of legal professional privilege. Art. 17(G) – Public Information that if disclosed and provided to Public Information, Requester could obstruct due process of law;</td>
<td></td>
<td>Article 14(IV) – Judicial cases that have not as of yet become final. Article 14(V) – Public officer liability proceedings.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Various confidential information</td>
<td></td>
<td>S34 – Parliamentary Privilege S35 – Government Privilege S37 – Communications with the Royal Family and the granting of honours S38 - Endangering health &amp; safety S41 – Confidentiality S42 – Legal Profession Privilege. Art. 17(G) – Public Information that if disclosed could reveal contents of any personal authentic certificate and a person’s last wish or testament;</td>
<td></td>
<td>Article 13(IV) – Jeopardise the life or health of a person.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tax / Audit &amp; Government Operations</td>
<td>Item 8 Exceptions to EON2</td>
<td>5 U.S.C. § 552(b)(8) – Documents which are related to specified reports prepared by, on behalf of, or for the use of agencies which regulate financial institutions</td>
<td>S33 – Prejudice to audit functions</td>
<td>None</td>
<td>None</td>
<td>Article 13(V) – Cause damage to ongoing investigations</td>
</tr>
<tr>
<td>Environment</td>
<td>5 U.S.C. § 552(b)(9) – Geological and geophysical information and data, including maps, concerning wells</td>
<td>S39 – Environmental Information</td>
<td>Art. 17 (D) – Public Information that if disclosed and provided to Public Information Requester could reveal the natural resource assets of Indonesia;</td>
<td>None</td>
<td>None</td>
<td></td>
</tr>
<tr>
<td>Commercial</td>
<td>5 U.S.C. § 552(b)(4) – Documents which would reveal &quot;trade secrets and commercial or financial information obtained from a person and privileged or confidential.&quot;</td>
<td>S43 – Trade secrets prejudicial to commercial interests</td>
<td>Art. 17 (B) – Public Information that if disclosed and provided to Public Information Requester could obstruct protection of intellectual property rights and protection from unfair competition;</td>
<td>Section 8(d) - information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information.</td>
<td>Article 14(I) – Privileged commercial information under a specific legal provision Article 14(II) – Commercial secrets pursuant to any legal provision</td>
<td></td>
</tr>
</tbody>
</table>
4.3 An Independent Oversight Body

The oversight body charged with implementing a freedom of information law is crucial to its success. International experience shows that the implementation of FOI needs to overcome challenges and resistance with the entire government bureaucracy, especially one that has been accustomed to a culture of secrecy. Without a strong oversight body, information can be withheld or delayed incorrectly, or loopholes can be exploited to effectively deny access to information. Thus, a commission serves not only to review FOI appeal requests, but also to spearhead the actualisation of the very right to information.

The OAS notes that in the context of FOI implementation, “without a continuous oversight body, government efforts are dispersed and diluted with no clarity as to responsibilities, lack of clear guidelines, and reduced ability to conduct long-term planning and to promote best practices, thus costing governments more in terms of human and financial resources”. Neuman in a 2009 World Bank report, also notes that “Perhaps most critical to the overall legitimacy of an external enforcement model is its independence (perceived and real)… A series of factors determine the overall independence of the entity, including the manner of selecting the commission(ers), their term limit and procedures for dismissal, the branch of government from which they receive their powers and to whom they report, and autonomy in budgeting.”

There is a case for establishing a dedicated, independent information commission. The information commission serves as the catalyst for change in a highly bureaucratic environment. This is pertinent in the case of the Malaysia where the civil servants-to-population ratio is higher than many countries. As Right2info.org highlights:

“this right should not be underestimated. Introducing a modern access to information regime often requires many procedural and cultural changes within the administration, the introduction of new systems for managing and archiving information, support in transferring data into electronic format, and restructuring of internal decision-making procedures. All of this requires provision guidance and technical assistance to public bodies and training of public officials. The creation of an Information Commission can serve to protect the right of access to information by reducing the potential bottlenecks in the application of the law […] At the same time, members of the public need to know about how the right functions, how they can apply for information, what kind of procedures to expect and how to appeal if their rights are denied. […] Another positive role of the Information Commission is to gather information about the functioning of the right: statistics of the number of requests filed, the number answered, the time frames and the nature of the problems that have arisen, all of which will guide more effective implementation in the future.”

This line of thinking is aligned to several international legal codes: (1) In a decision by the Inter-American Court of Human Rights, the court noted that in “positive obligation” of a state to provide information, “an appropriate administrative procedure for processing and deciding requests for information” as well as providing “training to public entities, authorities and agents responsible for responding to requests for access to state held-information”; (2) In the Council of Europe’s 2002 Recommendation on Access to Official Documents states in Principle XI that requests for an official document “should have access to a review procedure before a court of law or another independent and impartial body established by law”; (3) In The Organization for Security and Cooperation in Europe’s Review on the Right of Access to Information in the OSCE region in May 2007, they recommended member states to create a dedicated oversight body which can investigate and order information releases, and educate and promote freedom of information.

Should an Oversight Body Be Combined? Right2info.org, while slightly dated, gives a good overview of the considerations of the oversight bodies with regards to other functions. In some governments, the
ombudsman office takes the responsibility of FOI oversight. This is because of (1) there is some overlap between an ombudsman’s duties of being an independent, non-partisan investigator of citizen’s complaints with FOI appeals mechanisms, and (2) some governments do not have the capacity or scale that warrant a dedicated body. In some governments, as well, the oversight body is combined with a data protection & privacy commission, because of the overlap with privacy concerns in FOI and the overall management of public information.

Meanwhile, in states which the Ombudsman’s office also undertakes the Freedom of Information portfolio, right2info.org argues that in countries with developing democratic traditions, the ombudsman can be saddled with other existing commitments, or has limited power to order the releases due to ombudsmen’s offices typically taking a mediatory rather than executive role. Neuman also highlights that ombudsmen often possess weaker powers of investigation, and have no order-making powers which in turn leave their recommendations to be disregarded.210

There are actually highly specific roles that requires a dedicated oversight body with trained staff to handle the necessary work to ensure freedom of information and the citizen’s right to access information. Right2info.org develops several categories to assess oversight bodies:

- An independent selection process for commissioner(s);
- Power to establish regulations and to create guidelines for officials;
- Responsibility to train officials;
- Power to order disclosures;
- Power to sue public bodies;
- Monitoring compliance of government agencies with the FOI law (both for systems of information requests and systems of proactive disclosure);
- Prerogative to review refusals;
- Mandated to raise public awareness;
- Provision of advice to requestors;
- Mandated to report to Parliament regularly, and;
- Recommending existing and proposed legislation.

Selection Process: There are two issues with the selection process to ensure that the commissioner(s) act in the interest of defending the rights of citizens and the promotion of maximal public disclosure. The first is to maintain the independence of the information commissioner(s). The candidate(s) must not appear to be a political appointee, has the support of civil society and can win the public trust. Right2info.org recommends that the nomination process be as “open and consultative as possible”, with public hearings that should be held by Parliament to consider a short list of candidates, and for the public to raise objections if candidates are less than independent. Additionally,

- Article 19’s and OAS’s Model Law recommends an appointment by the executive official (prime minister/president/head of state) after a nomination by 60% majority of the vote by the legislative party (parliament).211 The African Law is vaguer, but procedures are to be stipulated by Parliament. (Art 46)
- All model laws recommend a maximum of two terms per commissioner. Article 19’s model law recommends that each term is seven years; OAS Model Law recommends a 5-year term, and to stagger the commissioners so that no one government of the day dominates the appointment of commissioners (Art 57).
- Consequently, the OAS Model Law also recommends a minimum of three, but ideally at least five, commissioners to be appointed, as a smaller commission of three is more susceptible to abuse when two commissioners isolate the third politically or philosophically (Art 54).
- Article 19 and the African Model Law also recommends that commissioners can only be removed after a two-thirds majority vote in Parliament. The African model Law specifies that the termination can only happen on certain grounds, and the termination must be investigated by
an independent commission of inquiry who submits their findings to the appropriate authority. (Art 49(2))

The second issue is **qualification of the commissioner(s)**. There are generally no requirements for a commissioner to have had previous experience in government. However, some model laws do recommend for some criteria to ensure the commissioner discharges his/her duties without fear or favour. Additionally, the post must be of sufficient rank to attract a well-qualified candidate, and to ensure that the commissioner is serving full time or unbehendon to other interests, it should be legislated that he/she holds no other salaried employment. To avoid conflict of interest, the commissioner must not have connection with a political party.

