AN OVERVIEW OF THE FREEDOM OF INFORMATION ACT
(An Appraisal from a Lawyer’s Perspective)

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Abstract:

The Freedom of Information Act was enacted a few years ago, to promote, enhance and develop our precarious democracy. The Act (which is an expansion of Section 39 of the Constitution of the Federal Republic of Nigeria), was signed into law on 28th May, 2011 by the President Goodluck Jonathan administration. The purpose of the Act is to make public records and information more freely available, provide for public access to public records and information, protect public records and information to the extent consistent with the public interest and the protection of personal privacy, protect serving public officers from adverse consequences for disclosing certain kinds of official information without authorization and establish procedures for the achievement of those objectives. The Act further spelt out ways of getting access to records by Court, materials and documents under the security classification. The foundation of a sound democracy involves accountability of the Government and its agencies. It is hoped that with the enactment of the Freedom of Information Act, this would be guaranteed.

INTRODUCTION

Access to information held by public authorities is a fundamental element of the right to freedom of expression as provided under Section 39 of the Constitution of the Federal Republic of Nigeria. Without doubt this right is vital to the proper functioning of any country’s democracy. Access to information is an important aspect of the universal guarantee of freedom of information which includes the right to seek and to receive as well as to impart information. This right is proclaimed in Article 19 of the Universal Declaration of Human Rights and protected in international human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples’ Rights. Article 19 of the ICCPR provides that everyone shall have the right to hold opinion without interference. Everyone shall have the right to freedom of expression: this right shall include freedom to seek, receive and impart information and ideas of all kinds,

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2 ICCPR is a multilateral treaty adopted by the United Nations General Assembly on 16 December 1966, and came into force on 23 March 1976.
3 This is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent. It came into effect on 21 October 1986.
regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of choice. Also Article 9 of the African Union Convention on Preventing and Combating Corruption (adopted by the 2nd Ordinary Session of the Assembly of the Union in July 2003) requires all State parties to: adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences.

Article 13 of the United Nations Convention against Corruption (adopted by Resolution 58/4 of the General Assembly of the United Nations in October 2003) requires governments to ensure citizen participation in anti-corruption measures through: (a) enhancing the transparency of and promoting the contribution of the public to decision-making processes; and (b) ensuring that the public has effective access to information.

Access to information is one of the fundamental requirements of having a viable democracy in any country. The tendency to withhold information from the people at large should be limited as much as possible. According to Abdul Waheed Khan, Assistant Director-General for Communication and Information of UNESCO:

“The concept of true flow of information and ideas constitute the nucleus of democracy and is also critical to the respect for Human rights. Without the right to freedom of expression, which incorporates the right to seek, receive and impart information and ideas, the right to vote is undermined, human rights abuses are perpetrated in secret and it becomes impossible to expose corrupt and inefficient governments. Therefore the essence of free flow of information and ideas is predicated upon the truism that public bodies hold information not for themselves but on behalf of the public. If public bodies with a vast of information hold them in secret, the right to freedom of expression, guaranteed under international law in many constitutions and other extant law would be seriously undermined.”

HISTORY OF THE FREEDOM OF INFORMATION ACT

The origin of the freedom of information laws of most countries can be traced to the action of a man named Anders Chydenius (a Finn) about 250 years ago. During that period, he fought for democracy, equality and respect for human rights under the principle of public access called “OFFENTLIGHETSPRINCIPEN”. This led to the promulgation of the Freedom of

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Information law in Sweden which from 1766 became a part of the present Swedish constitution of 1974. Another country to have freedom of information as a constitutional provision before the 19th century was Columbia. However, by 1990, over 13 countries had freedom of information as part of their laws and by 2008, over 70 countries had adopted it globally. As at December 2015, more than 130 countries have the law either as a constitutional provision or as extant domestic law.

