



A CRITICAL ASSESSMENT OF NIGERIA'S FREEDOM OF INFORMATION ACT 2011

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ABSTRACT

Democracy, the world over, is founded on the principle of popular participation through exercise of the right to freedom of speech and the press. Government, being trustee of the people's power, is accountable to the people and should lay bare for public access and scrutiny, information needed to enrich the debates in the political marketplace. However, this right is not absolute - legislation such as the Official Secret Act restricts the public from accessing information the government considers secret and confidential. But today, with the enactment of the Nigeria's Freedom of Information Act 2011 (FOI Act), the question asked is whether the FOI Act marked a departure from the secrecy usually associated with government information? How effective is the FOI Act in meeting the people's desire for information? To this end, the paper critically assessed the Nigeria's Freedom of Information Act 2011 by employing as a method, comparative analysis of Freedom of Information Legislations in other jurisdictions and juxtaposed them with what obtains in Nigeria. The paper puts forward the argument that the Nigeria's Freedom of Information Act lacks in its provisions, is fraught with inconsistencies and regrettably, contains little to assuage the yearnings of Nigerians for information accessibility. It is concluded that there is a need for legislative rethink to bring the Act in tandem with developed democracies of the world.

Keywords: Good Governance, Human Rights, Press Freedom

1. INTRODUCTION

Democracy, throughout the world, is recognized as the best form of government because it affords the people the channels to participate through their elected representatives in the governance of their country. There can be no progress if man is not in a condition that affords him the freedom to search for the truth, in an environment in which the exchange of idea is not unduly impeded by the state or the society. Democracy calls for an open society. It assumes progressive improvement in the human condition in tandem with enhancements in knowledge.¹ According to Ben Nwabueze, free speech and free press are instruments of self-government by the people because they enable the people to be informed and educated about the affairs of government.²

¹ Osita N.O., *Human Rights Law and Practice in Nigeria: An Introduction* (Enugu: CIDJAP Press, 1999), 181.

² Nwanbueze B.O., *Presidential Constitution of Nigeria* (London: C. Hurst & Company, 1981), 458.

The role of the Press as watchdog of government on access to official information and dissemination to the public, many a time had led to the proscription of newspapers and prosecution of journalists. The Press scuttled the third term agenda³ of Nigerian former President Olusegun Obasanjo in collaboration with civil society groups. The involvement of President Nixon of America in the Watergate scandal was exposed by the press just as the Nigerian press was at the forefront of the opposition to the corrupt, inept and dictatorial regimes of Ibrahim Babangida and Sanni Abacha⁴ and subsequently, the corruption and inefficiency of the Shehu Musa Yar'Adua and Goodluck Jonathan administrations. The paper argues that corruption can be prevented, checked, and minimized, if not eradicated, by making people 'conscious' of its pernicious impact on their life. To do so, what is essential is to mobilize them on a common political platform focusing on the issues of transparency and accountability. Thus, the scope of democracy will have to be extended beyond its mere electoral/ballot box nature to routine monitoring and participation. What is needed is an informed citizenry organized as a network of civil society and community based groups prepared to hold the state accountable through the power of information gathering and dissemination. By gaining access to official records pertaining to development programs, the people can monitor government allocation as well as expenditures and in the process expose any wrongdoing. In such a scenario, Freedom of Information is not merely a first generation civil-political right but it has the potential to fulfill the substantive needs of the people.⁵

Access to information remains a very challenging task, particularly access to official information. Information on important aspects of public governance such as the implementation of the national budget, emoluments of government officials as well as their financial net worth continue to be unavailable to the public? Legislation such as the Official Secrets Act⁶ continued in particular to hinder free and unimpeded accesses to information for the purpose of scrutiny and constructive criticism of government. In the United States of America, this problem has since 1966 been resolved through the Freedom of Information Act⁷ which allows the American public and the press to request and obtain access to information from government files, unless there is a legitimate concern for individual privacy or national security.⁸

This paper enquires into the effectiveness or otherwise of the Freedom of Information Act 2011 in Nigeria and what Nigeria can learn from other jurisdictions such as Australia, South Africa, UK, India, et al. The guideline used for the assessment of Freedom of Information in this work includes:

- **Maximum Disclosure:** The paper establishes a presumption that all information held by public bodies should be subject to disclosure and at best to be limited only in very limited circumstances.
- **Obligation to Publish:** It implies that public bodies, apart from acceding to requests for information, are obliged to publish and disseminate information of significant public interest, subject only to reasonable limitations based on resources and capacity.

³At the eve of the tenure of former President Olusegun Obasanjo of Nigeria in 2007, while acting in concert with some unscrupulous politicians, Obasanjo tried to amend the Nigerian Constitution to allow him contest the 2007 Presidential election for a record third term in office. The Constitution guarantees two terms of four years each. This Plan was however, scuttled when the Nigerian National Assembly threw out the Constitution Amendment Bill amid commendation by Nigerians.

⁴ Osita N.O., n 1 at 183.

⁵ Sanjay Lodha, 'Fighting Corruption: A Comparative Study of Civil Society Initiatives for Securing Freedom Of Information in Nigeria and India', (Vol. 12, July-Dec 2007 No.2 *Madhya Pradesh Journal of Social Sciences*).

⁶ Official Secrets Act Cap 03, Law of the Federation of Nigeria 2004.

⁷ Freedom of Information Act, 1966.

⁸ Walter G. Carrington, 'Democracy, Free Enterprise and Accountability', *Daily Star* (11 April, 1997) 10.

- Promotion of Open Government: It provides for public education by government agencies regarding the scope of information which is available and the manner in which the right can be exercised.
- Scope of Exemptions: Any refusal to provide information has to pass a three-part-test. Required information must relate to a legitimate aim listed in the law, disclosure will render substantial harm to that aim and thirdly, this harm will be greater than the public interest in possessing the information.
- Process to Facilitate Access: The law should provide for rapid and fair access to information both at the level of the public body and in appeals to the court on refusal.
- Costs: Since the rationale behind the law is to promote open government it should provide for reasonable costing so that potential information seekers are not deterred by the costing structure.
- Disclosure Takes Precedence: The Act outlines the extent that a law shall conflict with the principle of maximum disclosure to merit being set aside.
- Protection for Whistle-Blowers: Irrespective of the provisions of the criminal and penal code and the Official Secrets Act, individuals should be protected from any sanctions for releasing information on wrong-doings.

On the 28th day of May, 2011, Nigeria seemingly followed the example of the United States by enacting the Nigerian Freedom of Information Act 2011. Signed into law after eleven years of legislative dithering, the Act elicited celebrations from not only the media and civil society organizations, but from Nigerians in general. There are veils of secrecy which surrounds virtually all government information in the country. This veil is strengthened by plethora of laws, which prevent civil servants from divulging official facts and figures and also bars anyone from receiving or reproducing such information. More important among these Acts are the Official Secrets Act,⁹ Evidence Act,¹⁰ Public Complaints Commission Act,¹¹ Statistics Act¹² and the Criminal Code.¹³ The veil of secrecy not only affects the civil servants and the common citizens, but even government departments which withhold information from each other. In utter disregard to the norms of parliamentary democracy, the civil servants even refuse to give information to the National Assembly after being asked to do so.¹⁴ In such a scenario, the FOI Act is designed to put an end to the pervasive culture of secrecy and usher in a culture of transparency and openness. Secondly, Nigeria enjoys the dubious distinction of being one of the most corrupt countries in the world. The Corruption Perception Index of the Transparency International, ever since 1995, has put Nigeria among the three topmost corrupt countries in the world. The best way to fight corruption is to operate openly. As more and more information is placed in the public domain the chances of corrupt practices will recede. The reasoning is that it is difficult for corrupt to thrive in the open sun-lit public view. The FOI Act will have a restraining influence on the culture of corruption and make way for a culture of integrity in public life. Thirdly, as a result of long periods of repressive military rule and also relatively unrepresentative civilian rule, the culture of participatory democracy has not taken roots in Nigeria. The masses have remained alienated and therefore indifferent to the exercise of power. Their silence has made it easy for public officials to indulge in venal behaviour. The FOI Act is expected to empower a common Nigerian with a capacity to take part in the political process as

⁹ Cap 03 Laws of the Federation of Nigeria 2004.

¹⁰ Cap E14 Laws of the Federation of Nigeria 2004.

¹¹ Cap P37 Laws of the Federation of Nigeria 2004.

¹² The Statistics Act 2007.

¹³ Cap C38 Laws of the Federation of Nigeria 2004.

¹⁴ Sam Olukoya, 'Freedom of Information Bill Proves Elusive'. *Inter Press Service News Agency*, June 21, 2004.

an active citizen with adequate information about issues of governance. In this fashion, the long prevailing culture of silence would be replaced by a culture of activism.

The FOI Act should also be a catalyst in reviving the Nigerian economy which is in deep distress as more than 70 per cent of the people live below the poverty line and in the absence of a middle class there is huge socioeconomic disparity in Nigeria. The public sector provides about two-third of employment opportunities and the private sector continues to depend upon the state for most of its operations. In such a dismal scenario, implementation of this law will open for public scrutiny all public sector deals and also provide for a level playing field for economic actors. This openness will also lead to increased flow of funds from local as well as external investors.

Another economic benefit which will result from this entitlement is the significant savings that would accrue to the nation from the ability of the legislation to assist the current crusade against corruption in the public sphere. Moreover, such a right would also assist in the efficient allocation of scarce national resources to ensure optimum returns by enabling people to question decision-makers over the distribution of resources and pressurizing them to prioritize resource allocation to best serve the national interest. Furthermore, the FOI Act will bring about more harmonious relations within the three organs of the government by providing for meaningful checks and balances within the system. It is also expected to improve the efficiency of the employees in the public services fostering a culture of maintenance. Accountability and transparency would build trust between citizens and government and establish a basis for amicable conflict resolution and peace building. Finally, the FOI Act will make the media more responsible. It will reduce public dependence on the media as the only source of information. An effective FOI law would also remove the lame excuses for publishing inaccurate figures and also restrain the media barons from indulging in 'irresponsible journalism.' The FOI Act thus has a lot to promise to different sections of the society.

The Freedom of Information Act 2011 is espoused on a global comparative vista to bring out areas of inadequacies and lacunae while at the same time streamlining judicial response so far to the Act. Some of these challenges include; unclear classification standards and protocol of information and documents that form the source and content for FOI applications which may lead to arbitrary refusals of information on the grounds that such information is restricted; inadequate record creation, record keeping, organization and maintenance of documents integral to an FOI regime; the extant culture of secrecy that exists in the public service which is premised on the Official Secrets Act and the Civil service Rules and related regulations; deficiencies in the capacity of public service officials on the foundational principles, objectives, goals and benefits of the open government; the investment and budgetary provision that need to be made in both human and material resources that is required for the effective implementation of the FOI Act; and lack of effective coordination and information sharing between various ministries, departments and agencies that could hinder the timely identification and tracking of requested information. The Paper reasons that though the birth of the Nigerian Freedom of Information Act 2011 marks a watershed in the annals of the struggle for a better legislative policy on access to information in Nigeria, more still need to be done in areas of its practical implementation and needless exclusions of certain categories of information as 'no-go areas.'

