Journal of Administrative Science
Vol.15, Issue 1, 2018
Available online at http:jas.uitm.edu.my

Legal and Policy Measures to Overcome Public Information Lock Down in Malaysia

Haswira Nor Mohamad Hashim [1], Anida Mahmood [2], Nurul Shuhada Suhaimi [3]

[1, 2, 3] Faculty of Law, UiTM Shah Alam, Selangor, Malaysia,
haswira648@salam.uitm.edu.my[1], anidafuu@gmail.com [2], nurulshuhadasuhaimi@gmail.com [3]

Abstract

This paper reports a study that proposed legal and policy measures to overcome public information lock down in Malaysia. Public information lock down refers to the presence of the laws which impede citizens' right to impart public sector information. Previous studies have identified public information lock down arising from legislations which impede citizens' right to impart information. Despite the presence of Whistleblower Protection Act 2010, the Act prohibits direct public disclosure and the right is subject to other written laws currently in force in Malaysia. This study compared the laws and policies from several countries to identify the legal and policy measures to overcome public information lock down. A survey was conducted among respondents from government and non-governmental bodies to gain feedback on the most appropriate legal and policy measures to overcome public information lock down in Malaysia. The proposed measures are suitable for adoption to overcome public information lock down in Malaysia.

Keywords: information lock down; right to impart information; public sector information; law and policy

INTRODUCTION

Citizens have a right to information, which empowers them with the right to seek, receive and impart public sector information (Mishra, 2013. The right to information is interlinked to other constitutional rights and is also regarded as precondition of the freedom of press and media (Peled & Rabin, 2011). This study focuses on public information lock down which impede citizens' right to impart public sector information. Within the context of this study, 'Public Sector Information' refers to information produced or held by government or for government under a law or in connection with official function, business or affair. The term "Government" includes the Ministers, the government body/agency and the government employees at federal, state and local government levels (Lor & Johannes, 2007).

Citizens' ability to impart public sector information keeps open a continuing dialogue and communication between the Government and the people. The Government is under obligation to refrain from interfering with communication of public information necessary to citizens (Thiru, 2016). The obligation of the Government to facilitate the right to seek, receive and impart information derived from its duty to give effect to the right under Article 19 of the International Covenant on Civil and Political Rights. Hence, there is a need for the Government to ensure that these rights can be exercised without hindrance. Putting in place legal and policy measures which ensure, protect, respect and guarantee citizens' right to impart public sector information is beneficial to the citizens and the Government alike.

The legal and policy measures which overcome public information lock down can improve public trust and confidence in the Government as government and public sector bodies are seen as being transparent (UK Information Commissioner's Office, 2015). Overcoming public information lock down is also in line with the Malaysian Government Transformation Programme (GTP), which outlines the Government's commitment to transparency and accountability. As there is a *lacuna* for such measures, this study aims to propose legal and policy measures to overcome public information lock down in Malaysia. The purpose of proposing these legal and policy measures is to ensure the existing laws do not impede the citizens' right to impart public sector information, as well as to ensure disclosure of public sector information becomes a rule and secrecy is an exception.

PROBLEM STATEMENT

Despite the fact that the Whistleblower Protection Act 2010 (WPA 2010) was introduced to protect a whistleblower who disclosed improper conduct in private and public sector, a whistleblower is not allowed to make disclosure direct to the public. Instead, the whistleblower is required to disclose the improper conduct to an enforcement agency, department or other body set up by the Government. In addition, s 11(1)(d) WPA 2010, empowers enforcement agency who receives the information to revoke the whistleblower protection if the agency is of the opinion, that the disclosure principally involves questioning the merits of government policy. Already there are cases whereby individuals who acted as whistleblower being prosecuted for their failure to adhere to the requirements of the Act.

Further, s 6(1) WPA 2010 also provides that the disclosure made under the Act must not be prohibited by any written law. Therefore, disclosure of public sector information prohibited by the Official Secret Act 1972, Penal Code, Printing Presses Publication Act 1994, Sedition Act 1948 and Evidence Act 1950 would not attract protection under the WPA 2010 (Johan, 2013). Though admittedly the purpose of these

ISSN 1675-1302

legislations are to protect public order and safety as well as national interests and security, in practice these legislations also impede the citizens' right to impart public sector information.

In the absence of whistleblower protection, any person who impart information which are classified as affairs of state, official communication, prohibited publication or seditious, risks prosecution for violating s 8(1)(c),(e),(d) Official Secrets Act 1972 (release or disclosure of official secret). Further, the whistleblower may also risk prosecution under s 203A(1)&(2) Penal Code (disclosure or subsequent disclosure of any information or matter which has been obtained by a civil servant in the performance of his duties, or the exercise of his functions under any written law). Alternatively, the whistleblower may be prosecuted under two other laws: s 8(2) Printing Presses and Publication Act 1984 (issuing, circulating and distributing prohibited publication); or s 3(1)(a) & s 10(1) Sedition Act 1948 (printing, uploading, broadcasting, seditious speech, words, publication; prohibition of circulating seditious publications) (Amnesty International, 2015).

