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HARRIS BIN MOHD SALLEH V. CHIEF SECRETARY, GOVERNMENT OF MALAYSIA & ORS (2023) AND FREEDOM OF INFORMATION IN MALAYSIA

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A High Court recently ordered the Malaysian government to make public the investigation report on a plane crash accident in 1976 that killed 11 people. In granting the *mandamus* order, the court recognised that although not expressly provided for in the Federal Constitution, freedom of information ("FOI") necessarily flows from the free speech clause in the constitution. While the court's decision in acknowledging the existence of FOI in Malaysia is welcomed, this note argues that the implication of this decision seems minimal in advancing FOI in Malaysia. It is, therefore, suggested that an FOI legislative framework together with a consistent recognition, especially by the higher courts, of FOI in Malaysia would provide more systematic access to official information.

I. Introduction

Following a court order in *Harris bin Mohd Salleh v Chief Secretary, Government of Malaysia & Ors* ("*Harris Salleh*"),[1] Prime Minister Anwar Ibrahim announced that the federal government, through the Transport Ministry, would declassify the investigation report of the infamous *Double Six Tragedy* that killed 11 persons, including several Sabah state leaders, in 1976.[2] The decision of the High Court at Kota Kinabalu and the federal government's compliance with the court order is very much welcomed.[3] The decision, in particular, has been lauded as "ground-breaking"[4] and "significant"[5] as it "underscores the right of citizens to access information" in

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1 *Harris bin Mohd Salleh v Chief Secretary, Government of Malaysia & Ors* [2023] MLJU 424 (High Court) [*Harris Salleh*].

2 The report is now available on the portal of the Transport Ministry of Malaysia: <https://www.mot.gov.my/en/aviation/reports/>.

3 Notwithstanding the initial appeal motion filed by the Attorney General's Chambers. See Larry Ralon, "Harris Slams AG's Chambers: Credits Anwar and Daily Express", *Daily Express* (7 April 2023) <https://www.dailyexpress.com.my/news/210757/harris-slams-ag-s-chambers-credits-anwar-and-daily-express/>.

4 Ida Lim, "High Court Orders Putrajaya to Declassify Papers on Sabah's 1976 "Double Six Tragedy" Plan Crash", *Malay Mail* (8 March 2023) <https://www.malaymail.com/news/malaysia/2023/03/08/high-court-orders-putrajaya-to-declassify-papers-on-sabahs-1976-double-six-tragedy-plane-crash/58592>.

5 *Ibid*.

"ensuring accountability, and the legitimacy of representative government".[6] To a certain extent, the Kota Kinabalu High Court's decision may offer some comfort to the family of the victims in this tragedy as the investigation report may reveal truths that they have been seeking.[7] More broadly, the decision is encouraging given the long and arduous journey Malaysians have been taking in advocating for the recognition of freedom of information ("FOI").[8] Notwithstanding that, there seems to be some reservations about the implications of *Harris Salleh* to FOI in Malaysia generally.

A. *The Facts and Decision in Harris Salleh*

On 6 June 1976, an aircraft carrying 11 persons including Fuad Stephens, the then Chief Minister of Sabah and a few other state ministers crashed en route from Labuan to Kota Kinabalu. Everyone on board was killed. Accordingly, the Malaysian government launched an investigation into the tragedy and the investigation report was classified as an official secret on 28 October 1976 ("Investigation Report") under the Official Secrets Act 1972 ("OSA").[9] While refusing to disclose the Investigation Report, the Malaysian government maintained that the tragedy was due to human error. The calls for the release of the Investigation Report have for almost 50 years fallen on deaf ears.

The applicant, Harris bin Salleh, who was the then Deputy Chief Minister of Sabah filed a judicial review application to challenge the exercise of the discretionary power of the Minister in refusing to declassify the Investigation Report as an official secret, and to apply to the High Court a *mandamus* to order the government to make public the Investigation Report. For context, the applicant was appointed as the Chief Minister replacing Fuad Stephens who was killed in the tragedy. In consequence, he appeared to be the direct beneficiary of the tragedy and has since been implicated in different conspiracy theories. It was on this ground that the court opined that the applicant was not an officious bystander and had a legitimate interest in having the Investigation Report declassified and thus the necessary *locus standi* to bring this suit.[10]

In essence, the applicant argued that freedom of speech and the right to receive information are essential in the Malaysian democratic form of government.