This paper offers suggestions and recommendations for reform. It calls for strong institutions and demonstrative judicial activism to give bite to the provisions and intent of the Act. Records and information constitute veritable tools for decision making in the public sector. Historically in most countries, laws and rules were made to protect such records and information against unauthorized access, as well as prevent disclosure of sensitive information without authorization. On the other hand, FOI legislation is meant to engender openness in governance and has become a hallmark of democracy. It has, to a very large extent, modified

the existing legislations, rules and regulations governing access to public sector records and disclosure of government information in various countries. While promoting the right of access in order to ensure transparency, accountability and good governance, FOI law is not inconsiderate to the sensitive nature of some of these records, hence the exemptions to the right of access provided for in the law. These exemptions are in recognition of the fact that it is impracticable for any government, no matter how liberal, to allow access to all kinds of information in its custody without some interests being jeopardized. It is, therefore, desirable to have the FOI Act to maintain the right balance between openness and the culture of secrecy. Nigeria as a democracy will be better for it if information on governmental actions and the policies of custodians of political powers is made readily available for public scrutiny and discuss except if and only if public accessibility to such information would endanger public security, public health and public morality.

1.1 REVIEW OF SELECTED LITERATURE

The literature on Freedom of Information Act in Nigeria does not almost exist since the law is relatively new. However, various legislations and discussions about the Act are discussed by some researchers. A number of local, regional and international instruments provide the legal foundation for the FOI Act in Nigeria. At the local level, Sections 22 and 39 of the 1999 Nigerian Constitution implicitly provides for access to information. Section 22 provides the agencies of the mass media with the freedom to ‘uphold the responsibility and accountability of the government to the people’ and Section 39(1) entitles every person ‘to freedom of expression, including freedom to hold opinion and to receive and impart ideas and information without interference.’

At the regional level, this right is similarly guaranteed in Article 9(1) of the African Charter on Human and Peoples’ Rights which is part of Nigeria’s domestic law under the African Charter. The Charter entitles ‘everyone to access information held by public bodies’ and to ‘access information held by private bodies which is necessary for the exercise or protection of any right.’ At the international level, the Nigerian drive for securing freedom of information draws support from a number of provisions and conventions which include resolution 59(1) of the UN General Assembly passed in December 1946, Article 19(2) of the International Covenant on Civil and Political Rights, reports of the UN Commission on Human Rights, declarations by the Commonwealth Summits and also laws and decisions of courts in different countries of the world. The 1946 UN General Assembly resolution is perhaps the most authoritative enunciation of the right to information. It says:

Freedom of Information is a fundamental human right and is the touchstone of all freedoms to which the United Nations is consecrated. Freedom of Information implies the right to gather, transmit and publish news anywhere and everywhere without fetters. As such, it is an essential factor in any serious effort to promote the peace and progress of the world.¹⁵

The implementation of a FOI legislation will not only make Nigeria a member of the group of nations who have similar legislations but will also bring it in the forefront in the West African region as no other state in this region has so far passed such a law. The right has grown to be a global entitlement to which every government without exception claims commitment. The Universal Declaration of Human Rights states that: ‘Everyone has the right to freedom of

¹⁵ Article 19

opinion and expression. The right includes freedom to hold opinion without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'.¹⁶

The cumulative effect of these provisions is that it is fundamental in any civilized society to guarantee the rights of every person to express himself or herself not only in respect of matters of individual nature but also in respect of issues of public interest. The right to speak one's mind and to write down one's thought constitute two basic elements of freedom of expression. Since man is a political animal, he would necessarily be interested in the events that happen around him and if he is so interested, he has the right to inform others or the public at large.¹⁷ According to Olowokere et al,¹⁸ Freedom of expression therefore relates to the liberty of pen discussion without fear of restriction or restraint.

Sebina¹⁹ examined access to information and their enabling legislation and identified that freedom of Information Acts present challenges, prospects and opportunities for records managers. In the opinion of Sebina: 'constitutional guarantees of access to information would be fruitless where good quality records are not created, where access to them is difficult, and where procedures are lacking on records disposal.' In the same vein, Hazzel, et al²⁰ examined the benefits, limitations and difficulty of the Freedom of Information Act brought in by the Blair administration in 2000. Ajulo²¹ pointed out that the Freedom of Information Act in Nigeria faces the challenge of official secrecy. This secrecy is also strengthened by other legislations and acts that tend to hinder the freedom to obtain information when required due to state functions. Coker²² averred that the Freedom of Information Act faces enormous challenges in relation to human capital development. Odigwe²³ examined the FOI Act with its effect on record keeping in public service in Nigeria. Odigwe maintained that FOI better protects the public servant from prosecution especially with regard to dissemination of required information to the public. Ojo²⁴ explored the FOI Act as it affects media practitioners. The paper submits that the FOI Act has placed a greater responsibility on journalists especially to access and make public necessary information to the general public.

¹⁶ Article 19.

¹⁷ Ademola Yakubu, Press law in Nigeria, (Lagos: Law Books,; Malthouse, 1999) p. 3

¹⁸ Olowokere Emmanuel 'Nimbe and Olateru-Olagbegi Ololade. 'A Right to Freedom of Expression and the Press Under the 1999 Constitution', *European Journal of Social Sciences – Volume 22, Number 1 (2011)*.

¹⁹ Sebina, Peter, M. 'Access to Information: The Role of Freedom of Information Legislation and Constitutional Guarantees'. *ESARBICA Journal: Journal of the Eastern and Southern Africa Regional Branch of the International Council on Archives*. 24: 43-57.

²⁰ Hazell, Robert, Worthy, Ben and Glover, Mark. 'The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI Work?' Palgrave Macmillan, August, 2010.)

²¹ Ajulo, Kayode, A. (2011). 'A Freedom of Information Act: the challenge of Official Secret Act', 15th August 2011. <http://archive.punchontheweb.com/Articl.aspx?theartic=Art2011081512433789> < Last visited May 11 2012.

²² Coker, Omolola. 'The emergence of Nigeria's Freedom of Information Act 2011, August <http://www.internationallawoffice.com/newsletters/detail.aspx?g=e066adf0-c3f0-496d-b823-30494f0432ff> Last visited May 11 2012.

²³ Odigwe, B. 'The Freedom of Information Act and its Effect on Record Keeping in the Public Service' *The Delta Bureaucrat. A Bi-Annual Journal of the Delta State Public Service*. 11(1): 24-26 (2011.)

²⁴ Ojo, Edetaen. (2010). Freedom of Information: Current Status, Challenges and Implications for News media. www.unesco.org/new/.../multimedia/.../wpfd2010_background <Last visited May 18 2012.

2. METHOD AND MATERIALS

The data used are secondary. The secondary data were collected from textbooks, journals, magazines, periodicals and newspapers. In the course of the research, the researcher consulted the internet, Osun State University Main Library, Law Library of the College of Law of Osun State University, University of Lagos Law Library, The University of Lagos Main Library, and the Library of the Lagos State High Court of Justice, Ikeja, Lagos. The research design of this study is informed by the very nature of the study. Therefore the study used content analysis. The process of content analysis involved recording and analyzing past events with a view to discovering generalizations that were significant in understanding of the past and the present in order to predict and deal with the issue under consideration. To this end, documented literature was relied on. Documented literature was the major instrument of research, which are deemed to be able to stand alone if the need arises.

3. RESULTS AND DISCUSSIONS

The study reveals that access to records, particularly official records, is determined by a number of factors, the most important being the need to know. The concept of the need to know postulates that only those who have an official role to play in the transaction or activity requiring the use of records are allowed access to the records that are relevant to such transaction. This implies that as a member of an organization, an individual can have access only to the records of the organization that can facilitate the discharge of his official duties. In other words, there must be justification for access to official records. Records and official information will be used interchangeably in this paper in the context of official records and information. Access to official records is, therefore, based on the need to know, as well as legal authorization.

In Nigeria, as in most parts of Africa, FOI Act implementation has no precedent. For the effectiveness of the FOI Act, steps to establish the groundwork necessary to ensure its progressive and effective implementation must be taken. Nigeria's FOI Act presents a window of opportunity to lead the region in implementing FOI laws and establishing transparency and openness in governance and decision making. Indeed, the rest of Africa, and the world is keenly watching to see how much of a success Nigerians make of the implementation and utilization of the FOI Act. Making of the Attorney General of Nigeria a compliance manager is a big misnomer as it would amount to being a judge in one own cause if application is made to him or his ministry to disclose information in his possession. There is a need for legislative rethink to reform the Nigeria's Freedom of Information Act to meet the demands of modern democracies.

The press has always operated as the fourth arm of government, acting as watchdog of government policies and actions. It watches over the activities of the other arms of government and educates the people on how the government is run. According to Luke Uche,²⁵ in any crisis situation or conflict, the roles that the mass media, especially the newspaper play in coverage of the events are very important. These roles include arousing awareness of the crisis and assuming a national leadership identity and integration. To underscore the near total ban on access to information in Nigeria particularly during the military regimes, government breathes down the editor's neck, threatening to suffocate, and often does so through detention or dismissal. In order to avert this, some journalists advised that the press had to be partisan when its fundamental interests are at stake. It was reasoned at that time that if the journey to democracy was to be safe, the media, as a driver, must respect the driving code, the political regulations and should not forget that no one would do for the media what the media refuses to do for itself. In other words, the reporters should succumb to negative acts of government

²⁵ Luke U., *Mass Media, People and Politics in Nigeria*, (India: Concept Publishing Company, 1989).

towards the people if they do not want to be victims of harsh penalties from their Intimidators. Adid Uyo²⁶ in a response to the question, 'How free is the press in Nigeria?' at a symposium to mark world press freedom, said:

Government can do whatever it likes to the press whichever way it wants to ... Although the Nigerian press has a long history of defying the government in its quest for freedom. Freedom of the press is not something that is given to the press; rather it is the freedom of the people that ultimately translates to the freedom of the press.

It was Uyo's believe that the press does not clamour for freedom because it wants a license to ride roughshod, but because as a servant of the people, it need to be free in order to be an effective watchdog of the society. Of the three elements of freedom namely freedom to publish, freedom to comment and freedom to report; Uyo submitted that the freedom to report includes freedom of access to information and forms part of press freedom which have been fought for and won by the press outside Nigeria.

The fundamental rights under Chapter IV of the constitution are sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate section in Chapter IV of the constitution. Indeed, the fundamental rights guaranteed in Chapter IV of the constitution were specifically designed and intended to limit the powers of the Executive and the legislature both at the national and state levels.²⁷

Before the advent of the current democratic rule in Nigeria in 1999, Military dictatorship in Nigeria was one of the major inhibitions to press freedom. As Nigeria sought to achieve democracy, the increasing need to terminate the culture of secrecy that had become endemic in government circles was being championed by the press and civil society organizations. This is because it is only a democratic atmosphere that press freedom can thrive. A democratic government that is accountable to the people will respect the rule of law and fundamental rights of the citizenry. Democracy is based on the sovereignty of the people and the public right to know is the essence of media freedom and its deprivation diminishes other freedom. Thus, press freedom is a *sine qua non* in a true democracy.²⁸

The right has witnessed infractions from the military and even civilian governments that are tyrannical. However, the assurance and observance of the freedom fluctuate and differ from one type of government and regime to another. Although the press is intended to be a 'watchdog' for the country it has difficulty fulfilling the role. At some points in the history of Nigeria, newspapers and magazines, for examples were proscribed due to their criticism of government authorities. Even though most of the newspapers and magazines were privately owned, the government prohibited them from expressing their editorial opinions.²⁹ The personnel of media outfits, especially journalists were harassed by some leaders in

²⁶ Uyo Adidi, 'The press and civil society in Nigeria: The Mass Media and Democracy, (Lagos: Civil Liberties Organization,1996).