In addition, s 123 of the Evidence Act 1950 prohibits the production in Court any unpublished official records relating to affairs of State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold permission as he thinks fit, subject also, to the control of a Minister. Moreover, s 124 of the Act prohibits public officer from being compelled to disclose before the Court any communication made to him in official confidence when he considers that the public interest would suffer by the disclosure. The Act empowers the head of the department of the Government office to certify whether or not disclosure of an official record prejudicial to the public interest.

All these legal provisions have the effect of impeding citizens' right to impart public information (Muhamad Izwan, 2014). Due to the prevalence of public information lock down, there have been numerous calls by Malaysian civil society and distinguished members of community for the Government to respect the citizen's right to report, disclose and disseminate public sector information deemed necessary for the exercise of their right to (Fernandez, 2016). Civil rights activists from local non-governmental organizations urged for the right to information law which is consistent with international standards to be adopted and implemented as a matter of priority (Yong, 2016). Hence, it high time for legal and policy measures to overcome public information lock down to be proposed in Malaysia.

ISSN 1675-1302

Literature Review

Review of literature reveals that, between 2002 to 2007, several inter-governmental bodies and civil society such as The UN Special Rapporteur on Freedom of Opinion and Expression, Commonwealth Human Rights Initiative, Article 19 and Open Society Justice Initiative have laid down the general principles of right to information aimed as the international standards to be observed in the legislations that give effect to the citizens' right to public information (Daruwala, 2003).

About the same period of years, similar and other inter-governmental bodies/civil society alike have started to develop legislative models for the right to information (See, Article 19, 2018; African Commission on Human and Peoples' Rights, 2013; Commonwealth Secretariat, 2002). However, it is found that their focus is on developing a *sui generis* law which is at par with the international standards and general principles of the right to information. None of the legislative models was developed to overcome public information lock down arising from conflicting laws and policies. While the model laws attempt to balance the right with private and public interests, previous literature also does not ascertain which model law is most appropriate to overcome public information lock down.

As far as Malaysia is concerned, review of literature also finds that previous studies either by international body (see, The Constitution Unit UCL, 2011), or at national level (see, Muhamad Izwan, 2014; Venkiteswaran, 2010), mostly report about the absence of constitutional and legislative protection for the right to information in Malaysia. Several studies were also made on the Freedom of Information Enactment of the states of Selangor and Penang whereby these studies found that the laws are subject to the laws at federal level including those which impede the citizens' right to information (Daruwala & Nayak, 2011). Despite the existence of legal impediments to citizens' right to public information, the previous studies did not propose a legal and policy measures to overcome to public information lock down in Malaysia.

Due to the gap identified in the literature, this study aims to propose a legal and policy measures most appropriate to overcome public information lock down in Malaysia that arises from a myriad of competing laws of this country. This study is premised upon argument that a *sui generis* law on the right to public information cannot exist in silo, instead it needs to be implemented within a legal and policy framework that takes into account the unique legal condition of a particular country which may call for variations to its legal and policy measures (Peled & Rabin, 2011). Hence, this study endeavours to propose a legal and policy measures most appropriate to overcome public information lock down and at the same time harmonize conflicting legal provisions which affect the right.

ISSN 1675-1302

RESEARCH QUESTIONS

i) What Are Legal And Policy Measures Most Appropriate To Overcome Public Information Lock Down?; and
ii) How Should The Legal And Policy Measures Be Adapted To Overcome Public Information Lock Down In Malaysia?.

PURPOSE OF THE STUDY

The purpose of this study is to propose legal and policy measures to overcome public information lock down in Malaysia.

RESEARCH METHODS

Research Design

This study is classified as fundamental research since its aim is to propose legal and policy measures to overcome public information lock down in Malaysia. This study is further classified as legal research as its research problem stems from the absence of constitutional protection and inadequacy of WPA 2010, apart from the presence of conflicting laws which impede citizens' right to information in Malaysia. This study employs a mixed modes approach involving field work and library based research. A primary data was collected using survey questionnaires with 40 respondents.

Instruments

Survey questionnaires was used as an instrument to answer the first research question. The survey questionnaires are divided into seven separate sections. The first section (Part A) was designed with the purpose of obtaining the demographic information of the respondents by using nominal data. The remaining sections of the survey (Part B – Part G) were designed to meet the objectives of this study. The section which surveyed on legal and policy measures on information lock-down contains 11-variables, based on five-point Likert scale ranging from the lowest to the highest (1=Strongly Disagree, 2=Disagree, 3=Not Sure, 4=Agree, 5=Strongly Agree). The variables were derived from the legal and policy measures to overcome public information lock down which are currently adopted in the United Kingdom (UK), Canada and New Zealand.

ISSN 1675-1302

Sample

For the purpose of comparison, the UK, Canada and New Zealand have been selected as sample countries. While admittedly there are over 96 countries which have passed various legislations aimed at overcoming legal impediments to citizen's right to information (Trapnell, 2014), these three countries are the best countries for the purpose of comparison with Malaysia since they share similar legal system with Malaysia. Like Malaysia, Canada and New Zealand are former colonies of England, which inherit Common Law system and similar colonial era legislations. However, unlike Malaysia, the UK, Canada and New Zealand have taken appropriate legal and policy measures which are aimed at overcoming public information lock down.