The enactment of the Freedom of Information Act (“FIA” or “the Act”) can be traced to the evolution of press freedom in Nigeria. The first newspaper in Nigeria was established in 1859 and was called Iwe Irohin, The paper existed from 1859 to 1867 and subsequently other newspapers began to appear in the late 1880s. In the early 1900s, the British colonial government became uncomfortable with the press and enacted laws that made it harsh for the press to operate. They found ways of checking the perceived excesses of the press, especially towards the colonial administration. The colonial government enacted a law called the Newspaper Ordinance, followed by the Seditious Offences Ordinance etc. With the country’s independence in 1960, for the first time, freedom of information through the freedom of expression became a constitutional right, as it was incorporated into the Independence Constitution of 1960. However, there were still restrictions imposed by some colonial laws such as the Official Secrets Act of 1962 which had not been repealed as at independence. With the advent of the military, Nigeria went a step backwards, as the Military suspended several rights (including the freedom of expression) with the promulgation of various Decrees.

Apart from the decades of military rule where freedom of information was restricted most, if not all, government information in Nigeria is classified as ‘top secret’. A plethora of laws prevents civil servants from divulging official facts and figures, notably the Official Secrets Act which makes it an offence not only for civil servants to give out government information but also for anyone to receive or reproduce such information. Further restrictions are contained in the Evidence Act, the Public Complaints Commission Act, the Statistics Act and the Criminal Code, amongst others. Whilst it can be argued that the idea behind these laws was to protect vital government information, however, the level of secrecy is so ridiculous that some classified government files contain ordinary information like newspaper cuttings which are already in the public domain. So impenetrable is the veil of secrecy that

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6 Ordinance No.10 of 1903.
7 Ordinance No. 10 of 1909.
8 Section 24.
government departments withhold information from each other under the guise of compliance with official secrets legislation. This chaos and disturbing occurrences motivated some concerned citizens and non-governmental organisations led by the Media Rights Agenda (MRA),\(^ {10}\) to initiate and spearhead the drafting of the Freedom of Information Bill (FIB), the bill that later became the FIA.

The draft bill went through several reviews before it was presented to former President Olusegun Obasanjo in early June 1999, with the hope that the FIB would be forwarded to the National Assembly as an executive measure. President Obasanjo advised MRA to present it to the National Assembly if they wished to pursue it.\(^ {11}\) The bill was then submitted to the National Assembly in 1999, but the legislature’s four-year term passed without the bill being voted on. The bill was re-submitted few years after the inauguration of the 6\(^ {th}\) National Assembly, it scaled through both the lower and upper chambers of the National Assembly and the harmonised version was passed by both Chambers on May 26, 2011. It was conveyed to President Goodluck Jonathan on May 27, and he signed it into law on May 28, 2011. So far, only few states in Nigeria have adopted the Freedom of Information Act at State level.\(^ {12}\)

**AN APPRAISAL OF THE FREEDOM OF INFORMATION ACT**

**Section 1** of the Act provides that every citizen whether adult or minor is entitled to have access to any records under the control of the government or any public institution. The application for the information can either be in written or oral form and the applicant does not have to demonstrate and/or indicate any specific interest in the information applied for. This is perfectly in consonance with the liberal attitude which our courts have given to the doctrine of locus standi in recent times regarding such matters.\(^ {13}\) Unlike in the past, an applicant can now initiate a public-interest litigation or request for public information without the fear of confronting an objection based on standing. It should be noted that **Section 3(3)** of the Act also allows an illiterate or disabled applicant to request for information through a third party.

**Section 1(3)** of the Act allows an applicant who has been refused information by a public institution, to institute proceedings in Court (Federal or State High Court) to compel the public institution to release the information sought. By virtue of this section and in conjunction with **Section 24** of the Act, the presumption of disclosure is in favour of the

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\(^ {10}\) Other sponsors include the Civil Liberties Organization (CLO), the Nigerian Union of Journalists (NUJ) Lagos branch etc.


applicant, whilst the burden of justifying the non-disclosure of the information sought rests on the public institution.

Under Section 31 of the Act (the interpretation section) there is a general definition of public institution as "legislative, executive, judicial, administrative or advisory body of the government, including boards, bureaus, committees or commissions of the State, and any subsidiary body of those bodies including but not limited to committees and sub-committees which are supported in whole or in part by public funds or which expends public funds and private bodies providing public services, performing public functions or utilizing public funds. It is important to note that Section 2(7) of the Act also extends the definition of public institution to include all companies in which government has controlling interest, and private companies utilizing public funds, providing public services or performing public functions.

