

# **A Preliminary Assessment of The Early Years of State-level FOI Enactment Implementation in Malaysia**

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# A Preliminary Assessment of the Early Years of State-level FOI Enactment Implementation in Malaysia

## Introduction & History of State-level FOI

A Freedom of Information (FOI) or Right to Information (RTI) law is a piece of legislation that has two functions: (i) setting a clear framework for how government-held information is managed and distributed to the public or kept secret; and (ii) establishing a mechanism and service standards for the public to request for government-held information. The latter creates an obligation for government agencies to receive and respond to requests in a timely manner, mandates the allocation of organisational manpower, and creates an appeals process for information requests so that even if an information officer decides to err on the side of caution to not release information, a formal and fair process can be initiated to review the decision at a higher level.

The information request mechanism (henceforth, an “FOI request”) can be critical for multiple reasons. Generally, it provides an avenue for citizens to ask for pertinent information held by the government which is somehow not immediately available, such as on land use/ownership, parking space allocations, or zoning information about what kinds of businesses can operate in certain areas. In addition, FOI requests can be used by activists, academics and investigative journalists to uncover government information for further analysis and become a critical part of academic analysis and anti-corruption exposés, and ultimately a deterrent for corruption.<sup>1</sup>

Even if not for the above practical uses, RTI legislation has been upheld at the international level as a fundamental civil and political right that enhances democratic government, at least in Article 19 of the International Covenant on Civil and Political Rights (ICCPR, 1976) and SDG 16.10 of the UN Sustainable Development Goals (UNSDGs, 2015).<sup>2</sup> While Malaysia is not a signatory to ICCPR, it does endorse the UNSDGs and therefore needs to implement some form of constitutional,

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<sup>1</sup> Amongst others, see Krishna Chaitanya Vadlamannati and Arusha V. Cooray, “Transparency Pays? Evaluating the Effects of the Freedom of Information Laws on Perceived Government Corruption”, *Journal of Development Studies*, 53(1), 2017; Adriana S. Cordis and Patrick L. Warren, “Sunshine as disinfectant: The effect of state Freedom of Information Act laws on public corruption”, *Journal of Public Economics*, Volume 115, 2014, Pages 18-36. Alina Mungiu-Pippidi, “FOIA as an Anti-Corruption Tool”, *European Research Centre for Anti-Corruption and State-Building Working Paper no. 34*, April 2013;

<sup>2</sup> SDG 16.10 is the target to “ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements”. The relevant indicator for this goal is 16.10.2, “Number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information”.

statutory and/or policy guarantee for public access to information. Malaysia is also part of regional arrangements that uphold the public right to information.<sup>3</sup>

Obviously, implementing such a law has its challenges vis-à-vis the current government information management environment,<sup>4</sup> with regard to existing legal provisions, bureaucratic culture and operational requirements. The Official Secrets Act 1972 (OSA) is the primary law that defines the current informational environment. Article 2b of the OSA allows a federal government minister or *menteri besar* (chief minister) to appoint any officer to designate any government document as secret, under the categories *terhad* (limited circulation), *sulit* (confidential), *rahsia* (secret) and *rahsia besar* (highly secret). Article 2c of the OSA allows for reclassification (and implicitly, declassification) by similarly appointed, but is effectively delegated to the directors general, though only at their discretion.<sup>5</sup> Another relevant piece of statutory law is the broad wording of Article 203A of the Penal Code, which can be used against civil servants, as it criminalises the disclosure of "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".

The latest political movement towards a national FOI law is the Pakatan Harapan (PH) government's (2018–2020), in its manifesto committed to joining Open Government Partnership (which requires an FOI law) and in repealing the OSA.<sup>6</sup> Then Minister in the Prime Minister's Department (law), the late Liew Vui Kong, had also publicly committed towards an RTI law.<sup>7</sup> The following government (first under the premiership of Tan Sri Muhyiddin Yassin, then Datuk Seri Ismail Sabri Yaakob) deprioritised RTI reforms as it dealt with the COVID-19 crisis, although the minister in charge of parliament and law under the Prime Minister's Department then, Datuk Seri Dr Wan Junaidi Tuanku Jaafar, was supportive of an RTI law in co-existence with an amended OSA.<sup>8</sup>

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<sup>3</sup> Malaysia is part of the Commonwealth Heads of Government Meeting (CHOGM) which affirmed, in 1980, 1999 and 2002, that "public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information". Article 23 of the ASEAN Human Rights Declaration 2012 also upholds a similar principle.

<sup>4</sup> A note on the wider informational environment: There is also a government Open Data initiative launched in 2014, which went live in 2016, housed at <https://www.data.gov.my/>. It is based on a circular issued by the Malaysian Administrative Modernisation and Management Planning Unit. Datasets are uploaded on a voluntary basis by each ministry and agency. Otherwise, most government information or documents are warehoused physically at either the national archives or in government libraries, such as the National Archives.

<sup>5</sup> Meeting between the Department of Legal Affairs and CIJ, 15 April 2021.

<sup>6</sup> "Buku Harapan: Membina Negara Memenuhi Harapan", Pakatan Harapan, 8 March 2018, Page 52, [https://kempen.s3.amazonaws.com/pdf/Buku\\_Harapan.pdf](https://kempen.s3.amazonaws.com/pdf/Buku_Harapan.pdf)

<sup>7</sup> "Govt to formulate Freedom of Information Act—Liew", *The Borneo Post*, 15 August 2018, <https://www.theborneopost.com/2018/08/15/govt-to-formulate-freedom-of-information-act-liew/>

<sup>8</sup> Azril Annuar, "Putrajaya looking to amend Official Secrets Act, make it current: Wan Junaidi", *The Vibes*, 17 Nov 2021, <https://www.thevibes.com/articles/news/47480/putrajaya-looking-to-amend-official-secrets-act-make-it-current-wan-junaidi>; "Right to access accurate information vital to reduce spread of fake news: Wan Junaidi", *The Sun Daily*, 8 June 2022, <https://www.thesundaily.my/local/right-to-access-accurate-information-vital-to-reduce-spread-of-fake-news-wan-junaidi-IE9305291>

Despite the challenges, Penang and Selangor have had state-level FOI enactments since 2010 and 2011, respectively.<sup>9</sup> Although both enactments are superseded by the OSA if a piece of information has been designated as an official secret, they do cover some level of administrative information at the state level, and usage of the FOI law has been relatively encouraging, at least in the beginning.

The state-level enactments are significant because they can be taken as real-world studies or pilot trials for the wider Malaysian context. We can ask, at the most basic level, is the Malaysian public aware of the need for an RTI law? But there are also questions such as—Are the civil service and its informational systems ready for an RTI law? What are the barriers in implementation and effective usage? Who are the actual primary users of the request mechanism? What are their informational needs? How does the state-level law dovetail with the existing federal-level OSA? The lessons learnt from Selangor and Penang will have implications for the shape of a federal-level RTI law. This document aims to give a description and analysis of the FOI laws at the level of implementation and usage, based on empirical observations and data collected on their usage.