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6 *Ibid*.

7 The Investigation Report does not contain anything sensitive and it hence raises the question of why there was a need to keep it as a secret. This, again, questions the arbitrary use of the OSA. See Olivia Miwil, "Family of Victims of Double Six Tragedy Disappointed "Harmless" Report Locked Away for 47 Years", *New Straits Times* (12 April 2023) <https://www.nst.com.my/news/nation/2023/04/898989/family-victims-double-six-tragedy-disappointed-harmless-report-locked >.

8 See Zalina Abdul Halim, "Freedom of Information in Malaysia – A Long Arduous Journey to the Blue Yonder", Seminar on Asian Media and Freedom of Information, Bangkok (8–10 May 2000).

9 Official Secrets Act 1972 (No 88) (M'sia) [OSA]. As the aircraft was manufactured by the Government Aircraft Factory of Australia ("GAF"), a separate investigation was also conducted by the Australian authorities. The investigation report was also not publicly available until recently. See Australian High Commission Malaysia, "Release of Australian Records of the Double Six Accident", Media Release (26 April 2023) <https://twitter.com/AusHCMalaysia/status/1651145521074151426/photo/1>.

10 *Harris Salleh*, *supra* note 1 at [24].

The free speech clause in Article 10(1)(*a*) of the Federal Constitution ("FC") includes the right to receive information. Further, while Parliament may, by virtue of Article 10(2)(*a*) of the FC, make laws to restrict freedom of speech, the infringement imposed by the state shall be proportionate to the object it seeks to achieve.[11] In addition, the discretionary powers possessed by the Minister in relation to classification and declassification of official secrets shall not be without limits. They should be exercised for a proper purpose or should not be exercised unreasonably.[12]

In response, the respondents maintained that it is purely the Minister's discretion to determine whether an official secret shall be further so kept. Further, it was argued that the OSA is not discriminatory as it applies to everyone, the applicant and other Malaysians alike. They also submitted that it is established that freedom of speech in Malaysia is not absolute and it imposes no obligation on the Minister to declassify the Investigation Report.

The court acknowledged that it is the right and discretion of the Minister to classify and declassify an official secret and under the OSA, he has no obligation to give reasons for his decision. However, the court called into question the legitimacy of the government's refusal to disclose the Investigation Report:

> [64] Coincidentally, it is exactly nine years to today (8.3.2014) that MH370 disappeared from the face of the earth with 239 hapless souls on board. The Minister of Transport who is the 2nd Respondent made a statement through BERNAMA which was published yesterday (07.03.2023 but reported a few days earlier in the national press) and which I now quote excerpts from such report extracted from the Borneo Post, 07.03.2023 (paraphrasing, with emphasis):
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> > "Kuala Lumpur: Transport Minister Anthony Loke Sunday stressed that he will not summarily close the book on the Malaysia Airlines (MAS) flight MH370 tragedy……. I am painfully aware of the desire for closure. Since 2014, Malaysia and its international partners have searched millions of square kilometres … Loke said to the families of the 239 passengers and crew members on board the lost aircraft, no amount of sympathy can erase the grief and heartache of losing their loved ones. "Malaysians will always stand by you and share the weight of this tribulation together. We honour the lives lost and will not forget them,", he added"
>
> [65] For the Minister to deny de-classification of the Double 6 report, without offering any reason, but then speak of openness and closure in respect of MH370 cannot by any stretch of the imagination reflect well on him as Minister of the people. He has the acknowledged right under the OSA NOT to de-classify but in so doing his legitimacy as the people's representative in our democratic Government and in the context of the circumstances of this case, is diminished and consequently prejudices the legitimacy of the very Government he serves. It is this very state of affairs that Judicial Review can arrest.[13]

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[11] *Ibid* at [28].
[12] *Ibid* at [30].
[13] *Ibid* at [64]–[65].

As such, the court was inclined to agree with the applicant that in exercising his ministerial power under the OSA, the Minister's decision must be proportionate to the purpose of maintaining the official secrecy of the Investigation Report. Given the circumstances of the case, the Minister had a duty to declassify the Investigation Report. In the event that the Minister refused to do so, he should give reasons. In view of the stance taken by the Minister with regards to MH370, the court saw no reason why the Investigation Report should be further kept as an official secret.