- **Article 19’s** and **The OAS’s Model Law** recommends that commissioners’ pay scale is pegged to the level of a supreme court judge. This is also the case in at least Slovenia and Serbia’s FOI law. The African Model law recommends ‘a salary equivalent to that of other similar bodies in the state’. (Art 52).
- **African Model Law**: Limits outside work “activity, profession or trade for financial gain, or any political activity”. (Art 51), and cannot hold political office or political party position even five years preceding the nomination (Art 47). The OAS model law also recommends similar, but gives exceptions for “educational, scientific or charitable institutions”.
- **African Model Law**: consideration for gender balance (Art 46(d)); be publicly recognised human rights advocates and have demonstrable knowledge in access to information, transparency or public and corporate governance (Art 47(1)).

Finally, the last necessary factor for independence is **budgetary independence**. Holsen and Pascquier note that "a dearth of resources is one of the most commonly cited problems faced by ATI implementers and street-level bureaucrats". In order to carry out the functions listed above, the commission must itself has sufficient capacity and commission staff, which means a substantial guaranteed annual budget appropriated from the national budget by parliament. On average, right2info.org finds, in a survey of FOI commissions, that the average number of staff per population capita is about 1 staff per 300,000 citizens, with larger populations having a lower number of staff. So assuming a population of 30 million, a Malaysian federal information commission can be expected to be about 50-100 persons strong — more if it also takes up data protection and privacy oversight duties — and is exclusive of public information officers situated within ministries and government agencies. Budgets also need to include other project funding to carry out its other duties.
Article 6 of Article 19’s Model FOI Law states that a public body which falls under the FOI law should include any body which is “owned, controlled, or substantially financed by funds provided by the government or the state,” or which is “carrying out a statutory or public function”, provided they ”are bodies only to the extent of their statutory or public functions”. Additionally, it recommends that “the minister may by order designate as a public body any body that carries out a public function”.¹

The African Model FOI Law states early in its General Principles (Article 2(a)) that “Every person has the right to access information of public bodies and relevant private bodies expeditiously and inexpensively”, which it defines relevant private bodies as (a) owned totally or partially or controlled or financed, directly or indirectly, by public funds, but only to the extent of that financing; or (b) carrying out a statutory or public function or a statutory or public service, but only to the extent of that statutory or public function or that statutory or public service” (Article 1).¹

Article 3 of the OAS Model Law states that “This Law applies to all public authorities, including the executive, legislative and judicial branches at all levels of government, constitutional and statutory authorities, non-state bodies which are owned or controlled by government, and private organizations which operate with substantial public funds or benefits (directly or indirectly) or which perform public functions and services insofar as it applies to those funds or to the public services or functions they undertake”.¹

Additionally, C4 Center recognises that there are specific topical areas deemed ‘sticky points’: challenging areas for actualising freedom of information in Malaysia that need greater clarity. These issues are on government procurement, international trade negotiations, and defence deals. This section intends to address these issues areas by providing a basis for harmonisation with a freedom of information law.

5.1 TRANSPARENCY IN GOVERNMENT PROCUREMENT

Government procurement of goods and services is complicated, very likely opaque in many jurisdictions, and is historically a major site of corruption. Malaysia is no exception to this rule: every year, our auditor general’s reports highlight poor monitoring and poor implementation of government projects or purchases that make little sense. GIACC highlights that from 2013-2018, procurement is one of the issue areas that is most prone to corruption at 42.8%.214

While international standards on government procurement is a large topic deserving its own paper, there is some overlap with the principles of a Freedom of Information law — proactive publication, availability of relevant information to the public upon request, and the empowerment of civil society to examine and monitor the process. In general, international good governance practices in government procurement enshrine transparency in the procurement process through consistent and fair information management. However, the management of information is highly specific to the process of government procurement of goods and services, as transparency is also balanced against “principles of competition, equity, efficiency, and accountability”.215

There are several high-level international standards for government procurement that Malaysia may be said to be part of:

| Asia Pacific Economic Community’s (APEC) Transparency Standards for Government Procurement (2002),216 | Article 7 compels “each Economy will endeavour to maximize transparency in access to procurement opportunities”, especially though “publishing procurement opportunities in a medium readily accessible to suppliers”, “making the same information available to all potential suppliers”, and making publicly available requirements and procedures for pre-qualification of suppliers”.  
Article 8: “each Economy will make available for suppliers all the information required to prepare a responsive offer”.  
Article 9: “will maintain transparent criteria for evaluating bids and evaluate bids and award contracts strictly according to these criteria”.  
Article 10: “each Economy will award contracts in a transparent manner”. This should be done by publishing the outcome of the tender, and promptly notifying unsuccessful suppliers of the outcomes of their bids as a minimum. |
|---|---|
| The World Trade Organisation’s (WTO) revised Government Procurement Agreement (WTO GPA 2012). | Article VII promotes that notices of intended procurement should “remain readily accessible to the public, at least until expiration of the time-period indicated in the notice”.  
Article XVI on ‘Transparency of Procurement Information’, asks for procuring entities to inform participating suppliers of contract awards and, on request, give “an unsuccessful supplier with an explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier’s tender”. It also outlines that documentation be kept for at least 3 years and to collect and report statistics.  
Article XVII on ‘Disclosure of Information’, procuring entities “shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially and in accordance with this Agreement”.


The UNCITRAL Model Law 2011 is the most detailed of the three documents. In its preamble, it states the objectives of (e) Promoting the integrity of, and fairness and public confidence in, the procurement process; and (f) Achieving transparency in the procedures relating to procurement.

The model law recommends making available to the public “Judicial decisions and administrative rulings with precedent value in connection with procurement covered by this Law” (Article 5(2)) and promptly publishing notice of the award of the procurement contract or the framework agreement” (Article 23(1)).

Additionally, it recommends that the following information should be available to any person on request: “reasons for limiting the participation of suppliers or contractors in the procurement proceedings” (Article 8(5)); “the names of all suppliers or contractors that have been pre-qualified” (Article 18(9)); certain information relating to procurement proceedings such as names of suppliers who present submissions and the justifications of the framework of procurement (Article 25(2));

These international standards also propose principles on what, when, and how information about specific government procurement contracts that could be detrimental to national security, commercial trade secrets, or privacy can be managed.

Additionally, other relevant good governance standards include:

**Open Contracting Partnership's Open Contracting Global Principles (2014).**217

These principles were developed in a collaborative process involving nearly 200 members the open contracting community from government, private sector, civil society, donor organizations, and international financial institutions.

While not a long document, Article 1 notes that “Governments shall recognize the right of the public to access information related to the formation, award, execution, performance, and completion of public contracts.”

Article 3 recommends that “Governments shall require the timely, current, and routine publication of enough information about the formation, award, execution, performance, and completion of public contracts to enable the public, including media and civil society, to understand and monitor as a safeguard against inefficient, ineffective, or corrupt use of public resources.”

**OECD Principles for Integrity in Public Procurement (2009).**218

Principle #1: provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers.

Principle #2: governments should maximise transparency in competitive tendering and take precautionary measures to enhance integrity, in particular for exceptions to competitive tendering.

Principle #10: calls on governments to empower civil society organisations, media and the wider public to scrutinise public procurement.

Both the Open Contracting Global Principles and the OECD Principles are mentioned as aspirational standards in the Pakatan Harapan Manifesto under Promise 23.

A Transparency International report also recommended that a freedom of information law can be used to gather supplementary information that may not be made available by public procurement law to aid civil society monitoring of public procurement against corruption.219 Furthermore, while some non-disclosure can be tolerated during the bidding phase to ensure level competition, CLD and IREL recommend that “once the procurement process is complete, no harm will [ensue] from disclosing information about the process”.220
RECOMMENDATION: Good governance standards in procurement policy go hand-in-hand with freedom of information laws, as transparency is the key driving concept in both areas. It is recognised that more transparency is needed in government procurement practices. However, due to the competitive, technical, and time-sensitive nature of procurement policy, it may need its own separate law/legal reform of existing laws to implement transparency in its own procedures rather than have it spelled out in the proactive disclosure list of an FOI law. Nevertheless, an FOI law should be designed to complement procurement law and policy as a tool of last resort by whistleblowers and public watchdogs to detect corruption and maladministration in the case that procurement documents/decisions fail to be published. As a result, the FOI law, while complementary, must be harmonised with the laws regarding procurement.

5.2 Secrecy in International Trade Agreements Negotiation

Between 2008 and 2016, the United States spearheaded a wide-ranging regional trade agreement called the Trans-Pacific Partnership Agreement (TPPA) between itself and 11 other countries, Malaysia included. The text of the agreement under negotiation was kept mostly a secret, until versions of the document were leaked. Controversially, the implied strengthening of intellectual property rights for corporations would raise drug prices and allowed foreign companies to sue partner governments for alleged losses from policy change.221

While the new Trump administration of the US has effectively scuttled the TPPA, it shows how informational needs of citizens in international trade deals must be balanced against corporate/statist interest in international (trade) agreements.

So far, it is common practice and argument that potential trade partners must enter into a confidential arrangement over negotiations. Common justifications include that “a secretive approach can be seen as necessary to provide the negotiators with an environment of confidence in order to reach successful outcomes”,222 and that the “justification of popular control does not presuppose the publication of diplomatic negotiations”.223

However, this does not override popular and public interest in trade negotiations that may harm society’s own interest — and certainly not through the total restriction over the access to documents relating to international agreements until the finalisation of the text. In recognition of this, both WTO and TPP negotiations do have public consultation exercises but are often derided as ineffective.

Hitherto, there is no clear international agreement specifically outlining best practices as of yet. However, there is a relatively comprehensive European Parliament paper, ‘Comparative Study on Access to Documents (and confidentiality rules) in international trade negotiations’. While the document is situated in the supranational European Union Parliament context, especially on the Treaty of the Functioning of the EU (TFEU) and the Treaty of Lisbon which creates a right of access to documents, some principles can be drawn out.

Broadly, it makes recommendations for indirect public participation through Parliamentary transparency. It shows that the European Parliament’s International Trade Agreement (INTA) committee had created position of a Standing Rapporteur and Monitoring Groups for negotiations on international agreements. They may call for specific meetings with the representatives on the negotiating teams and have access to confidential information. The study notes that:

These parliamentary arrangements are not meant to overload and artificially complicate the negotiation and conclusion of international agreements. Instead, they are to ensure that Parliament, being the representative body of all the EU citizens, does not merely passively take note of the actions of the other institutions, but is afforded the opportunity to bring some
It also notes that the European Commission agreed to a graduated extension of the access “EU Limited” and “EU Restraint” to the INTA committee, and “Confidential Documents” which could only be accessed in a secure reading room.

Furthermore, the document argues that the TFEU compels that “The EP shall be immediately and fully informed at all stages of the procedure”, which include initial stages and negotiation stages.

If anything, Limenta neatly points out that transparency in international trade agreements should not just be phrased in transparency for transparency’s sake, but in terms of the public’s right to participate. While she notes that “there is no one-sized-fits-all model of public participation” as the complexity of negotiation grows and the definition of interested stakeholders expand, both “top-down” and “bottom-up” approaches need to be intensified to create a “two-way constructive dialogue between government and public”.

**RECOMMENDATION:** International trade agreement negotiations have historically been conducted in secret as part of diplomatic norms. However, there is a lot of room in finding that balance between transparency and accountability — the key is to continue to think of the wider public as a participating principal and partners in consultation, and act with the public as they are partners! If information cannot be widely disseminated, a rules-based tiered Parliamentary oversight mechanism needs to be a viable alternative.

### 5.3 Secrecy in Defence and Arms Deals

In 2002, the Malaysian defence ministry purchased two Scorpene-class submarines from French shipbuilders, DCN. However, the controversial and shocking murder of Altantuya Shaariibuu brought this defence contract into greater public scrutiny. RM540 million was paid out “in commission” for the deal to a company called Perimekar Sdn Bhd, which is purportedly linked to Abdul Razak Baginda, a close associate of the then-Defence Minister Najib Tun Razak. With defence procurement deals ranging to billions of ringgit and which deals place our national security on the line, there is a legitimate public interest in both ensuring that our defence remains credible, and that corruption itself does not undermine our security.

However, it must be recognised that there are two competing public interests in information about defence and arms deals: while the public is interested to maintain accountability of the defence ministry against corruption, the other is to maintain the effectiveness of the defence ministry in maintaining its operational edge in national security through the restriction of information.

In recognition that national security as one of the weightiest grounds for restricting information disclosure, 17 organizations and five academic centres (in consultation with 500 experts from across the world), issued a set of Principles on National Security and the Right to Information, otherwise known as 'The Tshwane Principles'.

These principles provide guidance to strike the right balance when drafting and revising laws and provisions relating to the state’s authority to withhold information on national security grounds, while preserving the citizen’s right to know.

At the very basic level, classification should be (a) drawn along categories prescribed by law in a narrow and precise way; (b) necessary in a democratic society, that the risk of harm from disclosure must outweigh the overall public interest in disclosure; (c) protects a legitimate national security interest.
It recommends that governments promulgate a list of categories that constitute public interest and that public servants may disclose without retaliation (Principle 37), as well as an exclusive list of narrow categories for non-disclosure. Furthermore, it gives an illustrative list of factors that may be considered in deciding when public interest in disclosure outweighs risk of harm (see Table 1).

<table>
<thead>
<tr>
<th>Factors Favouring Disclosure</th>
<th>Irrelevant Factors</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. promote open discussion of public affairs;</td>
<td>a. cause embarrassment to, or a loss of confidence in, the government or an official, or</td>
</tr>
<tr>
<td>b. enhance the government’s accountability;</td>
<td>b. weaken a political party or ideology</td>
</tr>
<tr>
<td>c. contribute to positive and informed debate on important issues or matters of serious interest;</td>
<td></td>
</tr>
<tr>
<td>d. promote effective oversight of expenditure of public funds;</td>
<td></td>
</tr>
<tr>
<td>e. reveal the reasons for a government decision;</td>
<td></td>
</tr>
<tr>
<td>f. contribute to protection of the environment;</td>
<td></td>
</tr>
<tr>
<td>g. reveal threats to public health or safety, or;</td>
<td></td>
</tr>
<tr>
<td>h. reveal, or help establish accountability for, violations of human rights or international humanitarian law</td>
<td></td>
</tr>
</tbody>
</table>

**Factors Favouring Non-disclosure**

disclosure would likely pose a real and identifiable risk of harm to a legitimate national security interest;

**Factors Favouring Disclosure**

<table>
<thead>
<tr>
<th>Irrelevant Factors</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. cause embarrassment to, or a loss of confidence in, the government or an official, or</td>
</tr>
<tr>
<td>b. weaken a political party or ideology</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Factors Favouring Non-disclosure</td>
</tr>
</tbody>
</table>

disclosure would likely pose a real and identifiable risk of harm to a legitimate national security interest;

**Table 1 – Tshwane Principles Recommended Factors of Disclosure and Non-Disclosure**

Part II of the Tshwane Principles outline recommendations on information that may legitimately be withheld:

a. Information about on-going defence plans, operations, and capabilities for the length of time that the information is of operational utility.
b. Information about the production, capabilities, or use of weapons systems and other military systems, including communications systems. (although the Principles also note that information about budget lines concerning weapons and other military systems should be made available to the public and commend states to publish and maintain a control list of weapons as encouraged by the Arms Trade Treaty.)
c. Information about specific measures to safeguard the territory of the state, critical infrastructure, or critical national institutions against threats or use of force or sabotage, the effectiveness of which depend upon secrecy;
d. Information pertaining to, or derived from, the operations, sources, and methods of intelligence services, insofar as they concern national security matters; and
e. Information concerning national security matters that was supplied by a foreign state or inter-governmental body with an express expectation of confidentiality; and other diplomatic communications insofar as they concern national security matters.