## Methodology

CIJ has been an advocate of RTI policies since its inception in 2001. Between 2019 and 2021, CIJ has conducted extensive RTI roadshows across Malaysia, several in partnership with the Department of Legal Affairs (better known by its Malay acronym, BHEUU) in the Prime Minister's Department to gather feedback on the informational needs of civil society, media and academicians, and capture the reactions of civil servants to their needs. To gain a bigger picture of the RTI scene, we searched for publicly available documents published by the respective state executive committee or State Assembly Hansards with regard to the issue. Any gaps in data not covered from the document search were filled by filing two FOI requests to each state for substantive information about the usage and implementation of each FOI enactment (this is also for CIJ and its researchers to gain first-hand experience of the information requesting mechanism). Finally, based on those findings, we followed up with one-to-one, in-depth interviews with one representative from each stakeholder group (especially if they have filed an FOI request) to explore typical use-case scenarios and their specific informational needs in the context of their informational environment. This is aligned with information from CIJ's engagement with stakeholders. Together, these sources provide a preliminary picture of FOI usage in Selangor and Penang.

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<sup>9</sup> Namely, the Penang Freedom of Information Enactment 2010 and Freedom of Information (State of Selangor) Enactment 2011. While the laws are dated 2010 and 2011, respectively, Penang's was only gazetted in 2012, coming into force in 2015, and Selangor's was gazetted in the same year as its tabling, but also coming into force later, in 2013. There are subsidiary enactments that support the main laws: In Selangor, they are the Freedom of Information (State of Selangor) (Access to Information) Regulations 2012 and State Information Board (State of Selangor) Rules 2012; in Penang, Peraturan-Peraturan Kebebasan Maklumat Pulau Pinang (Akses Kepada Maklumat) 2014; and Kaedah-Kaedah Lembaga Rayuan Kebebasan Maklumat Pulau Pinang 2014.

## Findings from FOI Requests

The primary source of detailed public information about FOI usage was Selangor's white papers,<sup>10</sup> and the State Assembly Hansards on Penang, as occasionally state assemblymen (ADUNs) will formally file questions about FOI usage to the state executive committee during state legislative assembly sessions. Further, given that the latest documents were produced in 2017, we made two FOI requests (regarding usage of the FOI enactments) to make up for the gap in data, and supplied a sample sheet to demonstrate the detail of data we wanted (see Annexe 1). The request for Selangor's FOI usage data was made to the Selangor state secretary office in 2020; for Penang's, it was the Penang state secretary office, in 2021. Henceforth, the data received from the request to the Selangor state will be referred to as *Selangor FOI implementation request*, while the data received from the request to Penang will be similarly named *Penang FOI implementation request*. While their responses to our FOI request did not provide a complete or sometimes not directly comparable set of data in places, we attempt to present them as best possible.

What we specifically requested for were:

1. **Trends in the number of FOI requests per year and types of data requested. This line of inquiry examines whether or not the FOI is effective at the most basic level.** A low number may suggest that the FOI law may either be unnecessary (as there exists more easily available public data or existing channels of information exists) or ineffective (such as from lack of publicity and public knowledge, poor reputation of efficacy, or poor compliance by information officers). After disaggregating the number of requests and types by state agencies, we are able to also gain a better picture of typical use-case scenarios.
2. **Number of rejections relative to FOI requests.** High numbers may suggest a variety of issues, from applicants being unsure about the application procedure, or that there is a tendency amongst information officers to reject requests. Disaggregation may show government agencies that are in a controversial spotlight, while qualitative analysis may reveal loopholes in how exemptions are set up in practice;
3. **Basic information of the appeals board (names of appeals board members, number of meetings).** A greater amount of information received may suggest better implementation of the appeals process and the confidence of requesters in it.
4. **Number and type of, and budget for public engagement activities.** A low number may explain poor public awareness and understanding of the FOI enactment, which also indicates bureaucratic priorities in implementing the enactment.
5. **Number of and budget for internal training sessions.** A low number may explain weakening awareness and understanding of the FOI enactment and its processes within the state civil service, if not amongst information officers themselves.

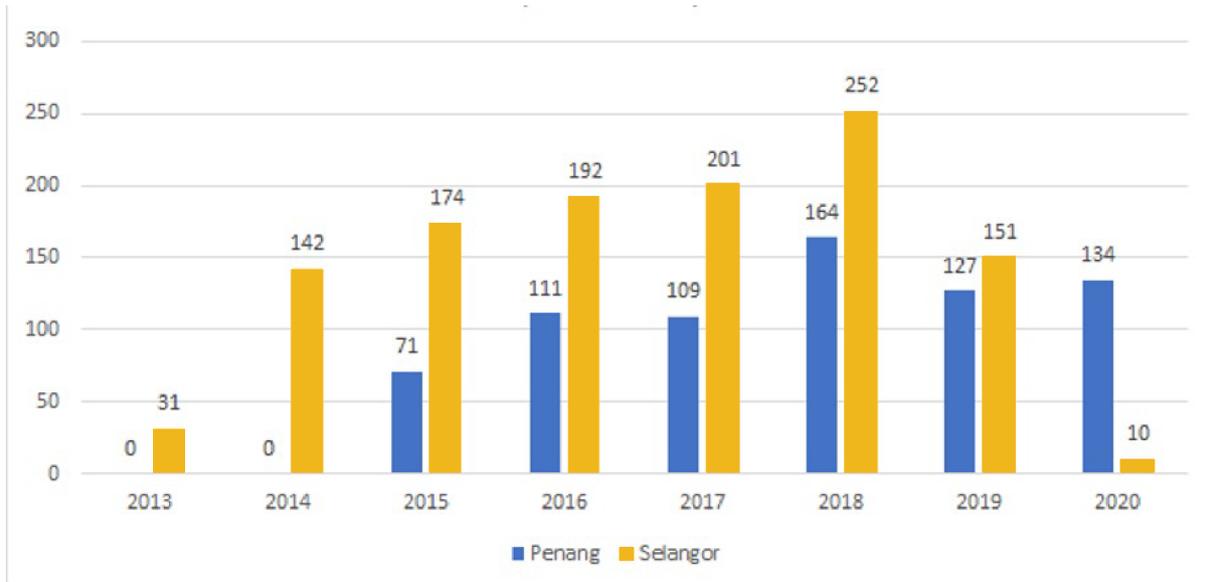
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<sup>10</sup> Specifically, Maklum Balas Penyata yang Telah Dibentangkan Semasa Mesyuarat Pertama Penggal Ketiga Dewan Negeri Selangor yang KeTiga Belas pada 30 Mac-3 April dan 6-9 April 2015: *Penyata Jawatan Kuasa Pilihan Khas Mengenai Keupayaan, Kebertanggungjawaban dan Ketelusan (Special Select Committee on Competence, Accountability and Transparency—SELCAT) bagi Dewan Negeri Selangor Berkenaan Enakmen Kebebasan Maklumat (Negeri Selangor) 2011*, Kertas Bilangan 3/2015. [http://dewan.selangor.gov.my/assets/pdf/Penyata/Maklumbalas-Penyata-Sidang-2015/MKLM%20BLS\\_KERTAS%20BIL.%203%20TAHUN%202015%20-%20\(SELCAT\)\\_ENAKMEN%20KEBEBASAN%20MAKLUMAT.pdf](http://dewan.selangor.gov.my/assets/pdf/Penyata/Maklumbalas-Penyata-Sidang-2015/MKLM%20BLS_KERTAS%20BIL.%203%20TAHUN%202015%20-%20(SELCAT)_ENAKMEN%20KEBEBASAN%20MAKLUMAT.pdf) [henceforth, *Penyata SELCAT 2015*].

6. **Other internal training documents or memos.** If item (5) is low, civil service awareness can be created by rigorous documentation; the existence of supplementary documentation may indicate greater consideration and formal development of the FOI process within the civil service.

