

OBSTACLES TO THE IMPLEMENTATION OF THE FREEDOM OF INFORMATION ACT, 2011 IN NIGERIA

Abstract

The Freedom of Information Act is the law that gives citizens the right to access information from government institutions and agencies. It is often described as the law that keeps citizens in the know about their government. This article examines the Freedom of Information (FOI) Act, 2011 in Nigeria and the changes that have been made since its enactment. The article reviews some recent cases on the FOI Act to underscore the efforts of the civil society organizations to use the Law as well as the conflicting judgments of the High Court on the Act. It highlights some of the obstacles to the effective implementation of the FOI Act, particularly non-compliance by government or public officials. The article recommends strategies to overcome these challenges and concludes that with political will, the objectives of the FOI Act will be realized.

Keywords: *Freedom of information, access, records, secrecy, Law, expression*

1. Introduction

Freedom of information, also known as access to information refers to a citizen's right to access information that is held by the state. It is the ability of citizens of a country to have free access to information enabled by legislation.¹ Freedom of information is an important element of the international guarantee of freedom of expression which includes the right to seek and receive, as well as to impart information and ideas.² The right to information is a fundamental human right enshrined in Section 39 (1) of the 1999 Constitution of the Federal Republic of Nigeria as amended which provides that 'every person shall be entitled to freedom of expression including freedom to hold opinions and to receive and impart ideas and information without interference'³ Similarly, Article 19 of the *Universal Declarations of Human Rights* provides that: 'Everyone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'⁴ Article 9 of the *African Charter on Human and Peoples Rights*, provides that 'every individual shall have the right to receive information; (2) every individual shall have the right to express opinions within the Law.'⁵ The African Commission on Human and People's Rights' adopted a *Declaration of Principles on Freedom of*

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¹ Omotayo, Funmilola Olubunmi, (2014), 'The Nigeria Freedom of Information Law: Progress, Implementation Challenges and Prospects,' Library Philosophy and Practice (e-journal), Paper 1219 at <http://digitalcommons.unl.edu/libphilprac/1219> accessed August 10, 2016.

² N. O. Obiaraeri, 'Access to Public Information in Nigeria- Celebrating with Caution', *Confluence Journal of Jurisprudence and International Law*; Vol.4 No.2, 2011, p.1.

³ The Constitution of the Federal Republic of Nigeria, 1999, as amended, (hereinafter CFRN) Section 39(1)

⁴ The Universal Declaration of Human Rights (UDHR), 1948; Article 19. See also The International Covenant on Civil and Political Rights (ICCPR), 1966- guarantees the right to freedom of opinion and expression on very similar terms with UDHR

⁵ The African Charter on Human and People's Rights, 1981; Article 9. See Obiaraeri, supra note 2.

Expression in Africa, stating: ‘Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.’⁶

Although the Declaration establishes the right of everyone to access information held by public institutions, it is apparent from the above text that the right only exists subject to *clearly defined rules established by law*. This reinforces the necessity for the adoption of Freedom of information laws which contain such clearly defined rules.⁷ While this right is a component of the broader freedom of expression as guaranteed in the constitution and the international instruments, it is not simply the converse of the former, but a separate freedom of its own.⁸ An individual is only able to enjoy the right to information when they are free to access relevant information. As such access to information is the practical implementation of the right to information.

A number of paradigmatic changes sweeping the globe have undoubtedly contributed to growing acceptance of the right to information. These include the transitions to democracy, albeit more or less successful, that have occurred in several regions of the world since 1990.⁹ They also undoubtedly include massive progress in information technology which have changed the whole way societies relate to and use information and which have, broadly, made the right to information more important to citizens. Among other things, information technology has generally enhanced the ability of ordinary members of the public to control corruption, to hold leaders to account, and to feed into decision-making processes. This, in turn or to be more precise, in parallel has led to greater demands for the right to information to be respected.¹⁰

The International NGO, Article 19, Global Campaign for Free Expression described information as ‘the oxygen of democracy.’¹¹ Information is an essential underpinning of democracy at every level. At its most general, democracy is about the ability of individuals to participate effectively in decision making that affects them. Democratic societies have a wide range of participatory mechanisms, ranging from regular elections to citizen oversight bodies for example, of public education and health services, to mechanisms for commenting on draft policies, laws or development programs.¹² Effective participation at all these levels depends in fairly obvious ways, on access to information including information held by public bodies. Public access to government held information allows individuals to better understand the role of government and the decisions being made on their behalf. With an informed citizenry, governments can be held accountable for their policies, and citizens can more effectively choose their representatives. Knowledge is power and transparency is the remedy to the darkness under which corruption and abuse thrives.¹³ Democracy depends on knowledgeable citizenry whose access to a broad

⁶ 32ND Ordinary Session of the African Commission on Human and Peoples Rights, 17-23 October, 2002, Banjul, Gambia. At http://www.achpr.org/english/declaration/declaration_freedom_esp_en.html accessed August 10, 2016

⁷ Edetaen Ojo, ‘Freedom of Information: Current Status, Challenges and Implications for News Media,’ at <http://www.unesco.org> accessed May 18, 2017.

⁸ Obiaraeri, *supra* note 2.

⁹ T. Mendel, *Freedom of Information: A Comparative Legal Survey*, 2ed. UNESCO: Paris, p.12 at portal.unesco.org/ci/en/files/26159/12054862803Freedom_information_en.pdf/freedom_information_en.pdf. accessed June 17, 2017

¹⁰ *Ibid.*

¹¹ *Ibid.* p.4.

