

Freedom of Information Act, 2011: An Explanatory Commentary*

ABSTRACT

The paper x-rays the significant objectives of freedom of information and its scope of application. The paper reveals that though the Act has not largely not judicially tested, its interpretation by the courts should follow a purposive manner of expanding the realm of information available to the public. It encourages Media houses to be procreative in seeking necessary public information, while enjoining the legislature to act in tandem with it by amending or repealing existing laws that pose threat to the objective of the Act.

1. Introduction

It will perhaps be instructive to herald this commentary with the trenchant statement of an American revolutionary, Patrick Henry, on the importance of access to information in public administration. He declared:

"The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them".¹

Information indeed is the bedrock of credible action in a state. It is as vital to the state and its citizens as blood is to the body. Taboos carry magnetism: labeling information, records, ideas or meetings 'secret' involves an instant and concomitant interest in trying to learn what's so 'secret'. It brings an almost Newtonian principle at work: the more secret or forbidden

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¹ Quoted in *The Commonwealth Lawyer*, Vol. 20, No. 1 (April 2011), p. 28.

something is, the harder people will try to learn about it. What may in ordinary context seem mundane becomes a very big deal. All these, and more, are at the heart of the campaign in favour of the passage of the Freedom of Information Act, 2011.

It has taken the Freedom of Information Act, 2011 (FoI Act, 2011) 12 solid years to arrive and take its place in the Statute Books of the Federal Republic of Nigeria. It is a feat that deserves celebration. Indeed Media Practitioners, Civil Society Organizations, and Human Rights Activists, have all accorded the Act a euphoric welcome.²

The excitement that followed the Freedom of Information Bill's road to becoming an Act is understandable given the very tortuous and long road that it had taken. A Freedom of Information Bill was first submitted to Nigeria's 4th National Assembly in 1999, when the country returned to democratic rule, but it made little progress due to the campaign of calumny and bad faith carried against it in official quarters. It was revived during the 5th National Assembly in 2003 and was passed by both Chambers 4 years later in the first quarter of 2007. It was, however, vetoed by President Olusegun Obasanjo. It returned to both Chambers of the 6th National Assembly in 2007 and was finally passed with significant modifications on May 24, 2011. It was sent to President Goodluck Jonathan on 27 May, 2011 who assented to it within 24 hours on 28th May, 2011.

The Bill's tortuous road to becoming an Act is perhaps a major reason why there is a lot of excitement and jubilation about it from the media and civil society groups, who had been resilient in pushing for the passage of the Bill.³ In fact there were at a point fears that President Jonathan would not give his assent to the Bill, especially given the comment by the former presidential adviser on National Assembly Matters, Alhaji Aba Aji, who said that the Bill was 'dead on arrival'. The FoI Bill must go down as one of the bills that took the longest time in our political history to become law.

² For instances of this, see *THISDAY Newspaper*, Wed., June 1, 2011, p. 21 (Davidson Iriekpen in "Politics Today"); *THISDAY Newspaper*, Fri., June 3, 2011, Back page (Chidi Anselm Odinkalu in "Guest Columnist"); *Daily Trust Newspaper*, Tues., June 7, 2011, etc.

³ See n. 2 above. Indeed, almost all the media publications in Nigeria, especially in June and July 2011, were awash with euphoric commentaries on the Act.

We salute the courage of the individuals, legislators, lawyers and civil society groups that played crucial roles in the passage of the Bill. President Jonathan also deserves praise for apparently ignoring the ill-informed opinions of some of his advisers and going ahead to assent to the Bill. With that assent, Nigeria is believed to have joined the over 100 countries of the world that have a freedom of information law.

II. Objects/Principal Provisions of The Act

The principal objects of the Act are comprehended in its long title which presents the Act as:

An Act to make public records and information freely available, provided for public access to public records and information, protect public records and information to the extent consistent with personal privacy, protect serving public officers from adverse consequences for disclosing certain official information and establish procedures for the achievement of those purposes and related purposes thereof, 2011.

It will help to itemize and plainly explain these stated objects in which, in effect, the principal provisions of the Act are fully anchored. We take the stated objects seriatim as follows:

1. The first object of the Act is "to make public records and information freely available".

The expression "Public Record" is defined in the Act to mean

a record in any form having been prepared, or having been or being used, received, possessed or under the control of any public or private bodies relating to matters of public interest and includes -

- (a) any writing on any material;
- (b) any information recorded or stored on other devices; and material subsequently derived from information so recorded or stored;
- (c) any label, marking, or other writing that identifies or describes anything of which forms part, or to which it is attached by any means;
- (d) any book, card, form, map, plan, graph, or drawing;
- (e) any photograph, film, negative, microfilm, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced.

It is clear that this definition is comprehensive enough to leave out almost nothing from the scope of public record.

Also, the term 'information' in the context under discussion is defined to include all records, documents and information stored

in whatever form, including written, electronic, visual images, sound, audio recording, etc. This again is comprehensive enough to leave out almost nothing.

The Act in section 1 establishes and confirms the right of any person to access or request for information, whether written or not, contained in any record which is in the custody or possession of any public official, agency or institution by whatever name or title described. The person who requests or applies for such information need not demonstrate any specific interest which he has in the information being applied for. Furthermore, the applicant for the information has the right to institute proceeding in a court of law to compel any public institution to grant his request.

It should be noted that the right to request for information given under section 1(1) is accorded to *a person*; whereas, liability for court action imposed under section 1(3) for refusal to grant the request is imposed on an *institution*. The idea, it seems, is to place a burden on the institution to put its internal administrative workings in order so as to avoid the liability. This is made clear by section 2 which requires a public institution to ensure that it records and keeps information about all its activities, operations and businesses in a way that facilitates public access to such information.

Section 2(3) also requires a public institution to cause to be published all and every information, including files, reports documents, etc., pertaining to its administrative organization and responsibilities and, by section 3(4), to widely disseminate them (in their present or updated form), and make them readily available to members of the public through various means, including print, electronic and online sources and at the offices of such public institutions.

2. The second object of the Act is "to provide for public access to public records and information".

Section 9 of the Act enjoins every government or public institution to ensure that it keeps and maintains every information or record about the institution's operations, personnel, activities, and other

relevant or related information or records and ensure proper organization and maintenance of all such information and records that facilitate public access to such information or records. Section 10 makes it a criminal offence punishable on conviction by the court with a minimum of one year imprisonment for any officer or head of any government or public institution to willfully destroy any record in his custody, or attempt to doctor or otherwise alter the same before such records are released to any person, entity or community applying for it. Section 3 of the Act makes copious provisions pertaining to access to records and information. If, for example, a record or information applied for does not exist in print, it can be produced from a machine normally used by the government or public institution. And such production shall be deemed to be a public record.

Furthermore, if the applicant for information or record is illiterate or disabled, and by reason of the illiteracy or disability is unable to make the application, he or she may make the application through a third party. Again, if an authorized official of a government or public institution receives an oral application for information or records from an applicant, he is under an obligation to provide a copy of the written application to the applicant.

Under section 4 of the Act, a public institution is under an obligation to provide the information or records requested within 7 days after the application is received. If the public institution for any reason considers that the application should be denied, the institution shall give written notice to the applicant that all or part of the information requested will not be granted, stating reason for the denial as well as the section of the Act under which the denial is made. