CENTRE FOR INDEPENDENT JOURNALISM
Advocating Media Freedom and Access to Information

Recommendation Paper

Aligning Official Secrets Act (OSA) 1972 with A New Federal RTI Legislation

December 2021

CENTRE FOR INDEPENDENT JOURNALISM

Advocating Media Freedom and Access to Information

The Centre for Independent Journalism (CIJ) is a feminist, freedom of expression watchdog and non-profit organisation that aspires for a society that is democratic, just and free, where all peoples will enjoy free media and the freedom to express, seek and impart information.

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Creating a Right to Information in Malaysia

Executive Summary

The government possesses and exercises its powers on trust for the people. Accordingly, the information it creates and holds in performance of its duties is not its sole property, but is also held on trust for the general public. The public's ability to access that information is of vital importance to mechanisms of political accountability that are central to a healthy democracy, and in aid of the constitutionally guaranteed right to freedom of speech.[1] Right to information legislation gives effect to these principles by imposing a presumptive duty on public authorities to disclose information they possess.

In Malaysia, the efficacy of any right to information legislation is hampered by a culture of secrecy in public administration. Such a culture is given legal force through legislation that confers public officials broad powers to classify information and makes the disclosure of classified information unlawful.

Therefore, the creation of a viable right to information regime requires the attainment of three key objectives. First, it must create a substantive legal right to information and a framework for its exercise and protection. Second, the creation of those legal rights must be coordinated with changes to legal provisions governing official secrets. Finally, these reforms must be sufficiently impactful to displace the existing culture of secrecy, and replace it with one of openness.

This report seeks to lay the groundwork for the attainment of these objectives through reforms to primary legislation. Part 1 will provide an outline on the existing legal environment, with particular attention to the Official Secrets Act 1972. It will analyse the ways in which current laws support a culture of secrecy and create obstacles to the right to information. On the basis of that analysis, Part 2 will suggest reforms to create a right to information on the basis of internationally accepted principles, and to amend the Official Secrets Act 1972 in line with such a right.

[1] Ashraf Shaharudin, "Open Government Data: Principles, Benefits and Evaluations" (Khazanah Research Institute Discussion Paper 12/20).

Part 1:

EXISTING LEGAL ENVIRONMENT

Part 1: Existing Legal Environment

The right to information is the public's right to access information created and held by public authorities in all branches of government, and at all levels. Its core justification is its necessity to ensure that public authorities, which exercise public power conferred by law, act transparently and are able to be held accountable for their actions. In the latter respect, its exercise creates the condition for a healthy practice of democracy in its instrumental role in providing the basis for political discourse. As noted by Abid Hussain (2000), UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression:

> *The right to seek or have access to information is one of the most essential elements of freedom of speech and expression. Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life.*

Its implementation as a legal right lies in the imposition on public authorities of a legal obligation to disclose requested information, unless that information falls within specific excepted categories.

The Official Secrets Act 1972

In Malaysia, the existence of a general obligation to disclose information would be at tension with the Official Secrets Act 1972 (OSA) which, in effect, allows for public officials to make unlawful the disclosure of any information, by deeming it an "official secret".

At the outset, it should be noted that the OSA has two effectively separate dimensions. First, the bulk of its provisions focus on the criminalisation of espionage, as seen in sections 3, 4, 7, 7A, 7B, 8, 9, 13 and 14. Such provisions formed the entirety of the Act as legislated in 1972 and as amended in 1984.[2]

In fact, the aspects of OSA as generally understood—that is, as the law under which vast amounts of government information are legally classified as being "official secrets"—only came into existence once it was amended by the Official Secrets (Amendment) Act 1986 (Act A660). Specifically, the key provisions—all introduced or amended in 1986—which will require amendment to ensure that the OSA is consistent with a right to information (RTI) law are:

[2] Official Secrets (Amendment) Act 1984 (Act A573).

- Section 2: Which defines the term “official secret” and introduces the Schedule
- Section 2B: Which creates the power to classify documents as “official secrets”
- Section 16A: Which immunises the exercise of the power under section 2B from legal scrutiny
- Schedule: Which contains a list of classes of information that are presumptively “official secrets”

Classification

The OSA’s regime on the classification of documents is underpinned by sections 2B and 16A. Together, they create a system under which the executive has the power to make it an offence to possess and/or disclose any information, and under which there is no meaningful restraint on that power.

Power to Classify

Section 2B empowers public authorities to classify information. It states:

> *A Minister, the Menteri Besar or the Chief Minister of a State may appoint any public officer by a certificate under his hand to classify any official document, information or material as "Top Secret", "Secret", "Confidential" or "Restricted", as the case may be.*

Notably, the power to classify information is not restricted to public authorities that are accountable to the federal and state legislatures (and by extension the public), but also “any public officer” appointed by them.

Ouster Clause

The power of classification is rendered immune from scrutiny by the courts through section 16A, which is both a “conclusive evidence clause” and an “ouster clause”. It has the effect of disabling any challenge of an exercise of the classification power before a court by removing the need for a public authority to fulfil the requirement, under administrative law, that there must be a reasonable factual basis for the exercise of a power.

Although it may still be possible to judicially review an exercise of the power on different grounds, such as bad faith, those grounds are exceptional, as the core grounds of judicial review relate to the issue of whether it was legally proper and reasonable for a public authority to exercise a power on the basis of the facts before it. By pre-emptively determining that the factual basis for an exercise of the classification power is made out, such forms of review are

made impossible, and, therefore, the overall effect of section 16A is to minimise the chances of a successful challenge to an exercise of the classification power, and to remove any meaningful constraint on how the classification power is used.[3] Although there are undisclosed internal guidelines on how the different classifications recognised by section 2B are used,[4] there is no formal legal distinction between them.[5] Such guidelines do not override section 16A, whose mere existence conflicts with any requirement that the section 2B power is applied with reference to any objective and enforceable criteria.