²⁷ Per Agoro J. in *Okogie v Attorney-General of Lagos State* (1981) 1 N.C.L.R. 218 at 230.

²⁸ Sean McBride et al, 'Many Voices, One World', quoted by Suleyman bin Muhammad Odapu, 'An X-ray of Press Freedom in Obasanjo's Nigeria.'(2005) p.2 viewed on <http://www.dauodu.com/odapul.htm> <Last visited May 18 2012.

²⁹ Examples of this form of silencing the press were found in the late 1970s and mid 1980s. In 1977 Newbreed was closed down. In 1984 the government closed down the Tribune and four years later in 1988 Newswatch became a victim of censorship.

government.³⁰ The press remains the megaphone or mouthpiece of the masses under a dictatorial or tyrannical regime and it bears the brunt. The various atrocities committed against members of the press include arbitrary detentions, misuse of criminal charges and unfair trials, torture and ill-treatment, suspected assassination attempts, mass confiscations of newspapers, banning orders, and arson attacks.³¹ The military did not only engage in gross abuse of press freedom, but it also ensured that it put on a solid ground for the abuse of press freedom before it was forced out of power.³² The civilian regime under Chief Obasanjo had its own record of abuse of press freedom.³³

Over the years the issue of the freedom of the press has been generating a lot of controversies and debate in the political and social development of Nigeria. All attention began to focus on the government because it has been granted a legal backing in the Constitution. But the freedom to source for and to publish information without intimidation or harassments became a source of concern. In the report of the MacBride Commission on the rights and responsibilities of the journalist,³⁴ it was observed that freedom of the press in its widest sense represents the collective enlargement of each citizen's freedom of the expression which is accepted as human rights. The report noted that democratic societies are based on the concept of sovereignty of the people, whose general will is determined by an informed public opinion. According to the Report, the Freedom of the Press is the right of the public to know to which the professional journalists, writers and producers are only custodians.

Now that there is constitutional government after long years of military rule, the case has been as if nothing works. The government of the day is the custodian of the Constitution, the basis of which the people are being governed. Government is to protect the Constitution. Tony Momoh on press freedom and acceptability said: 'The granting of freedom of the press cannot be freedom without any form of limitation'.³⁵ In essence, these laws are to check one another so as not to allow an authoritarian situation. The chairman, Governing Board of World Association of the Press Councils WAPC, and chairman, Australian press Council, Prof. David Flint during the regional conference of the Association in Abuja said 'Press councils are based on the assumption that freedom of the press is not so much the right of the editors and journalist to write, or proprietors to publish. It is the freedom of the people to be informed.'³⁶

The Media Rights Monitor in its editorial states that the government needs to realize that freedom of expression can only become a reality if there is a pluralism of mass media and competition of ideas in the society.³⁷

³⁰ In 1971 Minere Amakiri, a reporter for the Observer, was detained and had his hair shaved. Numerous journalists experienced similar assaults.

³¹ These allegations were reported in "Abacha's Media Crackdown" published by International Centre against Censorship, April 1997.

³² Three days before General Abdulsalam Abubakar handed over, he signed into law Decree 60, creating again the Press Council, an anti-press body which has penalties for defaulters of its codes, payment of N250,000 or imprisonment not exceeding 3 years and N100,000 for publishers who failed to report their progress.

³³ For examples, Police detained Emmanuel Okike Ogah and Ogbnonaya Okorie of Ebonyi Times Newspaper, for publishing what it called 'Seditious articles in a newspaper'; Ademola Adegbamigbe and his hired professional photographer were arrested by the police while covering civil violence in Abia State; the National broadcasting Commission (NBC) disallowed live broadcast of news from BBC and VOA.

³⁴ Kogag Page, Unipub, New York/UNESCO, (1980), 'Report by the International Commission for the Study of Communication Problem'. Available at www.scribd.com/doc/22698085/Mcbride-Report (Last Visited April 1, 2012, 12:03pm).

³⁵ Momoh P. T., *Nigerian Media Laws* (Lagos: Efua Media Associates, 2002).

³⁶ Nigerian Press Council, (1992), 'Report of the First Regional Conference of the WAPC', Lagos.

³⁷ A Human Right Report of Media Rights Monitor titled: 'Media Rights Agenda', (2001). Available at www.internews.org/mra. (Last Visited February 4, 2012, 09:43am).

To this end, freedom of the press will go a long way in enhancing the way journalists inform the people about social change or any other development project. As the watchdog of the society, the press ought to be given the necessary power and access to operate without hindrance and under a conducive atmosphere. According to John Stuart Mill:

If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind ... the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race, posterity as well as the existing generation, those who dissent from the opinion still more than those who hold it³⁸

There can be no progress if man is not in a condition where he has the freedom to search for the truth and where ideas are able to clash with each other without hindrance from the state or the society. To deny others the right to express their opinion is to assume one's own infallibility whereas no man is infallible. According to Nwabueze,³⁹ free speech and free press are instruments of self government by the press because they enable the people to be informed and educated about the affairs of government. In construing the amplitude and plenitude of expression under section 36 of the 1979 Constitution of Nigeria now section 36 of the 1999 Constitution, the courts have been liberal in a few cases. In *Anthony Okogie versus Attorney General of Lagos State*⁴⁰ the Supreme Court held that the section confers an untrammelled right on any individual to establish and run any educational institution as a medium for the dissemination of ideas. In this wise, it is safe to reason that nothing is more important to the media than their ties with their audience, which is the society in which they operate. As vehicle of communication they cater to a mass audience with divergent backgrounds, taste, views and interest. They are expected to give vent to a free flow of ideas thereby enabling their audience to make meaning out of the issues of their time.

The press in Nigeria has suffered hardship and deprivations in the hands of both military and civilian governments. The suffering includes unjust imprisonment and detention of journalists, prohibition of the circulation of some newspapers, censorship, forced closure of media houses and arbitrary arrest and torture of journalists. The press has also suffered heavy penalties of fines and imprisonment of pressmen for sedition and libel, heavy award of damages for libellous publications, summary dismissals of editors and other journalists. For example, during the Babangida's regime, the first magazine to go down the cooler was the News Watch Magazine. Through an evening news broadcast on the 6th of April, 1987, the Federal Military Government prescribed the Newswatch Magazine for what it termed irresponsible and illegal action of the management of the magazine.

The press can only become truly the fourth estate of the realm if it can be made into a well distinct category like the other three arms of government. The foundation for a free press and a free society is possible when the constitution of a country adequately protects it and the right laws are in place. For the press in any country to be free and thrive, the constitution and other laws in the country must not only guarantee but also protect the press in all ramifications and counter governmental, institutional, personal interference or anything that would amount to censorship. Nigerian constitution should not only guarantee press freedom but also mitigate or prevent media censorship as the Ghanaian example. This in turn would invalidate laws that tend

³⁸John Stuart Mill, 'An 'interview' of John Stuart Mill On Liberty'. (1859). Available at www.usconstitution.net/onliberty.html (Last Visited January 5, 2012, 09:53am).

³⁹Nwabueze B.O., n 2.

⁴⁰(1981) NCLR 337,

to hinder press freedom.⁴¹ Access to information is indeed, key to empowering the people. Knowledge, they say is power – at least certain kinds of knowledge. In Nigeria it seems that government is run on the code of Omertà, official transactions of government are treated with the secrecy of the Chicago mafia. As noted by Isaac Anyaogu, ‘Asset Declarations of our leaders are secret but their loot is often made public’.⁴² Anyaogu⁴³ argued that though, Nigeria is signatory to the Universal Declaration of Human Rights (UDHR) and the International Convention on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR) where articles 19 and article 9 respectively guarantee freedom of expression and the press. But the country has no law that prevents media censorship rather obnoxious laws that encourage it. Sections 50, 51, 59, 373 - 379 of the Criminal Code Act, LFN 1999; Obscene Publications Act 1961; Official Secrets Act 1962; Newspaper (Amendment) Act 1964; The defamatory and Offensive Publications Decree No 44, 1966 was carefully designed to rein in the press. To Isaac Anyaogu, to guarantee a free press involves more than semantics or empty platitudes. He reasoned that guaranteeing a free press involves the conscious desire to create the right social, political, economic and legal conditions through adherence to the constitution and the various charters Nigeria is signatory to. To him, an educated class of political leaders is also germane for a free press. He warned that the political space currently occupied by seasoned nincompoops is not healthy for a free press.⁴⁴ According to reports,⁴⁵ a journalist's head had been shaved by a state administrator with a broken bottle. Recently, a governor was accused of beating up an activist, flogging a Catholic Priest with a horse whip and several other acts of barbarism perpetrated by leaders whose intellect range a little higher than that of an ant. As Fela Anikulapo Kuti would sing - Human right is our property as such no government can claim to have given its citizenry human rights. A free press is not a privilege; it is the right of every nation.

3.1 INSPIRATION FROM OTHER WOLRD DEMOCRACIES

Freedom of Information Act is not unique to Nigeria. In many countries there have been deliberate efforts to implement Freedom of Information laws. It is now fashionable for nations to enact FOI law to grant the members of the public the right of access to information or official documents held by the State. Although the enactment of FOI legislation started in the 1960s, Sweden's Freedom of Press Act of 1766 is considered to be the oldest law in this regard.⁴⁶ The principle of FOI is rooted in the ‘concept of open and transparent government’.⁴⁷ Free access to information preserves democratic ideas,⁴⁸ and it is ‘an essential element of a vibrant

⁴¹ Isaac Anyaogu, ‘The Nigerian Press as Endangered Species’ *The Nigerian Voice* (03 May, 2010). Available at <http://www.thenigerianvoice.com/nvnews/22121/1/the-nigerian-press-as-endangered-species.html> (Last Visited April 5, 2012, 01:22pm).

⁴² See Isaac Anyaogu, n 16.

⁴³ See Isaac Anyaogu, n 16.

⁴⁴ *ibid.*

⁴⁵ Report available at <http://www.thenigerianvoice.com/nvnews/22121/1/the-nigerian-press-as-endangered-species.html> (Last visited March 20, 2012, 10: 45am).

⁴⁶ Katuu, Shadrack, ‘Freedom of Information in Kenya--a Knol’ (2008). Available at: <http://knol.google.com/k/freedom-of-informationininkenyaIntroduction> (Accessed 18 May 2012).