¹² *Ibid.*

¹³ L. Neuman, (ed.), *Access to Information: A Key to Democracy*, The Carter Center at <http://www.cartercenter.org/documents/1272.pdf>. Accessed July 12, 2017.

range of information enables them to participate fully in public life, help determine priorities for public spending receive equal access to justice and hold their public officials accountable.¹⁴

On the other hand, poor public access to information feeds corruption. Secrecy allows back-room deals to determine public spending in the interest of the few rather than the many. Lack of information impedes citizens' ability to assess the decisions of their leaders and even to make informed choices about the individuals they elect to serve as their representatives. The right to information is usually enshrined by governments in access to information or freedom of information legislation and regulations. The first access to information legislation was enacted in Sweden in 1776 when the government passed the *Swedish Freedom of the Press Act*.¹⁵ Since then, over fifty countries around the world have enacted legislation to facilitate access to records for press research and reporting and dozens of countries have legislations pending. In Nigeria, the Freedom of Information Act was passed into Law on May 28, 2011.

The aim of this article is to analyze the Freedom of information Act, 2011 in Nigeria and the changes it introduced into the Legal system. The article is divided into five parts. Part II reviews the provisions of the Freedom of Information Act, 2011 and some recent cases in Nigerian courts on the Act. Part III highlights the challenges to the implementation of the Act. Part IV recommends strategies for effective implementation of the FOI Act and Part V concludes the article. In this article, the terms 'access to information' and 'freedom of Information' are used interchangeably to describe the same type of legislation.

2. Freedom of Information, Act 2011

Historically, the Freedom of information Bill in Nigeria could be traced back to 1993 during the regime of General Sani Abacha.¹⁶ Three organizations- Media Rights Agenda (MDA), Civil Liberties Organisation (CLO) and the Nigerian Union of Journalists (NUJ) started the campaign for the enactment of FOI Act.¹⁷ President Goodluck Jonathan signed the FOI Act into Law on 28th May, 2011.¹⁸ FOI Act became a law almost 12 years after it was presented to the Legislature.¹⁹ The Freedom of Information Act contains far reaching provisions capable of transforming the culture of secrecy in governance that has, until now, been existing in Nigeria's public institutions. The cardinal purpose for which the FOI Act was passed is to enable the public to access certain government information. The Act aims to make public records and information more freely available, provides for public access to public records and information, protects public records and information to the extent consistent with the public interest and the protection of personal privacy, protects serving public officers from adverse consequences for disclosing certain kinds of official information without authorization and establishes procedures for the achievement of those purposes.²⁰ Let us examine some salient provisions of the FOT Act.

¹⁴ Ibid.

¹⁵ Omotayo, supra note 1.

¹⁶ M. A.A. Ozekhome, 'The Freedom of Information Act: The Journey So Far', p. 4.(paper delivered at the Faculty of Law, Benson Idahosa University, Benin on 30th April, 2014).

¹⁷ Ibid; see also Omotayo, supra note 1, p.4.

¹⁸ N. J. Aduba. & S. Oguche., *Key Issues in Nigerian Constitutional Law* (Abuja; Nigerian Advanced Legal Studies,2014) p.391.

¹⁹ Ozekhome, supra note 16; See also the Editorial, Daily Trust, 15th September, 2012 noting that: 'The FOI Act has a tortuous history. Long in coming, the Bill went through one of the most rigorous scrutiny of any piece of legislation in the country, surviving hundreds of amendments through both chambers of the national Assembly. It was first introduced in the National Assembly in 1999 but took more than a decade before it was passed into law.'

²⁰ The Explanatory Memorandum to the FOI Act.

Right of Access to Records

The FOI Act provides that: ‘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’.²¹ This provision means that the FOI Act is superior to and supersede the Official secrets Act.²² However, the FOI Act does not have the same effect on the National Security Agencies Act because the Act is entrenched in the Constitution and the special procedure prescribed in Section 9(2) of the Constitution for its amendment seems to be inapplicable in this case.²³ Therefore any person irrespective of age, race gender etc. has the right to access or request information, whether or not in a written form, in the custody or possession of any public official, agency or institution. The FOI Act further relaxes the tenuous requirement of *locus standi* by providing that an applicant need not ‘demonstrate any specific interest in the information or record being applied for.’²⁴ According to Obiaraeri, ‘the applicant’s interest may be for academic, professional, commercial or private reasons or no reason at all. It may be on a ‘need to know’ basis since it is often acknowledged that information is power.’²⁵ The Act effectively gives the ‘right to know’ to every Nigerian. The Act also makes provision for persons with disabilities or educationally challenged to access information: by making their application through a third party.²⁶

Essential Records

The FOI Act makes it compulsory for public institutions to keep and maintain records of their activities.²⁷ This is meant to enable public access to these records and thus encourage transparency.²⁸ The Act requires a public institution to make available to the public on its own initiative sixteen (16) different heads of information.²⁹ This is known as ‘Proactive disclosure’. These essential records of information or documents that every citizen has a right of access in an organization include: a description of the organization and responsibilities of the institution including details of the programs and functions of each division, branch and department; lists of all classes of records under the control of the institution in sufficient detail to facilitate the exercise of the right to information; lists of all manuals used in administering the institutions programs; Orders made in the adjudication of cases; statements and interpretations of policy of the institution; Factual reports, inspection reports and studies prepared by the institution on their behalf; Information related to receipt of expenditure or other funds; documents containing the names, salaries, titles and dates of employment of all employees and officers of the institution; documents containing the rights of the state, public institutions or of any private person(s); Lists of files containing applications for any contract, permit, grants or agreements and list of reports, documents, studies or publications prepared by independent contractors for the institution.³⁰

²¹ Section 1(1) of the Act.