Conflicts with the Right to Information

Absence of legal remedies

It should be reiterated that prior to the addition of sections 2B and 16A in 1986, the regime was already favourable to the executive. In the absence of the power to legally prescribe information as secret, the determination of whether any information was secret turned on judicial interpretation of the terms "secret information" and "secret document". As seen in the *Lim Kit Siang* and *Datuk Haji Dzulkifli* cases in 1979 and 1980, respectively, the terms were interpreted broadly, and the relevant information was secret because it was sourced from the government, but not officially communicated directly to the person who possessed it.[6]

Therefore, the effect of section 2B read with section 16A is to make the regime even more favourable to the executive by removing whatever minimal safeguards existed in the exercise of judicial discretion as to how the terms were applied. Under the current system, the

[3] It should be noted that the constitutional propriety of ouster clauses has been subject to sustained challenges. The principled basis of such challenges is encapsulated in Raja Azlan Shah Ag CJ's (as His Highness then was) statement in that: *"Unfettered discretion is a contradiction in terms ... Every legal power must have legal limits, otherwise there is dictatorship.*" (*Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprises* [1979] 1 MLJ 135, 148).

More recently, the legal focus has been on the nature of article 121 of the Federal Constitution, which vests the judicial power of the federation in the judiciary, and its relation to the necessity of judicial review of legislative and executive action. There is yet to be a conclusive case setting out whether ouster clauses are unconstitutional, but there have been strong comments, in both majority and dissenting judgments, to that effect.

See, e.g., *Indira Ghandi v Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545, [132] (Zainun Ali FCJ); *Maria Chin Abdullah v Ketua Pengarah Imigresen* [2021] 1 MLJ 750, [98] (Tengku Maimun CJ), [360] (Nallini Pathmanathan FCJ); *Zaidi Kanapiah v ASP Khairul Fairoz* [2021] 3 MLJ 759, [340] (Rhodzariah Bujang FCJ).

[4] Center to Combat Corruption and Cronyism, *Position Paper on the Official Secrets Act: Repeal, Review or Stay? Moving from Secrecy to Governance* (2016), page 6.

[5] Though it is likely to be a factor that is brought to the attention of a judge sentencing an individual for an offence relating to secret information, e.g. section 8.

[6] *Lim Kit Siang v Public Prosecutor* [1980] 1 MLJ 293; *Datuk Haji Dzulkifly bin Datuk Abdul Hamid v Public Prosecutor* [1981] 1 MLJ 112.

prosecution's only factual burden in relation to the 'secrecy' of information is to demonsrate that it has been designated under section 2B.

The OSA's classification provisions provide a straightforward tool for the executive to render an RTI law ineffective. Even where there is a request for information that would not fall under any specified exemption to the duty to disclose, an authority or official may simply classify the information as an official secret, which renders it an offence for any person to convey or receive it.

The categorical way in which the OSA confers upon the executive a broad discretion means that the sections 2B and 16A are unlikely to be re-interpreted by the courts in a way that renders them compatible with the spirit of a right to information. Therefore, it would be necessary to directly amend these sections to remove the risk that an RTI law is made toothless in practice.

Lack of political accountability

The structure of the classification power leaves minimal scope for political accountability, which could otherwise temper the absence of legal remedies. First, and most importantly, the power to classify is not limited to public officials who are politically accountable before the ballot box and/or to Parliament. Although Ministers, Chief Ministers, and Menteris Besar are expressly conferred the power to classify, they may also designate public officers who may exercise the power on their own accord. This provision allows members of the federal or state executives to evade responsibility by asserting that the power was exercised by a civil servant.

Further, the procedure through which information is classified is also not conducive to political accountability. Where a document has been classified, the only information available on it is, effectively, the certificate issued under section 16A. Yet, neither section 2B nor section 16A require any substantive information to be furnished on the certificate which is, in practice, a bare declaration. On one level, this reinforces the notion that the current law has no concern for substantive justification in the classification of information. Yet, on a deeper level, it facilitates evasion of accountability insofar as there is no formal and disclosable record of why information is classified, which allows the executive to state reasons which are merely convenient and do not necessarily reflect underlying truths.

Schedule of 'Official Secrets'

The second feature of the official secrets regime which stands in opposition to RTI principles is the Schedule to the Act. The Schedule is the second way in which the OSA renders information secret; any contents that fall within a prescribed category is deemed an "official

secret". The contents of the Schedule may be amended through the ordinary legislative process or by order of the Minister under section 2A.

Currently, the Schedule stipulates that the documents that are presumptively official secrets and do not require certification under section 2B are:

- Cabinet documents, records of decisions and deliberations including those of Cabinet committees.
- State Executive Council documents, records of decisions and deliberations including those of State Executive Council committees.
- Documents concerning national security, defence and international relations.

Conflict with the Right to Information

The existence of the Schedule and section 2A raise similar general concerns as the power to classify under section 2B. However, a further objection to creating official secrets through the Schedule is the removal of the practical and legal requirement that a public authority applies their mind to the question of whether to classify information.

Classification by category also removes the line of accountability through which responsibility for information's classification can be assigned. Where information is secret because it falls within a specified category, there is no single public official responsible for its classification. Instead, the public are left with a public official asserting that they are unable to disclose that information, as it is secret by virtue of the Schedule. This is exacerbated in relation to the third category in the Schedule, i.e. "*Documents concerning national security, defence and international relations*", as its potentially broad scope means that whether any given document falls within its definition is a matter of interpretation for the public official in question.