As for the survey, the target population for the survey are representatives of the government agency, independent statutory body, civil society and academia. A stratified, purposive sampling is used to select the respondents among the population of this study. The criteria for selections are legal officers who are currently attached with the Attorney General's Chambers and Malaysian Anti-Corruption Commission, as well as civil rights activists and academics who are experts in constitutional and human rights laws.

Data Collection

Data collection for this research is mixed-modes approach comprising field work to collect primary data and library based research to collect secondary data. Secondary data was drawn from primary legal sources in the form of legislative texts comprising of statutes and codes (collectively referred as 'the Laws") and regulations and non-legislative texts such as policy, procedures and guidelines (collectively referred as "the Policies"). The laws and policies were collected from the official websites of the government of selected countries. Altogether 14 laws and 3 policies were collected for analysis, listed below:

Table 1: Laws and Policies Overcoming Public Information Lock Down (UK, Canada, New Zealand)

United Kingdom	Canada	New Zealand
Laws: • Human Rights Act 1998 • Public Interest Disclosure Act 1998 • Freedom of Information Act 2000	**Laws:** • Canadian Charter of Rights And Freedoms • Access to Information Act 1985 • Evidence Act 1985 • National Defence Act 1985 • Security of Information	**Laws:** • Official Information Act 1982 • Bill of Rights Act 1990 • Public Disclosure Act 2000 • Evidence Act 2006, • Crimes (Repeal of Seditious Offences) Amendment Act

ISSN 1675-1302

Policies: • Government Security Classifications 2014	Act 1985 • Public Servants Disclosure Protection Act 2005 **Policies:** N/A	2007 **Policies:** • NZ Government Security Classification System • Guidelines for Protection of Official Information 2001

For primary data, a cross-sectional data was collected from the survey population. Data collection was conducted between 1 January 2017 until 1 April 2017. Survey was conducted with 20 respondents from the Attorney General's Chambers and Malaysian Anti-Corruption Commission. For the purpose of triangulation, 20 respondents who are civil rights activists and academic experts in constitutional law and human rights law were also surveyed. Self-administered survey questionnaires were distributed by the researchers to the target population by hand using stratified, purposive sampling techniques. The language of instruction for the survey is English and each respondent was allocated approximately thirty minutes to answer the survey questionnaires. The completed survey questionnaires were then collected by the researchers themselves.

Data Analysis

For qualitative data, a legal, doctrinal and policy analysis were made on the primary and secondary legal sources. Further, a comparative analysis was made on the laws and policies from the UK, Canada and New Zealand based on three criteria's: similarities, differences and special/unique features of the legal and policy measures adopted in the selected countries. The scope of comparison is pertaining to the legal and policy measures which overcome public information lock up in the selected countries. A normative analysis approach to determine what the laws and policies ought to be, was applied in order to answer the second research question.

The normative analysis approach which requires analysis of both the primary and secondary data is important as the aim of this study is to propose legal and policy measures to overcome public information lock down in Malaysia.

As for quantitative data, the survey data was analyzed using descriptive analysis. The nominal data was analyzed to find the Mode. The ordinal data was statistically analyzed to rank and to find the Median for each variables in the Likert scale and the Means was used to describe the scale.

ISSN 1675-1302

FINDINGS

i) What are the legal and policy measures most appropriate to overcome public information lock down?

The figures below illustrate the findings of the survey conducted with 40 respondents for the purpose of determining legal and policy measures most appropriate to overcome information lock down in Malaysia. Eleven (11) variables asked in the survey serve as the legal and policy measures which have been adopted in the UK, Canada and New Zealand to overcome information lock down. Likert scale is used to depict the appropriateness of the legal and policy measures to overcome public information lock down. The Likert scale used are as follows: 1=Strongly Disagree, 2=Disagree, 3=Not Sure, 4= Agree, 5=Strongly Agree. The summary of the analysis is presented in Table and Figure(s).