II. *Harris Salleh*'s Implications For The Freedom Of Information In Malaysia

The declassification of the Investigation Report will reveal to the public a state secret that has been kept for almost 50 years. While this is encouraging given the rare occasion that government would release a classified document, this note argues that it will not have far-reaching consequences on the recognition of FOI in Malaysia for several reasons.

A. *The Decisions of the Higher Courts*

It is worth noting that *Harris Salleh* was decided by the High Court, which is the first instance court in a judicial review action. Had the Attorney General's Chambers decided to continue with the appeal, *Harris Salleh* would have been at risk of being overruled.[14] This instantaneously brings to mind the decision of the Federal Court (the apex court) in *Malaysian Trade Union Congress v Menteri Tenaga, Air dan Komunikasi & Anor*[15] ("*MTUC*") which implicitly rejected the notion of FOI in Malaysia. This case concerned the water treatment and distribution services in the state of Selangor and the federal territory of Kuala Lumpur, Malaysia. Prior to 15 March 2002, these services were handled by a government department. However, after that, due to privatisation, the water distribution service was taken over by a company known as *PUAS*[16] whereas a business consortium consisting of *Puncak Niaga*, *Abass*, and *SPLASH* handled the treatment service. Due to its weak performance, *PUAS* was replaced with *SYABAS* in which *Puncak Niaga* had a 70% interest and a state government-owned company had 30%. Subsequently, in December 2004, a concession agreement was entered into by the Selangor state government, the Malaysian federal government, and *SYABAS* which agreed that *SYABAS* be given

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[14] See Larry Ralon, "Harris Slams AG's Chambers: Credits Anwar and Daily Express", *Daily Express* (7 April 2023) <https://www.dailyexpress.com.my/news/210757/harris-slams-ag-s-chambers-credits-anwar-and-daily-express/>.

[15] [2014] 3 MLJ 145 (Federal Court) [*MTUC*].

[16] The full name of the companies which have been identified by their acronyms in the main text is: PUAS – *Perbadanan Urus Air Selangor* [Selangor Water Management Corporation]; Puncak Niaga – *Puncak Niaga (M) Sdn Bhd* [Puncak Niaga (M) Pte Ltd]; Abass – *Konsortium Abass Sdn Bhd* [Abass Consortium Pte Ltd]; SPLASH – *Syarikat Pengeluar Air Sungai Selangor Sdn Bhd* [Selangor River Water Producer Company Pte Ltd]; and SYABAS – *Syarikat Bekalan Air Selangor Sdn Bhd* [Selangor Water Supply Company Pte Ltd].

a 30-year concession to provide treated water to Selangor and Kuala Lumpur at the prescribed tariffs, and it was entitled to raise the tariffs if it hit a 5% reduction in the non-revenue water. Relying on an audit report, *SYABAS* claimed that it had managed to do so, and in October 2006 the Minister allowed the former's request to increase the water tariffs by 15%.

This prompted the Malaysian Trade Union Congress ("MTUC") to write to the Minister to ask for the concession agreement and the audit report, but the request was rejected on the ground that the former was a commercial agreement which shall not be revealed without the agreement of all contracting parties, while the latter was an official secret. As a result, the MTUC, together with 13 other applicants, filed an application for judicial review seeking a *mandamus* order to release the documents. The trial court allowed the application and held that the audit report did not have any information that was detrimental to national security or public interest and "it is nonsensical to say that any document put before the Cabinet is automatically treated as 'RAHSIA' (secret) under section 2 of the Official Secrets Act 1972".[17] Further, the Minister's refusal was against the principles of good governance, accountability and transparency. At this juncture, it is not difficult to see the resemblance of *Harris Salleh* and *MTUC*.

Returning to *MTUC*, on appeal, by a majority of 2-1, the Court of Appeal overruled the High Court. The majority ruled that the MTUC "had not shown that it has a statutory right to the concession agreement and the audit report".[18] Moreover, it was irrelevant whether a document contained information detrimental to national security or public interest,[19] for as long as the concession agreement and the audit report were information and material relating to any document specified in the Schedule to the OSA,[20] they shall form part of the state secrets and be protected. The Federal Court agreed with the majority decision of the Court of Appeal. In rejecting the MTUC's public interest argument that it ought to be granted access to those documents, the Federal Court stated that:

> …this is not a case where MTUC was denied outright access to treated water in breach of its alleged fundamental right. MTUC's cause of action was based upon its alleged right of access to documents that had been requested for. Its interest was only in the tariffs to be imposed in respect of water supplied. We would also like to mention here that from the affidavit evidence it had not been shown that the water tariffs imposed or to be imposed were excessive and there was unreasonable profiteering by SYABAS. What had been proved was that the

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17 Cited in the judgment of the Court of Appeal in *Minister of Energy, Water and Communication & Anor v Malaysian Trade Union Congress & Ors* [2013] 1 MLJ 61 at 81 [*Minister of Energy, Water and Communication & Anor*].

