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Periscoping the global concern for freedom of Information and the peculiar Nigeria challenges

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Abstract
Globally, access to public information is a pre-condition for good governance and sustained fight against corruption in public life. This is usually achieved through a clear legal framework which supersedes existing inconsistencies and authorizes openness. Such a law enables the balancing of the narrower private interest to shield information as against the public's right to know. Freedom of information legal regimes exert a tension on governance as public bureaucracy and the routine acts of governance predispose public officials to traditionally protect information and records unless these are certified for disclosure. Achieving such a paradigm shift entails more than new legislation. Necessary political will as well as the provision of necessary institutional and infrastructural support are necessary to enable widespread compliance. It is in the light of these irreducible minimum standards that the Freedom of Information Act, 2011 applicable in Nigeria is examined. This article placed reliance on doctrinal method of research to contend among other things that the Freedom of Information Act, 2011 applicable in Nigeria despite its shortcomings provides a practical framework for openness in government although.

Keywords: implementation; child adoption; legal implication

Introduction

The United Nations Principles of Freedom of Information as espoused in 2001, include maximum disclosure of any information requested, as well as, the obligation to publish information for public perusal and scrutiny [1]. The promotion of open Government is another principle. This provides that the scope of exceptions to the coverage of the law should be limited and must be clearly and narrowly drawn [2]. There must be entrenched processes to facilitate access. There must be ease of access. Institutions must make available information in a manner that it can be easily understood by any member of the public. Another important principle is that disclosure takes precedence over other conflicting legislations. The case of access to assets declarations of public officers may serve as an acid test in this regard as there is a case pending in court against the Code of Conduct Bureau over access to Declarations [3].

A basic underlying principle behind most freedom of information legislation is that the burden of proof falls on the body *asked* for information, not the person *asking* for it [4]. The person making the request does not usually have to give an explanation for his actions, but if the information is not disclosed a valid reason has to be given [5].

Fundamental Issues Affecting Freedom of information in Nigeria [6]

Over 90 countries around the world have implemented some form of freedom of information legislation. Sweden's Freedom of the Press Act of 1766 is the oldest in the world. Most freedom of information laws exclude the private sector form their jurisdiction. Information held by the private sector cannot be accessed as a legal right. This limitation entails serious implications because the private sector is performing many functions which were previously the domain of the public sector. As a result, information that was previously public is now within the private sector, and the private contractors cannot be forced to disclose the information [7]. Other information might be withheld to protect various interests which are allowed for by the Act. If this is the case, the pubic authority must give reasons for withholding such information.

According to Bard [8], unless there's a good reason, the organization must provide the information within seven (7) working days. In a democratic world, the public is expected to have access to information particularly, through the media not only on how they are governed but also on anything that is of interest to the individual or group. However, there are always limitations as to what can be accessed in the operation of Freedom of Information, even in developed countries where Freedom of Information Act has been in practice for long.

In Nigeria, the case is different as the Freedom of Information Act contains more exemption sections and clauses than sections that grant access to information [9]. This means that some mischievous public officers can use these sections for unjust and mischievous purposes [10]. Other fundamental issues that will affect the Freedom of Information Act are inconsistent laws that are still fully operational in Nigeria. For example, we have the Official Secrets Act, the Evidence Act, the Public Complaints Commission Act, the Statistics Act and the Criminal Code; which all aim at suppressing the free flow of information. All these laws may affect the effectiveness of the Act in the long run as some mischievous public officers can use these aspects of the Acts for their selfish purposes just like what happened in the United Kingdom Parliament in 2009 [11].

The Freedom of Information Act (Herein referred to as Act) came into force on 28th day of May, 2011. Under Section 1 of the Act, all government or public situations are required, subject to certain exceptions, to disclose information

pursuant to a request by any person. In addition, public institutions must put in place adequate machinery for record keeping and publish information about itself as specified under section 2 of the Act. The Act defines "public institutions" as all authorities whether executive, legislative or judicial agencies, ministries, and extra-ministerial departments of the government, together with all corporations established by law and all companies in which government has a controlling interest, and private companies utilizing public funds, providing public services or performing public functions.