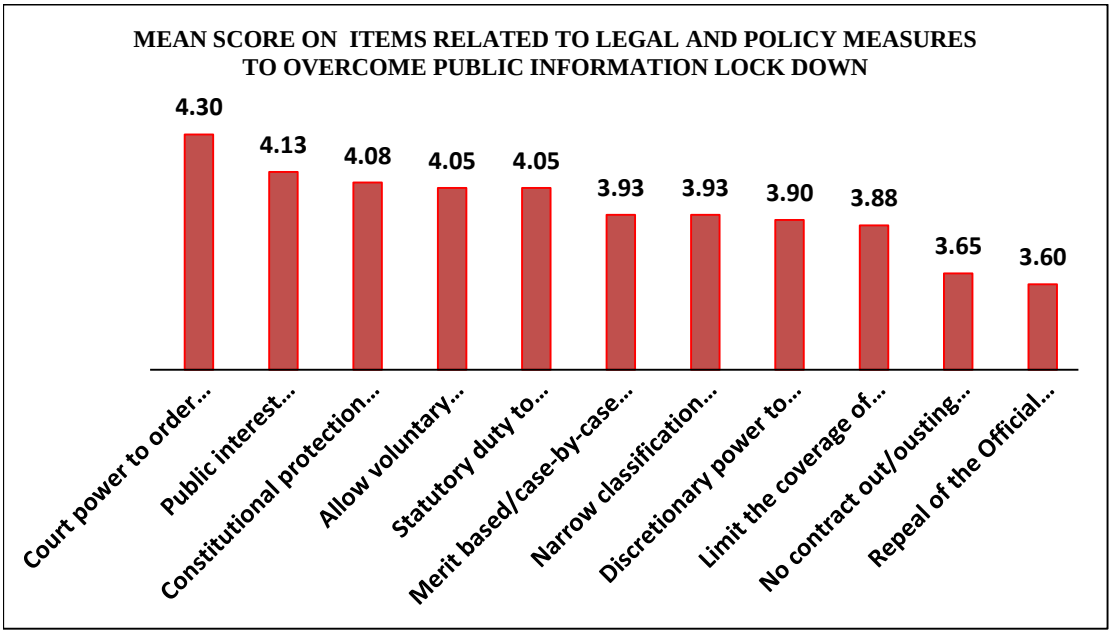

Figure 2: *Mean Value On Items Related To Legal And Policy Measures to Overcome Public Information Lock Down*

Based on the descriptive analysis, it is found that the highest Mean value is 4.30 (Court power to order disclosure of privileged and confidential information in judicial proceedings) followed by 4.13 (Public interest defence/statutory protection from civil and criminal liability for protected disclosure). The lowest Mean value is 3.60 (Repeal

ISSN 1675-1302

of the Official Secrets Act 1972). There are 5 variables which recorded a Mean value above 4.00, while 6 others recorded Mean values between 3.60 to 3.93. There are 2 variables with equal Mean value of 3.93; i) Narrow classification secret/protected information; and ii) Merit based/case-by-case basis/redacted forms of disclosure of secret and official non-sensitive information. The Mean values for all the variables surveyed range between 3.60 to 4.30. The findings indicate that the respondents of this survey are not fully agreeable as to the appropriateness of some of the legal and policy measures to overcome public information lock down in Malaysia.

Table 2: Total Median of 11 items measuring legal and policy measures to overcome public information lock down based on the organisation the respondents are attached with

	Organisation Attached With			
	Ministry / Government Agency	Independent Statutory Body	Civil Society	Academia
Constitutional protection of the right to impart information including freedom of press and other media communication	4.00	4.00	5.00	4.00
Allow voluntary disclosure by employee/public servant in good faith to Minister, Ombudsmen, his employer, other responsible person and public	4.00	4.00	4.00	4.00
Public interest defence/statutory protection from civil and criminal liability for protected disclosure	4.00	4.00	4.00	4.00
Discretionary power to disclose background information/statement of reason for administrative/policy decision making	3.50	4.00	4.00	4.00
Repeal of the Official Secrets Act 1972	3.00	3.00	4.00	4.00
Court power to order disclosure of privileged and confidential information in judicial proceedings	4.00	4.00	5.00	4.00
Statutory duty to establish internal procedures to manage disclosures of public sector information	4.00	4.00	4.00	5.00
Narrow classification secret/protected information	4.00	4.00	4.00	4.00

ISSN 1675-1302

Limit the coverage of seditious offences	3.00	4.00	4.50	4.00
No contract out/ousting clause to withdraw or abandon right to disclose information	3.50	3.00	4.00	4.00
Merit based/case-by-case basis/redacted forms of disclosure of secret and official non-sensitive information	4.00	4.00	4.00	4.00

Analysis of Median value based on organization attached, found that a Median value lower than 4.00 is recorded from the respondents attached to the government agency for the following variables: i) Discretionary power to disclose background information/statement of reason for administrative/policy decision making (3.50); ii) Repeal of the Official Secrets Act 1972 (3.00); iii) Limit the coverage of seditious offences (3.00); and iv) No contract out/ousting clause to withdraw or abandon right to disclose information (3.50). As for the respondents representing independent statutory body, Median values lower than 4.00 are recoded for i) Repeal of the Official Secrets Act 1972 (3.0); and ii) No contract out/ousting clause to withdraw or abandon right to disclose information (3.0). As for respondents representing civil society, Median values for all variables are 4.00 and above , with two variables record Median value 5.00: i) Court power to order disclosure of privileged and confidential information in judicial proceedings; and ii) Constitutional protection of the right to impart information including freedom of press and other media communication. A high Median value is also recorded from the academia, where Median value 4.00 is recorded for 10 variables, while one variable i.e. Statutory duty to establish internal procedures to manage disclosures of public sector information record a Median value 5.00. Therefore, it can be concluded that, the academia and civil rights activists are more receptive to the legal and policy measures to overcome public information lock down compared to the respondents who are attached to government agency and independent statutory body.

