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**FREEDOM OF INFORMATION IN MALAYSIA:  
INTERNATIONAL LEGAL INSTRUMENTS AND  
RESTRICTIONS UNDER NATIONAL LAW**

**<sup>1</sup>Khairul Anuar Abdul Hadi, <sup>2</sup>Rohana Abdul Rahman &  
<sup>3</sup>Zainal Amin Ayub**

<sup>2&3</sup>School of Law, College of Law,  
Government and International Studies,  
Universiti Utara Malaysia, Malaysia

<sup>1</sup>Faculty of Law Universiti Teknologi MARA  
Kampus Raub Pahang, Malaysia

*<sup>1</sup>Corresponding author: [khanuarah84@gmail.com](mailto:khanuarah84@gmail.com)*

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**ABSTRACT**

The acceptance of Freedom of Information (FOI) as a fundamental mechanism for enhancing accountability and transparency in the public sector is widely recognized. Numerous international legal instruments (Conventions) have advocated for the establishment and enforcement of legal frameworks pertaining to the FOI. The FOI legislation serves two essential functions, namely enhancing democratic engagement and mitigating corruption within the public sphere. Despite the acceptability of FOI on the global stage, Malaysia lacks a comprehensive legal framework to address the right to access information, except for Selangor and Penang. Additionally, there are various national legislations that hinder the exercise of FOI. This

article's objective is to examine the use of the FOI concept within the framework of international legal instruments as well as the challenges posed by Malaysian national laws that impose limitations on its implementation. The objective is achieved by employing a doctrinal methodology that incorporates international legal instruments as well as Malaysia's legislations (Constitution, Acts and Enactments) pertaining to the FOI. The findings show the restrictions under national law make it difficult to implement FOI legal regimes in Malaysia. This paper argues that implementing FOI can only be materialized through a comprehensive review of existing laws and administrative structure reform by adapting universal standards on FOI as stated under international legal instruments. This article serves as guidelines for policymakers intending to address FOI as the anti-corruption mechanism in public sectors. Moreover, recommendations are made for the implementation of FOI into Malaysia's domestic laws.

**Keywords:** Freedom of information, corruption, international instruments, restrictive laws.

## INTRODUCTION

FOI is known as the right to access information by the public (Berliner, 2014). The information in this context refers to the information held by the government (Burgess, 2015). At the international stage, FOI is recognized as part of human rights through various international legal instruments. FOI intends to strengthen democratic principles by encouraging public participation in the government decision-making process, as their involvement can enhance government accountability and transparency. This proposition is on the basis that the government is an agent that holds the responsibility to the public.

Even though various nations worldwide have adopted FOI to combat corruption in their national legislation, Malaysia has yet to do the same. Apart from that, multiple laws are associated with restrictions to obtaining information based on secrecy and national interest. The restrictive laws under the national legal framework limit the right of the public to access information. Due to the government's extensive discretion in classifying information, this restrictive law is vulnerable to abuse.

In 2022, the Malaysia Corruption Perception Index (CPI) released by Transparency International (2023) shows Malaysia has been

positioned at the 61st rank out of 180 countries, with a CPI score of 47 score points. This number reflects a marginal increase of one point compared to the previous year but a decline of one CPI score point from the year prior. One of the contributing factors to declining CPI scores in 2022 is grand corruption, which involves top-ranking public officials (Transparency International, 2022). The non-existence of laws that encourage disclosure of information and lack of transparency increases the possibility of corrupt practices in public institutions by those who hold public office.

Transparency International recommends the implementation of a legal framework known as the FOI legislation at the federal level. This measure is proposed to effectively tackle corruption and enhance transparency within the public sector. On record, two state governments, which are Selangor and Penang, enacted a state law to cater for the right of members of the public to access state government official documents. Nevertheless, the implementation of state legislation does not carry legal ramifications for the federal government.

Two state legislative assemblies, namely, Selangor and Penang, pass their own version of FOI enactments, with the main objectives of this enactment to increase transparency and reduce corruption. However, due to the principle of federalism, these legislations are exclusively applicable to state government institutions and agencies. Moreover, the legal effectiveness of both enactments is impeded by federal legislation, specifically the Official Secret Act 1972 [Act88] (OSA). For example, Section 14 (a) of the Freedom of Information (State of Selangor) stated that *'information that has been classified as confidential which is disclosed would seriously prejudice to the national security and national defence.'* The enactments also fail to provide legal safeguards for officials who choose to release official documents to the public. In addition, it is important to acknowledge that the implementation of the FOI state enactments is accompanied by substantial constraints in terms of its enforcement. Section 19 of the Freedom of Information (State of Selangor) provides that *'no prosecution shall be commenced without the consent in writing of the Public Prosecutor'*. According to the presented argument, it may be asserted that both legislations exhibit a significant reliance on federal laws, and the authority to implement these laws is contingent upon the Attorney General's Chambers.