18 *Ibid* at 84.

19 *Ibid* at 87.

20 The relevant part in the Schedule to the OSA is "Cabinet documents, records of decision and deliberation including those of Cabinet Committee". Although parts of the concession agreement were already being circulated in the public, the fact that the concession agreement and the audit report were used related to the decision of the Cabinet in allowing the increase of water tariffs made these documents official secrets. Until they are declassified, any wrongful communication of these documents is an offence under s 8 of the OSA.

> water tariff was reviewed and increased by 15% in November 2006. MTUC claimed that there was no transparency in the review as the basis of the review was questionable.[21]

Both *MTUC* and *Harris Salleh* are judicial review actions revolving around the applicability of the OSA, the issue of *locus standi* and the acts of Ministers in refusing disclosure of official documents. They are, however, distinguishable on two points. First, the High Court in *Harris Salleh* was readily acceptive of the notion of freedom of information despite it not being expressly provided in the FC.[22] Second, the doctrine of proportionality was raised and applied in *Harris Salleh* but not in *MTUC*.[23] These factors appear to have put *Harris Salleh* on a better footing.

However, it is important to point out that in *MTUC*, the appellants similarly argued that "freedom of information is implicit in, or is a derivative of, the freedom of expression"[24] and that "the disclosure of the two documents is necessary for the meaningful exercise of free expression on matters of public interest".[25] These propositions must have necessarily been built on Article 10(1)(*a*) of the FC (which expressly provides for freedom of speech and expression) simply for the reason that that constitutional clause is the starting point of freedom of expression in Malaysia. That said, intriguingly, the Federal Court did not address these arguments. While whether this was intended or otherwise is left open to interpretation, it somehow suggests the court's reluctance to delve into the question of recognising or creating a new right, namely, freedom of information.

In concluding that the Minister's refusal to disclose the Investigation Report was disproportionate to his duty of maintaining official secrecy, the court in *Harris Salleh* took into account several factors such as the legitimacy of the government as the people's representative in a democracy, and the credibility of the Minister. In other words, the High Court looked at the issue with a bird's-eye view. In contrast, confining themselves to the technicalities in the grounds of judicial review, the Federal Court in *MTUC* declined to consider any larger public interests that may have been involved in the appeal before them.[26] The question is, therefore, how the Federal Court would have responded had the doctrine of proportionality been raised. This note argues that despite the different doctrines such as proportionality,

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[21] *MTUC*, *supra* note 15 at 164.

[22] The High Court stated that "the most compelling argument on the part of the applicant is of the right to information being the corollary to the freedom of speech". See *Harris Salleh*, *supra* note 1 at [61].

[23] In fact, the doctrine of proportionality was adopted by the High Court in *MTUC*. However, it is not known as to why it was not being pursued at the appellate courts. See *MTUC*, *supra* note 15 at 153.

[24] *Ibid* at 156.

[25] *Ibid*.

[26] At both the High Court and minority judgment of the Court of Appeal, public interest was taken into account. For example, the minority judgment of the Court of Appeal took the position that the increase in water tariffs was based on the concession agreement and the audit report. Hence the consumers should be entitled to know whether these documents justified the price hike so as to enable them to be fully informed and able to make useful representation to the government. This was more so when SYABAS had a monopoly over distribution of treated water in Selangor. See *Minister of Energy, Water and Communication & Anor*, *supra* note 17 at 96.

public interest, legitimacy, *etc*, given the same set of facts and judicial attitude,[27] the Federal Court's decision in *MTUC* would most likely be the same.

Hence, if the Attorney General's Chambers proceeded with the appeal against *Harris Salleh*, the progressive ruling of the High Court might end up like *MTUC*. Of course, the appellate courts may otherwise affirm the High Court's decision. On top of that, it shall be borne in mind that the High Court had confined its findings of favouring disclosure of the Investigation Report to the specific factual circumstances of the case.[28] Hence, put differently, it remains unsettled whether FOI is a generally enforceable right in Malaysia. In the upshot, together with the reasons discussed below, the approach of the Federal Court in *MTUC* and other court decisions[29] may still stand in the way to recognising FOI as a fundamental right in Malaysia.