The following compiles the evidence from the above sources and discusses them with regard to the six questions above and other concerns.

## 1. Basic Usage



**Graph 1: Number of FOI Requests in Penang and Selangor by year (2013–2020)**

*\*Note: 2020 for Selangor only covers January–June 2020*

Overall, FOI usage by aggregate number of requests looks relatively healthy, as the numbers in Selangor were steadily rising until 2019, and the numbers in Penang were relatively sustained above the 100 per year range.

Selangor averaged about 185 requests per year if the first year of operation and the last year under study are exempted (2013 and 2020, respectively). The low numbers in the first year are likely due to the Freedom of Information (State of Selangor) Enactment 2011 being the first such law to come into force, so awareness and preparedness of users may be low. The extremely low numbers in 2020, on the other hand, are likely to have come from disruptions in the request process due to the COVID-10 pandemic and movement control orders.

Penang's enactment, Penang Freedom of Information Enactment 2010, came into force later than Selangor's in 2015. Overall, Penang's usage averaged about 119 requests a year, with no significant dip in the number of requests in 2020 despite the pandemic.

Disaggregated data according to government agencies were not fully available. Nevertheless, we present what existing data were available and what they may suggest.

	Government Agency (Selangor)	Year				Total
		2013	2014	2015	2016	
1	Jabatan Kehakiman Syariah Negeri Selangor	0	34	46	47	127
2	Lembaga Urus Air Selangor	13	25	32	23	93
3	Perbadanan Perpustakaan Awam Negeri Selangor	10	29	17	11	67
4	Majlis Perbandaran Ampang Jaya	0	14	13	19	46
5	Perbadanan Kemajuan Negeri Selangor	0	0	3	41	44
6	Pejabat Daerah dan Tanah Kuala Langat	0	10	10	17	37
7	Perbadanan Adat Melayu dan Warisan Negeri Selangor	5	8	16	6	35
8	Majlis Perbandaran Subang Jaya	1	5	9	4	19
9	Pejabat Setiausaha Kerajaan Negeri Selangor	0	4	6	4	14
10	Pejabat Daerah dan Tanah Petaling	0	3	5	4	12
11	Others	2	10	17	16	45
TOTAL		31	142	174	192	539

**Table 1: Top 10 State Government Agencies in Selangor Ranked by Total Number of FOI Requests (2013–2016), Disaggregated by Year**

*Note: The source lists a total of 41 government agencies, the majority of which have only a single-digit or zero FOI request made in the entire period.*

For the years 2013–2016, Jabatan Kehakiman Syariah Negeri Selangor (JAKESS, or the Selangor Syariah Court Department) had the highest number of FOI requests (see Table 1). According to the *Selangor FOI implementation request*, they were usually for documents of family and estate laws, but some notable ones are for the history of the establishment of the Syariah Court, guidelines for Syariah lawyers, and offences of contempt against religious officers. Lawyers are usually able to access these legal documents via the Court Register, and obtaining legal documents about for the purpose of legal claims or litigation should not typically use an FOI request; the fact that requests were made anyway suggests an informational service breakdown within that system. The latter type of requests also suggests that some academic research was being conducted into the Syariah Court system. We can only speculate that requests to Perbadanan Adat Melayu dan Warisan Negeri Selangor may be of a similar nature as well, as the *Selangor FOI implementation request* did not reveal the types of requests the corporation received.

The government agency with the second highest number of FOI requests, Lembaga Urus Air Selangor (Selangor Water Management Board), received a high number of requests. The *Selangor FOI implementation request* revealed that they were about dams, aquifers, rivers and river pollution, rainfall, and even locations of fresh water sources suitable for fish farming. We suspect that some of these requests were made by environmental conservationists and/or local citizens concerned with the level of pollution in rivers.

The third highest, Perbadanan Perpustakaan Awam Negeri Selangor (Selangor Public Library Corporation), had a lot of uncontroversial requests by our judgement, such as for data management processes, but also included some for collections such as audio-visual material or Koleksi DYMM Sultan Selangor.

Of note is Perbadanan Kemajuan Negeri Selangor (PKNS, or the Selangor State Development Corporation), ranked #5 on the list. The FOI requests to the government-linked company leapt 14-fold in 2016, from a total of only 3 in the previous year and 0 before that. Since the *Selangor FOI implementation request* (made to the Bahagian Komunikasi Korporate) did not include the types of filings made to PKNS), we can only speculate that certain actors were filing FOI requests because of the political controversy surrounding PKNS in 2015–2016.<sup>11</sup> Also notable is the Selangor state secretary office, Pejabat Setiausaha Kerajaan Negeri Selangor (#9), which received requests for information for high profile cases or concerning state leadership, such as: documentation for the approval of the Kinrara–Damansara Expressway (KIDEX)<sup>12</sup> and Damansara–Shah Alam Elevated Expressway (DASH); meeting minutes of the state executive committee; résumés of the heads of councils, the Yang Dipertua of the Majlis Perbandaran/Majlis Daerah; and documents pertaining to the restructuring of Air Selangor, the largest water operator in the country.

Lastly, another group of requests centred around the district and land office, Pejabat Daerah dan Tanah, and the municipal councils, Majlis Perbandaran. The requests were mostly on land ownership, land use and infrastructural development, but also on licences to operate certain businesses; the number of parking lots; whether a certain development falls under the appropriate zoning use; and KIDEX- and DASH-related documents.

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<sup>11</sup> In 2015, PKNS was brought back into public attention surrounding the unabated development of a PKNS Complex in Kelana Jaya. A 2012 SELCAT report found that the rezoning of its land was not done according to legal procedure. See Coalition of Good Governance, 'Invoke Section 37 and purchase PKNS field, *Malaysiakini*, 13 April 2015, <https://www.malaysiakini.com/letters/295120>; Selangor Special Select Committee on Competence, Accountability and Transparency, 'Pembangunan Tanah Padang PKNS-RTPJ2', Paper No. 27, 2012, [http://dewan.selangor.gov.my/assets/pdf/Penyata/2012/KERTAS%20BIL%2027%20TAHUN%202012%20-%20\(SELCAT\)\\_PEMBANGUNAN%20TANAH%20PADANG%20PKNS%20\\_%20RTPJ2.pdf](http://dewan.selangor.gov.my/assets/pdf/Penyata/2012/KERTAS%20BIL%2027%20TAHUN%202012%20-%20(SELCAT)_PEMBANGUNAN%20TANAH%20PADANG%20PKNS%20_%20RTPJ2.pdf)

<sup>12</sup> The Selangor government cancelled the project in February 2015 following public protests, but revived it as the Petaling Jaya Dispersal Link Expressway (PDLE) in 2018.