The right of access to information derives from the guarantee of freedom of expression found in Article 19 of the Universal Declaration of Human Rights 1948, Article 9 of the African Charter on Human and Peoples Rights,1981 and in the case of Nigeria is to be found in Section 39 of the Constitution of the Federal Republic of Nigeria, 1999 (As amended). Section 1 of the Act also guarantees a right of access to information whether written or not which is in the custody of a public agency or official. An applicant under this Act needs not demonstrate any specific interest in the information being applied for and the right is enforceable by summary proceedings in court.

In discussing the topic, the writers will address the key and critical areas in which proactive and resourceful action is required on the part of public officers. These areas area:

Obligations of the Public Institutions

Records keeping, classification and organization

The obligation to disclose information is both proactive and responsive. A public institution must organize its records in a manner that makes them accessible to the public as well as publishing information using multimedia formats i.e print, electronic and online. It is the duty of the officer with the assistance of appropriate units in an agency to generate a data map or guide which contains information on how and where certain records are kept [12]. Such information relates to administrative, management and operational records such as: (a) description of the organization and responsibilities of the institution, including details of the programme and functions of each division, branch and department of the institution;(b) a list of all manuals used by the employees;(c) a description of documents containing final opinions including concurring and dissenting opinions as well as orders made in the adjudication of cases; (d) Documents containing Statement and interpretation of policy which have been adopted by the institution, the names, salaries, titles, and dates of employment of all employees and officers of the institution; the name of every official and the financial records of voting in all proceedings of the institution;

Responding to requests

Public institutions are required to answer requests for information promptly. They are also to practice good records management to ensure that information is identified and retrieved. The kinds of record covered by the Act are all recorded information held by, or on behalf of a public institution. The legislation applies regardless of the age, format, origin or classification of information. However, certain records are exempted. An application under the Act would generally be in writing. However, illiterate or disabled applicants can still apply for information under the Act by making an oral application for information to any public institution.

The response process arising from section 1 of the Act entails the under mentioned procedural stages [13]:

a. Stage 1 - Read and analyze
b. Stage 2 - Record/Track
c. Stage 3 - Determine responsibility
d. Stage 4 - Retrieve
e. Stage 5 - Consult or refer to others
f. Stage 6 - Redact or separate
g. Stage 7 - Review
h. Stage 8 - Reply
i. Stage 9 - Publication

Refusal of Access To Information

Section 4 of the Act places three (3) obligations on a public institution. These are (a) An applicant is entitled to receive the record or information that he has applied for; (b) If the public institution considers that the application should be denied, it should give a written notice ("Refusal Notice") to the applicant informing him that access to all or part of the requested information will not be granted if it's relying upon one or more of the exemptions contained in sections 11, 12, 14, 15, 16, 17 and 19 of the Act; (c)the reasons for this refusal must be stated.

No Obligation to disclose where Exemptions Apply

The disclosure obligation under the Act is not absolute. The Act provides exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests. Exemptions under the Act are generally of two types – absolute and qualified. By virtue of section 26, the Act does not apply to:

a. Published material or material available for sale to the public;
b. Library or museum material made or acquired and preserved solely for public reference or exhibition purposes; or
c. Material placed in the National Library, National museum or non-public section of the National Archives of the Federal Republic of Nigeria on behalf of any person or organization other than government or a public institution.

However, qualified exemptions apply to these areas:

a. Injury to International affairs and the defence of Nigeria as stated in section 11 of the Act;
b. Protection of ongoing or proposed law enforcement measures, investigations and proceedings as provided by section 12 of the Act;
c. Protection of personal information save where the person to whom the information relates consents or where the information is publicly availablein section 14 of the Act;
d. Protection of commercial interests, for example, trade secrets, third party interests in negotiation, environmental surveys or tests or bids for a tender as stated in section 15 of the Act; (e) Preservation of professional and other privileges under the law, the public institution has a discretion to deny or disclose in section16 of the Act;
e. Research or course materials prepared by faculty members in section17of the Act;

f. Exemption in relation to certain records e.g. test questions or examination or scoring scheme; building plans of private and designated security installations; library circulation under section19 of the Act.