Principle 10 also mentions that the following should be proactively disclosed:

a. Violations of international human rights and humanitarian law;
b. Safeguards for the Right to Liberty and Security of Person, the Prevention of Torture and Other Ill-treatment, and the Right to Life;
c. Structures and Powers of Government (the existence of all military, police, intelligence and security authorities and their subunits, their regulations, accountability mechanisms, information needed for evaluating and controlling the expenditure of public funds, and major international commitments);
d. Decisions to use military force or acquire weapons of mass destruction;
e. Surveillance;
f. Financial Information (agency budgets, end of year financial statements, procurements rules, and audit reports);
g. Accountability Concerning Constitutional and Statutory Violations and Other Abuses of Power;
h. Public Health, Public Safety, or the Environment

Part III.A also gives recommendations when classification happens to legitimately classified information. When information is classified:

1. protective marking should be affixed indicating the level and maximum duration of classification (principle 11(a)(d));
2. a justifying statement included for the level and duration (principle 11(a)(e));
3. indication of the identity of the officer responsible for the classification (principle 13(b));
4. no information may remain classified indefinitely. National legislation should identify fixed periods for automatic declassification for different categories of classified information. (principle 16(c) and principle 17(d)).

RECOMMENDATION: While National Security issues have the strongest case for non-disclosure, the Tshwane Principles demonstrate that a clarity of specific areas for what can be disclosed when it pertains to public accountability can strike a balance between both national security and transparency. It is also recommended that different tiers of classification come with their respective maximum durations of classification, after which the information is automatically disclosed to the public.

5.4 COVERAGE OVER STATE OWNED ENTERPRISES

As demonstrated in Section 4, the Philippines FOI regime is relatively weak because its coverage only affects the executive branch of government, excluding the judiciary and the legislative parts of government. Therefore, it is a key criterion that any FOI law applies (with justifiable exemptions) over all parts of government, inclusive of the executive body, legislature, judiciary, state-owned enterprises, private bodies that perform a public function or receive significant public funding, and other public authorities, such as constitutional, statutory, and oversight bodies.

The most controversial area in Malaysia is perhaps state-owned enterprises (SOEs). There is growing cause for concern over the (mal)administration of government-linked companies (GLCs) and government-linked investment companies (GLICs) who serve as intermediaries between government and GLCs themselves. Therefore, there is a rights and good governance-based basis for FOI law to cover both GLCs and GLICs — but to what extent?

The problem is muddied conceptually as SOEs are also typically hybridised — besides being profit generating, they also provide some form of public good such as mitigating unemployment or the strategic development of a particular industry. They may take some level of government capital or the government acts as a guarantor for loans.

Because of this nature of being responsible for some provision of social good as well as being owned by the public sector, there are calls for greater transparency within the administration of Malaysian GLCs. There is clear maladministration of FELDA and Tabung Haji as a statutory body and 1MDB as a GLIC. Furthermore, the main international guidelines on SOE governance have been spearheaded by the OECD through the OECD Guidelines on Corporate Governance of State-Owned Enterprises (2015), which in turn broadly advocates for principles of transparency and disclosure at both the company and the state level.
However, Article 6 of the OECD guidelines makes recommendations that SOEs should observe standards of due diligence similar to listed companies, which means that the OECD guidelines stop short of FOI transparency requirements of allowing citizens to request information from SOEs. In the OECD milieu, transparency requirements of SOEs are usually aimed at SOEs being accountable towards a ministerial bureau in charge of SOE governance, audit bureaus or parliamentary oversight and regulated through a government companies law.\textsuperscript{230}

However, more modern human rights standards have evolved to recognise SOEs as under the purview of an FOI law, inclusive of the Article 19 Model FOI Law (1999), the African Model FOI law and the OAS Model FOI Law (see table). RTI-rating.org has an indicator for “the right of access applying to State-owned enterprises” of which 81 out of 123 FOI laws around the world have full coverage over SOEs. From our six case studies, Mexico, United States, United Kingdom, India, and Indonesia score 2 out of 2. Philippines scores 1 out of 2 for partial coverage.\textsuperscript{231}

Lane and Dixon notes that as a factual statement that in the late 90s, “governments generally view corporatisation and their engagement in commercial enterprise as incompatible with the FOI legislation... accordingly it has become the practice of governments to confer immunity on [Government Based Enterprises] engaged in competitive commercial activity by legislatively excluding them from the reach of FOI statutes”.\textsuperscript{232} Perhaps emblematically, Australia does not have coverage over all its SOEs. An Australian government commission reviewing their FOI in 1995 recommended that SOEs, which are purely market driven (minimal or zero provision of public good), should not disadvantage their market competitiveness by being subject to FOI laws, especially on trade secrets — only SOEs which do provide a public or social function should be subject to FOI requests as they directly impact citizens.\textsuperscript{233}

**RECOMMENDATION:** In principle, Malaysian GLCs and GLICs should have greater transparency and adhere to OECD Guidelines, regardless of whether they are market-competitive firms or serve a statutory or public function. To that extent, the proactive disclosure requirements for oversight of should be covered by the companies act or a more stringent due diligence law/guideline. But if we adhere to the exact minimum FOI principle of coverage based on their statutory or public function, then Malaysia need clear distinctions, direction, goals and KPIs over the social good that these SOEs provide. If FOI coverage over SOE is total, competitiveness of companies can be preserved by ensuring that trade secrets are on the FOI exemption list.

### 5.5 OVERLAP WITH ANTI-DISINFORMATION & ANTI-FAKE NEWS LAWS

Fake news is a human rights issue. ‘Disinformation’ (wilful sowing of wrong information with malicious intent) and ‘misinformation’ (inadvertent spreading of wrong information) critically affects the right to be informed during electoral periods and information affecting health through vaccines. At its worst, anti-fake news legislation becomes a pretence to prosecute and stifle (legitimate) government criticism.

However, while FOI and anti-fake news legislation typically fall under the same freedom of Expression umbrella in the human rights rubric, they are specifically two different sides of the same coin of publicly available information. If taken optimistically in principle, anti-fake news legislation intends to curtail the dissemination of false information. On the other hand, FOI legislation intends to protect and reveal (truthful) government information.

While we recognise that international anti-fake news legislation practices and norms are still developing as we speak, major documents have little mention of the impact of anti-fake news legislation on the shape of FOI legislation, and vice-versa. These include: Global Partners Digital's (GPD) booklet on disinformation and human rights; the 2017 Joint Declaration of the Special Rapporteurs on freedom of expression of the UN, OSCE, OAS, and AU; the joint report by Access Now, the Civil Liberties Union for Europe, and European Digital Rights (EDRi); and the EU Commission’s Code of Practice on Disinformation.\textsuperscript{234}
Principally speaking, FOI legislation fights against disinformation by providing a process for the public to obtain government-accurate and relevant information about themselves, thereby preventing speculation. If a country chooses to manage disinformation through a fact-checking body or through citizen media literacy campaigns, FOI legislation is complementary to it.

Internationally, Malaysia’s Anti-Fake News Act which was repealed in October 2019 was considered to be regressive, overly broad, and vulnerable to human rights violations and abuse. C4 Center’s position with the AFN was to repeal it. For more information, please refer to C4 Center’s Report on “Creating A Conducive Legal Environment for Freedom of Expression”.

**RECOMMENDATION:** Legislation meant to curb fake news that is vague and overly broad infringes on freedom of expression which includes freedom of information. To combat fake news, efforts must be taken to improve media literacy and enact effective FOI legislation.
THE INFORMATION ENVIRONMENT IN MALAYSIA

Taking note of the hitherto discussion of international practices of an FOI law, the main reason for why Malaysia needs a Freedom of Information Law is specifically to reform the information environment of Malaysia.

Malaysia’s Federal Constitution does not have a constitutional clause guaranteeing freedom of information or a right to access public sector data. Article 10 of the Federal Constitution only guarantees freedom of speech subject to certain conditions, and so far, has not been interpreted to include the right of access to information.

However, a position on the right of access to information can be inferred that it should be a guiding principle in Malaysia. As Christopher Leong says:

"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."237

Therefore, the right to seek, impart, and receive information is not only central to the freedom of speech and expression, but also necessary to effectuate other rights under the Constitution.

Hitherto, there have been too many cases of suspicious misgovernance being shied away by a culture of secrecy and patronage. This has mainly been facilitated by the abuse of the Official Secrets Act 1972 (OSA).