B. *The Absence of FOI in Malaysian Statutes*

Article 10(1)(*a*) of the FC provides that "… every citizen has the right to freedom of speech and expression". This is quite similar to international instruments like the Universal Declaration of Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR") that recognise freedom of expression and freedom of information.[30] However, absent from this constitutional clause is a phrase that explicitly provides for "freedom to seek, receive and impart information …"[31] or alike. At the same time, unlike Australia,[32] India,[33] New Zealand,[34] and the United Kingdom[35] which have legislated a separate and specific FOI law, Malaysia to date does not have federal legislation providing the citizens a systematic mechanism to obtain official information held by the government.[36]

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27 Other cases in which the courts similarly refused to recognise freedom of information in Malaysia: *Haris Fatillah bin Mohd Ibrahim v Suruhanjaya Pilihan Raya Malaysia* [2017] 3 MLJ 543 at 549C–F, 559D (Court of Appeal) [*Haris Fatillah*]; *Tengku Faedzah bt Raja Fuad v Kerajaan Malaysian & Ors* [2022] MLJU 1654 at [24]–[27] (High Court) [*Tengku Faedzah*].

28 *Harris Salleh*, *supra* note 1 at [70].

29 *Haris Fatillah*, *supra* note 27; *Tengku Faedzah*, *supra* note 27.

30 *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3rd Sess, 183rd plen mtg, UN Doc A/Res/217A (1948) Art 19; International Covenant on Civil and Political Rights (19 December 1966), 999 UNTS 171, 6 ILM 368, Art 19(2) (entered into force 23 March 1976) [ICCPR].

31 ICCPR Art 19(2), *supra* note 30.

32 Freedom of Information Act 1982 (Aust).

33 Right to Information Act 2005 (India).

34 Official Information Act 1982 (NZ).

35 Freedom of Information Act 2000 (c 36) (UK).

36 At the federal level, Malaysia does not have an FOI regime which would allow the citizenry to request for access to information held by the government. Out of the 13 states in Malaysia, only Penang and Selangor had their respective FOI laws passed in 2010. See Freedom of Information (Penang) Enactment 2010; Freedom of Information (Selangor) Enactment 2010. Nevertheless, it must be pointed out that the Federal Government has, in 2020, launched a portal called 'Malaysia Open Data Portal' <www.data.gov.my> which releases certain official statistics and information. The portal also provided an online form for the public to request for data. This is encouraging. However, there is no legislation setting out the legal basis upon which the government officials ought to assess the request. It is also silent as to refusal of disclosure and its remedies, *etc*. Hence, to obtain official information that is not proactively published by the government, the citizens will usually have to separately write to the relevant department and depending on various factors such as the type of information requested, and even

As a result, an applicant's counsel, including in *Harris Salleh*, often argued that "the right to information is derived from, or is implicit in, the freedom of expression housed under art 10(1)(*a*) of the Federal Constitution"[37] and "there is no need for freedom of information legislation to be enacted. In other words, in the absence of any federal legislation, it is not an impediment to recognise the right to information".[38] However, the courts' response, as illustrated below, to those propositions has been that in the absence of a statutory provision, there exists no right to information in Malaysia. An applicant therefore lacks a legal basis to ask for information in the government's possession.

For instance, in rejecting the appellant's request for information like "map or maps of the constituency, voting areas and the reasons for the proposed changes"[39] as a response to the Election Commission's invitation for public representation at the end of a nationwide delineation exercise, the Court of Appeal opined that "the appellant had failed to demonstrate that he has right under the Federal Constitution to the relevant information".[40] Similarly, in *Tengku Faedzah bt Raja Fuad & Ors v Kerajaan Malaysia* ("*Tengku Faedzah*"), the High Court said that:

> It is to be noted that Article 10(1)(*a*) of the FC concerns freedom of speech and expression. However, I find that there is no specific provision that such right includes right to information nor any specific federal legislation providing for right to information. Although other countries' positions differ, what matters is the wording of our Constitutions itself and the interpretation cannot be overridden by the principles of other Constitutions … I view that Article 10(1)(*a*) of the FC on freedom of speech does not entail right to receive information which the Applicants assert and hence failure of the Respondents to reply to the Applicants' letter is not a breach of the Applicants' constitutional rights.[41]