In addition to the legal challenges, the Centre of Independent Journalism highlights six weaknesses in the institutional mechanisms of the Selangor and Penang FOI rules. The weaknesses that have been identified encompass several aspects. These include the existence of elevated application costs, restricted accessibility to records, insufficient public participation, incomplete operationalization of oversight bodies, inadequate allocation of budgetary resources, and the absence of annual reports that publish statistics on the performance of the FOI system (Fong, 2023).

The most significant challenge of implementing FOI is the culture of secrecy practised by government institutions. In Malaysia's context, various federal laws are not in favour of FOI. For instance, the OSA provides broad power to executives to decide what is considered a state secret. The OSA grants government officials extensive discretionary authority, which may potentially lead to instances of power abuse (Yussoff & Nordin, 2021). Apart from that, enormous government circulars are also not in favour of FOI. For example, Security Order 2017 emphasizes the requirement for public officers to uphold government secrets strictly; failure to follow the rules results in public officers being subject to disciplinary action. Therefore, it is crucial to establish a centralized FOI institution and legal framework to effectively address the deficiencies in the implementation of FOI in Malaysia.

## **RESEARCH PROBLEM AND OBJECTIVES**

Two main international instruments, namely the Universal Declaration of Human Rights (UNDHR) and the United Nations Conventions against Corruption (UNCAC), emphasize the importance of promoting FOI and transparency in public sectors for the purpose of enhancing public democratic participation and decreasing corruption. Even so, in the Malaysian context, there is no FOI legislation except for the states of Selangor and Penang. This legislation is not applicable holistically throughout public institutions in Malaysia because it is only implemented in the respective state agency. There are two fundamental weaknesses of these enactments. First, both enactments are subject to federal legislation, specifically the OSA. Second, any criminal proceeding for violations of the enactment is subject to written approval from the Public Prosecutors. Thus, it is clearly found that both enactments have no effective legal force.

The implementation of transparency policies and laws allows the participation of society in reviewing government decisions and increases check and balance mechanism efficiency in a democratic society. Productivity and accountability will be significantly achieved when there is a disclosure of government data and documents (Bakar et al., 2011). Perhaps, in the long term, FOI will be the fundamental right that every sector and institution in Malaysia exercises. The reason for the implementation of FOI is that the numbers of corruption connected with political figures and public servants are on the rise due to the lack of transparency. 1 Malaysia Development Berhad (1MDB) and SRC international scandal is an example of public funds that can be manipulated due to the lack of transparency, restriction of information, and abuse of power that lead to the fall of a government (Lemière, 2018). The manipulative tactics and legislative safeguards that restrict access to information significantly contribute to the substantial financial losses incurred by public funds, amounting to billions of dollars.

**Table 1**

*Statistic on the Arrested Person (Malaysia Anti-Corruption Commission, 2023)*

Year	Public Officers/ Government Servant	Private Sector/ Individuals	Total
2018	418	469	894
2019	525	576	1101
2020	467	531	998
2021	411	400	811
2022	323	586	909

Table 1 shows the data on arrests conducted by the Malaysian Anti-Corruption Commission (MACC). It is seen that the number of arrests involving government servants is comparatively lower than those involving individuals in the private sector. Nevertheless, it is crucial to acknowledge that the commercial sector has a far broader scope than the public service sector. The evidence presented indicates a noteworthy trend of corruption within the ranks of public officials, necessitating focused action from the government.

Simultaneously, it is imperative for a legal framework to foster the facilitation of information accessibility that aligns with public interest

while also promoting the revelation of corrupt activities perpetrated by individuals holding public office. Since FOI has been recognized internationally as a legal tool to combat corruption, various international instruments promote member states to legislate national law that implements FOI. Thus, the primary aim of this article is to analyze the structure of the FOI framework, which is incorporated into international and regional conventions as one of the anti-corruption mechanisms. Additionally, it seeks to explore the obstacles presented by Malaysia's domestic legal systems, which place restrictions on the effective implementation of FOI.

## **LITERATURE REVIEW**

There are few studies in Malaysia, especially on the laws governing FOI and its interrelatedness with FOI. The non-existence of an FOI legal framework and various restrictive laws that limit the right to access official information contribute to the lack of research in this area. However, in the global context, there is sufficient literature to discuss the correlation and level of effectiveness of FOI in reducing corrupt practices.

### **Conceptual Framework of FOI**

The liberal perspective on defining the concept of rights is characterized by the principle that "rights always prevail" (Tushnet, 2016). In the context of civil disobedience, when laws and policies are inconsistent and come into conflict with rights, it is the rights that will be given priority (Sebastian, 2023). It is imperative that the government refrain from enacting legislation that encroaches upon the fundamental rights of individuals. However, this concept does possess certain drawbacks. In the context of FOI, it is imperative for the government to intervene by establishing legislation that safeguards the right to access information and imposes the duty upon the government to disclose such information.