	Government Agency (Penang)	Year						TOTAL
		2015	2016	2017	2018	2019	2020	
1	Majlis Bandaraya Seberang Perai	20	15	72	159	119	129	514
2	Jabatan Kehakiman Syariah Negeri Pulau Pinang	24	66	16	0	0	0	106
3	Majlis Agama Islam Negeri-negeri Pulau Pinang	11	11	11	3	6	4	46
4	Pejabat Setiausaha Kerajaan Negeri Pulau Pinang	2	12	6	1	1	1	23
5	Majlis Bandaraya Pulau Pinang	13	4	2	0	0	0	19
6	Pejabat Ketua Negeri Pulau Pinang	0	0	1	0	1	0	2
7	Jabatan Perancangan Bandar dan Desa Negeri Pulau Pinang	1	0	0	0	0	0	1
8	Jabatan Kebajikan Masyarakat Negeri Pulau Pinang	0	1	0	0	0	0	1
9	Jabatan Pengairan dan Saliran	0	1	0	0	0	0	1
10	Pejabat Daerah dan Tanah Daerah Timur Laut	0	1	0	0	0	0	1
11	Others	0	0	1	1	0	0	0
	TOTAL	71	111	109	164	127	134	716

**Table 2: State Government Agencies in Penang Ranked by Total Number of FOI requests (2015–2020), Disaggregated by Year**

In contrast to Selangor, Penang's FOI usage was concentrated amongst fewer government agencies, and increasingly more so in recent years (see Table 2). From 2015 to 2020, the vast majority of requests (71%) were made to the Seberang Perai city council, Majlis Bandaraya Seberang Perai. The *Penang FOI information request* returned almost no details about the types of requests being made, but did have a line mentioning that "*Maklumat permohonan yang dimohon oleh pemohon adalah seperti maklumat pelan kelulusan bangunan yang berkaitan dengan infrastruktur bangunan/premis perniagaan*" (the information requested is typically building approval plans for building infrastructure or business premises). It is likely that heavy development in Batu Kawan is driving the business use of the FOI enactment, but this warrants further qualitative investigation. By 2018, there was a sharp drop in FOI requests to the single digit in all departments except for Majlis Bandaraya Seberang Perai.

Mirroring its Selangor counterpart, Penang's Syariah Court Department (and the Islamic religious council, Majlis Agama Islam) too received a fair number of FOI requests, although the numbers dropped to zero in 2018. We can only speculate that similar types of requests as in Selangor's case were being made to extract documents for litigation purposes, and a recent implementation of a digital document request system may have reduced the need to use the FOI request mechanism to obtain court-relevant documents.<sup>13</sup>

Other notable requests were for CCTV footage (what looked like evidence for crime investigation) and copies of Environmental Impact Assessment (EIA) reports; both types of requests appeared to have been successfully applied and issued.<sup>14</sup>

Overall, the data gathered on the number of FOI requests (summarised in Tables 1 and 2) shows that the FOI enactments are viable despite the OSA, as otherwise it would entail a sharp downwards trend as the public learns that it is not a reliable method of getting the data they need. We would argue that as a whole, the viability is relatively equal; while Selangor's average request count per year was notably higher than Penang's, Selangor does have the higher population count and covers more land.<sup>15</sup> Selangor's higher numbers are consistent with the notion that lower application costs increase the accessibility of the FOI mechanism,<sup>16</sup> although this might be confounded by the larger size of Selangor. It was also apparent that certain government agencies receive the bulk of the requests, with many receiving none at all, indicating that the bureaucratic workload is uneven across agencies.

However, some worrying trends are developing: In Penang, the drop in numbers in all government departments—apart from the Seberang Perai council, which experienced a rise—is highly concerning because it suggests a break in usage or application of the FOI enactment in most state government offices. A qualitative assessment should be conducted to investigate the reason(s) behind this trend. In Selangor, the extremely low number of requests in the first half of 2020 could recover as the pandemic alleviates, but it could also never recover as the evidence points towards a lack of both training amongst staff, as well as sustained public outreach on the FOI mechanism (see sections 4, 5 and 6 ahead).

## 2. Rejection Rates

At the implementation level, an information officer processing FOI requests may reject all incoming requests, to leave the actual disclosure to the appeals board. Hence, a high rejection rate may indicate a process breakdown at the information officer stage. Given available information and without sighting actual requests, however, it is difficult to parse what is or is not

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<sup>13</sup> Interview with a Penang Syariah lawyer on 15 October 2021.

<sup>14</sup> From the 2020 Selangor FOI implementation request.

<sup>15</sup> Selangor and Penang's population in 2020 is 6.52 million and 1.77 million respectively; while their land area is 7,951 km<sup>2</sup> and 1,049 km<sup>2</sup> respectively.

<sup>16</sup> The basic cost of making an FOI request in Selangor is RM12; in Penang, it is RM50 for data from the current year, and/or RM100 for other years.

reasonably or legally rejected, such as a request that is clearly covered by the exemption clause or primarily consists of third-party personal data.

Department/Agency (Penang)	Total FOI Requests	Total FOI Requests Rejected	Rejection Rate (%)
Pejabat Setiausaha Kerajaan Negeri Pulau Pinang	23	10	43%
Majlis Bandaraya Seberang Perai	514	9	2%
Majlis Bandaraya Pulau Pinang	19	7	37%
Jabatan Kehakiman Syariah Negeri Pulau Pinang	106	4	4%
Pejabat Ketua Negeri Pulau Pinang	2	1	50%
Perbadanan Ketua Menteri Pulau Pinang (CMI)	1	1	100%
Pejabat Daerah dan Tanah Seberang Perai Selatan	1	1	100%

**Table 3: State Government Agencies in Penang Ranked by Total Number of FOI Requests Rejected (2015–2020)**

Despite having the most FOI requests, Majlis Bandaraya Seberang Perai had the lowest rejection rates (discounting agencies with zero requests). The relatively high rejection rate from Pejabat Setiausaha Kerajaan Negeri Pulau Pinang may be due to its position as one of the apex coordinating agencies, which makes it likely to receive some **controversial FOI requests**.

The Penang Hansards gave examples of reasons for rejections:<sup>17</sup>

- (1) A request of a public-private contract was denied because it was still in the drafting stage;
- (2) A request on a public-private land reclamation contract was denied because of a confidentiality clause in the contract.
- (3) A request for the contract of the SPICE (Subterranean Penang International Conference & Exhibition Centre) project was denied because it involved a third party;
- (4) Information that was requested was not complete;
- (5) Information that was requested was not available;
- (6) A request on rezoning information by a property company was denied, as the requester did not provide a complete form (a similar request was filed later by the same person and was completed);
- (7) A request for the meeting agenda of the permanent committee of the city council was denied, as it is classified as secret;

<sup>17</sup> Pejabat Setiausaha Kerajaan Bahagian Dewan Undangan Negeri Pulau Pinang, "Lampiran Kepada Soalan-Soalan Bertulis", Dewan Undangan Negeri Pulau Pinang yang Ketiga Belas, Mesyuarat pertama, Penggal Persidangan Kelima, Volume 1, dated May 2017, uploaded 27 September 2017, in section "Lampiran Soalan YB Datuk Sr Haji Muhad Farid bin Haji Saad", pp. 1 to xxiv. <https://dun.penang.gov.my/index.php/hansard/category/102-folder-lampiran-bertulis?download=357:lampiran-soalan-bertulis-jld-1>.