²² Aduba & Oguche, supra note 18, p. 393.

²³ Ibid.

²⁴ Section 2(2) of the Act; see Obiaraeri, supra note 2, p. 4. On *locus standi*, see Section 46(1) of the Constitution of the Federal Republic of Nigeria, as amended, 1999; *Senator Abraham Adesanya v. The President of the Federal Republic of Nigeria & anor.* (1981) ANLR 1; *Thomas & Ors. v. Olufosoye* (2004) 49 WRN 35; *Gani Fawehinmi v. Akilu & Anor* (1987) 1 NWLR pt. 67, p. 797. See also N. A. Inegbedion., & J. O. Odion, *Constitutional Law in Nigeria*, 2ed. (Benin, Ambik Press, 2011) p.133.

²⁵ Obiaraeri, *ibid.*

²⁶ Section 3(3) of the Act.

²⁷ Section 9 (1) & (2), *ibid.*

²⁸ Section 2(1) & (2), *ibid.*

²⁹ Section 2(3) & (4), *ibid.* This means that the public institution should disclose these information on its own without anyone having to first submit a request for them.

³⁰ Section 2(3) (a-p), *ibid.*

Response to Access Request

The FOI Act makes it mandatory on public institutions to grant access upon request for records or information within seven days. The Act provides that: Where information is applied for under this Act the public institution to which the application is made shall, subject to sections 6, 7, and 8 of this Act, within 7 days after the application is received: Make the information available to the applicant. Where the public institution considers that the application should be denied, the institution shall give written notice to the applicant that access to all or part of the information will not be granted, stating reasons for the denial, and the section of this Act under which the denial is made.³¹

Furthermore, where a public institution receives an application for access to information, and the institution is of the view that another public institution has greater interest in the information, the institution to which the application is made may within 3 days, but not later than 7 days after the application is received, transfer the application, and if necessary, the information, to other public institution, in which case, the institution transferring the application will contain a statement informing the applicant that such decision to transfer the application can be reviewed by a Court.³² Where an application is transferred from one public institution to another, the application will be deemed to have been made to the public institution to which it was transferred on the day the public institution received it.³³ In any situation, where the application is for a large number of records, the law provides an extension of an additional seven days.³⁴

Where the access to information is refused by government or public institution, the institution is required by law to give a written notice to the applicant that access to all or part of such information will not be granted. The notice of denial will state the grounds for the refusal, the specific provisions of the FOI Act that it relates to and that the applicant has a right to challenge the decision refusing access and have it reviewed by a court.³⁵ Any notification of denial of any application will contain the names, designation and signature of each person responsible for the denial of such application.³⁶ It is not enough for the government or public institution to merely deny access to the applicant because section 7(3) of the Act makes it mandatory for the government or public institution to indicate whether the information or record exists.

Penalties for Destruction of Records

The Act makes it a criminal offence to destroy or falsify records and documents. Thus where any officer or head of any government or public institution willfully destroys any records kept in his or her custody, or attempts to doctor or otherwise alter same before they are released to any person, entity or community applying for it, it will be a criminal offence punishable upon conviction with a minimum of one year imprisonment.³⁷ Section 7(5) of the Act also sets a fine of N500, 000 payable on conviction by any institution or public officer who wrongly denies access to information or records.

³¹ Section 4 (a-b), *ibid.*

³² Section 5(1), *ibid.*

³³ Section 5(2), *ibid.*

³⁴ Section 6, *ibid.*

³⁵ Section 7(1), *ibid.*; Aduba & Ogucha, *supra* note 18, p. 394.

³⁶ Section 7(2), *ibid.*

³⁷ Section 10, *ibid.*

Protection of Whistleblowers

The FOI Act provides immunity for public officers against any form of civil or criminal proceeding for ‘disclosure in good faith of any information or any part thereof’ pursuant to the FOI Act. Section 27(1) expressly exempts any public officer or any person acting on behalf of a public institution who in good faith discloses what was hitherto known as ‘official secrets’ ‘protected information’ or ‘classified information’ from criminal and civil liability or proceedings. Thus is irrespective of anything to the contrary contained in the Criminal Code, the Official Secrets Act or any other enactment like the Evidence Act regulating privileged communication.³⁸ Therefore, a public officer may, with or without authorization, disclose to any person information which he reasonably believes to show-(a) a violation of any law, rule or regulation; (b) mismanagement, gross waste of funds, 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 provision of this Act.³⁹ Furthermore, no civil or criminal proceedings will be taken against any person receiving the information or further disclosing it.⁴⁰ No person receiving information is to be compelled to disclose the source of his information or his informant. Accordingly the Court held, *inter alia*, in *Oyegbemi and Others v. Attorney-General of the Federation*⁴¹ that:

No person, be he an editor, reporter or publisher can be compelled to disclose his source of information for any matter published by that person and non-disclosure cannot be contempt of court. This is subject to interest of justice, national security, public safety, order, morality, welfare of persons or prevention of disorder or crime. Consequently, the right to withhold information is like all other freedoms, not absolute.