The concept of human rights has undergone significant evolution in the 21st century. The proliferation of democratic systems and accompanying ideals serve to facilitate the engagement of the public in the process of governmental decision-making (Moon et al., 2023). During the initial phase, public participation constitutes an integral

component of the representative government framework. The increasing necessity to regulate representation has heightened the importance of the FOI, which enables members of the public to directly access government-held information. In addition to its primary aim of safeguarding human rights and democracy, the FOI also serves the purpose of promoting accountability and mitigating the potential for corruption among government members and officials. The intricate nature of government systems necessitates the implementation of comprehensive mechanisms to safeguard against potential instances of abuse. Therefore, the United Nations (UN), in collaboration with Non-governmental Organisations (NGOs), advocates for the adoption and enforcement of FOI as a legislative framework at the national level, with the aim of eliminating corrupt practices inside government institutions.

The fundamental aspect of FOI is based on openness and transparency (Birkinshaw, 2006). The reduction of secrecy schemes in the government through public observation and participation can be materialized by strengthening pro-information legal regimes. Openness and transparency are the elements that can improve the government's accountability, integrity, and legitimacy. Due to public observation, public officials are more aware and responsible for any decisions made by them. This led to the public officer adapting and developing structure and policy to cater to public scrutiny.

Corruption commonly occurs behind closed doors (Ikhsan & Matah, 2022) and is difficult to discover with the non-existence of public scrutiny of the public official's decision. Public officials possess the capacity to conceal criminal or deceptive behaviours by leveraging administrative regulations established by the government, which restrict the disclosure of information to the broader public or through the auditing procedure (Yusoff et al., 2023).

Geissel (2008) stated that well-informed citizens are the ideal social and democratic structure. The information the citizen receives will be used as references in electing representatives in the government; it is part of the citizen's initiative to participate in the government's decision-making process and strengthen transparency in the government. The transparent democratic environment allows a public member to participate actively in the formation of public policy. The purpose is to ensure that every decision made by the government is

made in the public's best interest while at the same time promoting accountability and transparency.

The concept of representative government is one of the fundamental aspects of FOI. The late President of the United States, Abraham Lincoln, stated that a democratic state is based on the concept of 'government of the people, by the people, to the people' (Arnold, 2022). This proposition carries two crucial aspects. First, the people have several rights over the affairs of the state, and second, the government must be accountable and responsible for any decision it makes. FOI legal regime can compel a public official to discharge their power within the parameters of the law and to avoid unchecked usage of arbitrary discretion (Ikhsan & Matah, 2022). The absence of oversight and the unrestricted exercise of discretionary power create opportunities for the institutionalization of corrupt practices (Carothers, 2022).

The experience of the United Kingdom (UK) in implementing a global standard for FOI can serve as a noteworthy illustration. The initiation of the FOI legislation and policy in the UK commenced with the civil movement commonly referred to as "Your Right to Know". The movement, which had its inception in the early 20th century, has seen a series of transformations, culminating in the enactment of the UK's Freedom of Information in the year 2000 (Wyeth, 2021). The UK's Freedom of Information Act 2000 conferred upon the public the entitlement to obtain access to material retained by governmental entities, subject to certain restrictions (Worthy, 2017). However, the movement faces several political and cultural challenges on a broader scale. These challenges encompass the decline in confidence towards governmental institutions, the emergence of populist and authoritarian forces, and the polarisation of public debate (Shepherd, 2015). Despite the challenges mentioned, the movement persists in exerting a substantial impact in the UK as civil society organizations strive to promote improved accessibility to information and an open and responsive government.

The Malaysian federal laws do not provide a precise explanation for the concept of FOI. However, the judicial interpretation of FOI is expanded from the literal wording of Article 10 of the Federal Constitution. The expansion of the judicial interpretation of FOI was highlighted in the case of *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507:



*“Article 10 contains certain express and, by interpretative implication, other specific freedoms; for example, the freedom of speech and expression is expressly guaranteed by Article 10 (1) (a). The right to be deprived of express protection is the right to receive information, which is equally guaranteed.”*

Based on the court’s interpretation of Article 10. It can be inferred that the term “freedom of speech and expression” encompasses the concept of (FOI) as a basic right safeguarded by the Federal Constitution. However, Article 10(2) of the Federal Constitution permits specific limitations on these entitlements to safeguard national security, public order, morality, and other relevant considerations. Critics contend that these limitations have occasionally been employed to suppress dissent, government criticism, and valid modes of articulation. Besides, the linguistic expression employed in Article 10 of the Federal Constitution exhibits occasional imprecision, hence allowing for potential variations in interpretation. The circumstances have given rise to discussions and legal conflicts regarding the breadth of these rights and the permissible limits on their imposition. The absence of precise delineations for concepts such as “security,” “public order,” and “morality” may result in inconsistent application and the possibility of misuse. In the case of *Mat Shuhaimi bin Shafiei v Public Prosecutor* [2014] 2 MLJ 145, the court stated that the provisions under Article 10 (1) (a) of the Federal Constitution are not absolute and subject to restrictions. Further, in the case of *Nik Nazmi bin Nik Ahmad v. Public Prosecutor* [2014] 4 MLJ 205 stated that the provision stated in Article 10(2)(b) of the Federal Constitution grants the Parliament the authority to impose limitations on the right to assemble, as it deems appropriate or necessary to safeguard security or maintain public order. This would afterward empower the Parliament to enact legislation that imposes limitations on the citizens’ freedom to gather. In order to contextualize within the framework of FOI, it is important to acknowledge that the public’s entitlement to access information is contingent upon legislative measures enacted by Parliament. Thus, by the nature of the OSA, it is almost impossible for the members of the public to obtain information from the government.