Finally, principles of democratic governance mean that it is more legitimate for the elected legislature to create interferences with rights. Such a principle is found in the structure of the qualified fundamental liberties in Part II of the Federal Constitution. However, the idea that the Schedule to the Act creates interferences with a right to information through democratically accountable legislative activity is illusory. This is because although the Schedule is part of the Act, it may be amended by the executive through a ministerial order under section 2A. Although, unlike with section 2B, there is no ouster clause and therefore administrative law principles apply in determining the validity of any such order, those principles are still deferential to the executive and impose a high threshold for invalidity.

Part 2:

REFORM PROPOSALS

Part 2: Reform Proposals

In proposing reforms for the creation of a right to information and amendments to the OSA, this Part will first outline the premise and structure of the reforms proposed, before specifying the legal provisions which should be included in an Act of Parliament that implements those reforms. Illustrations of how those provisions are to be framed can be found in the Appendix.

Premise for Reforms

Based on the analysis in Part 1 and the Justification Paper for a new RTI law[7], the legislation of an RTI law must be accompanied by significant reform to the OSA. The absence of such reform would create the possibility of legal conflict in disclosure obligations and maintain the presence of a secrecy regime which undermines the right to information in both principle and practice.

The reforms proposed in this section apply the principles of RTI legislation outlined by ARTICLE 19,[8] and, to a large extent, adopt the conclusions of CIJ's earlier comparative study of RTI legislation.[9] It also takes into consideration the proposals contained in the civil society-drafted Freedom of Information Enactment 2009 and updated Right to Information Bill.

Structure of Proposed Legislation

These reforms should be completed in a single Act of Parliament which, for the purpose of this report, will be referred to as the Right to Information Act. The Act should be separated into two parts. The first will create the substantive RTI law, whereas the second will amend the OSA to harmonise its provisions with the RTI regime.

The key benefits to legislating the reforms in a single Act is to make severance of the two parts more difficult, and to reduce the political backlash which is likely to ensue against a separate Act that significantly alters the structure of the OSA. Legally, a single-Act approach also allows for more effective use of a Preamble and a Purpose section to the Act to underscore the centrality of OSA reform to the right to information, which will become of relevance when the Act is inevitably interpreted by a court.

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[7] Centre for Independent Journalism, January 2022

[8] *The Public's Right to Know: Principles on Right to Information Legislation* (ARTICLE 19, 2016).

[9] Priscilla Chin, *Comparative Study: Structures and Status of Implementation of RTI Legislations (Afghanistan, India, Indonesia, Sri Lanka, Australia, United Kingdom)* (CIJ 2019).

An alternative single-Act approach is to re-legislate OSA provisions to be retained into the Right to Information Act. Under such an approach, the second part of the Act would not amend the OSA. Instead, it would first repeal the OSA in its entirety, and promulgate anew the provisions that are to be retained with the necessary modifications. Nevertheless, such an approach provides few—if any—additional benefits compared to the amendment approach, at additional cost. Most importantly, it would expend additional political capital to justify the notion of 'repealing' the OSA, despite the fact that its anti-espionage sections are to be re-legislated. Additionally, the concern that the apparent retention of the OSA may lead courts to apply interpretative approaches that do not take into account the intended impact of the amendments can be addressed by inserting an interpretation provision stating that the OSA is to be read in line with the Right to Information Act and subject to the rights contained within it.

Proposed Framework

The proposed reforms accept that there are compelling justifications for the protection of national security and the criminalisation of espionage. Therefore, they do not propose to abolish the OSA's original anti-espionage provisions. Instead, they focus on creating a framework within which there is both a qualified substantive right to information, and an exception relating to classified information. Nevertheless, the classification power itself will also be reformed to promote both legal and political accountability in its exercise, and to ensure that it cannot be used to render the right to information illusory. Under this framework, the OSA's provisions which deal with activities relating to espionage rather than official information would be, to a large extent, untouched.

The proposed RTI regime is structured around a general duty to disclose information upon request, which is subject to exceptions whose applicability is legally regulated by the three-part test established by Article 19(3) of the International Covenant on Civil and Political Rights. The test would apply to refusals to disclose and pre-emptive classification and require that either requires: (1) a recognised legitimate aim; (2) harm to be occasioned to that aim if the information were not classified and/or disclosed; and (3) that the public interest in classifying and/or not disclosing the information outweighs the public interest in disclosing it.

Provisions to be included in a Right to Information Act

Preliminaries

Purpose

Section 17A of the Interpretation Act 1967/1948 requires a court to have regard to the purpose for which legislation was enacted. Generally, the ascertaining of a legislative purpose behind an Act is conducted by the court interpreting legislation. The stipulation of an express purpose for the Act minimises the uncertainty as to what legislative purpose will be found by the court and counteracts recent developments in case law which have emphasised a textualist approach to statutory interpretation, which more often favours executive power at the detriment of rights protections.[10]

For the Right to Information Act, the section on purpose should state that the Act creates a qualified right to access information held by public authorities, exceptions to which are to be read and interpreted in line with the Act's creation of the right at large. Additionally, the overarching significance of the Act can be underscored by including an additional subsection which requires other legislation to be interpreted in a way that is consistent with the Act.[11]

Preamble

Similarly, and to slightly weaker effect, Section 15 of the Interpretation Act 1967/1948 states that the preamble of an Act "shall be construed and have effect as part of the Act", and is therefore relevant when interpreting its substantive sections. Where a section stipulating the purpose of the Right to Information Act states the underlying reasons for the legal changes contained within an Act, the preamble can outline the overall structure of the Act, and indicate the way in which its separate parts are related.

In relation to the Right to Information Act, the preamble should outline the three-part structure of the Act wherein: (1) a right to information is created; (2) the implementation of which is overseen by an Information Commissioner; (3) and the creation of which is given further effect through amendments to the OSA and the Penal Code.

[10] See, e.g., *Tebin bin Mostapa v Hulba-Danyal bin Balia* [2020] 4 MLJ 721, [30] (Vernon Ong FCJ).

