Access to Information in Africa

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CHAPTER TWELVE

ACCESS TO INFORMATION AND TRANSPARENCY: OPPORTUNITIES AND CHALLENGES FOR NIGERIA'S FOI ACT 2011

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Abstract

This chapter assesses the characteristics of Nigeria's Freedom of Information Act, 2011 (FOIA), first in relation to previous Acts in Nigeria which partly regulated access to information, and second, in relation to emerging challenges. Content review and assessment of public perception of the FOIA (passed on 28 May 2011) shows that the Act is intended to make public records and information more freely available and accessible to members of the public and also allow them to have recourse to the courts in the event that their request for information is denied. The law purposefully deals with the shortcomings of pre-existing Acts by introducing statutory provisions aimed at recognizing, ensuring, protecting, and encouraging the exercise of the public's right to information. Information 'sacredness' still persists in public agencies, and the FOIA cannot achieve its purpose without the general public accepting the collective responsibility of demanding and ensuring a transparent government. Consequently, awareness and enlightenment programs should be frequently organized so as to create a participatory platform for members of the public; the judiciary should also actively play its watch-dog role; and the legislature should exercise its mandate to monitor the implementation of the Act and to ensure that it is kept up to date by regular reviews.

Introduction[1]

In this chapter, we assess the characteristics of Nigeria's Freedom of Information Act (FOIA), first in relation to previous Acts in Nigeria which partly regulated access to information, and secondly in relation to emerging challenges. This assessment is conducted bearing in mind the six

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[1] The authors hereby acknowledge comments from Fola Adekele (Supreme Court of South Africa) and Maxwell Kadiri (Open Justice Society Initiative).

principles set out in Paragraph 2 of Part 4 of the Declaration of Principles on Freedom of Expression, issued by the African Commission on Human and Peoples' Rights in 2002, which elaborates on Article 9 of the African Charter on Human and Peoples' Rights as follows: everyone has the right to access information held by public bodies; everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right; any refusal to disclose information shall be subject to appeal to an independent body and/or the courts; public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest; no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and secrecy laws shall be amended as necessary to comply with freedom of information principles. Mendel (2008) also sets out the principle of clear exceptions that are limited in scope and subject to strict 'harm' and 'public interest' tests.

On 28 May 2011, Nigeria enacted the Freedom of Information Act, 2011, which is aimed at making public records and information more freely available and accessible to members of the public and also allows them to have recourse to the courts in the event that their request for information is denied. The importance of guaranteeing and protecting the right of ATI[2] lies in the fact that the government may never be truly transparent and accountable without being actively held to account by the electorate.

On the one hand, enacting laws such as the FOIA also necessarily facilitates the prospects of ensuring public participation in governance, in keeping with the provisions of Section 14(2)(c) of the 1999 Nigerian Constitution, which provides that "the participation by the people in their government shall be ensured in accordance with the provisions of this Constitution".[3] Section 39 further guarantees the right of every person to freedom of expression, including the freedom to hold opinion and to receive and impart ideas and information without interference. On the other hand, this provision of Section 39, like the provision of Article 9 of the African Charter on Human and People's Right (Ratification and

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[2] This right is guaranteed by Article 19 of the Universal Declaration of Human Rights and also by Section 39 of the 1999 Constitution of the Federal Republic of [illegible]. C23, Laws of the Federation of Nigeria.

[3] Cap. C23, Laws of the Federation of Nigeria, 2004.

Enforcement) Act, 1983,[4] is quite weak in terms of the protection it affords to the right to FOI. The weakness stems from the failure to expressly protect the right 'to seek' information, which is the expression used in the relevant portions of Article 19 of both the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR), respectively.

Using archival records, secondary data, and substantive interviews of officials of some government agencies, this chapter discusses the pre-FOIA legal regime, the FOIA, and post-enactment activities, with a view to assessing the level of transparency in practice and ascertaining the actual and possible impacts of the FOIA against the backdrop of the transparency agenda of the current Nigerian government. In this chapter, all the above-mentioned principles are assessed, with extra attention given to two principles: clear exceptions as they relate to matters of Nigeria's national security, and the principle of actively promoting open government. Bearing in mind the more-than-a-century-old principle of secrecy that permeated Nigeria's public service architecture before the advent of the FOIA, it is pertinent to commence with a history of the right of ATI in Nigeria.

Pre-FOIA Legal Framework on ATI in Nigeria

Before 28 May 2011, there were several laws in force which had provisions regulating the public's right to access information held by public institutions. Such laws include the Evidence Act of 1945,[5] the Statistics Act of 1957,[6] the Official Secrets Act of 1962,[7] the Public Complaints Commission Act of 1975,[8] the Criminal Code 1990,[9] and many other laws which either remotely or directly provided for the right of members of the public to access specific information held by public bodies. As it will be shown in

[4] The African Charter on Human and People's Rights provides for the right of every individual to receive information and to express and disseminate opinion within the law. In the case of Abacha v Fawehinmi (2006) 6 Nigerian Weekly Law Reports, [part 660] at p. 228, the Supreme Court held that by virtue of the African Charter on Human and People's Right (Ratification and Enforcement) Act, which domesticates the Charter, the latter had the same authority as any other Act of the Nigerian National Assembly.