In all these cases of qualified exemptions, the public institution shall disclose the information requested for it (i) disclosure would be in the public interest and (ii) if the public interest in the disclosure clearly outweighs the injury to any of the interests outlined in sections 11-12; 14-1 of the Act. Where the public institution determines that disclosure will not be in the public interest or that the public interest in favour of disclosure does not sufficiently out-weigh the public interest to safeguard the interests outlined in any particular case covered by the above provisions, it may:(a) refuse the request in accordance with section 7 of the Act; or (b) Consider whether there is some non-exempted part of the information covered by the request which can be severed from the exempted part.

The decision of the public institution is not final as section 20 of the Act provides that an applicant may apply to court for judicial review of the decision within 30 days [14]. The onus of proving that information falls within any particular exemption rests on the public institution.

The Doctrine of Public Interest

The first point to note under the exemptions scheme of the Act is that there must be some public interest element in the disclosure. This can be explained as disclosure which is of benefit to the public as distinct from arousing public curiosity or amusement. Thus, while it is in the public interest for example that hospitals are evenly spread the fact that a local celebrity is receiving treatment in a hospital is probably not. The second point is that there can be no room for generalizations. Every case has to be determined on the peculiar circumstances and the conflicting interests weighed. The issue requires delicate balancing of the public interest in favour of disclosure and the public interest against it.

It is noteworthy that the competing interests to be considered are the public interest favouring disclosure against the public, rather than private interest favouring the withholding of information. There will often be a private interest in withholding information which would reveal incompetence on the part of or corruption within the public authority or which would simply cause embarrassment to the authority. However, Obiaraeri [15] argues that the provisions of the Freedom of Information Act, 2011 if properly harnessed will promote transparency and good governance being that corruption thrives in secrecy. The paper accepts with the proposition and contends that open Government requires that government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculations or abstract fears**.** Of course, there will be many occasions when public and private interests coincide. Even where private interests are being protected as in section 14 of the Act, there is clearly a public interest element involved i.e. that individual rights within the framework of constitutional order be protected. It may sometimes be argued that information is too complicated for the applicant to understand or that disclosure might misinform the public because it is incomplete, for instance because the information consists of a policy recommendation that was not allowed. Neither of these are good grounds for refusal of a request. If an authority fears that information disclosed may be misleading, the solution is to give some explanation or to put the information into a proper context rather than to withhold it.

It is submitted that information or disclosure officers should in rendering a decision on a request, demonstrate that they have considered and carefully weighted these interests before coming to a decision. In this regard, it is desirable that every decision should show: (a) All the circumstances that have been considered; (b) The specific public interest against disclosure in the particular case and the weight accorded it; (c) The specific public interest in favour of disclosure and the weight accorded it; and (d) The considerations given to the timescales in terms of necessity and proportionality and whether there are circumstances for severance.

The following are illustrations that can be identified as public interest factors that would encourage the disclosure of information and which have to be balanced against the considerations of public interest captured in the qualified exemptions aforesaid: (a) Furthering the understanding of and participation in the public debate of issues of the day. This factor would come into play if disclosure would allow a more informed debate of issues under consideration by the Government or a local authority: (b) Promoting accountability and transparency by public authorities for decisions taken by them. Placing an obligation on authorities and officials to provide reasoned explanations for decision made will improve the quality of decisions and administration; (c) Promoting accountability and transparency in the spending of public money. The public interest is likely to be served, for instance in the context of private sector delivery of public services, if the disclosure of information ensures greater competition and better value for money. Disclosure of information as to gifts and expenses may also assure the public of the personal probity of elected leaders and officials; (d) Allowing individuals and companies to understand decisions made by public authorities affecting their lives and, in some cases, assisting individuals in challenging those decisions; (e) Bringing to light information affecting public health and public safety. The prompt disclosure of information by scientific and other experts may contribute not only to the prevention of accidents or outbreaks of disease but may also increase public confidence in official scientific advice.