[11] See, e.g. the approach taken in Sri Lanka seen in section 4 of its Right to Information Act, No. 12 of 2016.

Interpretation

The interpretation section should define key terms in a way that promotes the purpose of RTI. The most significant of these terms is the reach of the category of "public authority", which should include: the offices of the Dewan Rakyat; the Dewan Negara; the Judicial and Legal Service; the legal services of the States; Ministers, including the Prime Minister; all ministries and departments within the Federal and State governments; local authorities; State legislatures; members of state executive councils, including Menteris Besar and Chief Ministers; state-owned enterprises; any body that performs a public function; anybody receiving funding from any public authority for the performance of public functions, to the extent that its activities concern that public function; any all other bodies established by the Constitution or by any law; and any organisation or institution that is owned or controlled by a public authority.

Right to Access Information Held by Public Authorities

Structure of right

The right to information held by public authorities should primarily be enclosed within a duty for public authorities to disclose information when requested. To ensure that exceptions are fine-grained, and that the overall information disclosed is maximised, a distinction should be drawn between the duty to disclose the substantive information requested and the duty to disclose whether the authority holds the information requested (referred to in the UK Freedom of Information Act 2000 (UK FOIA) as "the duty to confirm or deny").

The focus on a duty to disclose upon request, rather than a duty of proactive disclosure, is to ensure the clarity of the duty imposed by the broader notion of the right to information. It minimises the possibility of resistance on the basis that the right creates unworkable and indeterminate obligations on public authorities which may be raised in relation to more abstractly defined duties to disclose. Nonetheless, the creation of a concrete duty in this form does not foreclose the creation of a separate duty of proactive disclosure, which is beyond the scope of this report.

Finally, the exceptions of availability and planned publication should be incorporated into the scope of the duty itself, rather than integrating them in the same way as other exceptions. This is because refusals to disclose on their bases do not require further justification with reference to a legitimate aim and serious harm.

Structure of exemptions

All exemptions should be framed in a way that requires the application of the three-part test. The legislative text itself should provide both the overarching "legitimate aims", and the specific classes of information which may be exempt pursuant to them. In all cases, the rejection of the request is subject to the serious harm and public interest requirements.

List of exemptions

Each exemption should have at least one underlying legitimate aim, and each legitimate aim may justify multiple separate exemptions. The purpose of expressly specifying the legitimate aim within the exemption is to ensure that any interpretation of the exemption, whether by a public authority, the Commissioner, or a court, has a fixed reference point, and provides a safeguard against over-expansion of the exception itself.

The legitimate aims to be recognised are:

- *(a) the effective conduct of law enforcement activities;*
- *(b) the protection of the privacy of individuals;*
- *(c) the protection of national security;*
- *(d) the protection of commercial secrecy and confidentiality;*
- *(e) the protection of public or individual safety;*
- *(f) the promotion of effective government decision-making processes; and*
- *(g) the promotion of effective conduct in public affairs.*

The key exceptions for the aim of promoting effective conduct of law enforcement activities are: information whose disclosure is likely to prejudice law enforcement, the administration of justice, and/or the exercise of regulatory functions; and information obtained during investigations for the purpose of criminal investigations or the exercise of regulatory functions.

The key exceptions for the aim of protecting individuals' privacy aim are: information whose disclosure would contravene the PDPA 2010; information whose disclosure would constitute a breach of confidence actionable by the person who provided the information to the public authority; and information subject to legal professional privilege at common law and under the Evidence Act 1950.

The key exceptions for the aim of safeguarding national security are: information classified under the OSA on the basis that its classification is necessary for the safeguarding of national security; and information whose disclosure would prejudice defence of Malaysia or the capability, effectiveness or security of relevant forces.

The key exceptions for the aim of protecting commercial secrecy are: information that comprises trade secrets or whose disclosure would harm the commercial interests of the person that provided it to the public authority; and information whose disclosure would constitute a breach of confidence actionable by the person who provided the information to the public authority.

The key exception for the aim of protecting public or individual safety is information whose disclosure would endanger the mental or physical health, or safety of an individual.

The key exceptions for the aim of promoting effective public decision-making are: information whose disclosure would hamper the formation of government policy, inhibit ministerial communications, or inhibit provision of effective legal advice by the Attorney General; information whose disclosure would prejudice Cabinet collective responsibility; information whose disclosure would inhibit the provision of advice and the free exchange of views within Cabinet or prejudice the conduct of public affairs; information whose disclosure would inhibit the provision of advice from sovereign; information whose disclosure would violate parliamentary privilege; and information whose disclosure would inhibit the functions of an authority responsible for auditing or assessing the effectiveness of other public authorities.

The key exceptions for the aim of promoting the effective conduct of public affairs are: information likely to prejudice relations between the government and state governments, or between state governments; information whose disclosure is likely to prejudice Malaysia's international relations; and information whose disclosure is likely to prejudice the economic interests of Malaysia

Interaction with Classification under the OSA

In the case of refusal on the ground of classification, those requirements should be enforced through a formally separate, but substantively similar, mechanism to review the classification. The formal separation is both necessary and expedient, as the information may have been classified prior to the request and, in any case, is an exercise of power under the OSA rather than the FOIA. In tandem, it will also be suggested below that the power to classify be subject to limited grounds, the applicability of which is also subject to the three-part test and legal review by the Information Commission.

Legal Redress

Information Commission

At first instance, oversight over public authorities' compliance with the Act and their application of the exemptions is to be entrusted to an Information Commission. Although some jurisdictions, such as the UK, combine the roles with responsibility over freedom of information and data protection laws, the existing Personal Data Protection Commissioner (PDP Commissioner) created by the Personal Data Protection Act 2010 would be unsuitable for the role. Legally and in practice, it does not have the sufficient independence from political government which would allow it to effectively oversee public authorities' implementation of an RTI law.