[5] Cap. E14, Laws of the Federation of Nigeria, 2004.

[6] Cap. S10, Laws of the Federation of Nigeria, 2004.

[7] Cap. O3, Laws of the Federation of Nigeria, 2004.

[8] Cap. P37, Laws of the Federation of Nigeria, 2004.

[9] Cap. C38, Laws of the Federation of Nigeria, 2004.

due course, these were laws that also more or less constrained or circumscribed the existence and application of this right rather than strongly providing for it. Laws that provide for it positively, without circumscribing it in any way, include the Environmental Impact Assessment Act, 1992; the Nigerian Extractive Industries Transparency Initiative (NEITI) Act, 2004 (except for its construal confidentiality provision that has not been applied hitherto and is up for legislative review); the Fiscal Responsibility Act 2007; and the Public Procurement Act, 2007. The subsequent paragraphs will expand on how specific legislation impacted on ATI.

The Evidence Act of 1945 is a law that regulates matters relating to the obtainment and admissibility of evidence in both criminal and civil court cases, amongst other things. The Evidence Act also regulates ATI by members of the public; for instance, Section 111 provides that every public officer who has in his custody a public document which any person has a right to inspect, shall upon demand and payment of legal fees give such a person a certified true copy of the document. However, some provisions of the Evidence Act also limit ATI. Sections 165 to 176 in particular deal with information referred to as official and privileged communication. Specifically, judges, magistrates, jurors, legal practitioners, court clerks, and interpreters cannot be compelled to disclose information which came to their knowledge while acting in their official capacities, though they may be examined as to other matters which occurred in their presence while so acting. Also, police officers and magistrates cannot be compelled to disclose their sources of information as to the commission of a crime; subject to the directions of the President or a governor, unpublished official records relating to the affairs of the state cannot be produced or given in evidence; and lawyer–client information is protected as privileged communication. These restrictions are necessary to ensure that the judiciary is able to impartially perform its duties while at the same time protecting people's right to privacy, ensuring national security, and fostering confidence in the judiciary. However, the disclosure of some of the information under this category can in some instances be compelled by a special order of court.[10]

The 1957 Statistics Act authorized the Federal Statistician to take statistics from time to time and to provide for the collection, compilation, analysis, and publication of statistical information and to provide for

[10] No organ of government is exempted under the FOI law; the judiciary to the FOIA.

connected matters. The Federal Statistician is further empowered to obtain information from any person for reasons incidental to the execution of this duty, and failure to furnish the required information is an offence punishable by three months' imprisonment.[11] In Section 12, persons employed in the execution of any power or duty under the Act are bound to subscribe to an Oath of Secrecy before assumption of such duty; a violation of this oath attracts a punishment of one year imprisonment with an option of fine or both. Unlawful disclosure of information is punishable by a term of one year imprisonment; this offence extends to the person who publishes or communicates information which he knows to have been disclosed in contravention of the Act.[12] The practical effect, therefore, is that a journalist who publishes information of this kind is guilty of an offence alongside the public official who makes the disclosure. This provision effectively discourages whistle-blowing activities and thus reduces the possible sources of credible information, as it would be difficult to verify information received from the few informants who provide any information relating to government activities. Inasmuch as the Statistics Act seemed to be aimed at upholding the right of the citizenry to information, it is more of a privilege than a right. The Act did not provide for the right of the populace to make a demand for information; and the right to query the published information is not provided for under the Act.

Another Act that was to follow was the Official Secrets Act of 1962, which made further provisions for securing public safety and connected purposes. Section 1 of this Act makes it a punishable offence to transmit, obtain, retain, or reproduce classified information without due authorization, and such an offence is punishable with a maximum sentence of 14 years imprisonment.[13] However, concerning ATI, the Act provides for restrictions in certain circumstances, such as information for purposes which may be prejudicial to national security[14] and information about things designed or adapted for use for defence purposes during periods of emergency.[15] The Official Secrets Act, being security-centred, was not designed to guarantee or protect the right to information but to curtail it.

Three decades later, the 1990 Criminal Code Act was enacted to also regulate the circulation of information to members of the public through

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11 Section 14 of 1957 Statistics Act.
12 See Statistics Act, Section 13, for penalties.
13 Official Secrets Act, Section 7.
14 Ibid. Section 2.
15 Ibid. Section 3.

some of its provisions. For instance, Section 97 makes it a misdemeanour punishable by two years' imprisonment for a public servant to publish or communicate facts which he obtained by virtue of his office and is duty-bound to keep secret. This section therefore discourages whistle-blowing activities by public officers.

Having considered the provisions of some of the numerous laws which existed to regulate ATI before the advent of the FOIA, it is apparent that before the adoption of this law, there was no all-embracing piece of legislation in place which aimed at ensuring the protection of the citizen's right to know. Rather, there were several laws which either constrained or promoted ATI in varying degrees. This legislative constraint of the right of ATI was attributed by Ajulo (2011) to Nigeria's colonial heritage and long period of military rule, which entrenched in the conduct of government business a culture of secrecy, thus shielding the governments and their actions from public scrutiny.