This is in light of constitutional provisions guaranteeing right to receive and impart ideas and information without interference. There is no doubt that to compel a person for example a journalist to disclose his source hinders him in the sense that it may make his source become very limited or non-existent because of fear of disclosure.⁴²

Exemption of Classified Information from Disclosure

The FOI Act exempts certain information and records from public access. This includes any information the disclosure of which may be injurious to the conduct of international affairs and the defence of the Federal Republic of Nigeria;⁴³ information on administrative enforcement proceedings and by any law enforcement or correctional agency for law enforcement purposes;⁴⁴ personal information;⁴⁵ third party information such as trade secrets and commercial or financial information.⁴⁶ Information and records subject to professional privileges such as Legal practitioner/Client privilege, Health workers/Client privilege, Journalism Confidentiality privileges and any other professional privileges conferred by any other Law.⁴⁷

³⁸ Obiaraeri, *supra* note 2, p. 11.

³⁹ Section 27(2) of the Act.

⁴⁰ Section 27(3), *ibid*.

⁴¹ (1982) 3 NCLR 695; See also *Momoh v. Senate* (1981) 1 NCLR 105, (1983) 4 NCLR 296.

⁴² Mowoe, K.M., *Constitutional Law in Nigeria* (Lagos. Malthouse Press Limited, 2008) p. 452-3.

⁴³ Section 11 (1) of the Act.

⁴⁴ Section 12 (1), *ibid*.

⁴⁵ Section 14(1), *ibid*.

⁴⁶ Section 15(1) (a), *ibid*. See *Public & Private Development Center Ltd/GTE (PPDC) v. Federal Ministry of Finance*, Suit No. FHC/ABJ/CS/856/13.

⁴⁷ Section 16(a-d), *ibid*; See also *Aduba & Oguchi*, *supra* note 18, p. 396.

Submission of annual reports to the Attorney-general of the federation

The FOI Act provides for submission of annual compliance reports to the Office of the Attorney General of the Federation. Section 29(1) of the Act enjoins all public Institutions to submit to the Office of the Attorney-General of the federation a report containing details of request received and matters arising on or before February 1st each year and shall cover the preceding fiscal year.⁴⁸ Furthermore, the section also requires the Attorney-General to publish the report electronically and in print and submit copies to the relevant Committees of the National Assembly on or before April of the year in which each report is issued, of the existence of such report.⁴⁹ The FOI Act mandates the Attorney-General of the Federation to oversee the effective implementation of the Act through his oversight powers conferred on him under the Act and report promptly on the execution of this duty to the National Assembly by submitting an annual report on or before the April 1 of each calendar year.⁵⁰

3. Recent Cases in Nigeria on the FOI Act

Some successes have been recorded since the FOI Act was passed into law in 2011. There has been an encouraging increase in the number of individuals and organizations requesting information pursuant to the provisions of the Act. There have been varied reactions by public institutions to requests for access to information that range from outright and unsubstantiated refusal,⁵¹ to delays in granting requests.⁵² However most of the cases have been initiated by civil society organizations to demand for information, accountability and good governance in Nigeria.⁵³ In *General India Garba v. Commissioner of Finance Benue State*⁵⁴ the High Court of Benue State presided by Hon Justice S.O. Itodo held that the FOI Act applies to all states of the Federation including Benue State. The Court overruled the objection raised by the Counsel to the Defendant that the FOI Act 2011 was not applicable to Benue state because Benue State had not enacted a law domesticating the Act in the State. In *Public & Private Development Center Ltd./GTE (PPDC) v. Federal Ministry of Finance*,⁵⁵ the Applicant applied for access to a loan agreement executed between the Federal Republic of Nigeria and the Chinese Exim Bank on the execution and completion of the Abuja light rail Project in the custody of the Federal government. The Federal government denied the request on the grounds that the documents contain the trade secrets of the Chinese Exim Bank which ought not to be disclosed. After perusing the documents, the Court held that the respondents had no justification in denying the Applicants the documents sought under the FOI Act.

In *Uzoegwu F.O.C. v Central Bank of Nigeria*⁵⁶ the Federal High Court ordered the Central Bank of Nigeria to allow the applicant access the emoluments of its senior staff. The Court overrule the objection

⁴⁸ Section 29(1) of the Act.

⁴⁹ Section 29(4), *ibid*.

⁵⁰ Section 29(6), *ibid*; See also Obiaraeri, *supra* note 2, p. 12.

⁵¹ Recently, the Code of Conduct Bureau refused public access to details of assets declared by Governors or other public office holders on the ground that the Code of Conduct Act did not mandate them to make their declarations public. See Monday Ubani, 'Is Freedom of Information Act Working?', (2013, Nov. 19), *The Nation Newspapers*, at <http://thenationonline.net/freedom-information-act-working-2/> accessed July 28, 2017.

⁵² Omotayo, *supra* note 1, p. 7.

⁵³ Civil society Organizations such as National Human rights Commission (NHRC), Legal Defence and Assistance Project (LEPAD), Progressive Shareholders Association (PSA), Socio-Economic Rights and Accountability Project (SERAP), Civil Society Network Against Corruption (CSNAC), Media Rights Agenda (MRA) and Right to Know (R2K) among others.

⁵⁴ Suit No. MAC/2564/M/2012

⁵⁵ Suit No. FHC/ABJ/CS/856/13; See also *PPDC v. National Agency for Food & Drug Administration and Control (NAFDAC)* Suit No. FHC/ABJ/CS/760/13

⁵⁶ Suit No. FHC/ABJ/CS/1016/2011

of the CBN that request such as these would be exempted under the personal information provision of the FOI Act.