There are several arguments not in favour of FOI. FOI can be manipulated by the anti-establishment movement to destabilize the existing political structure (Stewart & Marlin, 2004). In this context, political entities can use the information to create a political narrative

for a political gain far from facts. To a certain extent, the action can threaten national security and unfairly decrease the trust in the government. The operation of FOI requires involvement from a public servant. The government's expenditures are expected to increase due to the obligation to provide requested information to the public, which includes the expenses associated with hiring government personnel to meet the demands of FOI to some extent, necessitating privatisation. (Aman & Rookard, 2019). Moreover, FOI demands the government agency to respond to the request for information from the members of the public. Due to the government's obligation to fulfil the request under the law, the government is required to ensure the said information has been given to the requester within the qualification laid down by the law. On this note, the government administration and financial burden will increase. Ikhsan (2014) believed that the problem of FOI is about implementation. For example, the FOI is still subject to various restrictions that hinder the concept of maximum disclosure. The restriction under law, mainly based on national security and interest, can be used to avoid disclosure. Further, FOI alone cannot effectively combat corruption without independent journalism and strong democratic institutions. Waisbord (2007) pointed out that FOI can only have a real effect if the government guarantees independent journalism through political and legal protection.

### **Conceptual Framework of Corruption**

There is no standard definition of corruption. Every country and international instrument defines corruption differently. However, the common features of obtaining unlawful personal gain through an official position are still the same. According to the United Nations Convention against Corruption (UNCAC), corruption is a crime committed by a government official who abuses their positions to get an advantage for someone else or themselves (UNCAC, 2003). Damijan (2023) explains that corruption has evolved from the government's inability to maintain a power balance to include political patronage and favouritism. It now encompasses both public and private domains involving bribes, favouritism, and resource misuse. This phenomenon violates regulations prohibiting official influence for personal financial or social advantages.

Based on the definition, the corrupt practice is mostly associated with a person who holds an official public position. The position is then used to obtain advantages for personal benefits in monetary forms or favour. Zakari and Button (2022) emphasized that in the public

sector, abuse of power, nepotism, bribery, misappropriation of assets, insider trading and extortion are among the forms of corruption. Essian (2012) referred to corruption as the abuse of power by a public official for monetary gains.

The Malaysian Anti-Corruption Commission Act 2009 [Act 694] (MACCA) is the principal instrument to combat corruption in Malaysia. The MACCA refers to corruption as gratification under Section 3 of the said Act, which generally refers to the act of using power, authority, or position for personal benefit or to acquire an unjust or deceitful advantage. This can manifest in diverse forms, including gifts, loans, valued securities, properties, and financial advantages. The court further elaborates on the definition of gratification as in the case of *Public Prosecutor v. Dato' Saidin bin Thamby* [2012] 3 MLJ 476. The court stated that the word gratification is within the meaning of corrupt practice. Corrupt means “*doing an act knowing that the act done is wrong, doing so with evil feelings and evil intentions*”. (*Lim Kheng Kooi v Reg* [1957] MLJ 199); ‘purposely doing an act which the law forbids’ (*R v Smith* [1960] 1 All ER 256). In this context, the definition of gratification under MACCA reflects the word corruption. The court is free to interpret the corrupt action and practice based on the circumstances and how the commission of corrupt practices is being committed. In the case of *Baharuddin Ahmad v. PP* [2010] 7 MLJ 577, the court stated the act of receiving unlawful benefits through various means, including a loan, is considered bribery within the meaning of gratification.

In the context of the development of anti-corruption legislation and policies (Cahyani et al., 2023) examine the evolution of Malaysia’s anti-corruption legislation and explore the country’s efforts to adhere to internationally recognized standards of anti-corruption policies. According to Refakar and Cárdenas (2023), the prevalence of corruption occurrences has increased due to weak government institutions and legal control. Government transparency suffers because of restrictions on public access to official papers, which demonstrate that the law protects against corruption. Hamin et al. (2012) stated that the authority must consider the opportunity, motive, and justification while formulating and enforcing regulations and policies. According to Muhammad Azman et al. (2022), the legal framework of Malaysia’s anti-corruption laws exhibits a fragmented nature, which is deemed inadequate. Therefore, it requires constant reform-based anti-corruption policies from other jurisdictions.

The government has implemented several anti-corruption regulations to combat corruption because it recognizes the threat that it poses to the public sector. In 2004, the government under the Ahmad Badawi administration introduced the National Integrity Plan (NIP), intending to strengthen the Malaysian Anti-Corruption Commission and establish the Malaysia Institute of Integrity (Saidin & Haron, 2017). Under the Najib Razak administration, the government introduced the Government Transformation Plan (GTP), and one of the key initiatives under it is to reduce corruption by promoting transparency in the government sector. In 2018, Mahathir Mohammad, under the *Pakatan Harapan* administration after a historic win in the 15th general election, introduced the National Anti-Corruption Plan 2019-2023 (NACP) to increase integrity and transparency in public administration. Despite the government's ongoing efforts, there has not been a satisfactory result (Muhamad & Gani, 2020).