Instead, the oversight role should be fulfilled by an Information Commission, comprising five Commissioners, which makes decisions through panels of three Commissioners, including either the Chairperson or Vice-Chairperson presiding over the panel. All appointments are to be given prior approval by the Dewan Rakyat, which should hold the responsibility of nominating a list of candidates, from which the Minister must appoint a Commissioner.

The Chairperson and Vice-Chairperson should have the same qualification requirements as a superior court judge, i.e. at least 10 years' experience as an advocate or solicitor, a member of the federal judicial and legal service, and/or a state legal service. To ensure a diversity of backgrounds in the remaining Commissioners, the candidates list proposed by the Dewan Rakyat must include one candidate from the following categories: academia; a person with experience in publishing or media; and a person with a background in civil society.

Appeal Against Decision

Under the FOIA, the Commission will be responsible for hearing appeals against public authorities' decisions in relation to requests made under the Act. This includes both appeals against decisions that the requested information is exempt and appeals against unsatisfactory performance of the duty to disclose.

Appeals will take the form of *de novo* (from the beginning) rehearing, whereby the Commission will be required to make a fresh determination as to whether an exemption applies to the information. As the Commission would be required to step into the shoes of the public authority and may not simply adopt the decision of the public authority, the public authority is, in practice, therefore required to present to the Commission all the evidence on which it based the original decision. This is because although it may not be legally necessary for the authority to submit all such evidence, it is in its own interests to do so. Otherwise, the Commission would not have

access to the information that allowed the authority to make the initial decision and, therefore, would be unable to make a legally sustainable decision to exempt the information from disclosure.

To ensure that the public authorities are not able to obstruct with the Commission's proper functions, the Commission should have the legal power to compel the production of evidence and, where necessary, the calling of witnesses. Breaches of the Commission's orders should be punishable as if it were contempt of court, but only by the High Court once a breach of an order has been certified by the Commission.

The final mechanism that acts as a backstop for determinations about requests is judicial review. As judicial review is not an appeal, the public authority (whether acting as an applicant or intervening party) would be precluded from adducing additional information to establish that the information should be exempt. Instead, the factual basis for the court's decision is the evidence that was before the Commission.

In contrast to the *de novo* appeal to the Commission, judicial review focuses on correcting legal errors and allowing for the courts to make authoritative interpretations of the law. As the power to judicial review is inherent to the High Court's constitutionally entrenched supervisory jurisdiction over administrative and subordinate bodies, it need not be formally recognised in the Act.

Financial Independence

Finally, it is important for the Commission's funding to be sufficiently independent to remove perverse incentives for the Commission to act and decide favourably to the executive. The key mechanism this can be entrenched in legislation is by requiring parliamentary funding to be allocated on a five-year basis, which brings it outside the vagaries of political motivations within individual Parliaments and governments.

Additionally, it should be noted that although the existing PDP Commission does not possess the qualities to act as an effective Information Commissioner, there is potential to increase the Commission's financial stability if the independence-guaranteeing reforms to the PDP Commissioner proposed by CIJ are accepted. In such a case, combining the roles of Information Commission and PDP Commissioner would be beneficial as revenue from the

data protection fee and, as proposed, data protection enforcement actions would act as a cross-subsidy for the body's functions in relation to RTI requests.[12]

Reform of the Official Secrets Act

Limiting Section 2B

To harmonise the OSA with the proposed FOIA, the extent of the power to classify should be curtailed and brought in line with RTI principles. In that respect, information can only be classified, and thereby pre-emptively restricted from disclosure, in pursuance of the legitimate aims of national security and the protection of public or individual safety. In all cases, the official classifying the information must state the harm that is anticipated if the information is not classified and must declare that the public interest in classifying the information is greater than the public interest in allowing it to remain subject to freedom of information requests.

This information, i.e. the legitimate aim, specification of harm, and public interest, must be recorded on the certificate of classification, which itself cannot be subject to classification. Instead, certificates are to be exempt from disclosure on a case-by-case basis and require the fulfilment of the three-part test on each request for disclosure.

Further, classification should only be a power exercisable by Ministers, Chief Ministers and Menteris Besar. On the application of administrative law principles, the decisions as to the exercise of the power can be delegated to subordinate officials. In contrast to the current framing of section 2B, however, the power should not be delegable *in toto* to other officials, and any certificate of classification must be under hand of a statutorily prescribed official, who remains politically accountable for the classification.[13]

[12] The relevant changes being made to the proposals on reform of the Personal Data Protection Act 2010 to account for this report's proposals. Such a change would, in practice, relate to the decision-making procedure in relation to data protection policy to facilitate the move from a single PDP Commissioner to a combined-function Information Commission with several members. Options would be to vest the power to make such decisions in the Chairperson, or subject it to a majority vote within the Commission. Given the significant overlap in substantive subject areas subject to information law, there would be no further changes required to the proposed procedure for the selection of commissioners.

[13] See *Carltona v Commissioners of Works* [1943] 2 All ER 560 (CA) and, for Malaysia, e.g., *Balakrishnan v Ketua Pengarah Perkhidmatan Awam Malaysia* [1981] 2 MLJ 25 (FC).

Allowing Appeal of Power to Classify

Further, the classification of information should be subject to appeal before the Information Commission in the same manner that decisions on requests for information are. In practice, most of such appeals would arise when requests for information are rejected on the basis that the information is classified.

As with appeals to decisions relating to requests, the Commission is required to make a fresh determination on certification which, in practice, would require the public authority to produce before the Commission sufficient evidence to establish a legal basis for classification. As with those appeals, the Commission's decision on the appeal would be subject to judicial review.