⁴⁷ Adams, M. ‘Freedom of Information and Records Management in Ghana.’ *African Journal of Library, Archives and Information Science*, (2008) 16 (1) 29-38.

⁴⁸ Mason, M.K., ‘The Ethics of Librarianship: Dilemmas Surrounding Libraries, Intellectual Freedom and Censorship in the Face of Colossal Technological Progression.’ (2008) Available at: www.moyak.com/researcher/resume/papers/ethics.html (Accessed 14 May 2012.)

democracy'.⁴⁹ According to Millar,⁵⁰ It is a significant paradigm shift from secrecy and concealment to openness and transparency. The right of access to information held by the State has become a benchmark of democratic development.⁵¹ The main goal of FOI, as succinctly captured by Mnjama⁵² is, therefore, to ensure that public bodies are more transparent and accountable in conducting the affairs of the State. Successful implementation of FOI legislation itself is achieved under a good records management regime.⁵³

The United States of America (USA) FOI Act is one of the earliest FOI legislations, having been signed into law on July 4, 1966 by President Lyndon B. Johnson 'with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded'.⁵⁴ The Act was recently strengthened by the Open Government Act of 2007 which confers the National Archives and Records Administration (NARA) with 'the authority to establish the Office of Government Information Services (OGIS) to work in cooperation with Federal agencies to promote accessibility, accountability, and openness in government'.⁵⁵ In Canada, the FOI was enacted in 1982 and titled 'Access to Information Act'.

South Africa is one of the African countries with FOI legislations having enacted the Promotion of Access to Information Act, 2000. Some of the countries that have adopted various forms of the FOI include: Ghana (Right to Information Bill, 2003); Kenya (Freedom of Information Bill, 2005); Liberia (Freedom of Information Bill, 2008); Malawi (Access to information Bill, 2004); Morocco and Mozambique respectively (Right to Information Bill, 2005); Nigeria (Freedom of Information Bill, 1999); Sierra Leone (Freedom of Information Bill, 2006); Tanzania (Right to Information Bill, 2006); and Zambia (Freedom of Information Bill).⁵⁶

Some countries that provide a right to information in their constitutions also have constitutional procedures that enable the right to be directly enforceable by the courts. For instance, in several Latin American countries including Costa Rica, Honduras, Nicaragua, Panama and Peru, the constitutional right to information may be enforced via a habeas data petition. Several courts have interpreted the right to information to be an implicit component of the right to freedom of expression. For instance, South Korea's Constitutional Court ruled that the right to information is implicit in the right to freedom of speech and press, given that free expression and communication of ideas requires free formation of ideas as a precondition, and

⁴⁹South African History Archive (2003). Freedom of Information Programme. Available at: http://www.saha.org.za/about_saha/freedomofinformationprogramme.htm (Accessed 14 May 2012).

⁵⁰ Millar, L. 'The Right to Information--The Right to Records. The Relationship Between Record Keeping, Access to Information and Government Accountability.' (2003) Available at: www.humanrightsinitiative.org/programs/ai/articles/record_keeping-ai.pdf (Accessed 20 May 2012).

⁵¹Justice Initiative, 'Access to Information Tool: South Africa.' (2003). Available at: http://www.justiceinitiative.org/db/resource2?res_id=102366 (Accessed 18 May, 2012).

⁵² Mnjama, N. 'Freedom of Information Legislation in Esarbic States and Its Implication on Records Management Practices.' *African Journal of Library, Archives and Information Science*, (2003) 10(1) 43-54.

⁵³ Mnjama, N. 'Records Management and Freedom of Information: A Marriage Partnership. Information Development', (2003) 19(3) 183-188.

⁵⁴SourceWatch, 'Freedom of Information Act (USA).' Available at: <http://www.sourcewatch.org/index.php?title=FreedomofInformationAct> (Accessed 18 May 2012).

⁵⁵ Thomas, Adrienne C. (2009). FY 2010 Appropriations for the National Archives and Records Administration. Available at: http://appropriations.house.gov/witness_testimony/FS/AdrienneThomas051909.pdf (Accessed 30 May 2012).

⁵⁶ Ojo, Edetaen, n 24.

that ‘free formation of ideas is in turn made possible by guaranteeing access to sufficient information.’⁵⁷

In Canada, the Constitution of Canada does not expressly provide for a right of access to information. However, Canadian courts have held that freedom of expression, found in section 2(b) of the Canadian Charter of Rights and Freedoms (“the Charter”), includes the right to receive as well as to convey information. According to the Supreme Court in *Edmonton Journal v. Alberta (Attorney General)*⁵⁸, ‘listeners and readers, as members of the public, have a right to information pertaining to public institutions and particularly the courts’. Several courts, including the Supreme Court of Canada, have reasoned that Freedom of Information legislation, given its connection with the concept of democracy, has a quasi-constitutional status.⁵⁹ For instance, Justice Laforest concurring with the Supreme Court majority judgment on this point, noted, in the landmark case of *Dagg vs. Canada (Minister of Finance)*⁶⁰ that:

The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.⁶¹

It is therefore submitted that the Canadian Courts through judicial activism and liberal interpretations of the Constitution, ensures that the citizens are not denied access to information through any shade of official secrecy or privilege. In South Africa, section 32(1) of the 1996 Constitution of South Africa reads: Everyone has the right of access to –

- Any information that is held by the state; and
- Any information that is held by another person and that is required for the exercise or protection of any rights. National Legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

Section 32(1)(b) of the 1996 Constitution of South Africa was the first constitutional provision that provided for a comprehensive right of access to privately-held information. Moreover, it is uncontested that the phrase ‘another person’ includes juristic as well as natural persons.

⁵⁷ *Forests Survey Inspection Request Case*, (1989) 1 Korea Constitutional Court Report 176, 88Hun-Ma22 (S. Kor.), available at http://www.ccourt.go.kr/home/english/decisions/mgr_decision_view.jsp?seq=374&code=1&pg=1&sch_code=&sch_sel=&sch_txt=&nScale=15 (Last visited April 17, 2011, 10:32am).

⁵⁸ [1989] 2 S.C.R. 1326 at 1336.

⁵⁹ See *MacDonnell v. Quebec (Commission d'accès à l'information)* [2002] S.C.J. No. 71(S.C.C.); *Canada (Attorney General) v. Canada (Information Commissioner)*, 2004 FC 431 (F.C.) at para 194 (Dawson J: ‘The investigation is conducted in furtherance of the quasi-constitutional right of access that has as its purpose the facilitation of democracy’); and *Canada (Attorney General) v. Canada (Information Commissioner)*, [2002] F.C.J. No. 225 (Fed. T.D.) (McKeown J: ‘I recognize that the Access to Information Act is quasi-constitutional legislation and the Information Commissioner has an important role to play in our society ...’).

⁶⁰ [1997] 2 S.C.R. 403 (S.C.C.) at 433.

⁶¹ *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (S.C.C.) at 433, per La Forest J. (dissenting, but not on this point).

In the United States, the right to freedom of information is considered central to the concept of democratic accountability. James Madison, a leading figure in the drafting of the US Constitution, eloquently described the importance of an informed citizenry to democratic governance:

A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.⁶²

Nonetheless, most commentators view the *Houchins* decision⁶³ as the most decisive ruling in the United States on the question of whether the right of access to information receives constitutional protection.⁶⁴ Although motivations for freedom of information vary from country to country, the need to engender openness in reaction to endemic corruption and graft often seems to be a fundamental consideration.⁶⁵ The purpose of the law, according to the explanatory memorandum of the Nigeria's FOI Act is '... to increase the availability of public records and information to citizens of the country in order to participate more effectively in the making and administration of laws and policies and to promote accountability of public officers.' Not surprisingly however, the FOI Act currently before the Nigerian legislature borrows most of its provisions from many of the existing FOI laws of other countries, most of which are developed countries, but a growing number of which are developing countries.

The Official Secrets Act, first enacted in 1962, and which has been re-enacted as Cap. 335, Laws of the Federation of Nigeria, 1990 and now re-branded Cap.03, Laws of the Federation of Nigeria, 2004, contains many provisions that restrict access to records and information, which are presented here under various subheadings for clarity, classified Information otherwise, classified matter is defined in section 9 (1) of the Act to mean "any information or thing which under any system of security classification from time to time in use by or by any branch of government, is not to be disclosed to the public and of which the disclosure to the public would be prejudicial to the security of Nigeria". A public officer, for the purpose of the Act, includes a person who formerly exercised, for the purpose of the government, the functions of any office or employment under the State (section 9 (1). Security classification of information is based on the principle that the degree of importance or sensitivity of information varies. As such, different degrees of protection are required for different kinds of information. Security marking evolved out of the need to protect defence-related information. Among the factors usually considered for classification of information in the public sector are the sensitivity of information, the age, and what the law and other regulatory stipulations enjoin. Systems for the security classification of records vary from country to country. For countries following the British system, common classification labels

⁶² Letter from James Madison to William T. Barry (4 Aug. 1822), in 3 Letters and Other Writings of James Madison 276 (R. Worthington ed., 1884).

⁶³ In the *Houchins* case, in an opinion written by Chief Justice Burger, the Columbian Court held that the First Amendment granted no special right of access to the press to government-controlled sources of information. The Court reasoned that the importance of acceptable prison conditions and the media's role of providing information afforded 'no basis for reading into the Constitution a right of the public or the media to enter these institutions and take moving and still pictures of inmates for broadcast purposes'.

⁶⁴ Roy P. and Yoram R., 'The Constitutional Right to Information', vol. 42(2), *Columbia Human Rights Law Review*, pp.375-78.

⁶⁵ Blanton, T.S., 'Global Trends in Access to Information.' Available at: <http://www.pcij.org/accessinfo/blanton.html> (Accessed 14 May 2012).

include restricted, confidential, secret and top (or most) secret in the ascending order of sensitivity. Nigeria, by virtue of its colonial experience, adopts these classification labels. A restricted material is considered capable of causing undesirable effects if made generally available to the public and can, therefore, only be released to particular individuals. Confidential materials are those materials that can cause damage or be prejudicial to national security if publicly available. So also are the materials tagged 'secret' which are particularly sensitive records. Materials with 'top secret' marking are considered capable of causing exceptionally grave damage to national security if made public. In the past, the marking meant 'no disclosure to foreign powers without exceptional permission.' Prohibition of transmission of classified matter in section 1 of the Official Secrets Act states that, a person who: (a) transmits any classified matter to a person to whom he is not authorized on behalf of the government to transmit it; or (b) obtains, reproduces or retains any classified matter which he is not authorized on behalf of the government to obtain, reproduce or retain, as the case may be, shall be guilty of an offence. In the same vein, "a public officer who fails to comply with any instructions given to him on behalf of the government as to the safeguarding of any classified matter which by virtue of his office is obtained by him or under his control shall be guilty of an offence".