ISSN 1675-1302

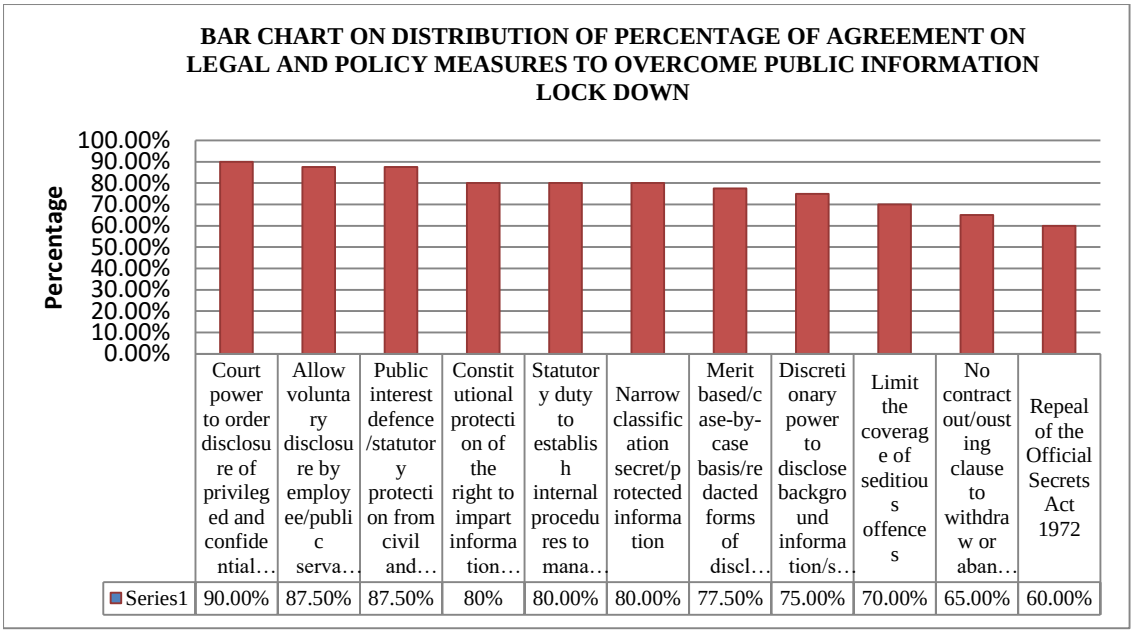

Figure 4: *Distribution of percentage agreement of 11 items measuring legal and policy measures to overcome public information lock down*

In terms of Mode value for each variable, Court power to order disclosure of privileged and confidential information in judicial proceedings record the highest Mode value of "Agree and Strongly Agree" at 90.0%. This is followed by two variables, i) Allow voluntary disclosure by employee/public servant in good faith to Minister, Ombudsmen, his employer, other responsible person,; and ii) Public interest defence/statutory protection from civil and criminal liability for protected disclosure (87.5%). The lowest Mode value for "Agree and Strongly Agree" response is Repeal of the Official Secrets Act 1972 (60%). This is followed by response for i) No contract out/ousting clause to withdraw or abandon right to disclose information (65.0%); and ii) Limit the coverage of seditious offences at 70.0% who "Agree and Strongly Agree". From the above findings, this study observes that overall, majority of the respondents either "Agree" or "Strongly Agree" as to the appropriateness of the legal and policy measures to overcome public information lock down. Therefore, all variables from the survey can be incorporated as part of legal and policy measures to overcome public information lock down in Malaysia.

ISSN 1675-1302

ii) How should the legal and policy measures be adapted to overcome public information lock down in Malaysia?

The main purpose of proposing legal and policy measures is to provide means to overcome public information lock down in Malaysia. The proposed legal and policy measures are adapted from the findings of the survey reported above. The variables which record high Mean, Median and Mode values are incorporated into the proposal. Besides the survey findings, established principles of citizen's right to public information are also incorporated as part of the proposal.

Table 3: Legal and Policy Measures to Overcome Public Information Lock Down in Malaysia

ACTION PLAN	LEGAL MEASURES	POLICY MEASURES
• To amend Article 10, Federal Constitution (Malaysia) which does not contain a provision which recognizes, guarantees and protects citizens' right to information. • To introduce a Policy on Internal Disclosure Procedures for Public Sector Information	• To adapt Art 14, Bill of Rights Act 1990 (NZ) and Art 10(1), (Human Rights Act 1998 (UK) which provides that everyone has the right to freedom of expression that include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. • To adapt Art 2(b), Canadian Charter of Rights and Freedoms which protects freedom of press and other media of communication.	• To impose an obligation on Ministries, government agencies and statutory bodies to establish internal procedures to manage disclosures of public sector information.
• To amend s 6(1), Whistleblower Protection Act 2010 (WPA 2010) which contains no provision which enables a whistleblower to disclose improper conduct direct to the public. Under WPA 2010 a whistleblower is strictly required to disclose to enforcement agency of a ministry, department, agency or other body set up by the Federal Government, State	• To adapt s 10(1)(a)-(c), Public Disclosure Act 2000 (NZ) that allows disclosure to be made to public, if the person or appropriate authority to whom the disclosure was first made: ▪ has decided not to investigate the matter; or ▪ has decided to investigate the matter but has not made progress with the investigation within a reasonable time after the date on which the disclosure was made to the	N/A