For the aforementioned reasons, especially in a democratic dispensation, the FOIA became a 'must have' for Nigeria; without it, a transparent and accountable government would have remained nothing but a lofty ideal. The Act once in place declared itself as

> an Act to make public records and information more freely available, provide for public access to public records and information, protect public records and information to the extent consistent with public interest and the protection of personal privacy, protect serving public officers from adverse consequences for disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and for related matters.[16]

The Act thus attempts to put an end to the era of a government shrouded in secrecy. In the following section, we examine the FOIA in greater detail.

Examining the FOIA, 2011

The journey from FOI Bill to Act spanned a period of 18 years, during which the proponents of the Bill and other stakeholder groups fought to have the Bill passed into law. The Media Right Agenda (MRA), Civil Liberties Organization (CLO), and the Nigerian Union of Journalists (NUJ) conceived the idea of a Freedom of Information Law for Nigeria.[17]

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[16] The preamble, FOIA.

[17] See Origins of the Freedom of Information Campaign, Freedom [illegible] Coalition website:

Despite several setbacks and major opposition, the Bill was assented to by Nigeria's President Jonathan on 28 May 2011. The law before its enactment was the topic of many debates,[18] which have continued even after its passage.

Section 1 of the Act boldly declares it to be superior to its predecessors as far as the right to access information is concerned. It reads thus:

> Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established.

Relevant Provisions of the FOIA

This section will expatiate on and critically analyse some core provisions of the FOIA in order to aid in the understanding of the Act.

Record-Keeping and Proactive Disclosure

The Act proceeds to impose an obligation of proper record-keeping on public institutions.[19] Public institutions are defined as legislative, executive, judicial, administrative bodies, and private bodies which expend public funds or carry out public duties.[20]

Public institutions are required to create records of all their activities, transactions, and operations, and keep, organize, and maintain such information in a way and manner that facilitates public access to the record or information so created.[21] These records existed prior to this enactment, at least for audit purposes; however, the novelty of this section

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http://www.foicoalition.org/publications/foi_advocacy/background.htm (accessed on 1 August 2011). Other organizations like the R2K and Open Justice Society Initiative joined the campaign along the line and contributed to the advocacy campaign for the enactment of the Bill into law.

[18] See for instance the submission of the Nigeria Labour Congress (NLC) to the public hearing on the freedom of information bill organized by the Senate committee on information and media on Monday 2 June 2008 at the National Assembly. Available at: http://www.foicoalition.org/news/2008/submissions.htm (accessed 30 May 2012); the Lagos Chamber of Commerce & Industry, Observations, comments and corrections on the Freedom of Information Act 2004. Available at: http://www.foicoalition.org/news/2008/submissions.htm (accessed 30 May 2012). Also, AELEX, a firm of legal practitioners and arbitrators, held a lecture on the theme: 'Freedom of Information: Balancing the Public's Right to Know Against the Individual's Right to Privacy', on 24 July 2008.

[19] FOIA, Section 2.

[20] FOIA, Section 31.

[21] FOIA, Sections 2(1), 2(2), 9(1) & 9(2).

is the requirement to create or dedicate specialized units in public offices where records can be easily accessible on demand. For example, the Minister of Finance Mrs Okonjo-Iweala makes public quarterly intergovernmental transfers. This particular practice the minister undertakes pre-dates the enactment of the FOIA, particularly during her first stint in office from 2003 to 2006. Furthermore, under Section 2 Subsection 3, public institutions should ensure the publication of information such as a list of all classes of records under the control of the institution; manuals used by employees; names, salaries, titles, and dates of employment of all employees and officers; names of every official and final records of voting in all proceedings, etc.[22] Subsection 4 of the same section requires that such records and information are widely disseminated and made readily available to members of the public through various means; and such information should be reviewed and updated regularly.[23] Prior to this enactment, proactive disclosure was not generally practised by public bodies (with the exception of a few[24]); thus, the inclusion of this section in the FOIA imposes a new obligatory practice, which if observed will allow members of the public to be more informed about the activities of public bodies and thereby generate more public interest in governance and thus encourage public participation in government. The alteration, falsification, or destruction of public records by a public officer is a criminal offence punishable on conviction by at least one year's imprisonment.[25]

Making Application for Information

Members of the public are entitled to make an application for the desired information without having to demonstrate any specific interest in the information applied for.[26] Section 8 of the Act stipulates that the fees payable for such applications are limited to standard charges for document duplication and transcription where necessary. In terms of financial costs, this appears to be in favour of those who demand few pages of documents.

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[22] See *supra* Note 20 for a comprehensive list of all information which public bodies are expected to proactively disclose to members of the public.

[23] FOIA, Section 9.

[24] For instance, the Lagos State government, via its official website (http://www.lagosstate.gov.ng/) proactively discloses information related to the awards of contracts, the progress made on government projects, proposed projects, a[illegible]ts, etc.

[25] FOIA, Section 10.

[26] FOIA, Section 1.