- (8) *A request for the meeting agenda of the OSC was denied, as it is classified as secret;*
- (9) *A request for open-tender and approval documents for state contracts was denied as those documents were with the Malaysian Anti-Corruption Commission (MACC).*
- (10) *A request for proposals on the Penang Transport Masterplan was denied as the masterplan was (then) still under consideration.*

No rejection data was given by the *Selangor FOI implementation request*. Nevertheless, the earlier *Penyata SELCAT 2015* stated that 5 out of 163 requests from 2013 through 2015 were rejected, and for the following reasons:

- (11) *It required the approval of the chief minister;*
- (12) *Their requests required more time, as it needed information from more departments;*
- (13) *Third party permission was required.*<sup>18</sup>

The same *Penyata SELCAT* highlighted that there were larger, more difficult issues to consider when deciding to disclose information when requests on major public projects were made, such as: (a) the approval documents on DASH, (b) the documents of the Memorandum of Understanding on *Projek Hulu Langat II* between the state and federal governments; and (c) documents on KIDEX.<sup>19</sup>

Despite the difficulty in ascertaining whether or not a rejection was appropriate, we think that the *Penyata SELCAT 2015* raises several questions about the application of the exemption list. Items (2), (11) and (13) above warrant attention for loopholes. In the case of Item (2), can a confidentiality clause in a contract between the government and a private entity override the enactment in principle even if it is not covered by OSA? This sets the precedent for confidentiality clauses becoming a standard inclusion in all government contracts. Item (11) is also worrying (although limited by the lack of details surrounding the request) that the request could be vetoed by the chief minister in power.<sup>20</sup> Finally, Item (13) also highlights the intersection between privacy and public interest. One of our interviews highlighted a case where an FOI request filed about the necessary approvals for the renovation of a house neighbouring the applicant's home risked rejection because it would reveal the neighbour's personal information.<sup>21</sup>

Greater clarity and guidance are required in such cases. Ideally, even if an FOI officer rejects the request, an appeals board should be able to adjudicate and redact the private, identifying information.

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<sup>18</sup> *Penyata SELCAT 2015*, p. 4

<sup>19</sup> *Ibid.*

<sup>20</sup> While not effectively provided by the respective FOI enactments, it can be provided under OSA 1972, section 2C. A Minister or public officer charged with any responsibility in respect of any Ministry, department or any public service or the Menteri Besar or the Chief Minister of a State or the principal officer in charge of the administrative affairs of a State may, at any time, declassify any document specified in the Schedule or any official document, information or material as may have been classified and upon such declassification, the said document, information or material shall cease to be official secret.

<sup>21</sup> Interview with a lawyer on 12 October 2021.

### 3. Appeals Board

We requested for the names of the members of the appeals board (which are appointed on a 2-year term in Penang and a 3-year term in Selangor); the number of meetings held, and the number of appeal cases heard, if any.

The *Selangor FOI implementation request* stated that the names of the appeals board members could not be disclosed (*sulit*), and that no meetings had been convened since the commencement of the law until mid-2020, when our FOI request was made. Nevertheless, we managed to find the names of the members of the first-term appeals board in the Selangor State Legislative Assembly Hansards.<sup>22</sup>

The *Penang FOI implementation request* gave the same answer with regard to the names on the board, and stated that one meeting was held in 2018 to discuss an appeal over three related cases pertaining to reclamation work in Penang.<sup>23</sup> Nevertheless, the names of the appeals board members until 2019 could be found in the Penang Hansards, as the members are confirmed by the state assembly;<sup>24</sup> furthermore, an FOI request made by the watchdog NGO Sinar Project in 2015 also disclosed a detailed list of names<sup>25</sup>—so, again, the choice of withholding this information is incongruent with already publicly accessible records.

We understand that there are concerns that revealing appeals board members' names may expose them to either pressure from the public to sway their judgement or reprisals as a result of a particular decision. Nevertheless, this is usually mitigated by having a larger pool of members, where it is not disclosed which board member(s) were involved in any a particular judgement. Whereas the downside to a lack of information about appeals board members is that it does not inspire public confidence about the fairness in the appeals process, and may potentially stifle public usage of the process.<sup>26</sup>

The other issue is the frequency of the appeals board meetings. Ideally, the board would meet at a reasonably regular frequency, such that the appeal process becomes normalised (although conditional on requesters' filing appeals and the FOI officer's rejecting it on non-frivolous grounds). With data/detailed records on appeal judgements, we can gauge the fairness of the

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<sup>22</sup> Hansard Dewan Negeri Selangor Yang Ketiga Belas Penggal Pertama Mesyuarat Kedua, Shah Alam, 01 Julai 2013, p. 30.

<sup>23</sup> The cases were dismissed, however, due to procedural issues.

<sup>24</sup> For example, Bahagian Dewan Undangan Negeri Pulau Pinang, *Penyata Rasmi Mesyuarat Pertama Penggal Persidangan kedua, Dewan Undangan Negeri yang Keempat Belas*, 03 May 2019, pp. 72-76 details the discussion during the appointment of the appeals board sitting from 1 June 2019 to 31 May 2021. The appointed chairperson was Wong Chiang Kiat.

<sup>25</sup> Pejabat Setiausaha Kerajaan Bahagian Dewan Undangan Negeri Pulau Pinang, "Lampiran Kepada Soalan-Soalan Bertulis", Dewan Undangan Negeri Pulau Pinang yang Ketiga Belas, Mesyuarat pertama, Penggal Persidangan Kelima, dated May 2017, uploaded 27 September 2017, p. 13.

<sup>26</sup> We considered filing an appeal to contest the non-disclosure of names of the appeals board members, but this presented an interesting conflict of interest, as the appeals board would be deciding on a case that would reveal their own names.

process and whether the public interest override does take place.<sup>27</sup> Since the appeals board had yet to overturn an FOI request rejection, however, we cannot confirm whether the principle of the public interest override was upheld.

As a result, our confidence in the implementation of the appeals process is relatively low. The lack of a record in the appeals board process in both the Selangor and Penang scenarios does not indicate experience in interpreting the enactment and upholding the public interest. Though this is partly due to the near-zero frequency of appeals being filed, it presents a catch-22 problem: people are discouraged from filing because there is no record of a successful appeal, but for them to have a record at all, requesters must file an appeal.

#### 4. Public Engagement/Education

We requested information on the budget provided for public engagement and education on the FOI enactment, as public awareness does influence usage. In an interview in 2017, the Selangor State Assembly representative for Subang Jaya claimed that greater signage at Majlis Perbandaran Ampang may have led to greater usage, in at least the first few years.<sup>28</sup> The *Penyata SELCAT 2015* noted that public engagement should be coordinated by the state executive committee, the state secretary and the various government departments and agencies, and proposed that coordinating meetings be held three times a year.<sup>29</sup> The Penang FOI Enactment webpage also stated that there was a special counter in KOMTAR (from January 2015), the building housing the administrative offices of the state government, for submitting FOI requests.<sup>30</sup> However, in September 2020, when we first initiated the Penang FOI request, we could no longer find the counter amongst the various counters. When asked, the staff could not direct us to such a counter.

Both the *2020 Selangor FOI implementation request* and the *2021 Penang FOI implementation request* disappointingly did not specify any public engagement events, programmes or initiatives. The former reiterated that it is under the control of the various agencies, but did not provide any further details. The latter reported that some outreach had been conducted on social media and *Bulletin Mutiara*, the monthly bulletin of the Penang government, but did not provide any links or evidence. Both also did not give any concrete numbers of the actual budget provisions or money spent on FOI. In Penang, allowances were only given for registrars to meet.

Selangor seems to be half a step ahead of Penang, in that *Penyata SELCAT 2015* has made recommendations for strengthening public engagement, such as publishing flyers and organising booths. However, the data from the *Selangor FOI implementation request* did seem to

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<sup>27</sup> The duty of an appeals board is to judge at a higher level whether a non-disclosure by an FOI officer can be overturned and disclosed in the public interest—such as in a case of corruption.

<sup>28</sup> From a C4 Center meeting in 2017 with Hannah Yeoh, then Selangor State Assembly representative for Subang Jaya, and Speaker.

<sup>29</sup> *Penyata SELCAT 2015*, pp. 11-12.