ISSN 1675-1302

government or local government.	person or appropriate authority; or ▪ has investigated the matter but has not taken any action in respect of the matter nor recommended the taking of action in respect of the matter, as the case may require. • To adapt s 16(a),(b), Public Servants Disclosure Protection Act 2005 (Canada) which allows disclosure to public by a public servant if there is not sufficient time to make the disclosure to the designated parties and the public servant believes on reasonable grounds that the subject-matter of the disclosure is an act or omission that constitutes a serious offence under an Act of Parliament or of the legislature of a province; or constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment 2005.	
• To amend s 6(1) *proviso*, Whistleblower Protection Act 2010 (WPA 2010) which provides that the disclosure made must not be prohibited by any written law.	• To substitute the existing provision in s 6(1) *proviso*, with the following overriding provision: *"The statutory right and protection given under WPA 2010 shall prevail over other laws currently in force in Malaysia that prohibit disclosure of public sector information, provided the disclosure is made in the public interest".* • To adapt s 15(1), Security of Information Act 1985 (Canada) on public interest defence test: *A person acts in the public interest if the public interest in the disclosure outweighs the public interest in non-disclosure.* • To adapt s 15(4), SIA 1985 on the statutory guidelines on factors to	N/A

ISSN 1675-1302

	be considered by a judge in deciding whether the public interest in the disclosure outweighs the public interest in non-disclosure, *inter alia*: ▪ whether the person had reasonable grounds to believe that the disclosure would be in the public interest; ▪ the public interest intended to be served by the disclosure; ▪ the extent of the harm or risk of harm created by the disclosure; and ▪ the existence of exigent circumstances justifying the disclosure i.e. to avoid grievous bodily harm or death or related to human rights violations or crimes against humanity.	
• To repeal s 11(1)(d), WPA 2010 which requires the enforcement agency who received the information on improper conduct to revoke the whistleblower protection conferred on the person who disclosed the information if the agency is of the opinion that the disclosure principally involves questioning the merits of government policy, including policy of a public body.	• To adapt s 23(1) & (2), Public Disclosure Act 2000 (NZ) that prohibits the employers from inserting a contract out or ousting clause which require the employees/contractors to withdraw or abandon their statutory right to disclose information.	• N/A
• To amend Official Secret Act 1972 (OSA 1972) which prohibits release or disclosure of official secret for a broad category of public sector information. • To introduce Government Security Classifications like the UK.	• To adapt s 4(1), Security Information Act 1985 (Canada) which provides that protected information only applies to wrongful communication by a person who has in his possession or control any secret official code word, password, sketch, plan, model, article, note, document or information relating to prohibited place. • To adapt s 31(1) & s 14(1), SIA	• To adapt para 14, Part II, UK Government Security Classifications 2014 (GSC) to operate within the framework of domestic law, including the requirements of the Official Secrets Acts and and the Data Protection Act. • GSC 2014 provides that: ▪ Information classified as "Official" is likely to be releasable unless it is

ISSN 1675-1302

	1985, which only protect from disclosure, purported or unauthorized communication or confirmation by a person who is permanently bound to secrecy of special operational information. • To introduce the "Harm Test" which requires the prosecutor to prove that release or disclosure of the official secret is for the purpose prejudicial to the safety or interest of the State • To adapt s 3(1)(a)-(n), SIA 1985 that provide a statutory interpretation of what amounts to the purpose that is prejudicial to the safety or interest of the State, *inter alia*: ▪ to advance a political, religious or ideological purpose, objective or cause or to benefit a foreign entity or terrorist group; ▪ adversely affects the economic stability, the financial system or financial market without reasonable economic or financial justification; ▪ impairs or threatens the capability of the armed forces/military service, or any part of it; ▪ impairs or threatens the capability of government or of a Bank, to protect against, or respond to, economic or financial threats or instability; ▪ impairs or threatens the capability of the Government to conduct diplomatic or consular relations, or conduct and manage international negotiations; ▪ develops or uses anything that is intended or has the capability to cause death or serious bodily injury to a significant number of people	subject to statutory exemptions; ▪ Where appropriate, official non-sensitive information should be published for re-use. • All Official Information will be transferred to the National Archives as open records wherever possible, at 20 years and in accordance with the Public Records Act. • Disclosure of 'Secret' information, is to be assessed on a case by case basis. Some information might be releasable in a securely redacted format. • 'Official Information' is to be distinguished from 'Official Sensitive' information. Where appropriate, non-sensitive information should be published for reuse.