Recent developments with Selangor and Penang politics have seen state-level freedom of information enactments. While the Selangor law is decent, it also demonstrates certain contours of the challenge with freedom of information — especially in implementation and usage. Furthermore, both enactments are disappointingly circumscribed by the OSA.

The Economic Transformation Programme (ETP) of the previous Barisan Nasional government, identified Open Data as a National key Economic Area, which marks a first foray for Malaysia into this area. Open data, as routine and proactive disclosure of government information, is a vital facet of the information environment. However, Open Data is only valued in terms of economic gains, and its implementation leaves a lot to be desired.

However, as Malaysia has elected the Pakatan Harapan government, its electoral manifesto promises that “A Freedom of Information Act will be enacted, and financial provisions will be provided to implement this new Act” (Promise 14). This was made in the context of strengthening anti-corruption efforts and revising the Official Secrets Act 1972, the Whistleblower Protection Act 2010, and the Witness Protection Act 2009.

RECOMMENDATION: Because of the literal interpretation of the constitution, a Federal Constitution amendment to consider is to enshrine principles of right to information and right to access documents as a constitutional provision, in the long-term. Enacting a FOI law is a priority to change the information paradigm and make transparency the driving factor in PH governance framework.
6.1 The Official Secrets Act

The Official Secrets Act (OSA) 1972 is currently the main barrier against citizens’ right to information in Malaysia. As it stands, its powers are too sweeping and broad: it allows Ministers, Chief Ministers/Menteri Besar, or an appointed public officer to designate any other official document as “top secret”, “secret”, “confidential”, or “restricted”. Consequently, any official document is liable to be classified as an official secret, and not open to judicial review.

For better or for worse, it was originally enacted in 1972 to prevent the recurrence of the racial tensions of May 1969. To that purpose, the act has a schedule of specific items that were to be classified as official secrets (such as cabinet documents and documents concerning national security), and criminalises deliberate disclosure and receipt of them, even unintentionally.

However, the survival of the act as it is, in such a broad scope of definitions of an official secret, allows for abuse and misuse, both for the culture of the civil service and grand corruption.

First, the OSA breeds fear and distrust between civil service and the wider public through the classification of all official documents through a circular document called ‘Arahan Keselamatan’. Publicly available briefing notes on these documents imply that confidential documents are those which contain information that will be embarrassing to the government. Some briefing notes also single out ‘investigative journalists’, ‘the opposition’, and ‘members of the public with interests’ as groups of people which need to be denied government-held information. As a result, getting any information from the civil service is almost always futile, unless already sanitised as a class of pre-approved publicly accessible information. Interviews with media practitioners and journalists have indicated to us that the 1986 amendments to add a mandatory prison sentence to the OSA had a chilling effect throughout the industry. 238

More recently, one of the earliest significant milestones of the PH government was to declassify the Auditor General’s 1MDB Report, which was previously sealed under the OSA. We are reminded that the report was not included in the Public Accounts Committee Report on 1MDB because of the OSA, and Azmin Ali’s bid to have the report declassified by the Kuala Lumpur High Court, citing that he does not have locus standi, despite the fact of being a member of Parliament (Gombak). As a result, Malaysians’ confidence in the public management of government-linked investments have deteriorated.

Additionally, with a new Federal government in place, new secrets in the public interest have been discovered which should have been public in the first place. PH Finance Minister Lim Guan Eng has revealed that a suspicious RM9.4 billion gas pipeline deal has been classified as a red file in the Ministry of Finance, 240 while Dr. Wan Azizah Wan Ismail in her capacity as Women, Family, and Community Development Minister, discovered that a study by Protect and Save the Children on sexual abuse cases, was classified under the Official Secrets Act. 241

**RECOMMENDATION:** A potential Freedom of Information law needs to be decisive in reforming the government’s role as the main driver in our public information ecosystem. A new FOI law needs provisions which supersede the OSA and other secrecy laws if the OSA is not repealed itself; at the very least, an amendment to harmonise the OSA with FOI by deleting provisions granting broad secrecy powers is necessary.
6.2 State Freedom of Information Enactments

After Selangor and Penang fell to Pakatan Rakyat rule in 2008, they consequently enacted state-level Freedom of Information enactments in early 2010s. Selangor gazetted theirs in August 2011 (enforced 2013), while Penang gazetted in February 2012. Both enactments are relatively similar, but also differ in certain respects.

While the Selangor and Penang state-level Freedom of Information enactments are similar, they also have significant differences as well.

<table>
<thead>
<tr>
<th>SIMILARITIES</th>
<th>PENANG FOI ENACTMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Appoints information officers</td>
<td>1. Appoints information officers and the Appeals Board</td>
</tr>
<tr>
<td>and the State Information Board</td>
<td>2. Gives the right for people to make FOI requests</td>
</tr>
<tr>
<td>2. Gives the right for people to</td>
<td>3. Rejections can be appealed within 21 days</td>
</tr>
<tr>
<td>make FOI requests</td>
<td>4. State government has the right to declassify information</td>
</tr>
<tr>
<td>3. Rejections can be appealed</td>
<td>5. Partial disclosure is possible</td>
</tr>
<tr>
<td>within 21 days</td>
<td></td>
</tr>
<tr>
<td>4. State information board must</td>
<td></td>
</tr>
<tr>
<td>prepare annual report of usage</td>
<td></td>
</tr>
<tr>
<td>5. Partial disclosure is possible</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>MAIN DIFFERENCES</th>
<th>PENANG FOI ENACTMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. 30 days to respond; 7 days if</td>
<td>1. 14 days to respond, 48 hours if life or liberty threatened</td>
</tr>
<tr>
<td>life or liberty threatened</td>
<td>2. Application can automatically be transferred if the information is elsewhere</td>
</tr>
<tr>
<td>2. Must state the reasons of why</td>
<td>3. Long list of specified confidential information categories.</td>
</tr>
<tr>
<td>the FOI request is refused</td>
<td>4. Appeal decisions are incontestable.</td>
</tr>
<tr>
<td>20 years</td>
<td></td>
</tr>
<tr>
<td>4. State information board must</td>
<td></td>
</tr>
<tr>
<td>prepare annual report of usage</td>
<td></td>
</tr>
<tr>
<td>5. Destroying information is an</td>
<td></td>
</tr>
<tr>
<td>offence</td>
<td></td>
</tr>
<tr>
<td>6. Appeal decisions can be</td>
<td></td>
</tr>
<tr>
<td>contested again at a higher court.</td>
<td></td>
</tr>
<tr>
<td>7. Can fine people up to RM50,000</td>
<td></td>
</tr>
<tr>
<td>and/or 5 years’ jail for making</td>
<td></td>
</tr>
<tr>
<td>false application, destroying</td>
<td></td>
</tr>
<tr>
<td>information, wilfully obstructing</td>
<td></td>
</tr>
<tr>
<td>access</td>
<td></td>
</tr>
</tbody>
</table>

Table 2: Comparison of Selangor and Penang FOI Enactments

The Penang FOI enactment notably has a tighter time limit compared to the Selangor FOI enactment, which is short by international standards. The Penang FOI also has a long list of exceptions, spelling out what should be confidential information.

However, the Selangor enactment also has additional clauses over its Penang counterpart that puts disclosure as a priority. The Selangor enactment makes an offence of destroying government information, compels the government to prepare an FOI usage report for submission to the state council every year, and sets a maximum period of state classification for 20 years.

In terms of implementation, the Selangor enactment is also more accessible because of the lower cost for citizens to make a freedom of information request.

Even though the mandated time to respond is longer in the Selangor law, the Selangor law as drafted does feature more clauses that prioritise the public’s right to know when compared to Penang’s enactment.

Selangor has stronger a FOI legislation that privileges citizens and the disclosure of government information. Notably, when Pakatan Rakyat took over the Selangor State Government in 2008, officers took to destroying government documents, which led to the stronger penalisation component of the Selangor enactment and the criminalisation of destroying information.242
The Selangor State Government also publishes an annual report of usage of the FOI law. The 2017 report indicates low, but rising, year-on-year usage of FOI requests. Across 41 state agencies in 2016, the agencies which received the most requests were Jabatan Kehakiman Syariah Negeri Selangor (47 requests), Perbadanan Kemajuan Negeri Selangor (41 requests), and Lembaga Urus Air Selangor (23 requests).