For instance, the cost of photocopying one page of a document varies from 3 to 10 Naira.[27] Section 3(3) of the FOIA provides for the right of illiterates and disabled persons, who by reason of such illiteracy or disability are unable to personally make an application for information, to make such applications through a third party. It is further provided for that in the case of an oral application for information being made to an authorized public official, the official shall reduce such application into writing and provide a copy of same to the applicant.[28]

Time within which to Respond to Requests for Information

In order to ensure expedient responses to applications for information by entitled persons, the law requires that all such requested information, subject to certain exceptions, shall within seven days be made available to the applicant, and in the case of a refusal, it shall be made in writing to the applicant, with the reasons stated therein.[29] However, where a public institution receives a request for information which in its opinion is of greater interest to another public institution, the recipient institution may within three days, but not later than seven days, transfer the request to the other institution. In this case the application is deemed to have been made on the date in which it was received by the transferee. The applicant shall be notified of the transfer of his or her request.[30] However, Section 6 permits the public institution to extend the seven days' time limit by a time not exceeding an additional seven days if the application received is for a large number of records or if consultations must be made in order to comply with the application and this cannot reasonably be completed within the original seven days' timeframe. Notice of the extension must be given to the applicant, and it must state the reason for extension and that the applicant has a right to have the extension of time reviewed by the court.[31] Failure to comply with the timeframe as specified in the Act is deemed and treated as a refusal of application.[32]

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[27] Street value as at October 2011; approximately 0.06 US Dollar cents (Naira–Dollar conversion rate as at October 2011).

[28] FOIA, Section 3(4).

[29] FOIA, Section 4.

[30] FOIA, Section 5.

[31] The Attorney General of The Federation, through his senior special assistant, reportedly said: "The challenges are that some of the information required may not be readily available within seven days". See "How to make FOIA work, by Soyinka, govs, others", The Guardian, Friday, 22 July, 2011, pp. 1 & 4.

[32] FOIA, Section 7(4).

Refusal of Application and Reviews

The right to access information is justiciable in terms of Section 1(3), through any State High Court or Federal High Court as the case may be.[33] In the event of a refusal of an application for access to records or information applied for or any part thereof, the public institution must, by a notice given to the applicant, state the grounds for refusal and that the applicant has a right to challenge the refusal and have it reviewed by the court. The notification must also include the name, designation, and signature of each person responsible for the refusal and shall also state whether the requested information or record exists. Wrongful denial of an application is an offence, and the defaulting officer or institution is liable on conviction to a fine of N500,000.[34] An applicant whose request has been totally or partially refused is encouraged by Section 20 to make an application to the court for a review of the refusal. The application must be made within 30 days after the refusal of request by the public institution, or within such further time as the court may, either before or after the expiration of the 30 days, fix or allow. Courts may actually grant a late applicant an extension of time within which to tender an application for review.

The intended effects of these provisions are therefore to ensure that in the event of a wrongful refusal, the responsible officers will be held liable and this will in turn deter indiscriminate refusal of applications. The question arises whether the courts should be the only port of review of these refusals. Of course it might be argued that the judiciary, being the custodian of justice, should be the arbiter of such issues; however, it must be noted that litigants may encounter problems such as delays in court proceedings and the cost of litigation. Nigeria's judicial system is well known for adjournments that stretch cases for long periods.[35] These problems are likely to discourage users of the law from enforcing their rights. In view of the fact that some information requests will be time-sensitive, a more effective option would be the establishment of an independent information commission which is charged with the responsibility of ensuring the promotion and protection of the right of ATI, as is the case in

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33 *Supra* Note 21.

34 FOIA Section 7(5); also equivalent to €2175 based on August 2011 Naira-Euro exchange rate.

35 For further reading on long delays of case disposal in Nigerian courts, see I.C. Enwas, 'Problems of Access to Courts in Nigeria: Results of a Survey on Legal Practi
10 Social & Legal Studies 397, 410.

countries like Canada[36] and Belgium.[37] This is a less costly option for the applicant (financially and time-wise)—in comparison with filing a lawsuit at the High Court. The information commissioner would be empowered to make decisions in respect of information requests, which in limited cases may then be the subject of appeals in a law court. This would ensure the quick processing of such reviews and thus reduce the possibility of frustrating information requests. This option was considered during the advocacy for the enactment of this law but was dropped because Parliament stressed the need to reduce the cost of governance in Nigeria. Moreover, bearing in mind the vast geographical spread of Nigeria and the constraints of public funding, its effectiveness in the short-to-medium term would have been limited. But this issue of effectiveness can be resolved by setting up offices in each state, for quick resolution of disputes.

What Nigeria has in addition to the courts' powers of dispute resolution is a combination of the following institutions: firstly, there is the National Human Rights Commission in position to resolve FOI-related disputes, in keeping with its expanded powers under its 2011 amended legislation, which also vests it with the power to make binding orders that are enforceable by the High Court;[38] secondly, there is also the Public Complaints Commission, an ombudsman committed to dealing with FOI-related disputes; and thirdly, there is the oversight responsibility of the relevant committees of Parliament that are created under Section 29(4) of the FOIA. All these institutions essentially serve to complement the judiciary's dispute-resolution role under the Act.