ISSN 1675-1302

	whatever means	
• To amend s 203A(1) of the Penal Code (Amendment) Act 2013, which declares as an offence whoever discloses any information or matter which has been obtained by him in the performance of his duties, or the exercise of his functions under any written law. • To amend s 203A(2) of the Penal Code which declares as an offence whoever has any information or matter, which to his knowledge has been disclosed in contravention of subsection (1), who discloses that information or matter to any other person.	• To adapt s 15(1), Security of Information Act 1985 (Canada) which provides public interest defence for any person who is found guilty of an offence of purported or unauthorized communication or confirmation under section 13 or 14. • To adapt s 15(4), SIA 1985 on the statutory guidelines on factors to be considered by a judge in deciding whether the public interest in the disclosure outweighs the public interest in non-disclosure.	N/A
• To amend s 7(1) of the Printing Presses and Publications Act 1984 (PPPA 1994) which empowers a Minister in his absolute discretion order to prohibit *inter alia* issue, circulation and distribution of publication and future publications of a publisher if he is satisfied that the publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or	• To omit the word "in his absolute discretion" and to insert a provision that allows judicial review to challenge Minister's decision made under s 7(1), PPPA 1984. • To introduce a statutory guidelines on what type of contents in a publication which is likely: ▪ to be prejudicial to public order, morality, security, or ▪ to alarm public opinion, or ▪ to be prejudicial to public interest or national interest.	N/A

ISSN 1675-1302

is likely to be prejudicial to public interest or national interest.		
• To amend s 8(2), PPPA 1994 which declares as an offence any person who *inter alia* issues, circulates and distributes any prohibited publication punishable with imprisonment or a fine or both.	• To insert public interest defence which allows a person who disclosed classified or protected information to avoid punishment by establishing that the public interest in disclosure of the prohibited information outweighs the public interest in non-disclosure.	N/A
To amend s 10(1), Sedition Act 1948 on power of court to prohibit circulation of seditious publications	• To adapt s 82, National Defence Act 1985 (Canada) which limits seditious offences to advocating governmental change by force by publishing or circulating any writing, printing or document in which is advocated, or who teaches or advocates, the use, without the authority of law, of force as a means of accomplishing any governmental change within Canada. • To amend s 10(1), SA 1948 by substituting the word "shown to the satisfaction of the court" with the word "proven", and omitting the words "be likely to" and "appears to", so as to read as follows: *Whenever on the application of the Public Prosecutor it is proven that the issue or circulation of a seditious publication is or if commenced or continued would lead to unlawful violence, or have the object of promoting feeling of hostility between different classes or races of the community, the court shall make an order (in this section called a "prohibition order") prohibiting the issuing and circulation of that publication (in this section called a "prohibited publication") and requiring*	N/A

ISSN 1675-1302

	every person having any copy of the prohibited publication in his possession, power, or control forthwith to deliver every such copy into the custody of the police.	
• To amend s 123, Evidence Act 1950 (EA 1950) which prohibits the production in Court any unpublished official records relating to affairs of State, or to give any evidence derived therefrom except with the permission of the head of department. • To amend s 124, EA 1950 which prohibits public officer from being compelled to disclose before the Court any communication made to him in official confidence when he considers that the public interest would suffer by the disclosure unless the head of the department certifies that such disclosure would not be prejudicial to the public interest. • To introduce Guidelines for Protection of Official Information and Government Security Classification System like New Zealand.	• To adapt s 37(4.1) & (5). Evidence Act 1985 (Canada) which vests the court with discretionary power to order disclosure of the information, if the court concludes that the public interest in disclosure outweighs in importance the specified public interest. • To adapt s 69(2)(a)-(c), Evidence Act 2006 (NZ), which vests a judge with discretionary power to give a direction for disclosure if the Judge considers that the public interest in the disclosure in the proceeding of the privileged communication or confidential information is outweighed by the public interest including for the purpose of maintaining activities that contribute to or rely on the free flow of information.	• To provide policy and administrative guidelines to the head of department of the ministries, government agencies, and statutory bodies as to: ▪ unpublished official records relating to affairs of State that can be disclosed in Court; and ▪ the circumstances where public interest would suffer by disclosure of the official communication. • To adapt Guidelines for Protection of Official Information 2001 (NZ) which does not allow official information to be withheld; rather, the information must be considered on its merits using the criteria in the Act. • To adapt para 4.5, Government Security Classification System (NZ), which provides that government agencies should limit the duration of the protective marking and set up review procedures. • To adapt s 35(2), Freedom of Information Act 2000 (UK) as a matter of policy that once a decision as to government policy has been taken by the Government, statistical information used to provide an informed background to the taking of the decision may be disclosed under the Act. • To adapt s 21(2)(a) & (b), Access to Information Act 1985 (Canada) as a matter of

ISSN 1675-1302

		policy that the head of government institutions cannot refuse disclosure of a record that contains an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person; or a report prepared by a consultant or an adviser who was not a director, an officer or an employee of a government institution or a member of the staff of a minister of the Crown at the time the report was prepared.