The latter two are unsurprising because both organisations have been embroiled in controversy.243 They also are the agencies which hold the highest number of rejected requests (2013-2016).244

The report also states the average time for processing a request, which is 7 days from the date the request was made, the amount of money collected as processing fees, as well as a list of information officers.

It was also communicated to us that Majlis Perbandaran Ampang Jaya has the highest amount of requests amongst all the city councils (19 requests) as they take more steps to engage the public to use FOI facilities,245 and that changing the culture of bureaucracy in Malaysia to enable these requests was a long, tedious process.

The Penang FOI law does not have an annual report. However, Penang Deputy Chief Minister II Prof P. Ramasamy did reveal that there were about 71 FOI requests in Penang in 2015, and 47 for the first half of 2016. Of these, seven and two applications were rejected in each year respectively.246

There are other instances which require addressing as well:

• An earlier 2015 SELCAT report on the FOI enactment notes that it was relatively underfunded and public bodies bound by the enactment were undertrained to realise that there was such a law in the first place.247

• Yeo Bee Yin, during her time as an ADUN, made a request to find out the salaries of the CEOs of state-owned subsidiaries. It was turned down on the basis of it being “confidential” despite a freedom of information law.248

• A citizen, Madam Chia Gek Suan, requested for information on a massive highway project, the Kinarra-Damansara Expressway (KIDEX), but was met with non-disclosure ("they delayed responding formally to Madam Chia’s formal request, and then replied without providing the information requested", citing inadequate application and did not comply with FOI legislation).249

• A citizens’ lobby group, Say No to Dash (SNTD), opposed the building of the Damansara-Shah Alam Elevated Expressway (DASH). They applied unsuccessfully under the FOI law to obtain meeting minutes by the state executive council in relation to its building.250

• Steven Sim reports for the Penang legislation that “From January 2015 up till June 2016, the highest number of FOIE applications was to the Syariah Court to obtain documents such as court
orders and Muslim inheritance certificates (faraid). These documents do not need to go through FOIE previously”.  

- Requesting for information from the Penang government has a relatively high cost: RM50 for information in the current year, RM100 for information from previous years, and RM1 photocopy per page; FOI applicants must also sign a statutory declaration which is not mentioned in the law itself. Selangor only charges RM12.  

- Freedominfo.org’s analysis of the Penang FOI law is that: (1) it does not mandate routine proactive publications by state agencies; (2) the oversight body is not independent; (3) no sanctions are in place against officials who destroy information or wilfully denies access to information in bad faith; (4) documents on deliberations and decisions of the state executive council should not be exempt; and (5) declassification is solely by goodwill of the state authority, it does not codify a public interest test for disclosure.

- Freedominfo.org’s analysis of the Selangor FOI law is that: (1) it does not mandate routine proactive publications by state agencies; (2) the appointments to oversight body are opaque, undermining its independence; (3) restrictions on using information requested solely for the reasons stated in the application are overly burdensome; (4) the law does not mandate that the fees for requesting information be kept low.

It also bears reminding that although the other states do not have FOI enactments, these state-level enactments do not cover federal agencies, and are themselves limited by wide-ranging existing secrecy laws, especially the Official Secrets Act 1972. The OSA covers most government documents, while the Open Data initiatives, even at the state administrative level, are not taken seriously, so buy-in is relatively low.

In conclusion. While both FOI enactments are well-deserved landmarks in the march towards democratic empowerment, it also underscores the need for serious political commitment to continually reform bureaucracy. At the very least, the Penang and Selangor enactments are testbeds for FOI-type laws in Malaysia and demonstrate that they’re not an impossible dream in Malaysia.

**RECOMMENDATION:** The Selangor enactment is better from a rights-based perspective as it reports to its state executive council, has overall lower cost barriers for citizens to request information, the internal appeals board process is not a final decision, and it penalises non-compliance. However, as all FOI laws, there were some weaknesses in implementation — given the lack of training and internal funding, as well as the OSA also circumscribing what can be released. Other state governments should also consider adopting their own state-level FOI enactments.

### 6.3 PROCUREMENT AND E-PROCUREMENT PRACTICES

In a recent 2018 C4 Center policy paper on public procurement, we argued that there exists very serious problems with both internal control systems and external oversight mechanisms. Some of the information openness-related issues are that:

a) **notices of public procurement are decentralised and non-transparent:** information on tenders released is insufficient and non-standardised, spread across multiple different websites (myProcurement portal for Federal agencies, and each state has their individual portals);

b) **opaque evaluation and decision-making process:** despite having relatively comprehensive rules of evaluation, it is difficult to assess to what extent these rules have been followed due to non-disclosure of full results of evaluation committees;

c) **contract award is undislosed:** at the federal level, only the name of the winning bidder is disclosed, while Selangor and Penang also include the offered price. In both cases, they still lack the final bill of quantity, specification, and design offered by the winning bidder.
d) Because of the overall lack of transparency, civil society watchdogs face great difficulty in monitoring and detecting kickbacks, nepotism, bid-rigging, shell companies, and misrepresentation of facts.255

This dovetails with several other earlier reports as well, all which highlight similar issues with transparency, civil society involvement, and accountability in the Malaysian procurement system.256

Furthermore, the Pakatan Harapan government pledged in their manifesto that:

“The Pakatan Harapan Government will review the practice of government procurement and tendering system, as well as the processes to issue public private partnership contracts by the Public-Private Partnership Unit (UKAS). Our aim is to make sure that the criteria for bidding is transparent and consistent... The use of information technology and online systems will be widened so that individual and political influences in decision-making can be eliminated. Information about contracts that have been awarded will be posted online so that the public and civil society can check them. International best practices such as the relevant OECD guidelines and the Open Contracting Partnership standards will serve as a major reference in our reform”.257

The C4 Center report makes multi-pronged recommendations, which include improving processes at the administration level such as conducting needs assessments, strengthening monitoring capabilities, blacklisting underperforming contractors, and reducing procurement thresholds — likely through administration circular. Externally, it recommends a government task force for reform, the establishment of an independent ombudsman and a defence procurement ombudsman, the strengthening of the auditor-general’s office, and strengthening the independence of the Malaysian Anti-Corruption Commission.

However, two recommendations stand out which dovetail strongly with FOI issues, especially in terms of proactive disclosure: publishing bills of quantities, specifications and design, methods of procurement procedure used and criteria; and, publishing decisions on award of contract with justifications of selection.

**Recommendation:** Procurement and Freedom of Information have serious overlaps in transparency. As a result, the interaction between both must be seriously considered and harmonised. Due to the technical requirements, public procurement law and administrative circulars (not FOI) must mandate the timely publication of the necessary documents to ensure that the goals of competitiveness of bidding companies are maximised for the contracting agency. On the other hand, some provisions in the FOI exemption list can be made for exempting deliberation documents on procurement from disclosure until the awarding is completed.

**6.4 Open Data under the ETP**

Malaysia’s main thrust into the proactive publication of information comes from the Malaysian Public Sector Open Data (MPSOD) platform. In 2014, under the National key Economic Area (NKEA) pillar of Communications Content and Infrastructure (CCI), the Minister of Communications and Multimedia empowered the Malaysian Administrative Modernization and Management Planning Unit (MAMPU) to develop the platform, but instead of a rights-based approach, it emphasises the digitisation of information for the purpose of national productivity in the digital sector.258

A September 2015 government circular establishes a Jawatankuasa Penyelarasan Data Terbuka Sektor Awam under the Government IT and Internet Committee which is part of MAMPU. It also orders
respective committees and working teams to be set up in each government ministry and agency to oversee implementation and ensures that the necessary data is uploaded in the required formats.

The circular also includes a Government Open Data License, granting free use of the data, and a reference list of data categories to be published by the various ministries and agencies, although at their discretion.

The MPSOD gained ministerial support in August 2014, and a government portal, data.gov.my, was published to facilitate access. In May 2017, MAMPU announced an action plan for broader public access to government data under The World Bank’s Open Data Readiness Assessment (ODRA).259

A 2016 World Bank report on Malaysia’s Open Data Readiness notes that:260

- Open data buy-in among data-owning agencies is still a critical issue to be addressed in Malaysia.
- Stronger sense of purpose for open data as an instrument for impact
- Access to data is challenging and remains an area of concern among data users in Malaysia as the legal framework is fragmented
- Fees charged for data requests are inefficient and act as a further barrier with little benefit to data owners
- Little automated inter-agency data exchange practically means that there is not much high-quality data released
- Ongoing open data and big data programs likely to accelerate by connecting existing elements, not increased funding.
- Report ultimately concludes that Malaysia requires a high level of national leadership to achieve consensus across government agencies on the scope of legislative, regulatory, and/or policy changes that need to be made to turn open data into a practical reality and regular occurrence for data users large and small.