The failure to reduce corruption is due to various factors. Dahlan and Hamizan (2018) suggested that a weak institutional structure leads to an increase in corruption. Even though Malaysia introduced various policies intending to reduce corruption, corrupt practices still prevail (Kapeli & Mohamed, 2015). This finding has been supported by several researchers, such as Hashim and Mohamed (2019) and Jones (2020). The continuation of corruption in Malaysia can be attributed to several factors, including the ineffectiveness of enforcement mechanisms, the prevalence of money politics, the participation of political actors in the government decision-making process, and the limited efficacy of anti-corruption programs (Jones, 2022).

1 Malaysia Development Berhad (1MDB) and SRC International Berhad (SRC) case showed a lack of effective countermeasures for anti-corruption initiatives in Malaysia. One example is the report concerning the irregularities in 1MDB that has been classified under OSA, making the investigation and public scrutiny impossible (Hashim, 2020). As a result, the anomalies remained hidden until *Barisan Nasional* lost the 14th general election, which led to the prosecution and conviction of Najib Razak, the former Prime Minister for the SRC International case (*Datuk Seri Najib Razak v. Public Prosecutor* [2022] 3 MLJ 656) and continued prosecution of 1MDB scandal.

According to Azmi and Zainuddin (2021), the public's acceptance of politicians who profit from public cash is what gives rise to the culture

of money politics. This culture needs to be denounced by embedding a comprehensive anti-corruption environment. Jones (2022) emphasized that formulating anti-corruption programmes requires transparency in dealing with government incumbents, asset disclosure by public office holders, and public scrutiny of public officer's judgements. This proposition is consistent with the fundamental principle of FOI. Thus, incorporating FOI in the legal structure is necessary to promote a transparent culture in public institutions.

## **Legal Framework of FOI**

Internationally, FOI has been embedded in various international legal instruments and conventions. In this regard, the UN advocates for and supports member states in the adoption and incorporation of FOI within their respective national legal frameworks. The incorporation of FOI inside national legislation has the potential to enhance openness and foster effective government (Peters, 2023). The International and regional legal instruments are as follows:

**Table 2**

### *Universal Legal Instruments*

<b>Legal Structure</b>	<b>Governing Instrument</b>	<b>Key Features</b>
<b>United Nation</b>	Universal Declaration of Human Rights (UDHR)	<ul style="list-style-type: none"><li>• emphasis on the protection of human rights</li><li>• emphasis FOI as an important aspect of democratic exercise</li></ul>
<b>United Nation</b>	United Nations Convention against Corruption (UNCAC)	<ul style="list-style-type: none"><li>• universal anti-corruption instrument</li><li>• Article 8 - Codes and conduct of public officials.</li><li>• Article 9 - public procurement and management of public finance</li><li>• Article 10 - public reporting of government financial records.</li><li>• Article 13 - participation of society in the government decision-making process.</li><li>• Malaysia is a signatory party.</li></ul>

Table 2 illustrates two UN legal instruments that are interrelated with FOI. The UDHR emphasizes that FOI is part of human rights, and UNCAC provides a mechanism for the member states to embed FOI as part of national laws in their respective legal system. Both conventions point out the importance of FOI in empowering governance and transparency in the public sector.

**Table 3**

*Malaysia Legal Structure on FOI*

<b>Legal Structures</b>	<b>Governing Instrument</b>	<b>Key Features</b>
Federal	Federal Constitution	<ul style="list-style-type: none"> <li>• Freedom of speech and association</li> <li>• There is no specific article on FOI</li> </ul>
State of Selangor	Freedom of Information (State of Selangor) Enactment 2011	<ul style="list-style-type: none"> <li>• Allow a member of the public to access information held by the state government.</li> </ul>
	Freedom of Information (State of Selangor) (Access of Information) Regulation 2012	<ul style="list-style-type: none"> <li>• Impose several restrictions and limitations for the disclosure of documents.</li> </ul>
	State Information Board (State of Selangor) Rules 2012	<ul style="list-style-type: none"> <li>• Subject to federal legislation, particularly OSA</li> </ul>
State of Penang	Penang Freedom of Information Enactment 2010	<ul style="list-style-type: none"> <li>• Access to information held by the state government department and agencies.</li> </ul>
	Regulations Freedom of Information Pulau Pinang (Access to Information) 2014	<ul style="list-style-type: none"> <li>• Provide limitations and restrictions for disclosure.</li> <li>• Subject to federal legislation, particularly OSA</li> </ul>
	Rules of the Appeal Board Freedom of Information Pulau Pinang 2014	

Table 4 illustrates two pieces of state FOI legislation and respective subsidiary legislation. The implementation of this legislation is only

applicable within state government institutions and state government link corporations. Both states of Selangor and Penang enacted this enactment to fulfil an election manifesto under the *Pakatan Harapan* government in 2011 and 2010, respectively. The enactments provide limitations and restrictions on disclosure apart from being subject to federal laws. Having to say that even though this enactment is a good initiative by the state government, the effectiveness of its implementation is compromised.