In Nigeria, the Public Service Rules (PSR) of 2006 also contains provisions relating to official information and records and complements the provisions of the Official Secrets Act. The following provisions therein are relevant to this discussion: Classified information: Rule 010103 defines classified correspondence to mean "correspondence which has been graded Restricted, Confidential, Secret or Top Secret". Rule 030415 of the PSR makes it mandatory for every permanent secretary/ head of extra-ministerial office to ensure that all officers, employees and temporary staff in his or her ministry/extra-ministerial office who have access to classified or restricted papers have signed the Oath of Secrecy in the appropriate form before they are granted such access and that the declarations so signed are safely preserved. This is similar to the provisions of the UK Official Secrets Act of 1989, which requires individuals working with sensitive information to sign a statement to the effect that they agree to abide by the restrictions of the Act. The administration of the Oath of Secrecy and Declaration of Secrecy on the aides of President Yar' Adua and the Vice President to 'guides the possible disclosures of confidential reports to outsiders, particularly the media and the opposition, which have been most critical of the Presidency'⁶⁶ was probably an attempt to give effect to the provision of this rule. The exercise has, however, been heavily criticized, particularly against the background that the aides concerned 'are not civil servants who fall under the Civil Service Regulation'.⁶⁷

Public Officers and the Official Secrets Act: Rule 030416 of the PSR states that every officer is subject to the Official Secrets Act and prohibits unauthorized disclosure of official information. In view of the importance of this rule to this subject matter, the provision is substantially quoted as follows:

Every officer is subject to the Official Secrets Act ... and is prohibited from disclosing to any person, except in accordance with official routine or with special permission of Government, any article, note, document or information entrusted to him/her in confidence by any person holding office under any Government in the Federal Republic of Nigeria, or which he/she

⁶⁶ Chedozie, I., 'Yar'Adua, VP's Aides Take Secrecy Oath.' *The Punch*, Wednesday September 24 2008). Available at: <http://www.punchontheweb.com/Article-print2.aspx?theatric=Art200809241424264> (Accessed 20 May).

⁶⁷ Amokeodo, T. and Ketefe, K., 'Reactions to Oath of Secrecy: SANs, Others Flay Presidency.' *The Punch*, Thursday September 25, 2008 p.7.

has obtained in the course of his/her official duties. Similarly, every officer shall exercise due care and diligence to prevent the knowledge of any such article, note, document or information being communicated to any person against the interest of the Government.

Apart from the possible criminal liability under the Official Secrets Act, the PSR in Rule 030402(i) defines unauthorized disclosure of official information as a serious act of misconduct and the ultimate penalty for serious misconduct, according to Rule 030407, is dismissed. The implication of dismissal for the officer dismissed is that he forfeits all claims to retiring benefits. Copying and removal of records: Rule 030417 of the PSR prohibits a public officer from abstracting or copying official minutes, records or other documents except in accordance with official routine or with special permission of his Permanent Secretary/Head of Extra-Ministerial Office. It is also a contravention of the PSR for an officer, on disengagement from the public service, to take with him any public record without the written permission of the Permanent Secretary in the Office of Establishments and Pension. Access to own personal records: The general rule in the Nigerian public service, according to Rule 030418, is that an officer should not have access to official and secret records relating personally to them. Publications and Public Utterances: Rule 030421 regulates publications and public utterances on particular interest are the provisions of sub rule (i) (b) (c) and (d) of the Rule which are quoted hereunder for emphasis.

Except in pursuance of his/her official duties, no officer shall, without the express permission of his/her permanent secretary/ head of extra-ministerial office, whether on duty or on leave of absence:

- (a) Contribute to, whether anonymously or otherwise, or publish in any newspaper, magazine or periodical or otherwise publish, cause to be published in any manner anything which may reasonably be regarded as of a political or administrative nature;
- (b) Speak in public or broadcast on any matter which may reasonably be regarded as of a political or administrative nature;
- (c) Allow himself/herself to be interviewed or express any opinion for publication on any question of a political or administrative nature or on matters affecting the administration, public policy, defence or military resources of the Federation or any other country.

These provisions are meant to ensure that public officers are to be seen and not heard except when authorized in order to prevent vital information of government from being divulged through careless and unguarded utterances. They also confirm the age-long administrative practice under which the civil service is regarded as neutral and anonymous.⁶⁸ Criminal Code Act: The Criminal Code Act makes provisions relating to disclosure of official secrets in Nigeria. Section 97 of the Act stipulates that:

- (a) Any person who, being employed in the public service, publishes or communicates any fact which comes to his knowledge by virtue of his office, and which it is his duty to keep secret, or any document which comes to his possession by virtue of his office and which it is his duty to keep secret, except to some person to whom he is bound to publish or communicate it, is guilty of a misdemeanour, and is liable to imprisonment for two years.

⁶⁸ Lamb, W.K., 'Liberalisation of Restrictions of Access to Archives.' *Archivum*, (2005) 14: 35-40.

(b) Any person who, being employed in the public service, without proper authority abstracts, or makes a copy of, any document the property of his employer is guilty of a misdemeanour and is liable to imprisonment for one year

The important question which this paper addresses is whether the provisions of the FOI Act is not in serious conflict with existing legislations and rules that had been used since the country's political independence to restrict access to official records and information. In order to answer this question, it is necessary to consider certain provisions of the FOI Act as they relate to corresponding provisions of the Official Secrets Act, Civil Service Rules and the Criminal Code Act that were reviewed above. The relevant and seemingly contradicting provisions of the FOI Act *vis-a-vis* the provisions of the Official Secrets Act and the Criminal Code Act shall be discussed in the next part of this work.

3.2 PROSPECT AND CHALLENGES.

Freedom of Information Legislation comprises laws that guarantee access to data held by the state. They establish a "right-to-know" legal process by which requests may be made for government-held information, to be received free or at minimal cost, barring standard exceptions. Also variously referred to as *open records* or (especially in the United States) sunshine laws, governments are also typically bound by a duty to publish and promote openness.

The idea of a Freedom of Information law for Nigeria was conceived in 1993 by three different organizations, working independently of each other. The organizations, Media Rights Agenda (MRA), Civil Liberties Organization (CLO) and the Nigeria Union of Journalists (NUJ), subsequently agreed to work together on a campaign for the enactment of a Freedom of Information Act. The objective of the campaign was to lay down as a legal principle the right of access to documents and information in the custody of the government or its officials and agencies as a necessary corollary to the guarantee of freedom of expression. It was also aimed at creating mechanisms for the effective exercise of this right.⁶⁹ It was therefore a deserved celebration in the Nigerian media over the recently passed Freedom of Information Act, which provides citizens with broad access to public records and information held by a public official or institution. It was a landmark achievement of eleven year struggle to pass such a law in the Nigerian.

The Freedom of Information Bill was first submitted to Nigeria's 4th National Assembly in 1999 when the country returned to democracy but it did not make much progress. It returned to the legislative chambers in the 5th National Assembly in 2003 and was passed by both chambers in the first quarter of 2007 but it was vetoed by President Olusegun Obasanjo.⁷⁰ The bill failed because of the perception that it was a grand agenda of the ethically wayward media to further strengthen itself as a weapon of terror.⁷¹ It returned to both chambers of the 6th National Assembly in 2007.⁷² Commendably, the Freedom of Information coalition, established in 2000 to sensitize the public to the merits of the bill, began to broaden its appeal to address the perception that the legislation was simply for the media. The effort yielded some fruit; the

⁶⁹ http://www.foi.coalition.org/publications/advocacy_foi/background.htm. (Last Visited March 1, 2012, 12:08pm).

⁷⁰ Details available at <http://www.stakeholderdemocracy.org/index.php?mact=News,cntnt01,print,0&cntnt01articleid=341&cntnt01showtemplate=false&cntnt01returnid=114> (Last accessed March 20, 2012, 12:34pm).

⁷¹ Lanre Idowu, 'Media and Society', *The NEXT* (July 7, 2011).

⁷² *Ibid.*

National Assembly passed the Freedom of Information bill in 2007, although then President Olusegun Obasanjo withheld his assent on grounds that it did not adequately address some security considerations and once again, the whole process of legislation had to commence anew. The President Goodluck Jonathan's assent of May 28 has rekindled hope in Nigeria's commitment to openness in government.

This paper argues that in providing an unimpeded right of access to individuals, procedural step with deliberately created exceptions knowing that no right is limitless mark the legislation a good starting point. With a background that considers the most harmful of public information as 'secret,' the new law lifts Nigeria's public information management and record-keeping to all-time radical pinnacles. In the new legislation, the paper expresses the view that all institutions spending public funds should be transparent in their operations and expenditure information on the activities of these public institutions should be made accessible to the citizens. Insiders' informants otherwise known as whistle-blowers should be shielded and protected from firing at place of employment and other forms of victimization and reprisal attacks from their employers or organizations. In the words of Maxwell Kadiri,⁷³ associate legal officer, Open Society Justice Initiative the new law will profoundly change how government works in Nigeria. According to him, Nigerians can now use it as oxygen of information and knowledge to breathe life into governance. It will no longer be business as usual. In Section 3 of the Act, public institutions are mandated to provide a detailed description of their corporate profiles, programs and functions of each division, lists of all classes of records under their control, and related manuals used in administering the institution's programs. They are to provide public access to documents containing final opinions, including concurring and dissenting ones; orders made in the adjudication of cases, and those covering policies, contracts, receipts, or expenditure; and reports and studies conducted by the institutions.

The law directs public institutions to ensure that the public's right of access to information shall not be prejudicially affected by the institutions' failure to publish any information under this subsection. Although Section 12 (1) excludes information that may be injurious to the conduct of Nigeria's international affairs and defense, no application for information shall be denied where 'the public interest in disclosing the information outweighs whatever injury that disclosure would cause.' In other words, the onus is on the public agency to establish why the information should not be released. There are provisions for seeking redress for denying applications and penalty for wrongful denials.⁷⁴ In endorsing the people's right to know, the Freedom of Information Act acknowledges that sovereignty belongs to them, and that the quality of information available in a community leverages the quality of their participation in public affairs. Extreme secrecy in governance and a poor information flow breeds suspicion and misunderstanding among the populace and prevents the necessary

⁷³ Open Society Initiative, 'Freedom of Information Act Signals Consolidation of Nigeria's Democracy' (Press Release, May 11, 2012).