Similarly, In *Boniface Okezie v. Central Bank of Nigeria*⁵⁷, on August 2009, the Federal High Court in Lagos recently had opportunity to interpret Central bank of Nigeria while exercising its powers under the Central bank of Nigeria Act, fired the executive directors of five Nigerian Banks for borderline fraudulent acts and mismanagement of bank resources. The affected Bankers were also prosecuted by the Economic and Financial Crimes Commission which, in collaboration with the Central Bank, sought to recover some of the assets that they had allegedly stolen. However, there were questions about the manner in which the recovery of the assets was being handled, particularly the apparent lack of considerations for the rights of the affected banks' shareholders. In 2012, the Progressive Shareholders Association of Nigeria, represented by its president Boniface Okezie, wrote to the Central bank requesting information relating to the recovery of Oceanic International Bank Plc's assets.⁵⁸ The letter requested, *inter alia*, the following information:

the cost so far to the Central Bank, the government and the Nigerian people of the banking reforms instituted by the Central bank, and particularly the amount of legal fees and other fees paid and to be paid to professionals and professional bodies; how much of the amount mentioned above represented fees and to be paid to Olaniwun Ajayi LP and Kola Awodein & Co....

The Central Bank refused to disclose the requested information by the Association. As a result, the Association instituted a suit against the CBN under the Freedom of Information Act. The Association also requested the Court to compel the CBN to publish its handling of approximately N191 billion worth of assets forfeited by Ibru. In a landmark ruling on the application of the Freedom of Information Act, the Court held that the Central Bank of Nigeria, as a public institution, has a duty under the Act to provide details of such information, and that the banks' refusal to disclose the information on request by the Association was unlawful. Justice Mohamed Idris, ordered the Bank to comply with the Association's request by releasing the information sought. The Judge observed that: 'The Act is intended to promote transparency and prevent corruption; therefore all public institutions must ensure that they comply with the FOI Act in the interest of transparency, justice and development.'⁵⁹ However the Judge refused to compel the CBN to release information relating to the fees and commissions paid to the Law firms representing it on grounds that such information enjoyed Attorney-Client privilege and was protected by section 16 of the FOI Act, 2011.

However, in a recent ruling, the Federal High Court, Abuja, presided over by Justice Gabriel Kolawole suggested that the Freedom of Information Act 2011, was somehow defective because it provides in Section 1(2) that an applicant seeking information from a public institution should not be required to demonstrate his or her interest in that information and called on the National Assembly to amend the Law to restrict its application.⁶⁰ In *Paradigm Initiative Nigeria v. Dr. Reuben Abati*,⁶¹ the Learned judge declared that there is no 'country in the world where access to all forms of public records are thrown open to an applicant who is not required to show any specific interest in the information requested from

⁵⁷ Suit No. FHC/L/CS/494/2012

⁵⁸ Ozekhome, *supra* note 16, p. 17.

⁵⁹ *Ibid.*

⁶⁰ Edetaen Ojo, 'FOI Act: Where his Lordship got it Wrong,' (2013, August 6), Vanguard Newspapers.

⁶¹ Suit No.FHC/ABJ/CS/402/2013

a public body.’ He further called on the National Assembly to ‘review the Act so as to ensure that access to information is only made available to such applicants who genuinely need it for specific purpose(s).⁶² Despite the judgment in *Paradigm Initiative*, the passing of the FOI Act has been well received by Nigerians. The rulings of the courts on the need for public institutions to comply with requests for information are commendable and are in the spirit of transparency and accountability. It is hoped that the success of these cases will help entrench good governance in Nigeria. However, the cumbersome and time-consuming process of dragging requests for information through the Courts has a potentially negative effect on the utility of the information requested because of the time sensitive nature of information.⁶³

4. Obstacles to Implementation

The FOI Act empowers the public to access certain government information in order to ensure transparency and accountability in governance. Since then, there is little evidence of compliance by all the government institutions as prescribed by the Act.⁶⁴ The people to whom the law gives access right have not being proactive in using the law to demand for information. Unfortunately, apart from the few FOI requests filed by some civil advocacy groups, the FOI Act is grossly underutilized because of some inherent challenges bedeviling the implementation of the Act. Some of these challenges are as follows;

Some inherent deficiencies in the FOI Act

A major challenge to the implementation of that the FOI Act is that it contains some inherent deficiencies. The Act has more exemption sections and clauses than sections that grant access to information. This situation has been exploited by some public officers for mischievous purposes. For example, only sections 1 and 3 of the Act grant access to information, as many as ten sections i.e. sections 7, 11, 12,14,15,16,17,18,19 and 28 deny the public access to information. This is the reason why some civil liberty advocates argue that the final draft legislation of the FOI Act was watered down by the legislators in order to reduce the effectiveness of the Law. Exceptions should ordinarily be clearly and narrowly drawn and subject to strict ‘harm’ and public interest tests.⁶⁵ Curiously, throughout the gamut of the FOI Act the phrase ‘public interest’ was not defined.⁶⁶

Low Literacy Rate in Nigeria

The greatest challenge hampering the smooth operation of the FOI Act is the abysmally low levels of basic literacy in Nigeria. Access to information requires a literate population. The Nigerian Courts have repeatedly upheld education as a human right inherent in the right to information in section 39 of the Constitution of the Federal Republic of Nigeria 1999.⁶⁷ Basic education in Nigeria is supposedly compulsory for all children, yet about 10.5million Nigeria children live without access to basic

⁶² Ibid.