Whistleblower Protection

Section 27 of the Act is a provision designed to protect whistleblowers i.e. insiders who are public officers from adverse consequences in disclosing certain kinds of official information without authorization. It seeks to achieve this by protecting: (a) a public office who discloses in good faith any information pursuant to the Act from civil or criminal proceedings for any consequences that flow from a disclosure, or for the failure to give any notice required under the Act, if care is taken to give the required notice; (b) receivers and users of such information from any civil or criminal proceedings; and (c) a public officer from suffering any adverse consequence under the law, for example under the Official Secrets Act, where the officer without authorization discloses information which he reasonably believes to show: (i) violation of any law, rule or regulation;(ii) mismanagement, gross waste of funds, and

abuse of authority; or (iii) substantial and specific danger to public health or safety.

The provision specifically excludes the operation of the Official Secrets Act in these circumstances, and clearly demonstrates a definite paradigm shift in the management of and access to public records. It should follow from this, that certain provisions of the Federal Government Public Service Rules, extant circulars and indeed corporate Codes of Conduct that classify records as "secret" or "official" without regard to the public interest element that manifests in the exemptions under the Act should be reviewed. In specific terms Rules 03041 – 030418 which seek to prohibit or restrict the disclosure of classified records by public servants require urgent review so as to accommodate the exemptions in the Act as well as provide guidance for whistleblowers.

By virtue of Section 9 of the Official Secrets Act, a "classified matter" means any information or thing which, under any system of security classification from time to time in use 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. What Section 27 of the Act aforesaid, has done is in fact to re-define "classified matter" for the purpose of disclosure of information in terms of the exemptions referred to under the Act. Public officers should therefore ensure that before designating any record as classified, such must fall under one or more of the provisions referred to in section 28 of the Act, otherwise the classification will in accordance with section 28(2) of the said Act be ignored.

The Relationship Between Freedom of Information Act and Official Secrets Act

There is need for a proper understanding of the relationship between the provisions of the Official Secrets Act [16] and the Freedom of Information Act, 2011. The former is concerned with among other things securing public safety by restricting the disclosure of classified or security related information, while the latter seeks to make public records and information more freely available, in a manner consistent with the public interest and the protection of personal privacy.

It is important to observe that the Freedom of Information Act did not repeal the Official Secrets Act. A substantial part of the Official Secrets Act is still very much in operation, for example the provisions on: (a) unauthorized photography or recording; (b) unauthorized entry into protected places under section 2 of the Act; or (c) The powers of the President during a period of emergency to prohibit any person from photographing, sketching, or recording such things designed or adapted for use for defence purposes as stated in section 3 of the Act.

However, any inconsistency between the Freedom of Information Act and the Official Secrets Act should ordinarily be resolved in favour of the Freedom of Information Act in accordance with the well-known cannon of statutory interpretation that a latter statute prevails where there is inconsistency between two statutes. This is put beyond controversy by virtue of sections 1 and 28 of the Freedom of Information Act. Section 1 in particular establishes the right of any person to access or request information which is in the custody of any public official or institution notwithstanding anything contained in any other Act.

Another related provision is section 28 of the Freedom of Information Act which like section 27 of the said Act limits the operation of the Official Secrets Act, by providing that the fact that information is classified within the meaning of the Official Secrets Act shall not prevent disclosure under the Freedom of Information Act subject to the latter Act's provisions on exempted information under sections 11, 12, 14-17 and 19 of the Act. The implication of these provisions is to limit the scope of the Official Secrets Act which prohibits the disclosure by public officers of a classified matter.

Challenges to the Implementation of Freedom of Information Act, 2011.