⁷⁴ For example, in *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) vs. Petroleum Products Pricing Regulatory Agency & Others* brought Pursuant to section 20 of the Freedom of Information Act 2011: Suit No. FHC/CS/L/221/2011; SERAP a civil society organization had obtained the leave of the Federal High Court sitting at Ikeja in Lagos seeking an order of Mandamus over PPPRA's failure to release records on fuel subsidy. According to the organization, 'The 1st Defendant/Respondent is a public institution, and as such has a binding legal obligation to provide the applicant with the information requested for. The information requested for relates to the details of spending on fuel 'subsidy' in 2011; and this information does not come within the purview of the types of information exempted from disclosure by the provisions of the FOI Act. Up till the time of filing this action, the Defendants/Respondents have failed, neglected and refused to make available the information requested by the Applicant. The Defendants/Respondents have no reason whatsoever to deny the Plaintiff/Applicant access to the information sought for.' See details on www.serap-nigeria.org (Last visited May 6, 2012).

cooperation for development. According to Edetaen Ojo, executive director of the Media Rights Agenda:

The signing of the Freedom of Information Bill into law is the clearest demonstration ever of the power of civil society working together to influence public policy and initiate reform. We are committed to continuing our concerted efforts to ensure that the new law achieves its ultimate objective of making government work for the people.⁷⁵

Ifeato Agbu,⁷⁶ who spoke on 'Using the Freedom of Information Act to Enhance Journalism Practice', said accountability and transparency could only be guaranteed with openness of public officials on the income and expenditure of public funds. While using journalists to explore the advantages of the law, the former editor of Daily Sunray newspaper said it would add value to governance in Nigeria.⁷⁷ In summary, the newly enacted Freedom of Information Act 2011 contains the following:

- Guarantees the right of access to information held by public institutions, irrespective of the form in which it is kept and is applicable to private institutions where they utilize public funds, perform public functions or provide public services.
- Requires all institutions to proactively disclose basic information about their structure and processes and mandates them to build the capacity of their staff to effectively implement and comply with the provisions of the Act.
- The FOI Act gives whistleblower protection to any public officer or anyone who gives or receives in good faith information on wrongdoing, or information which would disclose a serious threat to health or safety.
- Makes adequate provision for the information needs of illiterate and disabled applicants.
- Recognizes a range of legitimate exemptions and limitations to the public's right to know, but it makes these exemptions subject to a public interest test that, in deserving cases, may override such exemptions.
- Creates reporting obligations on compliance with the law for all institutions affected by it. These reports are to be provided annually to the Federal Attorney General's office, which will in turn make them available to both the National Assembly and the public.
- Among other qualities the FOI Act possesses, the Act grants all persons the legally enforceable right to access information under the Act. Any refusal to disclose information is subject to appeal to either the High Court or the Federal High Court as the case maybe. The FOI Act requires that public bodies proactively publish 16 categories of information pertaining to the administration, functions and activities of such public bodies.
- The FOI Act also invalidates existing legislation that otherwise hinder public access to information held by public institutions and relevant private bodies.
- The establishment of the right to information by the FOI Act is in consonance with Article 9 of the African Charter on Human and Peoples Rights – which is part of Nigerian Law under Cap A09, Laws of the Federation of Nigeria, 2004 and also encapsulated in S 39 of the 1999 Constitution of the Federal Republic of Nigeria. It is a milestone in the quest for transparent and accountable governance in Nigeria.

⁷⁵ 'Information Act: Challenges before the Media' Editorial, *The NigerianDaily.Com* (October 24, 2011).

⁷⁶ Former Vice Chairman (East) of the Nigerian Guild of Editors.

⁷⁷ Igoniko Oduma, 'Nigeria: NUJ Workshop Unmasks Challenges in Information Act' *Daily Independent* (August 17, 2011).

The FOIA has the potential for momentous impact on governance in Nigeria, by modifying the dynamics of the interactions between government and the public. The FOI Act supersedes the Official Secrets Act (OSA), 1911 and other laws that bar access to information; and marks a shift from a legal culture of secrecy established by the OSA and similar legislation, under which provisions the unauthorized transmission, obtainment, reproduction, or retention of any classified matter was prohibited and criminalised. Within a regional context, Nigeria is now positioned among nine countries in Africa to have passed all embracing FOI legislation, thus joining the league of Angola, Ethiopia, Guinea, Liberia, Niger, South Africa, Uganda, and Zimbabwe. However, having FOI legislation is not an end in itself. Implementation of such legislation is vital, and yet among these African countries, only South Africa can be said to have its FOI law, the Promotion of Access to Information Act (PAIA), being implemented in some form.

The underlying philosophy of the Freedom of Information Act 2011 is that public officers are custodians of a public trust on behalf of a population who have a right to know what they do. This paper raises the fears about the implementation of the Act in Nigeria. It raises the issues of political interference, slow pace of the judicial process, contradiction on the existing laws that gives immunity to the President and state governors and cost of funding the implementation of the law, among others.

The first challenge is that of proper storage of records and information resources of all forms. Iwe⁷⁸ calls it: 'Accommodation of resources.' Most libraries were built without much provision made initially for information technological devices.⁷⁹ The FOI Act in section 32 refers to such records as: "all record, documents and information stored in whatever form, including written, electronic, visual images, sound, audio, recording etc." However, libraries in Nigeria face varying degrees of challenges in their ability to provide access to information resources demanded by the FOI due to such issues as: poor funding, power supply, Internet bandwidth, infrastructure, and human capacity.⁸⁰ Chisenga⁸¹ commenting on the Sothern African experience opines that libraries need to be adequately funded, equipped, and well staffed in order to effectively carry out the provisions of the FOI act as in Nigeria. This is because collecting and storing relevant, current, balanced and usable resources is an aspect of traditional library services. In Academic and research libraries for instance, library collections are built to meet the specific research and information needs of the institutions' academic and research programs.⁸² Lumande and Ojedokun⁸³ and Chiemekwe et al⁸⁴ stressed that library collections is measured by the extent to which they facilitate research activities and students' projects and assignments. For a library to be effective, its collection must match the expressed needs and information expectations of its service community.

⁷⁸ Iwe, J.I., 'A Historical Perspective of Library Service in Nigeria: Problems and Prospects for the Future.' *Global Journal of Humanities*. (2007) 6(1, 2): 33-40.

⁷⁹ Fabunmi, B. A. 'Challenges and Prospects of Virtual Libraries in Universities in Nigeria.' *European Journal of Scientific Research*. (2009) 33(1): 202-208.

⁸⁰ Ani, Okon E., 'Evolution of virtual libraries in Nigeria: myth or reality?' *Journal of Information Science* (2005) 31(1): 67-70.

⁸¹ Chisenga J., 'Global Information and Libraries in Sub-Saharan Africa', *Library Management*. (2005) 21(4):178-187.

⁸² Oseghale, O. 'Faculty opinion as collection evaluation method: a case study of Redeemer's University Library.' *Library Philosophy and Practice*. (2008). Available at <http://unllib.unl.edu/LPP/oseghale.htm>. Last accessed 19 May 2012.

⁸³ Lumande, E., Ojedokun, O et al., 'Collection mapping as an evaluation technique for determining curriculum and collective relationship: The University of Botswana experience.' *African Journal of Library, Archives and Information Science*. (2005)15(1): 25-34.

⁸⁴ *ibid*.

Another challenge is that of record keeping. Section 10 of the Act makes it mandatory for every Government or public institution to keep proper records or information about their operations, personnel, activities and other relevant and related information/records in a manner that facilitates public access to such information or record. One of the unexpected challenges might be the attempts to undermine the Act through ineffective keeping and storing of records from meetings and discussions occurring more often away from official 'recorded' procedures by institutions like the library.

Furthermore is the challenge of technology. Computerization is a capital intensive project. The implementation of the FOI Act implies that libraries will spend more money on computerization and its associated materials. Such according to Fabunmi⁸⁵ would include but not limited to hardware and software purchase/development, training and retraining of librarians in relevant technological skills in digital storage formats. Similarly, funds would be necessary for the translation of certain information content into digital forms which would make servers a great necessity. Ashcroft and Watts⁸⁶ maintained that Nigeria has a severe shortage of digital systems librarians who are informative and web technology literate to install and manage technology-based information resources. This is heightened by the very unpredictable nature of electricity supply in Nigeria.

The challenge of education of the public and execution of the FOI Act also exists. The challenge is to educate by way of reorientation, the conservative mind-set of the public officers that appreciate the reality that information is a tool for national development that must be accessed without impediments or shredded in greedy secrecy to the advantage of an oligarchic few. There is a wide belief, unfortunately encouraged by lawyers, that ordinary people will not be able to understand the FOI like all other laws of the country. Since freedom of information act is essentially legal text, it is unlikely that many ordinary people will read the original texts. Even among mainstream advocates of the FOI Act, very few who are non-lawyers actually read the texts of laws or draft laws which will make the provisions of the Act ineffectual if not accessed by the public. The challenge of the Act is to make the people understand the provisions of the Act and mount a series of enlightenment campaigns to educate the public on their right to information. Further restrictions are contained in the Official Secrets Act, Evidence Act, the Public Complaints Commission Act, the Statistics Act and the Criminal Code. People including students and researchers also find themselves barred from accessing or reading documents necessary for their research. In the name of official secrets, somebody sits on information that will benefit millions of people. The major challenge we face is how to ensure that ordinary people have a fair knowledge of these laws, the procedures and conditions outlined in them, the remedies available in the event of a denial of access to information, and most importantly, the potential impact of the law on their lives. Most ordinary people, especially in Africa, do not read legal texts.

It is no gainsaying that secrecy and official red-tapes are the major setback to several policies and programs of governments in several quarters. Some of these administrative and bureaucratic bottlenecks are created by unspoken sanctions from higher authorities from doing the right job even enabled by an act such as the FOI. Whatever is deemed not to be in the interest of the ruling political class or administering authority is punished in several ways. Public servants who have the responsibilities of carrying out full information and library services such as granting the public access to information enabled by the FOI are under pressure to deploy delay tactics to hold back relevant information.

⁸⁵ Ibi.

⁸⁶ Ashcroft, L. and Watts., 'ICT Skills for Information Professionals in Developing Countries: Perspective from a Study of the Electronic Information Environment in Nigeria.' Available at <http://www/ifla.org/V/iflaji/IFLA-Journal-1-2005.pdf> Last accessed 17 May 2012.

Despite the beautiful victory for transparency, accountability, democracy and integrity, it amounts to Pyrrhic victory because the Official Secrets Act appear to take away with the left hand what the Freedom of Information Act has given with the right! The Official Secrets Act makes it an offence not only for civil servants to give out government information - but also for anyone to receive or reproduce such information. The Evidence Act, the Public Complaints Commission Act, the Statistics Act as well as the Criminal Code, contain restriction to access public information. Prior to the passage of the Freedom of Information Act, virtually all government information in Nigeria was classified as top secret. This veil of secrecy made and still makes it difficult to get information from a state agency. It is a common practice in government departments to be told that very useful information you need is classified and as such not accessible.

The veil of secrecy that usually surrounds public information in government departments and agencies under the guise of official secrets legislation is not only needless and counterproductive, but entirely undemocratic. Instances abound where civil servants had refused to avail the National Assembly documentation after being asked to do so to enable the legislature carry out its oversight function. Consequently, the journalists are denied access critical information needed for accurate reporting, and unraveling the web of corruption in Nigeria. Public Officers, who have soiled their hands in the pot of corruption, classify information needed to expose and prosecute them as top secret documents. Students also find themselves barred from reading documents necessary for their research. According to Kayode Ajulo; “in the name of official secrets, somebody sits on information that will benefit millions of people. In some other countries, some of (this) classified information would ordinarily be found on the internet”.⁸⁷

A comparative study of the corresponding provisions of extant laws of information such as the Official Secret Act, et al, reveals potentially conflicting aspects. However, these seemingly conflicting provisions of the FOI Act are meant to remove any impediment or roadblock to the right of access and strengthen the doctrine of openness which is the general intendment of FOI legislation. The implication is that rules, regulations and legal provisions relating to the protection of official records are no longer sacrosanct under the FOI regime. Whatever access rules that hitherto existed are now subordinated and subject to the provisions of the FOI legislation which Allen Weinstein, the Ninth Archivist of the USA, has described as the ‘cornerstone of access to public records.’⁸⁸

3.3 LACK OF INDEPENDENCE OF ADMINISTRATIVE AUTHORITIES

Another challenge the FOI Act faces is the lack of the Independent Administrative Body. Most FOI legislation provides for decision-making at three levels, by the public authority to which the original request is made, by an independent administrative body with specific powers in relation to freedom of information and by the courts. These laws generally establish an independent administrative body, such as an information commissioner (IC), with various powers to ensure that the legislation is being applied properly and in a timely fashion. The rationale for the three levels of decision-making is as follows. It seems obvious that requests for information should originally go to the public authority which holds the relevant information and that this body should be given an opportunity to respond to the request. In practice, in most

⁸⁷ Kayode A. Ajulo. ‘FOI Act: The Challenge Of Official Secret Act’, A Paper Presented at a Workshop organized by Nigeria Press Council in conjunction with NUJ (2011). Available at www.transparencynigeria.com/index.php?...foi-act-the-challenge-of-official-secret-act.kayodeajulo (Last Visited April 24, 2012, 03:17pm).