Accordingly, the existing section 16A should be deleted and replaced with a section which merely states that a certificate purporting to be a classification certificate under section 2B is deemed to be a certificate of that nature. Such a provision merely facilitates legal proceedings involving such certificates and is a matter of evidence law, rather than a substantive provision ousting the jurisdictions of the Commission or the courts.[14]

Amendments to Criminal Provisions to Facilitate Whistleblowing

The final pair of amendments that should be enacted as part of the Right to Information Act is to insert a statutory defence of public interest disclosure into both the section 8 of the OSA, and section 203A of the Penal Code.

In both cases, this can be done by inserting a subsection which states that a person shall not be liable under the section if the impugned act was made under a reasonable belief that they were acting in the public interest, with reference to the content of the information to which the impugned act related. Importantly, such belief must be "reasonable", which requires the application of an external objective criteria, rather than focusing solely on the conduct and mental state of the accused.

[14] See section 25 of UK FOIA.

Appendix:
SUGGESTED LEGISLATIVE TEXT (CSO MODEL BILL DRAFT, NOVEMBER 2019)

Appendix: Suggested Legislative Text (CSO Model Bill draft, November 2019)

Creating a Right to Information

Preamble

An Enactment to create a right to access to information held by public authorities; to subject the right to access to information to specific and limited exceptions; to provide an independent mechanism for the review of decisions as to the disclosure of information held by public authorities; and to amend the Official Secrets Act 1972 to ensure its compatibility with the right to access to information.

Recognising the right to access as being essential to participatory democracy, transparency, accountability, and the freedom of expression under Article 10 of the Federal Constitution.

Right of Access to Information

Section 1: Purpose and Application

(1) *The purpose of this Act is to create a qualified right of access to information, under which:*

- *members of the public are entitled to information created and held by public authorities; and*
- *public authorities are, when requested to do so, under a duty to make public such information where not subject to qualifications as provided by this Act.*

(2) *Qualifications to the right to access to information under this Act are to be read in line with the general purpose in subsection (1) and, to that extent, must be specific, limited, and justified*.

(3) *The provisions of this Act shall have effect notwithstanding anything to the contrary in any other written law and, accordingly, in the event of any inconsistency or conflict between the provisions of this Act and such other written law, the provisions of this Act shall prevail.*

Section 2: Right to access information held by public authorities

(1) Any person making a request for information to a public authority is entitled —

- *(a) to be informed in writing by the public authority whether it holds information of the description specified in the request; and*
- *(b) if that is the case, to have that information communicated to him.*

(2) Subsection 1 does not apply to information which is reasonably accessible otherwise than under subsection (1).

(3) Where subsection (2) applies, the public authority shall, within seven days, inform the person making the request that it applies, and state where the information requested can be accessed.

(4) Subsection 1 does not apply to information if:

- *(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),*
- *(b) the information was already held with a view to such publication at the time when the request for information was made; and*
- *(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).*

(5) Where subsection (4) applies, the public authority shall, within seven days:
- *(a) inform the person making the request that it applies;*
- *(b) where the date for the publication of the information has been determined, of the date on which the information will be published; and*
- *(c) where the date for the publication of the information has not been determined, reasons for the absence of such a determination and the circumstances under which the information will be published.*

(6) Where a request has been made for information that is not exempt from subsection 1, the public authority shall communicate the relevant information to the person making the request within 30 days.

Section 3: Effect of exemptions

(1) *In respect of any information which can be exempt information by virtue of any provision of Part II, section 2(1)(a) does not apply if:*
- *(a) its exemption would be justified by an aim specified in subsection 3;*
- *(b) its disclosure would cause serious harm to the relevant aim; and*
- *(c) the public interest in exempting the information from section 2(1)(a) outweighs the public interest in disclosing that the relevant public authority holds information of the description specified in the request.*

(2) In respect of any information which can be exempt information by virtue of any provision of Part II, section 2(1)(b) does not apply if:
- *(a) its exemption would be justified by an aim specified in subsection 3;*
- *(b) its disclosure would cause serious harm to the relevant aim; and*
- *(c) the public interest in exempting the information from section 2(1)(a) outweighs the public interest in disclosing the information.*

(3) For the purpose of this section, legitimate aims which may justify an exemption from section 2(1)(a) or section 2(1)(b) by virtue of any provision of Part II are:
- *(a) the effective conduct of law enforcement activities;*
- *(b) the protection of the privacy of individuals;*
- *(c) the protection of national security;*
- *(d) the protection of commercial secrecy and confidentiality;*
- *(e) the protection of public or individual safety;*
- *(f) the promotion of effective government decision-making processes; and*
- *(g) the promotion of effective conduct in public affairs.*

(4) Where a public authority rejects a request for information on the basis that it is exempt from section 2(1)(a) or section 2(1)(b) by virtue of any provision of Part II, the public authority shall, within 15 days of the request:

- *(a) specify the legitimate aim for the exemption;*
- *(b) state the anticipated serious harm to the legitimate aim that will be caused if the information, or the information on whether the public authority holds information of the description specified in the request, is disclosed; and*
- *(c) declare that such serious harm would outweigh the public interest in the disclosure of the information or the information on whether the public authority holds information of the description specified in the request.*

Exceptions

Section 4: Security and Defence of the State

(1) This section only applies where an exemption to section 2 is necessary for the protection of national security.

(2) Information is exempt from disclosure under section 2 if its disclosure would cause substantial harm to the security or the defence of the state.

(3) For the purposes of this section, information the disclosure of which may cause substantial prejudice to the security or the defence of the state includes:

- *(a) military tactics or strategy or military exercises or operations undertaken in preparation for hostilities or in connection with the detection, prevention, suppression, or curtailment of subversive or hostile activities, such as:*
  - *(i) an attack against the state by a foreign element;*
  - *(ii) acts of sabotage or terrorism aimed at the people of the state or a strategic asset of the state, whether inside or outside the state; or*
  - *(iii) a foreign or hostile intelligence operation; or*
- *(b) intelligence or technology relating to:*
  - *(i) the defence of the state; or*
  - *(ii) the detection, prevention, suppression or curtailment of subversive or hostile activities; or*
- *(c) methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to in subsection (b); or*
- *(d) the identity of a confidential source; or*
- *(e) the quantity, characteristics, capabilities, vulnerabilities or deployment of anything being designed, developed, produced or considered for use as weapons or such other equipment, excluding nuclear weapons.*

Section 5: Promotion of effective conduct in public affairs

(1) This section only applies where an exemption to section 2 is necessary for the promotion of effective conduct in public affairs.