Considering the fact that many public officers traditionally come from a background of secrecy, imposed by the pre-existing laws and the various oaths of offices, the new responsibility of implementing the FOIA may seem daunting. The underlying principles of the FOIA appear contrary to the existing tenets of public service, where civil servants are automatically roped into the rule of secrecy regarding disclosure of information. While it is necessary to ensure the proper training of public officers in line with the provisions of the Act so as to foster compliance, it is also expedient that

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[36] Office of the Information Commissioner of Canada plays this role.

[37] This role is performed by the Commission on Access to Administrative Documents.

[38] See generally, the provisions of the National Human Rights Commission Act 1995 and the National Human Rights Commission Amendment Act, 2010. See also, Th[illegible]st, 'Complaint Commission Set to Prosecute Defaulters of FOI Act, says Sc[illegible]n 2012) at

the administrative rule of secrecy be expunged or brought in line with the provisions of the FOIA.

Exemption of Certain Categories of Information from Disclosure

Despite the need to have a transparent government, it is also clearly necessary that some categories of information be kept out of the public domain, in order to ensure national security and protect certain individual rights. Thus, public institutions may deny applications for certain kinds of information.[39] Such information include information which, when disclosed, may be prejudicial to national security; information which may constitute a breach of a person's right to privacy; privileged information; proprietary information; and trade secrets. However, these exemptions are subject to overriding public interest. The individual to whom the information relates may also consent to the disclosure of his/her personal information.[40]

Possibilities exist for the indiscriminate refusal of applications on grounds of the above-mentioned exemptions, particularly the exemption of information which may be prejudicial to national security. At present, the definition of exemptions appears to be left to the discretion of public officers, who are required to refuse disclosure if in their opinion public interest will be prejudiced thereby. However, the test of harm to public interest will be of no effect if not defined, as it may then be applied in a blanket manner, which will in turn whittle down the potency of the FOIA. It is important to note that this exemption, like other exemptions, is subjected to the public interest over-ride test, which should be applied by the relevant public official whenever he or she is faced with decision-making in this regard. The approach taken by Bosnia as regards information that relates to national security is worth considering. Article 6 of the Freedom of Access to Information Act for the Federation of Bosnia and Herzegovina, 2001 allows a competent authority to claim an exemption where disclosure would reasonably be expected to cause substantial harm to defence and security interests and to the protection of public safety. Similarly, the United Kingdom Information Commissioner's Office, in its guidance notes, recognizes that "[t]he exemption should not be

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http://www.dailytrust.com.ng/index.php?option=comcontent&view=article&id=158064:complaint-commission-set-to-prosecute-defaulters-of-foi-act-says-scribe[illegible]&Itemid=2 (accessed 30 May 2012).

[39] See FOIA, Sections 11, 12, 14–19 for the comprehensive detail[illegible] exemptions.

[40] FOIA, Section 14(2).

applied in a blanket fashion. There must be evidence that disclosure of the information in question would pose a real and specific threat to national security".[41] Also, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (adopted by a group of experts in international law, national security, and human rights on 1 October 1995)[42] provide guiding principles on invoking the exemption from disclosure on the grounds of national security. The following are some of such principles:

> Principle 12 (Narrow Designation of Security Exemption):
> that a State may not categorically deny access to all information related to national security, but must designate in law those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.
>
> Principle 13 (Public Interest in Disclosure):
> In all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.

The test for exemption therefore goes beyond whether the information requested relates to national security; rather, the question to be asked is whether the disclosure of such information is likely to cause specific and substantial harm. The implications of this will be discussed in a later section, where Nigeria's FOIA is weighed with regards to the pre-existing legal framework.

Protection of Whistle-Blowers

As an improvement on previously discussed Acts, another important section of the FOIA is Section 28. The provisions of this section counter Section 1 of the Official Secrets Act and Section 97 of the Criminal Code Act by providing for the protection of public officers who disclose information without due authorization. The articles 2 and 3 of the section provides as follows:

> (2) nothing contained in the Criminal Code or Official Secrets Act shall prejudicially affect any public officer who, without authorization, discloses to any person, an[y] information which he reasonably believes to show

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[41] United Kingdom Freedom of Information Act—Section 24: The national security exemption.

[42] Available at: http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf (acc... ...y 2012).

a) a violation of any rule or regulation
b) mismanagement, gross waste of funds, fraud, and abuse of authority; or
c) a substantial and specific danger to public health or safety notwithstanding that such information was not disclosed pursuant to the provisions of this act.

(3) no civil or criminal proceeding shall lie against any person receiving the information or further disclosing it.

These provisions have officially put an end to the forced conspiracy of silence which hitherto was the norm in public service; a whistle-blower is thereby legally protected, in theory, from any form of reprisal which might deter him from making the relevant disclosure. Three years before the FOIA became law, specifically in June 2008, the Nigerian Pension Commission (PENCOM) developed and adopted its Whistle Blowing Guidelines for Pensions. Similarly, the Securities and Exchange Commission, Nigeria (SEC) adopted a Code of Corporate Governance for Public Companies in April 2011. Cursory assessment indicates that the SEC's code is relatively weaker than the PENCOM guidelines in terms of whistle-blower protection, but both show a need for streamlining with the new FOIA.