<sup>30</sup> <https://www.penang.gov.my/index.php/foi-psukpp> [accessed 19 October 2021], states that “*Kaunter khas Enakmen Kebebasan Maklumat (FOI) telah dibuka di kaunter tingkat 3, KOMTAR berkuatkuasa pada 12 Januari 2015*”.

suggest that follow-up, both at the political and bureaucratic level, to the *Penyata SELCAT 2015*'s recommendations was weak.

As there are no public engagements or phases of public engagement to assign this activity as an intervening variable, it almost seems that the FOI enactment's usage is succeeding modestly despite the lack of public engagement. However, the disappearance of the special one-stop FOI request counter in KOMTAR is disappointing and correlates with a reduction of FOI requests in all government agencies apart from the Seberang Perai council, which saw a leap in uptick.

## 5. Number of & Budget for Internal Training Sessions

We requested information on the above as an indicator of the robustness of the mechanisms, as information officers do eventually rotate the position, and wider awareness of the existence of the enactments amongst the civil service will encourage civil service buy-in and compliance. Poor awareness and understanding of the enactment may lead to wrong information about procedural matters being given to requesters. *Penyata SELCAT 2015* also supports this understanding, which stated that periodic training needs to be conducted systematically.

Again, Selangor seems to be one step ahead of Penang. The *Selangor FOI implementation request* reported 3 internal training workshops (2 in 2013, and 1 in 2016).<sup>31</sup> Nevertheless, between 2016 and mid-2020, no internal training workshops were held. The *Penang FOI implementation request* reported that there was no training at all.

This suggests that internal operations processes may be weakening, an observation that is further strengthened by our impression gained from interviewing requestors. One interviewed requester said that their FOI officer provided wrong information about the FOI process. Another requester told of their FOI officer's complaining to them personally about needing more training. Further research into civil servant's attitudes and needs may be warranted.

## 6. Internal Guideline Documents

We requested for information about any internal documents used for training about or coordination of the FOI enactment(s), and, if available, for copies of them to be provided. The *Penyata SELCAT 2015* was especially useful in framing this inquiry. Supplementary documents (or equivalent documents in Penang) could be examined to gauge the challenges and level of coordination within the civil service on the FOI enactments. Supporting this line of thinking, the *Penyata SELCAT 2015* also recommended that a handover guide document be produced to new information officers from those leaving.

Unfortunately, no documents were obtained from both the *Selangor* and *Penang FOI implementation requests*; nor were any further documents revealed. Both states referred us to

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<sup>31</sup> It reported that the workshops were held on 5 March 2013 (45 participants), August 2013 (43), and May 2016 (40).

their respective public-facing websites for all documentation.<sup>32</sup> Table 4 details what information/documents were available on the page.

Items Available	Selangor	Penang
Coordinating personnel	Yes	Yes
Regulations and service standards for FOI requests	Yes	Yes
A list of information officers (and date of last update)	Yes undated	Yes updated 2 July 2020
Regulations and service standards for appeals	No	Yes
FOI request forms	Yes	Yes

**Table 4: Information/Documents Available on the Penang and Selangor FOI Enactments webpages**

Furthermore, the Selangor enactment does mandate the production of an annual report, but we have not sighted it in person or on the Selangor FOI homepage, and neither were we provided those documents in the *Selangor FOI implementation request*.

Disappointingly, we were not given any further records or evidence of documents that were not already publicly available. This weakens our confidence in the long-term viability of the FOI mechanism.

## 7. Public Needs: Findings from Interviews & Engagements

CIJ conducted five public meetings, between August 2022 to March 2021, titled “Roadshow on Right to Information (RTI) Legislation” in Penang, Johor, Sabah, Sarawak and Kelantan (in partnership with various local stakeholders) with a total of 189 participants, drawing mostly from the Malaysian public. A focus group discussion with representatives from six media organisations was also held in October 2021. In the same period, four more in-depth interviews with selected individuals were conducted to more deeply explore the link between the existing state-level enactments, the information environment and the needs of specific segments of society.

The five public meetings revealed the various types of information required by stakeholders—usually the media, academics, lawmakers, civil society—and how they are affected by the lack of information and the gaps in the information ecosystem in Malaysia. The issues identified included the lack of information pertaining to governance on budget allocation; political issues such as the outcome report of the MA63 Special Committee; changes in education system, academic

<sup>32</sup> Portal Enakmen Kebebasan Maklumat (Negeri Selangor) 2011, <https://www.selangor.gov.my/index.php/pages/view/97>; and <https://www.penang.gov.my/index.php/foi-psukpp>; both accessed on 19 November 2021.

development in the country and national plans about online learning; transparency about asset declaration by elected representatives and senior government officials; and development projects and documents such as EIAs. The demand also included information for innovation and creative output for educators, as well as for investigation into alleged misconduct and abuse of power, with the aim to create safer environments in school, get access to justice, and prevent occurrence of natural disasters as a result of development projects or illegal activities in forest reserves or on the customary land of the indigenous peoples.

Participants from Penang and Selangor, and those who had experience with the respective FOI regimes, gave feedback on, amongst others, the prohibitive cost of making FOI requests in Penang; government officials being unaware of the FOI enactment and procedures; and the information officers lacking knowledge in facilitating the application of an FOI request. Other challenges included limited access to documents where no copies were given—and access is conditional only by viewing and manual recording (pen and paper); and a lack of data inventory in every department. The participants also noted that there is a general lack of awareness amongst the public of the existence of the FOI enactment in Penang. Further, academicians shared that research findings on a particular study on migration (informed by government data) were not published, and accessing them may need an FOI request.

The participants of the public meetings broadly affirmed the need for a federal FOI law, noting there were more legal challenges and application of a potential federal FOI law in Sabah and Sarawak which have relatively more autonomous legal systems compared to Peninsular states.

From the focus group discussion with media representatives,<sup>33</sup> one journalist shared that their request for information pertaining to the Georgetown Festival financial reports and reports regarding development of high-density apartments were rejected due to lack of specificity of the requests. Other journalists noted that applications were often rejected, with often-vague reasons. Another challenge was that the information officer was not helpful in facilitating the application process.

One narrative highlighted by journalists was the high cost for FOI requests for a wide array of documents. It was also shared that Gerakan Youth Chief Jason Loo had tried to obtain documents and information on the Penang Undersea Tunnel Project, which was the subject of alleged corruption and abuse of power. Loo spent approximately RM1,500 in the process. He was even made to produce statutory declarations to the state that he would not abuse the information given. His efforts were not rewarded as he failed to receive the requested information, and he had eventually ceased trying. Nevertheless, the information for which he had fought so hard to obtain was published by the State Legislative Assembly soon after, as the Parliament Public Accounts Committee was looking into them. These reports were very detailed and included the contracts given out by the government, as well as the timeline of the project. The state assembly representatives were also given all the information without having to pay any fees or to go through the FOI regime in Penang. Given this scenario, one journalist also

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<sup>33</sup> Held on 13 October 2021 with six media practitioners, from Malaysiakini, Free Malaysia Today, Malay Mail, NST business section and Code Blue.

questioned whether the FOI enactment would inadvertently become an obstacle to the right to information.

From the interviews, we discovered the possibility of political winds determining outcomes of FOI requests<sup>34</sup>—that is to say, FOI requests involving corruption could see a greater chance of disclosure where the state is being controlled by one political party and the potential ‘target’ is a politician from a rival party, and there is a greater chance of non-disclosure if the affected stakeholders are from the same party as the government of the day.