⁸⁸Harris, E., ‘Freedom of Information Act’. Available at: <http://www.firstamendmentcentre.org/news.aspx?id=18297> (Accessed 30 April 2012).

jurisdictions the vast majority of requests is satisfactorily resolved at this level and this proportion should increase as public bodies become more familiar with the legislation and as a culture of openness gradually develops. There are a number of reasons for establishing an independent administrative body with the power to review refusals to disclose information. In many - if not most - cases, time is of the essence and public authorities may wish to try to frustrate requests by refusing to disclose information. Providing for a right of appeal to the courts is important, but it is both costly and very slow, and is therefore a poor remedy for many applicants. Experiences in other jurisdictions show that administrative bodies are far more accessible and affordable than the courts, and that they can resolve request disputes relatively quickly. Indeed, the legislation may provide for time limits within which such administrative decisions must be made. The vast majority of disputes are resolved at this level in most jurisdictions. To effectively exercise these powers, the Information Commissioner and his or her staff must be able to review actual records, in camera if necessary.

Providing for an effective appeal process against refusals to disclose is not the only way an independent administrative body can promote the objectives of FOI legislation. Such bodies have also proved invaluable in addressing the culture of secrecy within the bureaucracy which is often the greatest barrier in practice to open disclosure regimes. They can be given powers to educate information officers working in public authorities about the legislation and to promote good practices. They can also play a role in exposing and embarrassing public authorities which have poor disclosure records or which actively seek to undermine the objectives of the legislation. Finally, they can play a role in monitoring and promoting compliance with any positive obligations on public authorities to publish certain material. It is of the very greatest importance that any administrative body with the sorts of powers described above is fully independent of government and the bureaucracy. A key way of promoting independence is through the appointments process for the lead individual, or IC, and through ensuring that this individual is someone who can command significant social support and respect.⁸⁹

In Australia, which has had a Freedom of Information Act since 1982, provision is made for appeal to two different, pre-existing independent bodies, the Administrative Appeals Tribunal and the Ombudsman. The former may entertain appeals relating to refusals to disclose a document, to charge and to delays and has the power to make a binding decision in relation to these matters. The onus is expressly stated to lie on the public authority to justify its decision to refuse to disclose a given record and the Tribunal may inspect the record, in camera, if necessary. In appropriate cases, the Tribunal may order the government to pay an applicant's cost. Anyone can appeal to the Ombudsman concerning action taken pursuant to the FOI Act. The Ombudsman can make recommendations, which have considerable weight, regarding such actions, but cannot issue binding decisions.

Perhaps surprisingly, the South African Promotion of Access to Information Act, does not provide for an administrative appeal. The absence of an independent administrative body to oversee compliance with the Act has been widely criticised and it remains to be seen how effective the Act will be without such a body. The UK FOI Bill provides for an Information Commissioner (IC) and an Information Tribunal. Both bodies are derived from bodies which already exist under the Data Protection Act 1998, namely the Data Protection.

The Nigerian FOI Bill does not provide for an independent administrative body to promote compliance with its provisions and to provide an accessible form of appeal against refusals to disclose information by public authorities. Instead, it provides simply for judicial review of decisions by the courts. Considering the fact that the office of the attorney general is saddled with the responsibility of monitoring compliance of public institutions with the law and informing the National Assembly annually on progress so made, the personality of the occupant

⁸⁹ Memorandum on the Nigerian Freedom of Information Bill by ARTICLE 19 The Global Campaign for Free Expression London May 2000.

as well as the process of his appointment is crucial. The paper opines that to facilitate the administrative machinery to bridge the gap between policy formulation and implementation, there must be sufficient independence of the Administrative Body rather than an appointee of the country's Chief Executive whose activities might be subjected to public scrutiny and debate. This paper argues that this is the most significant failing of the Act. In this wise, the legislature, media and civil societies have a great role to play in ensuring that the attorney general, being the appointee of the president, lives up to his constitutional responsibilities and challenges of his office as the custodian of the constitution. There should be a legislative rethink by making the attorney general to be more responsive and alert to the provisions of the law been the number one law officer of the country. The media must perform its role of educating and explaining the provisions of the law to get citizen informed. The media need to intelligently exploit the law to unleash the best traditions of investigative journalism need to put both the government and the people on the part of participatory democracy and information sharing.

3.3 COST

It is essential for the success of freedom of information regimes that costs are not so high as to inhibit access in practice. While access regimes do cost public authorities money, they also provide intangible benefits in efficiency, professionalism and accountability within the civil service. Costs to public authorities must be viewed in the context of the Act's role in advancing democracy and public participation. Examination of the functioning of a number of long-standing FOI regimes, demonstrates a number of key points.⁹⁰ First, as public authorities become more efficient at recordkeeping and dealing with access, the cost of access requests decreases. Second, even high application fees recover only a tiny proportion of the overall costs to public authorities and yet such fees can exercise a significant deterrent effect. Third, the actual number of access requests made is often significantly lower than initially expected, thereby keeping costs down. Finally, the vast majority of access requests relate to personal information which is relatively easy to identify.

In Australia, report⁹¹ has it that costs to public authorities are relatively low. Between 1992 and 1995, the total cost of the FOI system fell from \$AUS12.7M (\$US7.5M) to \$AUS10.4M (\$US6M). The average cost of an FOI application to a public authority fell from \$AUS376 to \$AUS278.9 Costs to applicants are also relatively low. The Australian system seeks to provide a balance between strict applications of the user pays principle, which would clearly discourage applications and cause the regime to fail in its objective of providing access to information, and placing unreasonable financial and administrative burdens on public authorities. These authorities have discretion to levy various charges, including hourly search and preparation fees and copying expenses,⁹² and may require the applicant to pay a deposit,⁹³ but must give applicants an estimate in advance of the charges they intend to impose.⁹⁴ Access to documents will not usually be given until the charges are paid.⁹⁵ Anyone may seek remission of fees for any reason, including financial hardship or because disclosure of the information is in the general public interest. Decisions to refuse to reduce or waive fees are subject to appeal under the general appeal provisions of the Act.

⁹⁰See, for example, Report 77 of the Australian Law Reform Commission into the Commonwealth of Australia Freedom of Information Act. Available in full at <http://charlotte.anu.edu.au/alrc/report77> Last visited 17 May 2012.

⁹¹ See Attorney-General of Australia, *FOI Annual Report 1994-1995*, page 1.

⁹²Charges are regulated by sections 29 and 30 of the FOI Act 1982 and by the FOI (Fees and Charges) Regulations.

⁹³ Regulation 12 of the FOI(Fees and Charges) Regulations.

⁹⁴ Section 29 FOI Act, 1982.

⁹⁵ Regulation 11 of the FOI (Fees and Charges) Regulations.

The South African Promotion of Access to Information Act provides a detailed section on fees, to be supplemented by regulations.⁹⁶ The section addresses similar concerns to the Australian charging regime and provides for 'request' fees and 'access' fees. Requests for personal information are exempt from request fees. For requests which are granted, access fee may be charged to cover search and reproduction costs where the time spent was reasonably required and exceeded the number of hours specified in the regulations for such tasks. Applicants not requesting personal information may be asked for a deposit (refunded if the information is not released) and information will not be released until the full charges are paid. Charges may be challenged through the normal review procedures of the Act. The government may, by regulation, exempt people or categories from fees, cap fees, set out how fees are to be calculated, exempt particular documents from fees and provide that where the costs of collecting a fee exceeds the fee itself, the fee will be waived. It remains to be seen how this regime will work in practice. The provisions regarding fees in the Nigerian FOI Act is consistent with international standards in this area and the paper does not recommend any significant changes to these provisions. In particular, the paper recommends that the Act retain the reference to 'reasonable standard charges', the fee waiver for requests in the public interest and the ban on 'uneconomic' fee collection and advance payments.

3.4 TIME LIMITS

Time limits within which decisions must be made on access requests are an important means of ensuring that public authorities process requests efficiently and that applicants are satisfied and receive their information within a reasonable time. The latter is often of the greatest importance as information may lose its value or interest over time. Time limits must, therefore, balance the reasonable needs and interests of the applicant with the practical capacity of public authorities to process requests. A common way of doing this is to provide for a relatively strict initial time limit which may then be extended where necessary. This ensures that public authorities are under some obligation to act quickly, often with salutary effects in terms of promoting efficient recordkeeping and access mechanisms, while allowing for extensions where provision within the original time limit is unrealistic.

In Australia, the FOI Act originally provided for a decision period of 60 days.⁹⁷ As time progressed, however, and public authorities became more efficient at processing requests, the time limits were reduced to 45 days and then to the current 30 days. Where a public authority is required to consult a third party before releasing information, the limit may be extended by a further 30 days. Failure to make a decision within 30 days means that the request is deemed to have been refused and may be subject to the appeal procedures. The vast majority of FOI applications is processed within the 30 day limit although some public authorities regularly take more than 60 days to process requests. From the perspective of applicants, delays in the processing of requests remain a problem, although there is often negotiation between public authorities and applicants to allow for extensions of time beyond the statutory limits, generally to the satisfaction of all parties.

The situation is similar in the new South African Promotion of Access to Information Act, although reasons for extending the time limits are wider. The initial time limit is set at 30 days and this may be extended for a further thirty days for a number of reasons,⁹⁸ including where the request is for a large number of records, where it would unreasonably interfere with the activities of the public body concerned, where consultation between different public

⁹⁶ Section 22 of the Promotion of Access to Information Act 2000.

⁹⁷ Section 19, FOI Act, 1982.

⁹⁸ Section 26, Promotion of Access to Information Act, 2000.

authorities is required or where the applicant consents to an extension. Applicants may appeal through the normal procedures in the Act against the extension of time limits and a request is deemed to have been refused if it has not been decided within the relevant time limit.

The Nigerian FOI Act provides for an initial time limit of seven days, which may be extended for another seven days. This paper argues that in view of the Nigeria technological development and bureaucracy in government, the seven days limit though appears rather short and unrealistic, there should be room for extension. The paper notes that these time limits are shorter than is commonly the case in other jurisdictions. The paper recommends retention of the dual system which allows for a relatively short initial time frame and then for a possible extension where justified.