It can be argued that Section 1 of the Act is restrictive in the sense that it only protects access to information kept by public institutions. Information kept by private institutions which is meant for the public (e.g. bank statements of government agencies, reports of medical research in the custody of private firms) is not protected. A good way to cure this defect is to borrow a leaf from the South African Constitution which allows citizens to have access to not only information held by the State, but also access to any information held by another person, once the information is required for the exercise or protection of the citizen’s rights.\(^\text{14}\) This particular right is further expounded under South Africa’s Promotion of Access to Information Act.\(^\text{15}\)

Section 2(1) of the Act requires a public institution to keep records and ensure that its activities, operations and business are known to the public. This section makes it statutorily obligatory for public institutions to create, keep, organise and maintain records/information about their set up, structure, operations, et al, in a manner that facilitates public access to such information.

Sections 4, 5 and 6 of the Act generally deal with time for granting or refusing an application for information by a public institution. Under Section 4, where information is applied for under the FIA, the public institution to which the application is made shall make the information available to the applicant within seven days, and in the event that the public institution refuses the application, it must state the reason for refusal and the section of FIA under which the denial is made. Section 6 allows for extensions of time for granting or refusing information which must not exceed 7 days.


\(^{15}\) Act No. 2 of 2000.
Section 7 of the Act provides that when a public institution refuses to give access to information applied for, the public institution shall by a written notice state the reasons/grounds for refusing the application. The Applicant has a right to challenge the grounds for refusal or to have it reviewed by the Court. Under Section 7(5) of the Act, where a case of wrongful denial of access to information is established, the defaulting officer or institution will be liable on conviction to a fine of ₦500,000.00. It should be noted that the FIA is silent on who will receive the fine. Section 10 of the Act also makes it a criminal offence, punishable with a minimum of one year imprisonment with no option of fine, for any public officer or head of a public institution to willfully destroy any records kept in his custody or attempt to doctor or otherwise alter same before they are released to any person, entity or community applying for it. Section 8 describes the fees to be paid for document duplication and transcription where necessary.

Whilst it is undisputed that the essence of the FIA is to guarantee the right of access to information held by public institutions, it is important to note that there are limitations and restrictions to these rights. The FIA recognizes that not all information is for public knowledge. As a result, public institutions are allowed to deny or refuse any application for access to certain restricted information. The following sections deal with the exemptions/restrictions:

(i) Section 11: This section prevents a public institution from disclosing information which may be injurious to the conduct of international affairs and the defence of the Federal Republic of Nigeria. However, it should be noted that an application for information under this section shall not be refused where the public interest in disclosing the information outweighs whatever injury that disclosure would cause.

(ii) Section 12: An application for information relating to records of public institutions relating to administrative, investigative and enforcement proceedings may be denied if it will affect pending proceedings or may jeopardise ongoing investigation/security of such public institutions or areas touching on personal privacy. This section is quite wide as it allows a public institution to deny the citizens access to information on the basis that it may affect pending administrative/investigative/enforcement proceedings of the public institution. However, it is pertinent to note that just like Section 11 above, where the interest of the public overrides whatever injury that disclosure would cause, an application under this section shall not be denied.

(iii) Section 14: This section prevents the public from having access to information relating to personal information and matters touching on personal privacy.
(iv) **Section 15**: This section relates to trade secrets and commercial or financial information that are confidential and privileged or where disclosures of such information may cause harm to the interest of third parties.

(v) **Section 16**: Information relating to professional privileges (such as lawyer-client privilege, doctor-patient privilege) or other privileges conferred by law are exempted.

(vi) **Section 17**: A public institution would be allowed to deny an application for information which contains course or research materials prepared by Faculty members.

(vii) **Section 19**: This section allows the public institution to refuse an application for information pertaining to library circulation and records, test questions, scoring keys, examination data relating to public institutions; architects’ and engineering plans of public institution buildings or buildings built with public funds.

Where an application for information has been denied on the ground that it is information that is exempted from public knowledge, **Section 20** allows for a judicial review of such denial. Under this section, an applicant whose application for information has been denied may apply to the court for a review of the matter within 30 days after the public institution denied or is deemed to have denied the application, or within such further time as the Court may allow for the judicial review. According to some writers and most legal practitioners, this is the most important section of the Act as it allows the Court to give an authoritative interpretation of any provision of the Act. **Section 21** allows for such an application to be heard and determined summarily. Under **Section 22**, the Court shall have access to the information sought to be denied for the purpose of determining whether the information falls within the exemptions provided by the Act and whether the injury of disclosure outweighs the public interest disclosure.