Vis-à-vis the pre-existing legal framework, it is apparent that the FOIA is designed to do away with the era of secrecy while enshrining the public's right to information, so as to encourage public participation in government. The law represents a good starting point in this endeavour, as it purposefully deals with the shortcomings of the pre-existing legal framework by the introduction of statutory provisions which aim at recognizing, ensuring, protecting, and encouraging the exercise of the public's right to information.

Effect of the FOIA on Pre-Existing Legislation

The technical effect of the FOIA on pre-existing laws has been the subject of some speculation, pointing in one direction. Firstly, the FOIA has in effect technically repealed the Official Secrets Act, and according to Ajulo (2011) both Acts are in conflict with each other. This argument is based on a cardinal principle of interpretation, which is to the effect that where two statutes or laws made by the same legislature are in conflict with each other, the later law prevails as it is deemed to have come into existence to correct the mischief and anomalies of the earlier law. Also, Enonche[43]

[43] Ene Enonche co-ordinates the Right to Know (R2K) initiative (see www.r2knigeria.org); communication in Lagos, August 2011.

expressed the view that the FOIA is, by reason of its Section 1, superior to and supersedes the Official Secrets Act. The wordings of Sections 1 and 27 of the FOIA affirm that the legislature intended that the FOIA should prevail over all other Acts previously in place which curtailed the right of ATI.

The National Security Agencies Act of 1986 (NSA Act)[44] might, however, not be so easily dismissed. This Act establishes three security agencies: namely, the Defence Intelligence Agency, the National Intelligence Agency, and the State Security Service.[45] The NSA Act provides that the State Security Service is responsible for the protection and preservation of all non-military classified matters concerning the internal security of Nigeria,[46] while the Defence Intelligence Agency is responsible for the protection and preservation of all military classified matters concerning the security of Nigeria, both within and outside the country.[47] According to Enonche, the NSA Act, which is entrenched in Section 315(5) (c) of the 1999 Constitution, continues to exist and function side by side with the FOIA. This is due to the fact that the procedure for its repeal, as contained in Section 9(2) of the Constitution, is yet to be complied with. The concern raised by the continued potency of this Act lies in the criteria for categorizing matters as 'classified'. The question that readily comes to mind is this: what is the yard-stick for determining whether a matter is classified? Section 2(5)[48] of the NSA Act relies on the definition of 'classified matter' given in Section 9 of the Official Secrets Act:

> Any information or thing which, under any system of security classification, from time to time, in use by [the government] or by any branch of the 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.

This broad definition fails to provide the criteria for ascertaining that the disclosure of a matter would be prejudicial to national security. Whatever be the criteria for this categorization, it is hoped that with the advent of the FOIA, care will be taken to ensure that such categorizations are narrowly defined and are compatible with democratic principles.[49]

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[44] Cap. N74, Laws of the Federation of Nigeria, 2004.

[45] Section 1, NSA Act.

[46] Ibid. Section 2(3)(b).

[47] Ibid. Section 2(3)(b).

[48] This sub-section states as follows: "in this section 'classified matter' has the same meaning assigned thereto in Section 9 of the Official Secrets Act".

[49] As previously explained above (see the sub-paragraph on exemptions from disclosure).

expressed the view that the FOIA is, by reason of its Section 1, superior to and supersedes the Official Secrets Act. The wordings of Sections 1 and 27 of the FOIA affirm that the legislature intended that the FOIA should prevail over all other Acts previously in place which curtailed the right of ATI.

The National Security Agencies Act of 1986 (NSA Act)[44] might, however, not be so easily dismissed. This Act establishes three security agencies: namely, the Defence Intelligence Agency, the National Intelligence Agency, and the State Security Service.[45] The NSA Act provides that the State Security Service is responsible for the protection and preservation of all non-military classified matters concerning the internal security of Nigeria,[46] while the Defence Intelligence Agency is responsible for the protection and preservation of all military classified matters concerning the security of Nigeria, both within and outside the country.[47] According to Enonche, the NSA Act, which is entrenched in Section 315(5) (c) of the 1999 Constitution, continues to exist and function side by side with the FOIA. This is due to the fact that the procedure for its repeal, as contained in Section 9(2) of the Constitution, is yet to be complied with. The concern raised by the continued potency of this Act lies in the criteria for categorizing matters as 'classified'. The question that readily comes to mind is this: what is the yard-stick for determining whether a matter is classified? Section 2(5)[48] of the NSA Act relies on the definition of 'classified matter' given in Section 9 of the Official Secrets Act:

> Any information or thing which, under any system of security classification, from time to time, in use by [the government] or by any branch of the 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.

This broad definition fails to provide the criteria for ascertaining that the disclosure of a matter would be prejudicial to national security. Whatever be the criteria for this categorization, it is hoped that with the advent of the FOIA, care will be taken to ensure that such categorizations are narrowly defined and are compatible with democratic principles.[49]

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[44] Cap. N74, Laws of the Federation of Nigeria, 2004.
[45] Section 1, NSA Act.
[46] Ibid. Section 2(3)(b).
[47] Ibid. Section 2(3)(b).
[48] This sub-section states as follows: "in this section 'classified matter' ... me meaning assigned thereto in Section 9 of the Official Secrets Act".
[49] As previously explained above (see the sub-paragraph on ex ... n disclosure).