**Table 4**

*Restrictive Laws on Access to Information*

<b>Governing Instruments</b>	<b>Key Features</b>
Official Secret Act 1972 [Act88] (OSA)	<ul style="list-style-type: none"> <li>• Extensive power is given to the government for the classification of official documents.</li> <li>• Restriction for disclosure of the documents.</li> <li>• Principal act for non-disclosure of official documents.</li> </ul>
Printing, Presses and Publication Act 1984 [Act301]	<ul style="list-style-type: none"> <li>• Regulated matters related to the media and publications.</li> <li>• The government can revoke licenses.</li> <li>• Technically, it is applicable to social media.</li> </ul>
Sedition Act 1948 [Act 15]	<ul style="list-style-type: none"> <li>• Imposed restriction on freedom of speech and expression.</li> <li>• A statement or conduct that jeopardizes the national security and interest of the country.</li> </ul>
Communication and Multimedia Act 1998 [Act 588]	<ul style="list-style-type: none"> <li>• Regulating the internet providers and users.</li> <li>• Minister’s absolute discretion to impose a condition on the internet service provider.</li> </ul>
Computer Crimes Act 1997 [Act 563]	<ul style="list-style-type: none"> <li>• Aimed to fight computer crimes and cybercrimes.</li> <li>• Restriction on access to indecent, false, obscene, menacing, or offensive content.</li> </ul>

(continued)

Governing Instruments	Key Features
Penal Code 1936 [Act 574]	<ul style="list-style-type: none"> <li>• Elaborate on the definition of espionage.</li> <li>• A method of gathering sensitive information without consent or in violation of the law with the intention of harming Malaysia's security interests.</li> </ul>
Evidence Act 1950 [Act 56]	<ul style="list-style-type: none"> <li>• Section 123, no one is allowed to disclose any unpublished records related to state affairs.</li> <li>• Section 124, If a communication endangers the interests of the public, the public authorities cannot be obliged to reveal it.</li> </ul>
Emergency (Essential Powers) (No.2) Ordinance 2021	<ul style="list-style-type: none"> <li>• Section 2 of the ordinance provides <i>“any news, information, data, and reports, which are wholly or partly false relating to COVID-19 or the proclamation of emergency, whether in the forms of features, visuals or audio recording or another form capable and suggesting words and idea”</i>.</li> <li>• Repeal through a motion in Parliament</li> </ul>
Security Order (subsidiary legislation)	<ul style="list-style-type: none"> <li>• Government officials are prohibited from disclosing any government information to the public without prior consent from the head of the department.</li> </ul>

Table 4 explains restrictive federal laws that become the obstacles to implementing FOI in Malaysia.

The primary federal statute that imposes restrictions and limitations on access to information is the OSA. The OSA, which underwent amendment in 1986, is founded upon the England Official Secrets Act of 1911. (Suzuki, 2007). The objective of the England Official Secrets Act of 1911 was to effectively counteract espionage efforts within England both prior to and during World War 1 (Moran, 2008). In the context of Malaysia, the OSA primarily serves as a measure to counteract communist subversion, particularly during times of



emergency. There is no denying the significance of OSA as a crucial legislative instrument in safeguarding national interests and ensuring the preservation of security. Nevertheless, it is imperative to ensure that the subject matter is presented with utmost lucidity and accompanied by appropriate legal safeguards. In the absence of these measures, the OSA can be susceptible to manipulation to conceal unethical or illicit activities (Hutchinson, 2022). The OSA, especially the 1986 revisions, has been subject to criticism by various entities such as political parties and civil societies. This includes the National Union of Journalists (NUJ), the Bar Council, the Malaysia Trade Unions Congress (MTUC), the Congress of Unions of Employees in the Public and Civil Services (CUEPACS), the National Consciousness Movement (ALIRAN), Organisation of National Newspaper Editors (ONE), and Democratic Action Party (DAP) (Suzuki, 2007). One of the contributing elements to the resistance against the revision is the implementation of imprisonment penalties for the unauthorized disclosure of classified information, such as government tender and awards. The broad scope of the OSA can give rise to governmental abuse of power, as evidenced by several components of the OSA.

The OSA granted the government significant discretionary authority in determining the categorization of official secrets, establishing itself as the primary point of reference for other legislation and subsidiary regulations with restrictive provisions. In the case of *Takong Tabari v. Government of Sarawak & 3 Ors [1995] 1 CLJ 403*, the court emphasized that the reason why OSA has been enacted is none other than to protect the national interest and not to escape liability. However, the parameter of power under OSA is extensive and vague in nature. The provision under section 2B of the OSA empowered the government to determine the classification of official documents as 'Top Secret', 'Secret', 'Confidential', or 'Restricted'.