⁶³ Omotayo, supra note 1, p. 8.

⁶⁴ A report on the FOI Website of the Federal Ministry of Justice www.fois.justice.gov.org shows that in 2013, fifty two (52) institutions submitted; in 2012 thirty two (32) submitted; while in 2011, only sixteen (16) public institutions submitted their annual reports to the Attorney-General’s office. In 2014, only sixty (60) submitted their annual reports.

⁶⁵ P. K. Inokoba, ‘Freedom of Information Act and Democratic Consolidation in Nigeria: Prospects and Challenges’, *International Journal of Development and Sustainability* (2014) vol.3 No. 12, p .2268. at <http://www.isdsnet.com/ijds-v3n12-7.pdf>. Accessed June 13, 2017.

⁶⁶ Obiaraeri, supra note 2, p. 10., On the meaning of public interest, see *Re Stephane Peatling and Department of Employment and Workplace Relations* (2007) AATA 1011.

⁶⁷ See *Archbishop Okogie v. Attorney-General of Lagos State* (1984) 5 NCLR 78; *Ukaegbu v. Attorney General Imo State* (1983) 4 NCLR 256

education.⁶⁸ The adult literacy rate in Nigeria stands at 57.9%.⁶⁹ The implication of this is that about 70% of Nigerians are illiterates. Without effective access to education, the Act is compromised because it would be difficult to make the general populace to understand the provisions of the FOI Act.

Culture of Secrecy Government Institutions

The culture of secrecy of government information has become entrenched among both public servants and the citizens in Nigeria. Many former British colonies including Nigeria have official secrecy laws and civil service rules, which have guided their operations for years. This affects the effective implementation of the FOI Act. The culture of secrecy 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.’⁷⁰ After decades of operating official secret laws, there has emerged an iron-cast culture of secrecy ‘among civil servants and public officials and it has become extremely difficult for many of them to change.’⁷¹ As a result, changing the mindset of public officers and even private sector managers from a culture of secrecy to openness is therefore a great challenge to the implementation of the FOI Act.

Low level of public awareness of the FOI Act

There is a low level of awareness within the populace about the FOI Act and how to use it to obtain access to public information. This has affected the implementation of the FOI Act since it was signed into law. Most ordinary Nigerians do not readily see a link between the FOI Act and their daily struggles to work out a living.⁷² They do not see the FOI Act as a platform that could contribute to their wellbeing. The public therefore do not pay a lot of attention to the issue. Even among the well-educated and enlightened members of the society, there exists a very low awareness and knowledge of the Act.⁷³ A law can only be tested by citizens who are aware of their rights under the law.

Poor record keeping and infrastructure

Another challenge to the full implementation of the FOI Act is inadequate or absence of record creation, record keeping, organization and maintenance of documents. Record keeping in most Nigerian Ministries, Departments and Agencies (MDAs) is still manual based.⁷⁴ The provisions of the FOI Act for access to information would be ineffectual where good quality records are not created, where access to them is difficult and where procedures are lacking on records disposal. For example, Section 4 of the FOI Act provides for the public institution to respond to requests for information within seven days. However many MDAs in Nigeria cannot meet this target because information and records in many public institutions are still paper based and tied up in bundles of stacks of files. Majority of the documents containing the information have been torn and eaten by insects and rodents. Many of the

⁶⁸ USAID-NIGERIA: *Country Development Cooperation Strategy, 2015-2019* at <https://www.usaid.gov>, accessed August 18, 2016.

⁶⁹ National Bureau of Statistics, *Report of the National Literacy Survey*, June 2000 at <https://www.nigerstat.gov.ng> accessed August 18, 2016; See also Tayo Ogunbiyi, ‘Combating Illiteracy in Nigeria’, (2015, September 4), *The Nation* newspapers.

⁷⁰ Inokoba, ‘Freedom of Information Act and Democratic Consolidation in Nigeria: Prospects and Challenges’, *International Journal of Development and Sustainability* (2014) vol.3 No. 12, p .2268 at <http://www.isdsnet.com/ijds-v3n12-7.pdf>. Accessed May 13, 2017.

⁷¹ *Ibid.*

⁷² Omotayo, *supra* note 1, p.9.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

public institutions are not connected to the internet or their servers are perpetually down.⁷⁵ Therefore, some of the information requested by the public may not be easily available within seven days as provided for in the FOI Act. Additionally, the requirement for ‘proactive public disclosure’ is good.⁷⁶ However, very few public institutions have functional websites that are updated regularly: there are very few designated portals or platforms from where the public can obtain information. Therefore poor record keeping and lack of modern technologies adversely affects the implementation of the FOI Act.

Non- domestication of the FOI Act by most States of the Federation

In addition to the problems outlined above, most states governments in Nigeria are reluctant to adopt and domesticate the FOI Act. As of today, only Ekiti and Lagos States have domesticated the FOI Act.⁷⁷ This shows that some public officers, particularly state governors are not in support of the FOI Act and actively take steps to frustrate the implementation of the Act.⁷⁸ This is contrary to the principles of democracy in Nigeria since democracy is all about open and transparent participatory government.⁷⁹ Poor access to information feeds corruption. Secrecy allows back-room deals to determine public spending in the interest of the few, rather than the many. Lack of information impedes citizen’s ability to assess the decisions of their leaders and even to make informed choices about the individuals they elect to serve as their representatives.