We also discovered the information needs of environmental activists. Environmental activists typically request for reports of emission levels, zoning and land re-gazettement notices, EIAs and documentation of approval processes to ensure that the checks in place to safeguard and conserve nature reserves are functioning as intended. EIAs are not consistently published or publicly archived, and since they are commissioned by the developing party (usually a firm), the latter may choose to not release the EIA to private requests. Since the EIA is submitted to the regional Department of Environment office, which falls under federal jurisdiction, it may not be possible to extract the EIA via an FOI request.

We have a final note on the usage of FOI requests by small-medium commercial firms, on which we did not manage to get a relatively objective picture in terms of information requirements. Firms do occasionally use the FOI request, and some of it may have potential positive economic benefits. For example, businesses could request for information about business licences issued in their surrounding area to better tailor their marketing, services or products offered. Another notable FOI request was for water health measurements in service of establishing a fish farm.<sup>35</sup>

## 8. Procedural Topical Issues

This section highlights some thoughts, key aspects and topical issues on the entire FOI process that have arisen in the above fact-finding exercise but have not received its own specific section in the preceding discussion.

Some unexpected aspects of implementation were discovered in the first-hand experience of the FOI application process. In both states, there was a pre-approval screening process in application—that is, once an FOI officer has been located and agrees to receive an FOI application, they take about a week to perform checks if the data is available or can be released.

To complete the process above, the information officer will then contact the requester, to inform them if the data is available and to proceed with the next step: payment. Once cash payment is made at a government counter, and the receipt submitted to the information officer, then only does the FOI request begin proper. Presumably, it is possible for an officer to contact a requester at the pre-screening process to inform the latter that the data was altogether exempted from disclosure or unavailable. This itself has strengths and weaknesses—because the pre-approval process is conducted before payment, this can save a requester the basic cost

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<sup>34</sup> Interview with a lawyer on 12 October 2021.

<sup>35</sup> Found in the *2020 Selangor FOI implementation request*, made to Lembaga Urus Air Selangor.

of application (especially in Penang's case, where the application cost is much higher), although it means that the FOI request process is effectively longer by about an extra week.

Our experience was that, in spite of the pandemic, FOI requests in both states must be made on paper and hand delivered (despite the form being available primarily in PDF on their webpages). There is no option for online payment in either states as well—which can present a conundrum if the government office receiving the FOI request does not have a payment counter. We then collected both requests in person. In Selangor's case, the state government mailed paper letters updating the status of the request twice (once upon receipt of the FOI request and another upon completion).

The cost of making an FOI request in Selangor was relatively accessible for this study. The standard RM12 as the cost of application was paid and other charges were waived at collection. The cost in Penang, however, totalled RM400. However, the usage data showed that, despite the higher cost of making an application in Penang, there was not an expected reduction in filed requests in 2020, indicating that there are multiple factors (some of which are not well understood at this point) that contribute to usage and access to the FOI request mechanism.

A final reflection on the entire FOI request process is that we were reminded verbally by the processing officer in Selangor that we were not allowed to publish the document as is. Additionally, Penang's FOI in its early years had an extra legal requirement for the requestor to sign a statutory declaration that they will not use the information for commercial purposes.<sup>36</sup> This presents the question of copyright of the FOI request. In some international jurisdictions, the government itself hosts a publicly accessible online database of information disclosed through the FOI process (with private personal information redacted).<sup>37</sup> Such publicly archived disclosure is good practice for transparency and accountability.

Some of the documents requested through the FOI process are reasonably made in the public interest and benefit from public dissemination, which also prevents duplication of work in handling multiple similar requests and subsequently strengthening accountability processes. For example, requests for undisclosed EIA reports of development projects held by the state government usually warrant public dissemination, since they can affect local residents and indigenous rights. Admittedly, other use-cases in Selangor and Penang, such as extraction of land ownership data or Syariah Court documents, may not warrant such public disclosure. Nevertheless, at this stage, all records of FOI requests in Selangor and Penang are hard to come

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<sup>36</sup> Later, then Deputy Chief Minister II P Ramasamy clarified that it was to prevent the private resale of government information. See Boo Su-Lyn, "Freedom of information? Penangites not interested now that they have access", *The Malay Mail*, 17 August 2016, <https://www.malaymail.com/news/malaysia/2016/08/17/freedom-of-information-penangites-not-interested-now-that-they-have-access/1184881>; and "Penang govt relaxes requirements for statutory declaration", *The Sun Daily*, 5 September 2016, <https://www.thesundaily.my/archive/1960859-ISARCH392573>

<sup>37</sup> For example, the Department of Foreign Affairs and Trade of Australia, and the Ministry of Defence of the UK, publishes the FOI requests they have handled respectively. See "FOI disclosure log", Department of Foreign Affairs and Trade, Australian Government, <https://www.dfat.gov.au/about-us/corporate/freedom-of-information/foi-disclosure-log>; "FOI responses released by the Ministry of Defence: 2021", gov.uk, <https://www.gov.uk/government/collections/foi-responses-released-by-the-ministry-of-defence-2021#december>

by and not easily accessible. Further clarity is needed on not only the copyright status of the actual FOI request but also the publicly archival process of FOI requests and the metadata associated with it.

## Conclusion: Suggestions, Lessons & the Federal Outlook

Overall, the FOI mechanisms look promising so far as the Malaysian public does utilise the information request mechanism, and some modest utility has been derived from it. Nevertheless, usage trends point towards a likelihood of waning public confidence in the mechanism if further intervention to make it more accessible is not implemented. The public meetings and interviews both concur that public outreach and understanding of the application process are lacking. The appeals mechanism as well has not been seriously utilised by the public in challenging FOI request denials. While the COVID-19 pandemic may have dampened requests, we fear that without a strong civil service backbone and a lack of public outreach, the FOI mechanism will gradually lose its value in both the civil service and the public spheres, leading towards overall dismantling without a best-effort in ensuring its utilisation. While there are challenges in the information environment because the federal-level OSA withholds it, overall, the Selangor and Penang FOI enactments demonstrate that it is possible to have an FOI request mechanism within the Malaysian legal and bureaucratic context—it is only that, to make it truly successful from all angles, periodic tweaking and improvements based on situational developments are required.

For both Penang and Selangor, the clearest improvements can be made if there was a dedicated (but small) body to coordinate, administer and monitor the FOI mechanism, that is separate from the appeals board. Clearly, when the mandated annual report and recommendations from SELCAT are not fulfilled, there needs to be better executive management. We are also pessimistic about effective public outreach without a dedicated central administrative body to oversee efforts. Since public outreach is typically left to individual agencies to manage, there is no oversight or incentive for the information officers and government agencies to conduct public outreach. With an administrative body, performance reports and challenges can be clarified in order to better improve the FOI mechanism at either the legal or operational level. Such an administrative/oversight body can develop training materials and conduct the aforementioned training workshops, develop guidelines clarifying exemptions, further ensure consistency in application procedures across government bodies, develop and spearhead public outreach, coordinate appeals board sittings, and fill in any further functions that individual departments are not likely to undertake with regard to the FOI mechanism.