The main objective of restrictive laws is to establish secrecy as a default practice in government administration. The government officers are expected not to disclose any official document to the public or require them to provide such information upon request. This expectation is based on two legal points. First, government officials are required to act on the requirements of restrictive laws through government circulars, and second, there is no legal obligation to disclose or fulfill the request to disclose. Additionally, failing to comply with the requirements under restrictive law may result in imprisonment, a fine, and/or job termination.

## **METHODOLOGY**

The authors employed a doctrinal and analytical methodology in this study while focusing on the data already available from various sources such as legislation, journals, international legal instruments, and available decided cases in FOI and corruption. The literature search was undertaken in Scopus based on the area of FOI and corruption. This includes the title, abstract, and keywords of “Freedom of Information and “Corruption”. Web-based search engines, namely Google Scholar, were used to retrieve articles and grey articles that are associated with FOI and corruption. Current Law Journal (CLJ) is the primary search engine for legislation and subsidiary legislation, while Malaysian Law Journal (MLJ) uses the Lexis-Nexis Advance search engine to retrieve case laws. International legal documents are derived from the official websites of the United Nations.

## **RESULTS AND DISCUSSION**

Based on the assessment of Malaysia and international legal conventions, Malaysian laws are inclined towards secrecy legal regimes. Various restrictive law is widely interpreted not in favour of FOI. The policy adopted is based on the principle that all official documents are considered secret until stated otherwise. Thus, the implementation of FOI in Malaysia’s legal structure seems to be impossible. Based on the analysis, the Malaysian legal structure of FOI can be classified as restrictive regimes, disclosure regimes, and partial disclosure.

### **Restrictive Regimes**

National law legislation such as the Official Secret Act 1972 [Act88], Printing, Presses and Publication Act 1984 [Act301], Sedition Act 1948 [Act 15], Communication and Multimedia Act 1998 [Act 588], Computer Crimes Act 1997 [Act 563], and Penal Code 1936 [Act 574] can be considered as restrictive legal regimes that encourages secrecy as a default practice in the public sector. The significant number of restrictive regimes shows the federal government adopts a high level of secrecy when dealing with official documents. Under restrictive laws, the absolute power of the government to decide on the classification of official documents prevents the free flow of information from a government institution to the public domain.

## **Disclosure Regimes**

There is no national law that promotes disclosure. The Freedom of Information (State of Selangor) Enactment 2011 and the Freedom of Information (State of Penang) Enactment 2011 are two state laws that establish FOI policies inside state government organizations and agencies. Even though there is a disclosure exception and an adaptation restriction, it can still be considered a part of disclosure regimes.

## **Partial Disclosure**

The Federal Constitution recognizes FOI through a series of judicial interpretations of Article 10. Nonetheless, there is no direct wording of the right to the information stated under the Federal Constitution. Besides, the overall fundamental liberties are subjected to and limited based on public security, interest, morality, and health. It can be said that the Federal Constitution, as the supreme law in Malaysia, recognizes FOI as part of fundamental liberties, but its total structure provides wide restrictions and limitations.

## **Commitment and Political Will**

The government has conducted research on the implications and suitability of introducing FOI at the federal level since 2018. During the Pakatan Harapan administration in 2018, the government committed to reviewing the proposal to introduce the Malaysian version of the Freedom of Act (News Strait Times, 2018). The review includes studies on existing laws such as the Whistleblower Protection Act 2010, the OSA and the Witness Protection Act 2009. However, due to the collapse of the *Pakatan Harapan* government, the COVID-19 pandemic, and the declaration of emergency by the *Perikatan Nasional* government, the discussion and research on FOI have been put to a halt. In 2023, the government, through the Prime Minister Department (Law and Institutional Reform), conducted various discussions with civil society, NGOs, and the Centre for Independent Journalism (CIJ) pertaining to the FOI (John, 2023). On 14 September 2023, Prime Minister Anwar Ibrahim, through The Special Cabinet Committee on National Governance, agreed in principle to legislate Malaysia's version of FOI. This includes the review of the provision under OSA (The Star, 2023). This shows the government's political

will to introduce FOI legislation and acknowledge the importance of FOI to ensure transparency and accountability in the public sector.

## **RECOMMENDATIONS AND SUGGESTIONS**

The idea of FOI as a mechanism to combat corruption is a realistic approach. Countries around the globe implement FOI as part of their national laws as it is associated with human rights and can be a beacon to promote transparency and integrity. A combination of FOI and freedom of the press allows the members of the public to scrutinize decisions by the government, particularly concerning public fund expenses. As in Malaysia, there are no FOI regimes; international and regional legal frameworks are suggested as a reference. Imposing FOI requires several legal arrangements and strengthening the free flow of official documents within the public domain. To effectively implement the principles of FOI, it is proposed that the government undertake a constitutional amendment that includes specifics and unambiguous language pertaining to FOI.