Similarly, the Open Data Barometer 2016 Malaysia Country Detail has noticed similar issues of the quality of proactively published open data. Out of the 15 categories, only educational performance data is considered to be "open". Census data was also high scoring but judged to be not open because of licensing issues. Otherwise, data does exist but is not open because of various reasons. As a result, the political, social, and economic impact of open data is low-scoring (average score of 15 out of 100).261

The critical issue here is again the culture of "buy-in" of various agencies need to be addressed, and federal legislative action that addresses this has the potential to change government culture and practices that take citizen empowerment seriously. Because of non-compliance, the quality of available proactively published data is relatively poor (see chart on opposite page). 262

<table>
<thead>
<tr>
<th>Data Set Categories as recommended by the 2015 Government Circular</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Companies</td>
</tr>
<tr>
<td>3. Earth monitoring data</td>
</tr>
<tr>
<td>9. Accountability and government democracy</td>
</tr>
<tr>
<td>10. Health</td>
</tr>
<tr>
<td>11. Science and Research</td>
</tr>
<tr>
<td>12. Statistics</td>
</tr>
<tr>
<td>13. Social mobility and welfare</td>
</tr>
<tr>
<td>14. Transport and Infrastructure</td>
</tr>
<tr>
<td>15. Housing and Town Planning</td>
</tr>
<tr>
<td>16. Tourism, Culture and Recreation</td>
</tr>
<tr>
<td>17. Agriculture</td>
</tr>
<tr>
<td>18. Halal hub data</td>
</tr>
</tbody>
</table>
Under Pakatan Harapan’s Government, the Prime Minister’s Office has been restructured to move MAMPU to the Ministry of Multimedia and Communications.

The Overall Readiness index captures a mixture of expert opinion and secondary data on readiness of different national subsection to secure positive outcomes from an open government initiative. The Implementation categories from left to right are Map Data, Land Ownership Data, Detailed Census Data, Detailed Government Budget, Details Data on Government Spending, Company Registration, Legislation, Public Transportation Timetables, International Trade, Public Health Sector Performance, Education Performance, Crime Statistics, National Environmental Statistics, National Election results, and Public Contracts. Finally, the Impact index intends to capture the strength of the impact of open data through expert survey. All the indices are normalised to scale from 0-100, with 100 being the best possible score.

**RECOMMENDATION:** Without strong political will to change political culture of bureaucracy, civil servants will resist viewing citizens as partners of governance in the spirit of transparency and accountability. Categories of proactive disclosure must be instituted as law, promulgated with greater political force, and enforced with punitive sanctions for non-compliance if necessary. A dedicated oversight body should be tasked to monitor and empowered to ensure compliance.
CONCLUSION AND RECOMMENDATIONS

It is clear that Malaysia needs a freedom of information law. However, the issue is not just when will we get the law, but how effective the law is set up in the first place. Global trends and thinkers have demonstrated as much, but its strength is also a matter of a principled right for Malaysians under any understanding of democratic governance. Freedom of information is unimplemented only as a matter of political will, rather than any sort of incompatibility with our society.

1. The Basics Must Be in Place

<table>
<thead>
<tr>
<th>Presumptive Right of Access</th>
<th>Wide Scope of Application</th>
<th>Unobstructive Requesting Procedures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clear Rules-based Exceptions</td>
<td>Independent Appeals Process</td>
<td>Appropriate Legal Sanctions</td>
</tr>
</tbody>
</table>

As defined earlier in Section 2, the basics of the freedom of information must be upheld. It must bring force to the presumption that information is free to access by default unless circumscribed by a clear and justified exemptions list. In the drafting of the law, it must compel government agencies to respond within 10–20 working days, with a good practice of expedited requests to be done within days – this will be crucial for investigative journalists.

The law must allow the scope of application to be wide as well, in all senses of the term. It must apply to all information the government possesses in any format, and requests can be fulfilled as a collation of information, documents, or documents with reasonably redacted information. It also means that requests are valid even when requested by non-citizens, without stating a reason, and without the ability to complete official documentation. This is in line with the right to information as a universal human right. It also means that it covers all federal ministries, agencies, and if possible, state-owned enterprises as well.

Fees for requests can be prohibitive to the average person, and growing international trends attempt to reduce the cost for requesting as much as possible. A request should receive an acknowledgement receipt, and if denied, reasons for non-disclosure must be stated. Any non-disclosure should be able to be appealed at an internal (administrative) and subsequently external (judicial) level. If it is found that administrative officers have been acting in bad faith, they must be punished. On the other hand, legal immunity must be extended to those who provide information under the law in good faith.

2. It must Supersede Secrecy Laws and Complement Others

The main problem with the state-level enactments is that they are subservient to the federal-level secrecy law, the Official Secrets Act 1972, and other laws impacting Freedom of Expression or have secrecy provisions. Nevertheless, the OSA has been the largest impediment to public anti-corruption scrutiny. In the reform of the information environment of Malaysia, such laws must be brought into line with principles of anti-corruption and transparency under a freedom of information regime which prioritises disclosure.

In this, India and the UK should be considered as a deeper case study as both have an official secrets law as well as a freedom of information law. In both cases, their respective OSA laws have been rendered
ineffective and superseded. Additionally, an FOI law should mutually complement other laws such as a potential public procurement act, the whistleblower act, and the witness protection act such that citizens have confidence that using FOI laws to access information does not endanger their own safety.

3. FOI is Not Incompatible with National Security or International Relations

By clearly spelling out the explicit categories for classification and non-disclosure, as well as adding the burden of justification for classification, a citizen’s right to information can be harmonised with national security interest. Such categories have been spelled out by the Tshwane Principles, which should be the guiding standard for the information which sits in this public interest-national security nexus. Additionally, there exists a lot of room for practical changes in the transparency of international trade negotiations if there can be a paradigmatic change conceiving of the wider public as participants in the process.

One alternative is to moderate the need for secrecy through parliamentary supervision and oversight of trade negotiations by the executive, as well as involving greater citizen participation mechanisms and contact points within the negotiation process of international agreements. MPs in a select committee act as agents for the wider public in examining documents and questioning government representatives at stages of the negotiation process. This may or may not be codified into law through an FOI law.

4. Implementation Can Be Difficult, But Surmountable

The Selangor and Penang experience confirms the wider international experience around the world that implementation can be difficult and can effectively bring even the most well-crafted FOI law to its knees. Thus, the FOI law needs a champion within bureaucracy that is still mired in a culture of secrecy: a strong oversight body, usually called the information commission. The commission functions to spearhead the change necessary, perform monitoring of the implementation of both proactive and reactive disclosure, reports usage rates to Parliament, and conduct training and promotional efforts to internal and external stakeholders.

Optimistically, it may take several years for FOI to take full effect. First, information systems within each and every government ministry must be modernised, sufficient money and effort dedicated to training public sector employees to comply with new information management standards, and outreach efforts must be intensified to promote its usage by civil society. The African Model Law even includes a ‘transitional period’ clause that allows for laxer service standards in the first few years as a runway to full-service delivery, which may be something we want to consider.

5. Political Will Is Necessary to Refine the Law and Make the Change

Many of the countries ranked on the top of FOI law, such as Mexico, did not get a good FOI law from the very beginning. Instead, it was a process of negotiated and managed change with several amendments, each progressively improving upon the law with stakeholder and civil society engagement. Political will is also necessary to enact the change of culture towards transparency: even though the US and UK do not hold the leading standard in transparency laws, their culture of openness and positivity towards citizen empowerment buoys up the law. If lawmakers, politicians, and leaders are not serious in leading the change, the FOI law can amount to nothing more than mimicry of ‘international standards’.