Existence of Subsisting Laws which conflict with the FOI Act

The existence of subsisting laws which conflict with the FOI Act is another challenge to the effective implementation of the FOI Act. The subsisting laws include the Official Secret Act, the Evidence Act, the Criminal Code, the Penal Code, the Public Complaints Commission Act, and others. Although sections 27 and 28 of the FOI Act overrides the provisions of the Criminal Code, the penal code, the Official secrets Acts or any other such Laws with respect to disclosure of any information, the laws have not been repealed or amended by the Legislature.⁸⁰ Until they are repealed or amended, these laws will continue to adversely affect the effective implementation of the FOI Act.

Lack of Political will

Another challenge to the implementation of the FOI Act is the lack of political will on the part of leaders who ideally have the responsibility for putting such law in place.⁸¹ This lack of political will derives from a number of factors including the fear by government officials that greater public access to information which the FOI Act engenders, will make them vulnerable to their political opponents as such laws are will expose their misconduct, misappropriation and mismanagement of public funds.⁸² They also fear that the FOI Act will put their personal interest at risk by exposing the failure of government programmes and policies.

⁷⁵ U. Igwe, ‘Freedom of Information Act and the Fight against Corruption,’ (2015, Nov. 25) Premium Times, at <http://www.premiumtimesng.com/2015/11/25/freedom-of-information-act-and-the-fight-against-corruption-by-uche-igwe>. Accessed June 13, 2017.

⁷⁶ Section 2(3) & (4) of the FOI Act.

⁷⁷ See FOI: State Adoption at <https://www.r2knigeria.org> accessed August 18, 2016.

⁷⁸ Inokoba, supra note 70; see Ubani, supra note 51.- describing how the former Niger State Governor, Alhaji Babangida Aliyu ridiculed an application under the FOI Act by an applicant from Niger State, who wanted to know how much the governor collects as security vote.

⁷⁹ Ibid.

⁸⁰ Ubani, supra note 51; Inokoba, supra note 70.

⁸¹ Edetaen, supra note 7;

⁸² Inokoba, supra note 70.

5. Conclusion and Recommendations

The Freedom of Information Act, 2011 gives to citizens a right of access to information held by government or public institutions. Information is not just a necessity for people- it is an essential part of good governance. Weak companies and bad governments depend on secrecy to survive. Secrecy allows inefficiency, wastefulness and corruption to thrive. The FOI Act provides a framework for the civil struggle against corruption, abuse of power and also enables the citizens to exert some degree of control over actions of national leaders and monitor the use of public resources. To achieve these noble objectives requires a commitment to effective implementation of the FOI Act. It is one thing to enact a law and another to implement it. Making the FOI Act work in practice is the responsibility of the government on the one hand, and citizens and civil society groups on the other hand. Government should provide resources to create the system that will permit information requests to be responded to timely. Citizens and Civil society groups must generate requests and actually use the Law. This will ensure that the right of access is firmly established in the law for all. This article has identified some of the challenges both in the provisions and implementation of the Act. Overcoming all these challenges will be an arduous process requiring efforts of all stakeholders in adopting the strategies recommended above in the implementation of the Act. Finally, it should be noted that on its own, the FOI Act is not a panacea. However, with political will, it can lay the foundation stone around which can be built a fairer, modern and more successful society in fulfillment of the lofty goal of the Nigerian Constitution to provide '...good government and welfare of all persons in our country on the principles of Freedom, Equality and Justice, and for the purpose of consolidating the unity of our people.'⁸³

The article so far has revealed some of the challenges facing the implementation of the FOI Act. They are not exhaustive but will guide in proffering solutions to remedy the problems. It is not enough to adopt a FOI Act to guarantee access to information, if the law is not implemented and used by the public. The ways to remedy these problems are as follows:

Culture of Openness and Transparency

There is need to change the mindset of public servants who are the custodians of government information to appreciate the importance of entrenching an open and transparent society by complying with the FOI Act. The public sector need to reorient public officers to appreciate the new regime of according information its pride of place as a developmental tool and facilitate the administrative machinery to bridge the gulf between policy formulation and implementation.⁸⁴ There should be regular training and retraining of public servants particularly management personnel of public institutions to enhance their capacity on FOI Issues as well as other laws and statutes in the country. Copies of the FOI Act as well as other laws should be made available in all public institutions for the public servants and their knowledge should be tested as part of their promotional interviews.⁸⁵ This is in line with section 13 of the FOI Act which provides that every government or public institution must ensure the provision of appropriate training for its officials on public's right to access to information or records held by government or public institutions. Therefore, continuing education of both public officials and the public will assist in transforming the culture of secrecy. Private organizations also need to be trained on FOI Issues. Although the FOI Act does not ordinarily apply to private organizations,⁸⁶ such as private companies and non-governmental organizations, the Act applies to such organizations under certain conditions: Where the entity performs a public function, where the entity provides a public service and

⁸³ See The Preamble to the Constitution of the Federal republic of Nigeria, as amended, 1999.

⁸⁴ Omotayo, *supra* note 1, p. 11.