(2) Information may be exempt from section 2 if its disclosure would cause substantial harm to the international relations of Malaysia.

(3) In determining whether an exemption from section 2 is necessary under subsection 2, the public authority must consider the benefits to the international relations of Malaysia from the promotion of accountability and transparency by the public authority in question.

(4) Information may be exempt from section 2 if its disclosure would cause substantial harm to the economic interests of Malaysia.

(5) In determining whether an exemption from section 2 is necessary under subsection 3, the public authority must consider the benefits to the economy of Malaysia from the promotion of accountability and transparency by the public authority in question.

(6) This section does not apply where:

- *(a) the disclosure of the information is likely to reveal any past or anticipated misconduct by any public authority; or*
- *(b) the information relates to the expenditure of public funds.*

Section 6: Promotion of effective government decision-making

(1) This section only applies where an exemption to section 2 is necessary for the promotion of effective decision-making in government functions.

(2) For the purposes of this section, information relating to policy making and the functioning of public bodies may be exempt from section 2 if its disclosure is likely to:

- *(a) cause serious prejudice to the effective formulation or development of government policy;*
- *(b) seriously frustrate the success of a government policy, by premature disclosure of that policy;*
- *(c) significantly undermine the deliberative process within Cabinet by inhibiting the free and frank provision of advice or exchange of views;*
- *(d) significantly undermine the effectiveness of a testing or auditing procedure used by a public body; and*
- *(e) inhibit the provision of effective legal advice by the Attorney General.*

(3) For the purposes of this section, information relating to communications with the Yang di-Pertuan Agong, the ruler of a State, or the governor of a State may be exempt from section 2 if its disclosure is likely to inhibit the provision of advice from Yang di-Pertuan Agong, the ruler of the State, or the governor or the State, as the case may be.

(4) For the purposes of this section, information whose disclosure would violate parliamentary privilege may be exempt from disclosure by a parliamentary body.

(5) This section does not apply where:

- *(a) the disclosure of the information is likely to reveal any past or anticipated misconduct by any public authority; or*
- *(b) the information relates to the expenditure of public funds.*

Section 7: Effective conduct of law enforcement

(1) This section only applies where an exemption to section 2 is necessary for the effective conduct of law-enforcement activities.

(2) For the purpose of this section, information can be exempt if its disclosure would cause substantial prejudice to:

- *(a) the detection and prevention of crime;*
- *(b) the prosecution of offenders;*
- *(c) the administration of justice;*
- *(d) the assessment or collection of any tax or duty; or*
- *(e) the assessment by a public body as to the institution of civil or criminal proceedings, or the exercise of any power conferred under any enactment related to regulatory activities.*

Section 8: Protection of public and individual safety

(1) This section only applies where an exemption to section 2 is necessary for the protection of individual and public safety.

(2) For the purpose of this section, information can be exempt if its disclosure is:

- *(a) likely to endanger the physical or mental health of individual; or*
- *(b) endanger the safety of any individual.*

Section 9: Protection of commercial secrecy

(1) This section only applies where an exemption to section 2 is necessary for the protection of commercial secrecy.

(2) For the purpose of this section, information may be exempt from section 2 if its disclosure would harm the commercial interests of the person who provided the information to the public authority.

(3) For the purpose of this section, information may be exempt from section 2 if its disclosure would constitute an actionable breach of confidence by the person who disclosed it to the public authority.

(4) This section does not apply where:

- *(a) the disclosure of the information is likely to reveal any past or anticipated misconduct by any public authority; or*
- *(b) the information relates to the expenditure of public funds.*

(5) Where subsection 4 applies, the public authority disclosing the information shall not be liable for breach of confidence.

(6) For the purpose of this section, information may be exempt from section 2 if it constitutes a trade secret of the person who provided it to the public authority.

Section 10: Protection of privacy

(1) This section only applies where an exemption to section 2 is necessary for the protection of the privacy of individuals.

(2) For the purpose of this section, information may be exempt from section 2 if its disclosure would contravene a provision of the Personal Data Protection Act 2010.

(3) For the purpose of this section, information may be exempt from section 2 if its disclosure would constitute an actionable breach of confidence by the person who disclosed it to the public authority.

(4) For the purpose of this section, information may be exempt from section 2 if its disclosure would be impermissible under section 126 of the Evidence Act 1950.

Section 11: Classified Information

(1) Information classified under section 2B of the Official Secrets Act 1972 is exempt from section 2.

Creating an Information Commission

Section 12: Appointment and Tenure of Information Commission

(1) There is hereby established a body corporate by the name of "Information Commission" with perpetual succession and a common seal, and which may sue and be sued in its corporate name.

(2) The Commission shall consist of a Chairperson, a Vice-Chairperson and three Commissioners.

(3) The Minister shall appoint each member of the Commission from a list of three candidates proposed by the Dewan Rakyat.