This was, however, not fatal in *Harris Salleh*. The court accepted the argument that "the right to information exists as a corollary to the right to free speech"[42] in the FC. "When the Minister is given the power to declassify an official secret under the circumstances, a duty to declassify arises and the non-exercise of such duty must be with reason".[43] In other words, without an express statutory provision, a legal duty may still exist and that will serve as the basis upon which the applicant may found its action to pray for a *mandamus* order. Nonetheless, the effect of *Harris Salleh* in this regard is uncertain as the court put it quite bluntly that the findings made were

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the attitude of the officer-in-charge, the outcome of the application is uncertain. Therefore, when such a request is rejected, the citizen concerned will resort to filing a judicial review application which is time-consuming and costly.

37 *Haris Fatillah*, *supra* note 27 at 558. See also *Tengku Faedzah*, *supra* note 27 at [18]; *MTUC*, *supra* note 15 at 156.

38 *Haris Fatillah*, *supra* note 27 at 558 (Court of Appeal).

39 *Ibid* at 546.

40 *Ibid* at 549.

41 *Tengku Faedzah*, *supra* note 27 at [24]–[27] (emphasis added).

42 *Harris Salleh*, *supra* note 1 at [70].

43 *Ibid* at [61].

"within the specific circumstances of this case".[44] Hence, whether the same will be applicable in other cases relating to declassification of official secrets remains an open question.

C. *The Official Secrecy Regime*

The biggest impediment to "liberating" official information in Malaysia is arguably its obsolete official secrecy regime that is governed by the OSA. It is the "colonial heritage" left by the British to Malaya as well as the Borneo states and subsequently Malaysia.[45] This legislation on secrecy which has its roots in war times has now been widely used to keep any information which the authorities deem necessary for national security and public interest from the public. The OSA is wide enough to cover almost everything as an official secret. In section 2 it says that:

> "official secret" means *any document* specified in the Schedule and any information and material relating thereto and includes *any other official document, information and material as may be classified* as "Top Secret", "Secret", "Confidential" or "Restricted", as the case may be, by a Minister, the *Menteri Besar* or Chief Minister of a State or such public officer appointed under section 2B…
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> [emphasis added]

Based on section 2, a document may become an official secret by virtue of either the Schedule to the OSA, or the classification made by an authorised official. In the former category, as shown in the case of *MTUC*, the audit report that was presented during a cabinet meeting had naturally become part of "Cabinet documents, records of decision and deliberation including those of Cabinet Committee".[46] In the latter, the scope is equally wide as it empowers an authorised official to label *any* document as secret to varying degrees. In addition, it will not lose its secrecy even though the contents of such a secret are already known by the public:

> If the originator or the owner of the document treats it and the information contained in it as an official secret and clearly marks it and keeps it as such, it is not open to anyone to regard it as otherwise; and the law must give protection to such document or information even though it contains information generally known to the public.[47]

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44 *Ibid* at [70].

45 Saw Tiong Guan, Lee Ting Han, Lee Jia Chern & Lee Min Lun, *Undang-Undang Media di Malaysia* (Sweet & Maxwell, 2020) at 77–78. See also OSA s 31.

46 Schedule to the OSA.

47 *Datuk Haji Dzulkifli bin Datuk Abdul Hamid v Public Prosecutor* [1981] 1 MLJ 112 at 113 (Federal Court).

At the same time, the Minister is empowered to make regulations to "prescribe all other matters necessary to protect the safety or secrecy of any information or thing".[48] This seems to be a catch-all provision and a safety net for the Executive to keep any information, as it desires, as an official secret. In other words, it is at the absolute discretion of a Minister or an authorised official to classify a document as a state secret. Nevertheless, it is noteworthy to point out that the OSA does not provide for an ouster clause to exempt the classification of an official secret from being challenged in the court.[49] The oft-cited speech of Raja Azlan Shah FJ (as the late His Royal Highness then was), which the court in *Harris Salleh* also referred to and adopted, might provide some relief to an applicant who intends to challenge the decision of the Executive:

> Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene.[50]

Having said that, as with any other judicial review application, the applicant bears the burden to show that the government had acted illegally, irrationally or procedurally improperly in classifying the disputed document as an official secret. In *MTUC*, the appellant successfully proved that it had *real and genuine interest* in the concession agreement and audit report, hence was *adversely affected* by the Minister's refusal. The MTUC, therefore, had the necessary *locus standi* to bring the suit. However, the MTUC "failed to show that the Minister's decision was illegal, irrational and flawed on the ground of procedural impropriety".[51] *Harris Salleh* had, on the other hand, sufficiently demonstrated that it was objectively irrational for the government to conceal the truth of an accident which had taken away the lives of 11 victims and to keep their family members in the dark and suffering.[52]

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[48] OSA s 30A(*e*).