⁸⁵ *Ibid.*

⁸⁶ C. Duru, MDAs Compliance with FOI Act in Nigeria: Matters Arising, at <http://thewillnigeria.com/news/opinion-mdas-compliance-with-foi-ac...> June August 12, 2017.

where the entity utilizes public funds. Therefore, although passing the FOI Act is critical to developing an enforceable right to information, it is through changing the pervasive culture of secrecy that the FOI Act will be truly meaningful.

Legislative Amendment

There is need for the Legislature i.e. the National Assembly to amend some of the provisions of the FOI Act to remove some of the ambiguities which affects the effective implementation of then Act. The word ‘public’ and ‘public interest’ should be clearly defined and explained in the FOI Act, so that there will be no misunderstanding as to what the Act means by the word ‘public’ and ‘public interest’. Furthermore, there is need for the legislature to amend section 1 of the Act which gives the right of access to records to ‘any person’. The legislature should amend the section by specifying clearly who is eligible to access records from public institutions. Does it mean any person in the street can apply for information from a public institution without any interference? Or does it mean ‘any person whose right is being, has been or is likely to be infringed’?⁸⁷ Clarifying these concepts will aid in preventing conflicting judgments by the courts in the implementation of the FOI Act.⁸⁸ The National Assembly should also state clearly that the FOI Act applies to all states of the Federation so as to remove the issue of domestication and non-domestication of the Act by the States. Finally, the exceptions should be clearly and narrowly drawn and made subject to strict ‘harm’ and ‘public interests’ only. The National Assembly should take steps to address the gaps in the law with a view to strengthening it.

Increase Public awareness of the FOI Act

Public awareness and enlightenment on the FOI Act should be increased. The FOI Act should be publicized not only in urban areas but also in the rural communities in all the six geopolitical zones of the country.⁸⁹ The aim is to enlighten the public on the need for and the benefits of the FOI Act as well as their rights and responsibilities under the Act. Some of the ways to reach people includes printing posters, flyers, radio and television announcements, drama, blogs, websites, Facebook, twitter and mobile phone apps. Due to low literacy rate in Nigeria along with availability problems, Gazettes and other government publications should not be used in publicizing the FOI Act. A simplified or abridged version of the FOI Act should be produced to enable the citizens understand the provisions of the Act and increase the use of the Act. The publications should be written in several local languages in Nigeria to make it easy for people to understand the provisions of the FOI Act. Moreover, Institutions such as the National Orientation Agency, the Nigeria Bar Association, the Media houses and Civil Society Organizations should assist in the responsibility of educating Nigerians of the existence of the FOI Act and their rights and obligations under it.

Proper Record Keeping

The FOI Act cannot be functional until public officials develop a system and habit of Official record creation, keeping and organization. Record keeping is a fundamental activity of public administration. Without records, there can be no rule of law and no accountability. Records provide a reliable, legally

⁸⁷ Section 45 of the Constitution of the Federal Republic of Nigeria as amended, 1999.

⁸⁸ See *Paradigm Initiative Nigeria v. Dr. Reuben Abati*, Suit No.FHC/ABJ/CS/402/2013 where the Judge called on the National Assembly to ‘review the Act so as to ensure that access to information is only made available to such applicants who genuinely need it for specific purpose(s).’⁸⁸

⁸⁹ The six geopolitical zones in Nigeria are: South-East, South-South, South- West, North-East, North-Central and North-West

verifiable source of evidence of decisions and actions.⁹⁰ They document compliance or non-compliance with laws, rules and procedures. Record keeping is crucial to institutional memory and to continuity in governance as citizens can only evaluate government and its policies when records exist. Even where an applicant is successful in court, the public institution cannot produce a record that does not exist.⁹¹ Proper record keeping helps to ensure that applicants receive the information requested within a reasonable time as information may lose its value or interest over time. Proper record keeping is the basis of the FOI Act. It is on this basis that public institutions can provide information requested of them or proactively disclose information as the FOI Act mandates.⁹² Section 9 of the FOI Act requires every government or public institution to keep proper records or information about their operations, personnel, activities and other relevant and related information/records. Furthermore, ‘every government or public institution shall ensure the proper organization and maintenance of all information or record in its custody, in a manner that facilitates public access to such information or record under this Act.’⁹³ Therefore, public institutions must to comply with this provision of the Act. Advances in information and communication technologies provide the best opportunity for governments or public institutions to improve delivery of information and services to the citizens and businesses to streamline public sector functions and to increase participation in government. In some cases this is just a matter of providing electronic access to existing information. Therefore, record system in the public institutions should be strengthened to facilitate the full implementation of the FOI Act.

Repeal of all conflicting laws to the FOI Act.

All existing laws, such as Official Secrets Act, Penal Code, Criminal Code, Public Complaints Commission Act etc. that affect the effective implementation of the FOI Act should be repealed or amended to avoid conflict with the FOI Act. Even though sections 27 and 28 of the FOI Act also overrides the provisions of the Criminal Code, the Penal code, the Official Secrets Act or any other such enactment with respect to disclosure of any record, they ought to be repealed because they are adverse to the FOI Act.⁹⁴

⁹⁰ The World Bank, *Managing Records as the basis for effective service delivery and Public Accountability in Development: An Introduction to core Principles for staff of the World Bank and its partners*, July 2000, at siteresources.worldbank.org/EXTRACTIVES/Resources/corePrinciples.pdf accessed August 15, 2016.

⁹¹ Omotayo, *supra* note 1.

⁹² *Ibid.*

⁹³ Section 9(2) of the FIO Act.

⁹⁴ Omotayo, *supra* note 1, p. 13.