CONCLUSION

This study has achieved its aim to propose legal and policy measures to overcome public information lock down in Malaysia. The legal and policy measures proposed by this study are of international standard as the measures were adapted from the UK, Canada and New Zealand. Since the proposal comprised both legal and policy measures, it serves as authoritative implementation tools to overcome public information lock up in Malaysia. The implementation of the legal and policy measures requires the Federal Constitution and impeding statutes to be amended, and new legislation and policies to be introduced.

Due to time and budget constraints, the comparative analysis by this study only covers three countries and its survey only involves 40 respondents. In future, the comparative analysis could be expanded to include other jurisdictions from ASEAN and non-Commonwealth countries particularly USA. Further, the survey could be expanded to other government agencies, independent statutory bodies, as well as members of civil society and academic institutions not covered by this study. As this study focuses on information lock down, future research should focus on overcoming information lock out and information lock up which impede citizens' right to seek and receive public information.

Being a legal research, this study does not conduct feasibility study to carry out the legal and policy measures. However, since data and information in present day mostly exist in digital format, it is anticipated that public information can be released online, hence more costs efficient. This study also does not investigate attitude and

ISSN 1675-1302

readiness among legislatures and the civil servants, being the main stakeholders in passing and implementing the legal and policy frameworks. Hence, further study should be conducted to fill in the gaps left by this study.

ACKNOWLEDGMENTS

This paper is derived from a research supported by Universiti Teknologi MARA (UiTM) titled "Legislative Framework to Overcome Legal Impediments To Citizens' Right To Public Information In Malaysia" (2016). The writers thank UiTM for awarding the research grant with the project code 600-IRMI/DANA 5/3/LESTARI (0159/2016).

REFERENCES

African Commission on Human and Peoples' Rights. (2013). Model Law on Access to Information for Africa *African Commission on Human and Peoples' Rights*.

Amnesty International. (2015). Malaysia: Court Ruling on Sedition Act Yet Another Blow to Freedom. Retrieved from http://www.amnesty.org.au/news/comments/38165

Article 19. (2018). *A Model Freedom of Information Law*. Retrieved from London: https://www.article19.org/data/files/pdfs/standards/modelfoilaw.pdf

Commonwealth Secretariat. (2002). Commonwealth Heads of Government Draft Model Freedom of Information Bill 2002. London: Commonwealth Secretariat.

Daruwala, M. (2003). *Open Sesame: Looking for the Right to Information in the Commonwealth*. Retrieved from http://www.humanrightsinitiative.org/publications/chogm/chogm_2003/chogm_2003_report.pdf

Daruwala, M., Gurung, M., & Nayak, V. (2011). *The Freedom of Information (State Of Selangor) Enactment 2010: A Preliminary Analysis of The Enactment and Recommendations for Improvement*. Retrieved from http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/malaysia/SelangorFOIBill2010-Critique-Del-MichelleG-Feb11.pdf

Fernandez, J. (2016). Hindraf Calls for Freedom of Information Act. Retrieved from http://www.freemalaysiatoday.com/category/nation/2016/02/08/hindraf-calls-for-freedom-of-information-act/

ISSN 1675-1302

Information Commisioner's Office (UK). (2015). Freedom of information: The Guide to Freedom of Information. Retrieved from https://ico.org.uk/media/for-organisations/guide-to-freedom-of-information-4-5.pdf

Johan, S. (2013). Goodbye to Whistleblowers. *The Star*. Retrieved from http://www.malaysianbar.org.my/members_opinions_and_comments/goodbye_to_whistleblowers.html

Lor, P. J., & Britz, J. J. (2007). Is a Knowledge Society Possible Without Freedom of Access To Information? *Journal of Information Science*, *33*(4), 387-397.

Mishra, A. (2013). Right to Information Empowerment or Abuse. Retrieved from http://lawmantra.co.in/right-to-information-empowerment-or-abuse-2/.

Muhamad Izwan, I. (2014). Legal Hurdles in Freedom of Information in Malaysia. Retrieved from http://dx.doi.org/10.2139/ssrn.2470291

Peled, R., & Rabin, Y. (2011). The Constitutional Right to Information. *Columbia Human Rights Law Review*, *42*, 357.

The Constitution Unit UCL. (2011). Freedom of Information and Data Protection. Retrieved from https://www.ucl.ac.uk/constitution-unit/research/foi/countries/malaysia

Thiru, S. (2016). Misuse of the Communications and Multimedia Act Must End. Retrieved from https://www.malaysiakini.com/news/332239

Trapnell, S. E. (2014). Right to Information: Case Studies on Implementation. *Right to Information Working Paper Series*. Retrieved from https://openknowledge.worldbank.org/handle/10986/22527

Venkiteswaran, G. (2010). Freedom of Information in Malaysia: Turning the Secrecy Regime into a More Open One. Retrieved from http://www.asef.org/images/stories/ccs4/ws%206_gayathry%20venkiteswaran%20malaysia.pdf

Yong, A. (2016). Communications and Multimedia Act 1998 Needs to be Amended. Retrieved from https://www.malaysiakini.com/letters/331781

ISSN 1675-1302