Finally, by virtue of **Section 27** of the Act, whistleblowers and public officers who release information to the public are protected as no civil or criminal proceedings can be instituted against them for disclosing such information.

**PROSPECTS OF FREEDOM OF INFORMATION ACT**

The denial of access to information and the attendant widespread ignorance of governmental conduct in the society does more harm to the society than any harm that could possibly arise from granting access to information to members of the public. Political analysts have opined that the Freedom of Information Act is a vital tool to ensure democracy and responsible governance in Nigeria. Corruption in governance is more likely to be
exposed just as information regarding the mismanagement of the fuel subsidy regime was revealed in the public space. Recent cases such as *Boniface Okezie v. CBN*¹⁶ and *LEDAP v. Clerk of the National Assembly*¹⁷ are beginning to show that with the FIA in force, there will be openness, transparency and good governance which should complement government’s avowed commitment to stamping out corruption in Nigeria. The FIA also guarantees a right of access to information to everyone in the country and as such, it places enormous responsibility on those who hold information. It will further assist various government agencies such as the National Human Rights Commission (NHRC), the Independent Corrupt Practices and Other Related Offences Commission (ICPC), the Economic and Financial Crimes Commission (EFCC), the Code of Conduct Bureau and other law enforcement agencies in the performance of their duties. It will also enhance the speedy dispensation of justice, especially when one considers that it will make it easier to get public officers as cooperative witnesses unlike in the past when they were protected for divulging information in court cases.

**POSSIBLE CHALLENGES TO THE EFFECTIVE IMPLEMENTATION OF THE FIA**

In discussing the Act and its challenges, an important question needs to be asked. If indeed the rationale for the enactment of the FIA was for the public to have access to information kept by public institutions, why does the FIA have a lot of exemptions to access to information? This only leads to the conclusion that some ill-intentioned public officers can use these exemptions for unjust and mischievous purposes. However, considering the omnibus proviso against denial of information that says “where the interest of the public would be better served by having such record being made available, this exemption to disclosure shall not apply,” it will be very difficult for such public officers to use the exemptions unjustly. The effectiveness of the FIA also depends largely on a vibrant and active judiciary, being the final body that has the responsibility of determining what kind of information should be made available to the public.

Another fundamental issue that might affect the FIA is some existing laws which are still operational. For example, the Evidence Act,¹⁸ the Public Complaints Commission Act,¹⁹ the National Securities Agencies Act;²⁰ all have some sections that are aimed at suppressing the free flow of information in the country. All these laws may affect the effectiveness of the FIA in the long run as they are loopholes that can be utilised to avoid obligations under the FIA. Some mischievous public officers may also use such laws for their selfish purposes.

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¹⁶ (unreported) Suit No. FHC/L/CS/1188/2009.
¹⁸ Act No. 18 of 2011.
²⁰ Act No. 19 of 1986.
Other challenges of complying with the FIA include the poor culture of record keeping/maintenance and retrieval, capacity challenge in many public institutions, frustrating and time consuming bureaucracy in the public service, widespread corruption and the high level of ignorance about the provisions of the Act among the work force in the public sector.

CONCLUSION

Freedom of information in itself is a *sine qua non* for the fulfillment of all other rights and also important as a vital tool for democracy to thrive. Information held by public authorities is not acquired for the benefit of officials or politicians but for the public as a whole. Unless there are good reasons for withholding such information, everyone should have access to it; as the FIA is not a law for the Nigerian media alone. Finally, the success of implementation of the FIA is the co-responsibility of both the government (“supply side”) and the governed (“demand-side”). The demand-side which includes the citizens, civil societies and community organisations, media and the private sector must take responsibility for using the law as well as monitoring government efforts. The attitude of public administrators is critical to the successful implementation of the Act because public administrators, who are the face of government, will determine the quality of, and access to requested information. The FIA is a crucial tool for socio-economic development in the country. We should not forget that democracy depends on an empowered, well-informed public who can hold their government accountable.

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