Before concluding this paper there is need to discuss the main challenges to the implementation of the Freedom of Information Act,2011 in Nigeria. The first is the lack of awareness or will on the part of public officers to shift from a culture of secrecy tone of transparency. Also since its enactment as part of the law of the Federal Republic of Nigeria, it is now clear to many observers that the Act contains some inherent deficiencies. The information legislation contains more exemption sections and clauses than sections that grant access to information, a situation which have been exploited by some public officers for mischievous purposes. For instance, only sections 1 and 3 of the Act grant access to information as many as ten sections of same Act, that is sections7, 11,12,14,15.16,17,18, 19 and 28 are meant to deny the public access to information. This is basically the reason why some civil liberty advocates effectiveness of the law. Exceptions should ordinarily be clearly and narrowly drawn and subject to strict "harm" and public interest tests.

Furthermore, the time limit provided for granting or refusal to grant requests as provided in section 4 of the Act is seen by keen observers as to short and unrealistic, especially when one considers the unnecessary lengthy procedures associated with government offices in Nigeria. As expected, several government offices and public officials have used this defect as an excuse to deny public information to applicants. For instance, one of the first victims of this unreasonable time limit for granting request for public held record or refusal to grant such request was the Socio-Economic Rights and Accountability Project [17]. The group requested for information on how the sum of N126 trillion was released for fuel subsidy instead of the initial sum of N250 billion allocated for fuel subsidy in the year 2011; this request was challenged in the law court by the Accountant General of the Federation on the grounds that the request was filed "out of time" stipulated by the Act.

Another challenge to the full implementation of the FOI Act is the existence of subsisting laws which conflict with the information law, notably the Official Secrets Act, the Evidence Act, the Public Complaint Commission Act, and others. These laws are contrary to the provisions of the Act especially Section 28 of the Act which impliedly provides for the amendment or outright repeal of such conflicting laws. The extant culture of secrecy that exists in the public service which is premised on the Official Secrets Act and Civil Rules are yet other obstacles to the fruitful implementation of the Act. The culture of secrecy in government makes the notion of public scrutiny an alien concept. Government officials in Nigeria like most other African countries are obliged upon appointment to be

guided by "various Oaths of secrecy under which they undertake not to disclose any information which comes to them in the course of the performance of their duties [18]. After decades of operating official secret laws, there has emerged an iron-cast culture of secret among civil servants and public officials and it has become extremely difficult for many of them to change.

There is also the challenge of low level of awareness among members of the Nigerian public. This has adversely affected the implementation of the Act since it was signed into law. Most ordinary Nigerians do not readily see a link between Act and their daily struggles to work out a living. They therefore do not see the Act as platform that could contribute to their wellbeing. Hence, there is a need for massive and effective public enlightenment programme to educate both those in power or authority and the public service as well as the larger society about the role the Act could pay in the deepening of human rights and development of the Nigerian society [19].

Another real challenge of full implementation of the Act is inadequate or absence of record creation, record keeping organization and maintenance of document. The Freedom of Information Act cannot be functional until public offices and officials in Nigeria develop a system and habit of official record creation, keeping and organization [20]. Yet, another challenge to the functional operation of the Act is Section 308 of the 1999 Constitution of the Federal Republic of Nigeria. This section gives immunity to Nigerian President, governors and their deputies from arrest, prosecutions, and imprisonment. As expected, it has been very difficult to access information from these public offices. The benefiting officials of the immunity clause have severally hide under this section to commit all sorts of anti-public atrocities as well as declined inquiries by the public about happenings in these offices. And inall instances, the law has been powerless to check the excesses of these political office holders.

Conclusion

It is also noteworthy that the institutional framework for implementation of the Freedom of Information Act is skeletal as compared to other countries. Whereas under the Nigerian Act complaints arising from a refusal of a request lies to the courts, comparable legislation in the UK for example provides for the exhaustion of administrative channels, i.e. Information Commissioner – Information Tribunal, before complainants can go to the court. There is a risk of swamping the courts with complaints related to access to information. The Act needs to be strengthened by clearer and pragmatic provisions. There is need for an institutional mechanism for addressing complaints, and for stronger regulatory and oversight powers in addition to realistic timelines.