[49] OSA s 16A provides that:

> A certificate by a Minister or a 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 by the Principal officer in charge of the administrative affairs of a State certifying to an official document, information or material that it is an official secret and shall not be questioned in any court on any ground whatsoever.

The High Court in *Takong Tabari v Government of Sarawak & Ors* [1994] MLJU 386 explained that s 16A is to "ouster any action directed to question the reason or ground for the classification of a document as an official secret". However, in *Mohammad Ezam Mohd Nor v Public Prosecutor* [2004] MLJU 756 [*Mohammad Ezam Mohd Nor*], the High Court stated that s 16A "appears to be creating a new category of official secrets" as any information that has not become an official secret by virtue of the Schedule to the OSA or classification under s 2 of the OSA may attain secrecy simply by a conclusive certificate issued by a Minister or public officer under s 16A. This note agrees with the interpretation in *Muhammad Ezam Mohd Nor* in regard to the intention of s 16A.

[50] *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise* [1979] 1 MLJ 135 at 148 (Federal Court).

[51] *MTUC*, *supra* note 15 at 167.

[52] Due to the investigation reports being classified, there existed many different versions of truth as well as conspiracy theories which the family members of the victims had to endure since the tragedy

As such, while it is open for any concerned citizen to challenge, by way of judicial review, the classification of an official secret, the reality might not be so supportive. Given the stringent requirement at the leave stage of judicial review, the applicant may have already faced some difficulties in showing how they have been "adversely affected"[53] by the government's refusal. Unlike most of the FOI regimes in the world, under which one does not have to disclose the reason for an FOI request,[54] the Malaysian applicant might be treated by the court as a mere busybody whose application must be rejected.

III. Conclusion

For the reasons discussed in the preceding sections, the effect of *Harris Salleh* in advancing FOI in Malaysia seems minimal. Until and unless the FC is amended to expressly include a right to information like the UDHR and ICCPR, or an FOI Act comes into effect,[55] Article 10(1)(*a*) of the Constitution is always open to debate as to whether it implicitly confers Malaysians a right to access the information held by the government. Given the track records of the Executive in refusing access as well as defending the use of the OSA, and the Judiciary in its reluctance to recognise FOI, notwithstanding *Harris Salleh*, this note remains sceptical of the prospect of FOI in Malaysia.

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happened. See Sherell Jeffrey, "Families of Victims Also Hope Government Won't Appeal the High Court Decision: Hoping Report Has Not Gone Missing", *Daily Express* (13 March 2023) <https://www.dailyexpress.com.my/news/209192/families-of-victims-also-hope-government-won-t-appeal-the-high-court-decision-hoping-report-has-not-gone-missing/>.

53 Rules of Court 2012 (No PU(A) 205/2012) (M'sia) O 53 r 2(4): Any person who is adversely affected by the decision of any public authority shall be entitled to make the application (for judicial review).

54 See, for instance, s 15(2) of the Freedom of Information Act 1982 (Aust), Art 29 of the Open Government Information Regulation (People's Republic of China), s 6(2) of the Right to Information Act 2005 (India), s 12 of the Official Information Act 1982 (NZ), and s 8 of the Freedom of Information Act 2000 (c 36) (UK).

55 In 2018, the federal government announced that the Cabinet had agreed to enact an FOI law in Malaysia. See MyGovernment, "Freedom of Information Enactment" <www.malaysia.gov.my/portal/content/30718>. In 2023, the federal government started a public survey to obtain the public's view and feedback on the proposal of enacting an FOI law in Malaysia. See Legal Affairs Division, Prime Minister's Department, "Public Survey on the Proposed Drafting of the Freedom of Information Act in Malaysia" <http://apps.bheuu.gov.my/survey/index.php?sid=72411&lang=ms>.