---

2 For this, look no further than the Thai experience where there was once a surge of requests when the Thai FOI law first came into power, the bureaucracy progressively failed its citizens as even its commissioners failed to turn up to work.
It is expected that FOI laws will initially have a low adoption and usage rate, if not a rise in corruption perception. Over time, more freely available public sector information will draw the wider public to working together with the civil service in bettering government service delivery and complementing anti-corruption efforts, leading to a true reduction in corruption and an improvement in service delivery and good governance. It is in this hope that such an FOI law can be implemented for the advancement of Malaysia.
ACKNOWLEDGEMENTS

C4 Center would like to thank all those involved in the drafting of this expansive report, in particular the author Ho Yi Jian and those that assisted the process of this important publication. We would like to thank Dr Sonia Randhawa for her constructive input into the authorship of this report, C4 Center interns, Ikmal Rozlan and Tee Kai Yan, for invaluable research support as well as advocates and campaigners in civil society for their endurance for pushing human rights as the core of good governance and anti-corruption initiatives.
REFERENCES AND ENDNOTES

9 Ibid., para. 20.
11 Malaysia was reputedly represented at the 1999 CHOGM but not by our then head of government.
26 Trapp, S., E., & Lemieux, V., ‘Right to information: Identifying drivers of effectiveness in implementation’.


29 LaMay et al, 2013, p. 8.

30 LaMay et al, 2013, p. 6; Roberts, 2010, p. 929.

31 LaMay et al, 2013, p. 13.


60 Philippines country page, RTI-rating.org. It’s notes say “The following exceptions in the regulations as overbroad or illegitimate: 8, 11, 14, 15, 20, 22-29, 39, 51, 53, 55, 56, 65, 68-73, 82, 84-87, 90, 92-105, 118, 119, 135, 140-142. Other Exceptions” 1-8 are also overbroad or illegitimate.” “Regulations definition of confidential information lacks harm tests, as do the following exceptions: 5, 9, 10, 17, 40, 42, 43, 45, 57, 58, 59, 60, 61, 62, 80, 120, 122, 132.” See https://www.rti-rating.org/country-data/Philippines
61 ‘History of freedom of information in the UK’, Campaign for Freedom of Information.
65 Ibid.
76 Ibid. p. 8.
77 Ibid. p. 10.
78 Ibid. p. 11.
82 Executive Order No. 2 Section 9(d).
83 The Freedom of Information Act § 552 6(A)(i).
84 The Freedom of Information Act 2000 Section 10(1).
85 Undang-undang Keterbukaan Informasi Publik 2008 Bab VI Pasal 22(7)
86 Section 7(1) of the Right to Information Act 2005.
87 Federal Transparency and Access to Governmental Public Information Act Article 44.
88 Executive Order No. 2 Section 9(e).

Inference from Freedom of Information Act 2000 Section 10(4) & (5)

Undang-undang Keterbukaan Informasi Publik 2008 Bab VI Pasal 22(8)

An extension is possible if the application needs to be referred to another agency.

Federal Transparency and Access to Governmental Public Information Act Article 44

Executive Order No. 2 Section 8.


Could not find specific mention.

Section 4(1)(b) of the Right to Information Act 2005

Federal Transparency and Access to Governmental Public Information Act, Article 2

Ibid. 32.

Ibid 38.

Ibid 41.

Ibid 30.

Inference from Section 3 of the Right to Information Act 2005

Federal Transparency and Access to Governmental Public Information Act, Article 2

Executive Order No. 2 Section 9(a).

Nothing under the Freedom of Information Act expressly provides that a reason must be given.

Ibid, Section 6(2) of the Right to Information Act 2005

Federal Transparency and Access to Governmental Public Information Act, Article 40

Nothing under the Executive Order 2 expressly provides for the stated.

No specific mention found.

Unclear where this is explicitly provided however the Freedom of Information Act 2000 Section 1(1)(i) could be it.

Undang-undang Keterbukaan Informasi Publik 2008 Bab VI Pasal 22(7)(b)

Section 6(3) of the Right to Information Act 2005

Federal Transparency and Access to Governmental Public Information Act, Article 28

Executive Order No. 2 Section 10.


Freedom of Information Act 2000 Section 9(3).

Ibid from Undang-undang Keterbukaan Informasi Publik 2008 Bab VI Pasal 22(7)(g)

Section 7(5) of the Right to Information Act 2005

Federal Transparency and Access to Governmental Public Information Act, Article 27

Executive Order No. 2 Section 12.


The Freedom of Information Act 2000 Section 17(3).

Undang-undang Keterbukaan Informasi Publik 2008 Bab VI Pasal 22(7)(c)

Section 7(8) of the Right to Information Act 2005

Federal Transparency and Access to Governmental Public Information Act, Article 45

Executive Order No. 2 Section 13(a).


The Freedom of Information Act 2000 Section 57(1).

Undang-undang Keterbukaan Informasi Publik 2008 Bab VIII Pasal 35(1).

Section 19 of the Right to Information Act 2005

Federal Transparency and Access to Governmental Public Information Act, Article 49

Ibid., Article 47.

Ibid., Article 57.

Undang-undang Keterbukaan Informasi Publik 2008 Bab VIII Pasal 36(1)/

Ibid Article 9. However, it uses the words “aggrieved by a decision made...” This could be interpreted to mean that the person has to have been aggrieved and a mere rejection is not grounds for appeal.

Federal Transparency and Access to Governmental Public Information Act, Article 49

Nothing under the Executive Order 2 expressly provides for the stated.

The Freedom of Information Act 5 U.S.C. § 552 (a)


Undang-undang Keterbukaan Informasi Publik 2008 Bab III Pasal 7(1).

Section 4(1)(b) , Section 4(2) – 4(4) of the Right to Information Act 2005

Federal Transparency and Access to Governmental Public Information Act, Article 7

Executive Order No. 2 Section 4.


The Freedom of Information Act 2000 Part II.

Undang-undang Keterbukaan Informasi Publik 2008 Bab V Pasal 17.

Section 8 & 9 of the Right to Information Act 2005

Federal Transparency and Access to Governmental Public Information Act, Articles 13 & 14

Nothing under the Executive Order 2 expressly provides for the stated.

Unable to find under the Freedom of Information Act.

Could not find this.

Nothing under the Undang-undang Keterbukaan Informasi Publik 2008 expressly provides for the stated.

Section 8(3) of the Right to Information Act 2005

Federal Transparency and Access to Governmental Public Information Act, Article 15

No specific mention found.


No specific mention.

Nothing under the Undang-undang Keterbukaan Informasi Publik 2008 expressly provides for the stated.

Section 10 of the Right to Information Act 2005

No specific mention.

Executive Order No. 2 Section 15.

Unable to find under the Freedom of Information Act, 5 U.S.C.§ 552.

‘Intentionally destroying records’, Section 77(3) of the Freedom of Information Act 2000

All offences under Undang-undang Keterbukaan Informasi Publik 2008 have a max imprisonment of 1 year but the fine amount depends on the offence.

Section 20(1) of the Right to Information Act 2005.

215 At the very least, the Indonesian approach is that it has a public procurement law (Presidential Regulation No. 54 of 2010, Article 5 and 68 specifically) that provides for the confidentiality of documents related to procurement of goods and services to “prevent irregularities”, ostensibly so that some decision-making information can be kept uniformly undisclosed so that no one competitor has advantage over others. In CLD and IREL, Interpretation of Exceptions, 2012, p 67.


220 CLD and IREL, Interpretation of Exceptions, 2012, p 68.


222 Electronic Frontier Foundation et al v Office of the United States Trade Representative No 08-1599 (RMC) (DDC, 29 May 2009); quoted from Michelle Limenta, ‘Open Trade Negotiations as Opposed to Secret Trade Negotiations: From Transparency to Public Participation’, New Zealand Yearbook of International Law [Vol 10, 2012], p 74.

223 José Calvet de Magalhães (translated by Bernando Futscher Pereira), The Pure Concept of Diplomacy (Greenwood Publishing Group, New York, 1988) p. 69; quoted from Limenta 2012, p. 78.


225 Maurer, Comparative Study on Access to Documents, p 27.

226 Limenta, Open Trade Negotiations, 2012, p 94.


231 https://www.rti-rating.org/country-data/by-indicator/10/


controversy-selangor-mb-releases-classified-documents-clear-air-azmins-dismissal


246 From C4 Center Meeting with Hannah Yeoh, 2017.


The Center to Combat Corruption and Cronyism