Opportunities Created by the FOIA

According to Roberts (2002),

> FOI laws influence the balance of power within political systems. Opposition politicians, journalists or advocacy groups are better able to hold governments to account, and more successful in exerting influence within the policy process, if they can obtain documentary evidence that reveals the structure of internal debates over policy.

Examples of opportunities that the FOIA will create as checks and balances to government activities, obtained from 23 Reasons for the FOIA by the Right To Know (R2k, 2011), include:

- The general public can now learn how budgetary allocations to repair, provide for, or fund public utilities such as hospitals, roads, power, potable water in the community are utilized and ensure that the right persons are held accountable for none or inadequate performance;
- Budget administrators can more efficiently track where funds in the budget have been allocated and how much has actually been spent;
- Grants administrators will have access to how research grant allocations to academic and other research institutions are made and disbursed.
- Contractors bidding for contracts can determine whether the award of such contracts followed due process stipulated in existing public procurement processes, regulations and legislations;
- The general public can monitor the level of service delivery from government and their effectiveness in all areas including social policies, basic education, poverty eradication programmes and policies; and among others,
- Journalists and the Press can ensure that they do factual reporting, eliminating a culture of rumour and conspiracy; and encouraging informed and healthy public debate.

The above demonstrates that a proper implementation and usage of the FOIA will empower members of the public to check government activities and to ensure that due process is followed in the act of governance. The FOIA will also empower individuals to demand the fulfilment of their human rights and keep government under pressure to perform optimally and in accordance with its mandate.

Public Response to and Implementation of the FOIA so Far

Usage and Implementation

Within two months of its enactment, the FOIA was put to the test in a suit initiated by the Executive Director of the Committee for the Defence of

Human Rights (CDHR) Olasupo Ojo, suing for himself and on behalf of the CDHR against the Economic and Financial Crimes Commission (EFCC). In this case, the former applied for the leave of court to apply for a judicial review of the refusal of an application for information by the EFCC (Ketefe 2011). The Court in its ruling, dated 18 July 2011, granted the leave to apply for a judicial review and on 1 March 2012 granted an order of mandamus against the EFCC, requiring it to give CDHR the requested information.[50] It therefore took nine months from the beginning of the case to get this order, which underlines the point raised about delays in the Nigerian judiciary. But bearing in mind the history of adjudication in Nigeria, getting this order in nine months seems to suggest that the courts are sensitive to the provision of Section 21 of the FOIA, which urges it to summarily consider FOI cases.[51]

Some governmental agencies[52] were assessed as to level of implementation of the FOIA. At the time of the survey in July 2011, it was discovered that there had been no intentional steps taken yet in line with the implementation of the FOIA—publishing minutes of meetings, dedicating special units to ease access to information—and the rule of sacredness of official information was still binding and entrenching a culture of secrecy.[53] In addition, programs for the training of public officers as demanded by Section 13 of the FOIA have yet to commence. However, this is changing with the public circular issued by the Attorney General of the Federation (AGF) to all ministries, departments, and agencies of government (MDAs) on 29 January 2012 (published in the *Daily Trust* newspaper on 9 February 2012) and two follow-up circulars issued by the Head of the Civil Service (HoS) of the Federation on 31 January and 1 March 2012 respectively, also urging compliance with the FOI law, including directing MDAs to establish FOI compliance units in their respective institutions and to establish intra-ministerial FOI implementation committees. The HoS also has a road map for FOI implementation and an accompanying work-plan.

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[50] First-hand information received from the law firm of Bamidele Aturu & Co, counsel to the claimants, on the 31 August 2011.

[51] For details of the allegation, see EFCC media and publicity unit, 'Anti-Graft War: EFCC Accuses CDHR of Compromise', June 2011.

[52] Public bodies contacted are Lagos State Ministry of Water Front, Federal Ministry of Finance, and Ekiti State Ministry of Finance.

[53] A discussion with several journalists also indicated that it was too early to conduct a survey on the workings of the FOIA.

Awareness Creation and Public Enlightenment

On 21 July 2011, a town-hall meeting was organized by the Newspaper Proprietors' Association of Nigeria (NPAN), tagged 'For the Public Purpose: Deepening the FOIA'.[54] The agenda of the meeting was to critically analyse the FOIA, create enlightenment as regards its purpose, and discuss possible ways of deepening it in order to make the best use of it, and at the same time to encourage the public to exercise its right to information as guaranteed by the Constitution and protected by the FOIA. It is only through the exercise of this right by members of the public that the level of transparency necessary for open and accountable governance can be achieved.

During this meeting, one participant, Professor Wole Soyinka (Nobel laureate), made a call to President Jonathan to take advantage of the provisions of the FOIA by initiating an enquiry into the health status, hospitalization, and death of the late President Yar'Adua.[55] Despite widespread societal interest, this request for information is yet to be considered. We concede that such requests should not be made in a forum that gives the impression of playing to a public gallery; written requests need to be made.

These developments represent a step in the right direction as they demonstrate the readiness of some members of the public to make use of the law. However, the awareness campaigns need to be intensified for maximum impact.