It is suggested that the government needs to consider constitutional amendments to suit the adaptation of FOI as stated under UNCDR generally and UNCAC specifically. The assertion of clear provision on FOI in the federal constitution is necessary to ensure the right of the public to access information is protected. Under the current constitutional provision of article 10, there is no specific mention of the right to information. However, the judicial interpretation suggests that the provision includes the right of the public to seek information from the government, but this interpretation is not adequate. By referring to universal standards, UNCAC emphasizes that the members of the public must have the right to access information. Thus, it is suggested that Article 10 of the constitution includes the right to seek, receive and impart information apart from freedom of speech and information. As the constitution is the supreme law of the land under Article 4, any law inconsistent with the federal constitution shall be null and void. Embedding the FOI in the Federal Constitution is the first step for other legislations to follow suit.

The OSA is the greatest obstacle to the implementation of FOI. The wide power given to the government in classifying the official documents can be used to conceal any wrongful act committed by

the public official. Obtaining information from the government is an arduous task due to the government's ability to utilize the OSA as a means to deny public requests. In this context, Section 2 needs to be repealed. The power to decide the classification needs to be limited for national interest and security rather than wide power to classify the document. Undeniably, OSA is important to protect the interests and security of the nation. Certain official documents must be treated as secret for that purpose. However, the disclosure restriction must have a clear and legitimate purpose. For instance, the definition of the public interest and national security needs to be explained by providing a clear legal parameter on the absolute authority of the Minister.

The introduction of FOI legal regimes at the federal level is necessary. Even though the Penang and Selangor state governments implement their version of FOI legal regimes, the implementation is inadequate. Both legal regimes were only applicable to the state government department and agencies. Besides, federal legislation, specifically OSA, superseded state legislation concerning the classification of officials. Thus, both FOI legislation is subjected to the requirement stated under OSA.

Introducing FOI is the first step to promoting transparency and open government. The effectiveness of FOI legal regimes depends on the applicability and supremacy of the law itself. The provision under FOI must take priority over other legislation. Any separate restrictive laws that hinder the right to access information must conform to the requirements of FOI legal regimes. The protection of sensitive official documents associated with national interests and security can be embedded under the FOI legal regime to provide clarity when dealing with sensitive documents.

The government must implement an open government policy for FOI to be effective. Disclosure of governmental papers is the norm under the open government approach. Thus, heavy government circulars that restrict a member of the public from accessing official documents need to be re-evaluated. On the operational side, government officers are required to equip themselves to deal with the request for official documents by the public. This can be done through training and appointment of specific officers who deal with the public request. The balance of competing interests between the public and government must be drawn. In exercising administrative power, the government

official tends to be secretive. From the administration's perspective, the government is in favour of non-disclosure because they can make a decision quickly without being required to observe requirements under FOI's legal instrument. From the public perspective, obtaining information from the government without restriction is considered a fundamental right. International institutions and human rights organisations are continuously campaigning for maximum disclosure, which means all official documents are subject to disclosure with the limitation of the strict interpretation of national security. Whilst having the power to decide the classification of information managing the countries is crucial, the government needs to acknowledge it can be subject to abuse. Thus, the government must strike a balance between these two competing interests.

## **CONCLUSION**

In conclusion, FOI is recognized as an important human rights aspect. It can also be used to confront corruption in the public sector. This can be seen through various international legal instruments that promote the implementation of FOI legal regimes. On that note, the Malaysian government needs to amend, repeal, and review current laws that hinder the right of the public to access information and legislate their version of FOI legal regimes. By implementing FOI legal regimes, the culture of transparency will be part of government administrative policy that can increase the accountability and responsibility of public officers. The continuous checks and balances through FOI in government decisions related to public funds can root out corruption in Malaysia.

It can be argued that the execution of the FOI necessitates a substantial institutional transformation. This encompasses the various procedures and logistical considerations involved in the execution of FOI measures. Ensuring the affordability of information acquisition is crucial, and it is imperative to foster public engagement through ongoing campaigns and allocate sufficient budgetary resources for the effective functioning of FOI initiatives. Hence, it is advisable to mandate the inclusion of dedicated budgetary provisions within the annual national budget. In relation to education and public engagements, the government is recommended to constantly remind the public about the importance of FOI and for what purpose it serves.

This can be done through government agencies such as the Ministry of Information and Digital, Ministry of Education, Ministry of Higher Education and Ministry of Law and Institutional Reforms. It is also recommended that the government establish institutions under the Prime Minister's Department to oversee the implementation of the FOI system. The purpose is to guarantee efficient cooperation among various authorities while also addressing budgetary considerations. Furthermore, it is crucial to provide an annual report on the data about the accessibility of official information to the Parliament. This is necessary to facilitate a continuous evaluation of the performance of the FOI system.

Based on the above-mentioned discussion, Malaysia needs to conduct institutional and legal reform to allow FOI as part of Malaysia's legal structure. Due to the non-existence of a clear provision on FOI in the Federal Constitution, Malaysia needs to consider embedding certain provisions under the UDHR. In the process of overhauling domestic laws and introducing FOI legal regimes, the provision of UNCAC is an appropriate legal instrument to be referred to. Malaysia, as a signatory member of UNCAC, should fulfill the requirement stated under the Convention.

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