3.5 PUBLIC INTEREST DISCLOSURE

In order to maintain the principle of maximum disclosure underlying any freedom of information regime, it is vital to ensure that any refusals to disclose are subject to a public interest override. Public interest overrides provide for disclosure of information, even though this is likely to cause harm to a protected interest, where the overall public benefits of having the information disclosed outweigh any potential harm to the interest sought to be protected; for example, a public interest test might mandate disclosure of information exposing corruption in the armed forces even though this affected national security, on the basis that the longer term public interest was best served by exposing and hence rooting out the corruption. The “public interest” is an inherently flexible concept which is not easy to define. Very generally, the “public interest” comprises matters which are of concern to the public generally and not merely to an individual. It is, however, in the nature of the almost infinite variety of circumstances which could face public authorities and which would need to be taken into account when balancing different interests that any attempt to exhaustively define the term “public interest” in the legislation is likely to fail. It is a matter for the courts, acting in good faith with the specific aims of the FOI legislation in mind, to develop jurisprudential guidance as to the appropriate meaning of the “public interest” in specific situations.

To assist courts in this task, FOI legislation should clearly spell out the objects it seeks to promote and should require courts to interpret these laws so as to promote those objectives. Primary among these objectives should be the goal of achieving maximum disclosure of official information. In Australia, many exemptions are subject to public interest disclosure, either expressly or by implication. There is no attempt within the Act itself to define the term. Section 3 of the Act sets out its object as providing access to government information and states that the provisions of the Act and any discretion conferred by the Act must be interpreted or exercised in a way that furthers that objective. With this in mind, courts have provided extensive guidance as to the meaning of the term ‘public interest’ while not seeking to set down its limits in stone. A number of factors have been identified as relevant to the ‘public interest’. These include the general interest in government information being accessible, the need to disclose reasons for official decisions, whether disclosure would contribute to public debate and whether disclosure would enhance scrutiny of government decision making and thereby improve accountability and participation.

The South African legislation adopts a similar approach to the Australian Act. Many exemptions are subject to public interest disclosure where ‘the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.’ The Act does not attempt to define the concept of ‘public interest’ but does very comprehensively set out the objects of the Act and requires courts to prefer interpretations consistent with those

objects.⁹⁹ Similarly, most exemptions in the UK FOI Act are subject to disclosure in the public interest.¹⁰⁰

The Nigerian FOI Act provides for public interest disclosure by public authorities in relation to certain exemptions, for example relating to international affairs and defence. It also provides for general public interest disclosure, but apparently only by courts of law. This may be somewhat confusing for public authorities as they appear not to be under an obligation to disclose in the public interest but may be ordered to do so on that basis by the courts. This paper recommends that the public interest provisions in the Nigerian FOI Act be made applicable to all exemptions and that it be clear that this test is to be applied at all stages of consideration of an application, including by the relevant public authority. 'Public Interest' as it appears in the Freedom of Information Act, 2011 should be properly defined as the law would continue to create contradictions in its application. The protection of 'public interest' as contained in the Act was vague because of Nigeria public officials' construe public interest to mean their own interest

4. CONCLUSION

The access to information is one of the greatest tools that enhance economic advancement, good governance and sustainable democracy. Lack of information creates gaps, misunderstanding and lack of trust between the government and the governed. Access to public information is certainly a necessary condition for democracy to flourish. If democracy is understood as a system of government where the interests of the masses are protected, where the opinion of the masses are recognized, respected and accommodated in all the dimensions of governance, where the few serving leaders protect the desires and aspirations of the many whom they represent; then for the achievement of such a people-oriented and people-driven leadership, an unrestricted flow of information from the governance to the governed and vice versa cannot be substituted. Section 1 of the Official Secrets Act,¹⁰¹ makes it an offence for any person to transmit, obtains, reproduces or retains any classified matter. The Official Secrets Act was established in 1962, shortly after independence, and government officials, including staff, swear by the act to keep all government transactions secret.

The Official Secrets Act is often blamed for the obscurity in government transactions and ease of corruption in Nigerian government agencies. As submitted by Ajulo,¹⁰² ordinarily the idea behind these laws is to protect vital government information, but 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. This position is emphasized by the dawn of the internet where access to information has been made very easy. In information management, there is hardly any space or wall. So which way forward for the Freedom of Information Act as it relates to the Official Secrets Act? The answer is simple.

It is suggested that the Government should create an enabling environment for the implementation of the Freedom of Information Act by repealing the Official Secrets Act and all other laws in the statute books that inhibit freedom of expression and freedom of speech. On the part of the Nigerian Judiciary, a favorable environment for adjudication on cases pertaining to refusal to disclose information as stipulated in the Freedom of Information Act should be

⁹⁹ Section 2 of the Promotion of Access to Information Act.

¹⁰⁰ Section 13.

¹⁰¹ Cap 03, Law of the Federation of Nigeria 2004.

¹⁰² Kayode Ajulo, n 88.

created. To this end, the fuel subsidy suit¹⁰³ currently pending at the Federal High Court, Ikeja by SERAP is highly commendable. Furthermore, the Nigerian Judiciary must display rare courage and judicial activism by rising up to the occasion to declare as null and void any other law or act which is inconsistent with the provision of the Freedom of Information Act subject to the Constitution. This reason being that the Freedom of Information Act has a constitutional flavour rooted in sections 22 and 39 of the Constitution of the Federal Republic of Nigeria. Section 1 (3) of the CFRN 1999 is clear on this that where any enactment is inconsistent with the provisions of the constitution, the constitution would prevail and that other law would be null and void to the extent of the said inconsistency. Moreover, as suggested by Ajulo,¹⁰⁴ the judiciary has always strived to find means and ways of giving purposive interpretation to the constitution and statutes to the end that societal good is attained and the aim of the drafters of any legislation is not defeated. The attitude is fairly represented by the view that the fundamental rights under Chapter IV of the constitution are sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate section in Chapter IV of the constitution. Indeed, the fundamental rights guaranteed in Chapter IV of the constitution were specifically designed and intended to limit the powers of the Executive and the legislature both at the national and state levels. This position has also been borne out by the several occasions when the courts have had to pronounce on 'ouster clauses' fairly illustrate the point. In *Shugaba v Minister of Internal Affairs*¹⁰⁵ the Court held invalid section 18(3) of the Immigration Act on the ground that it conflicted with section 38 of the 1979 constitution. In view of judicial precedents, it is safe to submit that the Official Secret Act is obsolete, anachronistic and legally dead for being in conflict and contradiction of the constitutional right of freedom of expression. One of the fundamental human rights of the citizens guaranteed by the constitution is the right to comment freely on matters of public interest. Its importance to Nigerians and relevance to the rule of advocacy of government underscores how dearly Nigerians treasure it.

The Nigeria Judiciary is enjoined to be persuaded by decisions in the foreign jurisdiction in giving judicial bite to the Freedom of Information Act as demonstrated in the Indian case of *State of UP vs. Raj Narain and Others*¹⁰⁶ where A. N. Ray, C.J., A. Alagiriswami, R.S. Sarkaria and N. L. Untwalia, JJ; speaking for the Indian Supreme court held:

In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can but few secrets. The people of this country have a right to know every public act, everything, that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil secrecy the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.

¹⁰³ *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) vs. Petroleum Products Pricing Regulatory Agency & Others* Brought Pursuant to section 20 of the Freedom of Information Act 2011: Suit No. FHC/CS/L/221/2011.

¹⁰⁴ Kayode Ajulo, n 88.

¹⁰⁵ (1981) 1 NCLR 25.

¹⁰⁶ [(1975) 4 SCC428].

In the recent case of *Secretary, Ministry of Information & Broadcasting, Government of India Vs. Cricket Association of Bengal*¹⁰⁷ the Supreme Court observed that true democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The court held that the right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non information; according to the court; all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolized either by a partisan central authority or by private individuals or oligarchic organizations. Thus, the court warned, is particularly so in a country where a majority of the population is illiterate and hardly 1½ percent of the population has an access to the print media which is not subject to pre-censorship. In another recent case of *Dinesh Trivedi, M.P. and Others V. Union of India and Other*¹⁰⁸ the Court dealt with citizen's rights to freedom of information and observed as under:

In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government which, having been elected by them, seek to formulate sound policies of governance aimed at their welfare. Democracy expects openness and openness is a concomitant of a free society and the sunlight is the best disinfectant.

There is a practice followed in the United States of America, where a candidate contesting election for Senate has to fill up a form giving information about all his assets and that of his spouse and dependents. The form is required to be refilled every year; a penalty is also prescribed which include removal from voting. In a public interest litigation filed by Association of Democratic Reforms *Union of India vs. Association for Democratic Reforms & Ann*¹⁰⁹ the Supreme Court directed the Election Commission to require the persons contesting elections to give such information. It was felt that this information would help the people to choose good, sincere and honest persons to the legislatures. On its part, the Nigerian Press Organization, comprising the Nigeria Union of Journalists (NUJ), the Nigerian Guild of Editors (NGE), and the Newspapers Proprietors Association of Nigeria (NPAN) should publicize and enforce the Code of Ethics for Journalists in order to ensure that the Freedom of Information Act now that it has become law, is not abused and that journalists are able to meet highest standards of accuracy and fairness which will be required of them.

Lastly, it is suggested that the provision of the Freedom of Information Act granting power to the Attorney General of the federation to monitor compliance with the provisions of the act left much to be desired. It would amount to being a judge in his own case when it comes to ascertaining whether the Attorney General himself complied with the provisions of the Act. Besides, the Attorney General is the appointee of the President as such raises a big question mark on the sincerity of his loyalty to the President and the political party that formed the government. It is imperative that the section be amended to avoid undue power being at the disposal of the government as the section can be exploited by the ruling party to witch-hunt and silenced the opposition.

Nigeria may be left behind in the search for true democracy and federalism if government businesses and records continue to be shrouded in secrecy no matter the justification for so doing. Democracy is government by participation as such the citizenry at all

¹⁰⁷ [(1995) 2 SCC 161].

¹⁰⁸ [(1997) 4 SCC 306].

¹⁰⁹ JT 2002 (4) SC 501.

times have the right to know. This paper recommends that provisions regarding an independent administrative body be included in the Nigerian FOI Act rather than the office of the Attorney General. This body should play a number of key roles including educating public officials regarding the FOI Act, exposing and highlighting serious failures by public authorities to implement the spirit as well as the letter of the Act and reviewing decisions by public authorities regarding individual access requests. In relation to the latter, the administrative body should have the power to compel production of any document or record, to order the public authority to disclose the record, to reduce any fees charged and to take appropriate steps to remedy any unjustifiable delays. It possibly correct to say that no tyranny of dictatorship can permanently imprison a determine citizenry, hence the sustained agitation of an organized people can always push through an idea whose time has come. Openness and transparency in promoting good governance are the best requirements in any decent society today. The coalition of interest groups that fought for the Freedom of Information Act has more work ahead, teaching the public how best to utilize the law.