Enactment of State FOI Laws

Another question which affects the implementation of the FOIA at the level of state governments is whether the law is applicable to states within the federation or whether its scope is restricted to federal government and federal institutions. Nigeria comprises 36 states and a Federal Capital Territory (FCT, Abuja). A popular opinion is that the states are entitled to enact their own state laws because part of the scope of the FOIA falls within the concurrent legislative list. This view is further strengthened, for example, by the recent enactment of the Ekiti State Freedom of Information Law.[56]

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[54] See Public invitation: *The Guardian*, 15 July 2011, 18.

[55] 'Test FOI with probe of Yar'Adua's illness', *The Punch*, Friday, 22 July 2011, 6. See also *The Guardian*, *supra* Note 32.

[56] 'Ekiti domesticates FOI as Fayemi signs 8 bills into law', *Business Day*, 4 July 2011. Available at:

However, the FOIA implements two distinct and exclusive constitutional mandates of the National Assembly. First, Item 60(a) of the 2nd Schedule, containing the exclusive legislative list, empowers the National Assembly exclusively to make laws for the promotion and enforcement of the Fundamental Objectives and Directive Principles of State Policy in Chapter II of the Constitution. Section 14(2)(a), Chapter II of the Constitution provides that "[s]overeignty belongs to the people of Nigeria from whom government derives its power and authority". Section 14(2)(c) also requires that "the participation by the people in their government shall be ensured". The FOIA implements these constitutional responsibilities of the National Assembly (Right to Know, 2011).

In addition, Item 4 of the Concurrent Legislative List, contained in Part II of the 2nd Schedule to the Constitution, provides that the National Assembly may make laws for the Federation or any part thereof with respect to the archives and public records of the Federation. However, Item 5 provides that a House of Assembly may, subject to Item 4, make laws for that state or any part thereof with respect to archives and public records of the government of the state.

There have been several instances[57] where the courts have been called upon to intervene in situations where both the state legislators and the federal legislators have enacted laws which exist side by side on concurrent matters such as this. And in instances where the state and federal laws do not contradict each other,[58] the courts have been quick to apply the doctrine of covering the field. For instance, in the landmark case of *Attorney General* (*Ogun State*) *v Attorney General* (*Federation*),[59] Fatayi Williams (Justice of the Supreme Court) stated as follows:

> It is, of course, settled law, based on the doctrine of covering the field ... that if Parliament enacts a law in respect of any matter in which both Parliament and a Regional Legislature are empowered to make laws, and a Regional Legislature enacts an identical law on the same subject matter, the law made by Parliament shall prevail. That made by the Regional Legislature shall become irrelevant and therefore, impliedly repealed.

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http://www.businessdayonline.com/NG/index.php/news/latest/24053-ekiti-domesticates-foi-as-fayemi-signs-8-bills-into-law (accessed 11 June 2012).

[57] See the following cases: Attorney General of Abia State v Attorney General of the Federation (2002) 17 Weekly Reports of Nigeria, p. 1; Rector Kwara Poly v Adefila (2007) 15 Nigerian Weekly Law Report, [part 1056], p. 42.

[58] In the event of any contradictions between a federal and a state law in respect of a concurrent matter, Section 4(5) of the 1999 Constitution, which provides that the law made by the national assembly shall prevail, becomes applicable.

[59] [1982] 1–2 Supreme Court Cases, p. 13.

The Court of Appeal reiterated this position in the case of *Rector, Kwara Poly v Adefila.*[60] Thus, the States need not invest additional legislative resources in the enactment of state FOI laws. The federal legislation has sufficiently covered the field (Mowoe 2003), and each state government should implement the FOIA.

Challenges for the Implementation of the FOIA

The FOIA, like almost all enactments, is subject to certain challenges which, if not adequately and promptly tackled, may impede the implementation of the law. Some of these challenges include:

Misconception of the FOIA as Press Law

The law is widely viewed and even sometimes referred to as a press law, and more so in light of the fact that during the campaign for its enactment, journalists were seen to be at the forefront of the campaign.[61] Public appreciation of the purpose of the FOIA is somewhat limited by a skewed perception that the press/media should spearhead the exercise of the right to information.

Attitude of Courts

Bearing in mind that the Act defines 'public institutions' to include legislative, executive, judicial and administrative bodies, and that the Nigerian Judiciary is not totally independent of the legislative and executive arms of government, there are potential tests for the judiciary:

- How can judges, who are appointed by the legislative and executive arms of government,[62] be truly independent of these to the extent that they will boldly order such bodies to release public documents in the event of an unlawful refusal of an application for access to information?
- How will the judiciary treat applications for information that might expose corrupt practices in the judicial system? The PCC is relevant in this case, since under its enabling legislation it is specifically empowered to investigate administrative infractions in the judiciary. Administrative

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[60] (2007) Nigerian Weekly Law Report, [part 1056], p. 42.

[61] Personal communication with Bola Agunbiade, Senior Special Assistant to the Governor of Lagos state on Public law and Constitutional Matters, 1 August 2011.

[62] See Sections 231, 238, 250, 256 and 271 of the 1999 Constitution, for provision relating to the appointment of Judges.