(4) The Dewan Rakyat shall propose for Chairperson and Vice-Chairperson only candidates who:

- *(a) were formerly judges of the High Court, Court of Appeal, or Federal Court; or*
- *(b) for the 10 years preceding their candidacy has been an advocate of the High Court or any of them or a member of the judicial and legal service of the Federation or of the legal service of a State, or sometimes one and sometimes another.*

(5) The Dewan Rakyat shall for every list of candidates proposed for Commissioner include candidates who are of eminence in:

- *(a) academia;*
- *(b) publishing or media; and*
- *(c) civil society.*

(6) A person appointed by the Minister under this section:

- *(a) shall be independent and shall not hold any political office or hold any position in any political party;*

- *(b) shall, unless he sooner resigns his office or his appointment is sooner revoked, hold office for such period not exceeding three years as the Minister shall specify in the notification of appointment; and*
- *(c) shall not be eligible for reappointment.*

(7) The Minister shall not have the power to appoint a person save where that person has been proposed by the Dewan Rakyat pursuant to subsections (4) and (5).

(8) Meetings of the Commission shall be convened by the Chairperson, or in his or her absence the Vice-Chairperson, and shall consist of three or five Commissioners inclusive of the Chairperson or Vice-Chairperson.

(9) A decision at a meeting of the Commission shall be adopted by a simple majority of the members of the Commission constituting the meeting.

Section 13: Appeal against decision made by public authority

(1) Any person who submits a request for information and:
- *(a) is dissatisfied with the public authority's rejection of that request on the grounds that it is exempt from section 2(1);*
- *(b) is dissatisfied with the manner of disclosure of the information requested or is of the view that the information provided is incomplete, incorrect or misleading or does not correspond with the request in his application;*
- *(c) does not receive the information within the prescribed period; or*
- *(d) is otherwise aggrieved in any other way relating to the request or access to information under this Act,*

shall, within 21 days of the date of receipt of the notice informing them of such decision appeal against such decision to the Information Commission.

(2) Where an appeal is made under subsection 1(a), the Commission:
- *(a) shall determine whether the information is exempt from section 2(1);*
- *(b) may request the public authority being appealed against to provide their reasons for rejecting the request for information; and*
- *(c) may request the person making the request to provide its reasons why the information, or information as to whether the public authority information of the description specified in the request, should be disclosed in the public interest.*

(3) In determining an appeal under subsection 1, the Commission may issue orders requiring the production of evidence and compelling witnesses to testify.

(4) Where the Commission allows an appeal under subsection 1, it may make any decision open to the public authority in order to fulfil the request for information.

(5) If the Commission is satisfied that there has been non-compliance with an order issued under subsection 3, it may certify such non-compliance in writing to the relevant High Court.

(6) Where a failure to comply is certified under subsection (5), the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the person who did not comply with the order, and after hearing any statement that may be offered in defence, deal with the person who did not comply with the order as if they had committed a contempt of court.

Amendments to the Official Secrets Act 1972

Section 14: Limiting breadth of classification power

The Official Secrets Act 1972, which in this Act is referred to as 'the Principal Act', is hereby amended by:

- *(a) in section 2, after "'official secret' means", deleting "any document specified in the Schedule and any information and material relating thereto and";*
- *(b) deleting section 2A;*
- *(c) deleting the Schedule; and*
- *(d) deleting section 16A.*

Section 15: Power to classify subject to specified legitimate aims

(2) Section 2B of the the Principal Act is amended by substituting the current text with the following:

"(1) A Minister, the Menteri Besar or the Chief Minister of a State may by a certificate under his hand to classify any information as 'Top Secret', 'Secret', 'Confidential' or 'Restricted', as the case may be.

(2) Information may only be classified under subsection 1 if:

- *(a) its classification would be justified by an aim specified in subsection 3;*
- *(b) its non-classification would cause serious harm to the relevant aim; and*
- *(c) the public interest classifying the information outweighs the public interest in the information not being classified.*

(3) For the purpose of this section, the legitimate aims which may justify the classification of a information are:

- *(a) the protection of national security; and*
- *(b) the protection of public or individual safety.*

(4) A certificate for the classification of a document, information, or material under subsection 1 must:

- *(a) specify the legitimate aim for the exemption;*
- *(b) state the anticipated serious harm to the legitimate aim that will be caused if the document, information, or material is not classified; and*
- *(c) declare that such serious harm would outweigh the public interest in the non-classification of the document, information, or material."*

Section 16: Appealing against decisions to classify

The Principal Act is amended by inserting after section 2C the following new section 2D:

"2D Appeal to Information Commissioner

(1) Where a certificate has been issued under section 2B, a person whose request for information under section 2 of the Right to Information Act 2021 is affected by the issue of the certificate may appeal to the Information Commission against the certificate.

(2) On an appeal under subsection 1, the person issuing the certificate shall produce before the Commission the certificate and the information to which it pertains.

(3) If on an appeal under subsection 1 the Commission finds that the requirements in subsection 2 were not met, the Commission may allow the appeal and quash the certificate.

(4) In determining an appeal under subsection 1, the Commission may issue orders requiring the production of evidence and compelling witnesses to testify.

(5) If the Commission is satisfied that there has been non-compliance with an order issued under subsection 3, it may certify such non-compliance in writing to the relevant High Court.

(6) Where a failure to comply is certified under subsection (5), the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf the person who did not comply with the order, and after hearing any statement that may be offered in defence, deal with the person who did not comply with the order as if they had committed a contempt of court."

Section 17: Inserting Interpretative Provision

The Principal Act is amended by inserting after section 1(3) the following new section 1(4):

"(4) This Act is to be interpreted in accordance with the Right to Information Act 2021 and the substantive right to access information held by public authorities created therein."

Amendments to Criminal Provisions

Section 18: Amendment to section 8 of the Official Secrets Act 1972

The Principal Act is amended by inserting after section 8(2) the following new subsection 3:

"(3) A person shall not be liable under subsection (1)(ii) or subsection (1)(iii) if they acted under a reasonable belief that they were acting in the public interest."

Section 19: Amendment to section 203A of the Penal Code

The Penal Code is amended by inserting after section 203A(2) the following new subsection (3):

"(3) A person shall not be liable under this section if they acted under a reasonable belief that they were acting in the public interest."

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