Legislative review should in addition to the above, consider the following areas: (a) Seven (7) day period stipulated under section 4 of the Act should be increased to 30 days with an extension period of 30 days: (b) Requests should be in writing, but there should be facility to assist illiterates, blind and disabled persons to access information through transcription by a third party; (c) There is need to prescribe forms for making requests for information and also responses from public institutions;(d) There should be necessity to clarify the specific nature of oversight powers granted at the Attorney General under section 29 (5) – (8) of the Act. There is need to prescribe regulations to enforce compliance with the Act apart from prescribing procedure and timeless for reporting compliance; and (e) Exemptions should cover inchoate or deliberative phases of the policy making process.

References

1. In Nigeria, the Ministry of Finance has blazed the trail in this regard with the publication of monthly allocations to all tiers of Government in newspapers and the internet. The Federal Capital Territory also publishes information about land allocations and sale of Government properties, while the Federal Ministry of Information advertises information about tenders through the monthly Tenders Journal. For further reading, see N.O. Obiaraeri, *Still on Human Rights*(Global Press Limited,2012) 108-149.
2. They must also be subjected to strict 'harm' and 'public interests' tests.
3. Costs too are important; individuals should not be deterred from making requests for information by excessive costs. Meetings of public bodies are also expected to be open to the Pubic.
4. See section 24 of the Freedom of Information Act, 2011 which states that in any proceeding before the court arising from an application under section 20, the burden of establishing that the public institution is authorized to deny an application for information of part thereof shall be on the public institution concerned.
5. See Freedom of Information Laws Country available at *http:www.en.wikipedia.org/.../*Accessed 25th August, 2021.
6. In discussing the Act and its challenges, several questions need to be addressed. Should the public know everything? If the answer to the above question is no, what the exceptions? Are there other laws or regulations in place which prevent public institutions to disclose details of their activities, operations and business?
7. See also the Freedom of Information by Country available at *http:www.en.wikipedia.org/.../Accessed* 25th February, 2021.
8. See F. Bard, FOI in the Best Global Practices. A conference paper delivered at the Corporate Headquarters, Union Bank Plc Lagos. (20th February, 2011)
9. For example, see sections 14-19, Freedom of Information Act, 2011, see also K. Odunta, SimplifyingThe FOI Act,Next Newspaper,6th June,2011,available at htt 234nextnews.com,Accessed on 20th August,2021.
10. For instance, only Sections 1 and 3 grant access to information; but as many as ten sections (Sections 7, 11, 12, 14, 15, 16, 17, 18, 19 and 26) are meant to deny the public access to information.
11. One aspect of the Act that worries many stakeholders and which might disturb effective implementation of the Act are the exemptions it guarantees. The Freedom of Information Act is replete with more exception sections and clauses that tend to deny access to information than those that grant it, a situation which may be exploited by public servants to lock out information seekers. For example while only two sections (sections 1 & 3) deal with access to

information, ten (7, 11,12,14,15,16,17,18,19 and 28) deny the public access to information.
12. See J. J. Linzand A. Slepan: Problems of Democratic Transition and Consolidation: Southern Europe, Southern America (The John Hopkins University Press, 1995).
13. See also the relevant Revised Guidelines for the Implementation of the Freedom of Information Act,2011 by theFederal Ministry of Justice.
14. See Auchi Polytechnic V. Okuoghae (2005) 10 NWLR (pt. 933) 279 @ 293.
15. Obiaraeri (No.1) 145.
16. Cap 03 Laws of the Federation of Nigeria, 2004.
17. Hereinafter abbreviated and referred to as “SERAP”. This is a non-governmental organization with the primary objective of promoting accountability and transparency in the public and private sectors.
18. F Ojo. “Freedom of Information: Current Status, Challenges and Implications for News Media” 2010. available at www.unesco.com (Accessed on 27th day of August, 2021).
19. *Ibid.*
20. *Ibid.*