Will there be buy-in from civil servants for an FOI law at the federal level? Given that we still have a knowledge gap with regard to civil service culture, once a law has been legislated, civil servants will generally attempt to follow the law (begrudgingly or not)—albeit depending on their awareness of it, and the nature of the FOI request. There will likely be resistance—for example, in one of CIJ's engagements with government representatives, a civil servant participant

highlighted that there already exists mechanisms under the OSA to declassify information.<sup>38</sup> Our concern, however, was with the lack of obligation to reply to the requester in a timely fashion, the factors that were and should be duly considered for disclosure, and whether a perceived wrongful non-disclosure could be further appealed in court.<sup>39</sup> All these considerations are needed for a federal-level FOI, although this point needs to be clarified to civil servants while taking into account their needs as well.

On the aspect of implementation, a federal-level FOI request mechanism must also factor in scale and asymmetric burden. As demonstrated by the state-level numbers, some agencies/departments will have inordinately more requests than others. Further, some FOI requests could be a means to circumvent poor informational services, as highlighted by the information requests regarding the Syariah Court. Another point to bear in mind is that the fall-off in frequency of training workshops in Selangor and failure of public outreach will be magnified at a national level.

There is a hypothetical case for greater harmonisation between the OSA and a federal-level FOI law. Given the *Penyata SELCAT 2015*'s revelation that the chief minister blocked the release of an FOI request, it might be the case with the OSA that at the federal level, a minister or a high-ranking civil servant has the right to deliberately suppress the rightful release of information, and if that were the case, an independent appeals body would need to be sufficiently empowered to review such FOI requests that are blocked by the OSA, and order for a disclosure if the request was truly in the interest of the public. Secondly, given that the federal-level OSA takes precedence over state enactments, is not known if items on the exemptions list can actually be overturned by an appeals board. Nevertheless, since there have been zero appeals filed at the state level, it is difficult to extrapolate from the state to federal level on the specific interactions of the OSA with an FOI law at this point. It is clear that politicians and high-level civil servants should not be able to prevent an appeals board disclosure if a FOIA is implemented at the federal level, and some level of OSA amendment or repeal should take place to prevent the former from happening.

We note that there are ethical and "best practice" concerns with the implementation of FOI with regard to the reduction in cost of making a request, a need for maximum and proactive disclosure by government agencies, the speed of processing the applications, the qualitative issue of maximal access, and a sufficient budget to enable information officers and oversight bodies to perform their duties. However, the data does not immediately support any conclusions with regard to these concerns. Nevertheless, CIJ does take a position at an ethical level that barriers to FOI applications should be lowered as far as possible as to maximise access to government-held information as a matter of human rights.

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<sup>38</sup> Meeting at BHEUU on 15 April 2021.

<sup>39</sup> For example, in January 2018, then Selangor Menteri Besar, Datuk Seri Mohamed Azmin Ali, failed to get a court order for disclosure of the Auditor General's 1MDB report, as it was classified secret under the OSA; the courts ruled that he had no locus standi. A federal FOI law should/would create that locus standi. See Hoo Kit Yen, "Azmin cannot see A-G's 1MDB report, court", *Free Malaysia Today*, 24 January 2018, <https://www.freemalaysiatoday.com/category/nation/2018/01/24/court-dismisses-azmins-bid-to-declassify-auditor-generals-1mdb-report/>

This paper remains a *preliminary* assessment, because there are a number of aspects of the FOI enactments that we remain unclear about. The biggest knowledge gap about the implementation of the FOI enactments is civil service buy-in. Ostensibly, the civil service has the greatest to lose: Not only do they lose the luxury to wholly protect information afforded to them by the OSA (and if not, Section 203A of the Penal Code), but also it is likely to create greater administrative burden. While a shift in bureaucratic culture or mindset may be necessary, other structural impediments may also play a role in discouraging buy-in amongst the civil service. For example, is the remuneration from taking on the information officer role sufficient and commensurate? Is taking up the responsibility of an information officer a stigma? From what we know, there is no dedicated civil-service-level coordinating body in either state to monitor and recommend improvements for policy or at an operational level—as reflected in the irregularly updated list of information officers on the FOI webpages, or that while the Selangor enactment mandates an annual report, no such document exists. Other gaps in knowledge that we have yet to gain a sufficiently clear understanding of include the information environment around the Syariah Court and the inordinately high number of requests in Seberang Perai.

We hope that our research and advocacy efforts in the following year will allow us to gain a fuller understanding of the state-level FOI enactments, and make better recommendations at both the state and federal levels, to maximise the rights of peoples in Malaysia while promoting transparency and accountability in our governments.

# APPENDIX: COMMENTARY ON CLD'S RTI IMPLEMENTATION ASSESSMENT FRAMEWORK

Following the Canada-based Center for Law and Democracy's (2019) methodology for assessing the quality of implementation of RTI laws, there are certain observations that can be made about Penang and Selangor FOI laws. The CLD's 2019 methodology divides assessment into four areas:

- (1) The performance of a national central oversight body bearing the executive functions created by a national FOI law;
- (2) The performance of individual public authorities and offices;
- (3) Proactive disclosure; i.e. information/documentation that the government makes accessible programmatically without the need of an FOI request; and,
- (4) Substantive issues (relating to user experience).

While this project was not conceived initially with the rigour of the CLD framework in mind, some commentary can be made. From the outset, Selangor and Penang fall into an in-between category, between a national central oversight body and an individual public authority. Because Selangor and Penang are sub-national entities and their remit only covers state offices rather than national ministry functions, they resemble national central oversight bodies but do not have the broad scope of such.

On the oversight body, two thematic examinations rely on whether it has been properly established and is subsequently effective/functional in the delivery of its legal mandate. One of the indicators within the CLD methodology stipulates that the appointment of commissioners needs to be observable and independent, as it is this leadership that drives the effectiveness of the oversight body. Unfortunately, the expectation is subverted in our observation. Our impression is that for both states, the members of the appointed appeals body do not function as the leadership of the state-level oversight body but merely as adjudicators within the appeals process. No annual reports have been published or sighted. In the Selangor case, the state assembly subcommittee of SELCAT takes this function, but there does not seem to be follow-up on early SELCAT assessment of the effectiveness of the FOI Law. As a result, there is no embedded leadership driving the (improvement of) FOI process.

On the assessment of public authorities, CLD points towards the appointment and empowerment of information officers, as well as the public authority's own accountability towards FOI. On this note, we see that training for FOI officers in Selangor has stopped in recent years, and, without evidence of internal documentation/standard operating procedures/guidelines, our impression is that the implementation of FOI at the departmental level is guided by an organic, informal process following established reporting guidelines with varying understandings of the process between departments. As public outreach is left to each department, and there are no accountability mechanisms to it, it suggests that departments have not been conducting public outreach, as there is no incentive to do so.

On the area of substantive/user experience, CLD looks at ease of submitting of requests, proper procedural documentation, turnover time and accuracy of information. Notably, the Selangor and Penang experiences suggest that ease could be improved, as electronic submission is not acceptable and payment has not been rationalised—not all government offices are ready to receive cash

payment, and no electronic payment channel is available either. It is not directly possible to judge whether the requests were processed in reasonable time because our requests were conducted during the COVID-19 pandemic (sometimes we could not access government offices due to unexpected closures, and these could have disrupted information gathering in the longer process). It does seem that information transfers to other authorities are conducted in a relatively orderly manner. Furthermore, the information provided to us was not supplied in the format stipulated by us.

Finally, on the area of proactive disclosure, this study is not in a position to judge as we focused on the FOI mechanism. However, it can be commented that there is no public ledger of FOI requests to any detailed degree. The FOI requests we made was because such records were not easily available, except for combing for the data through state assembly Hansards, and only if a state assembly person fielded the question.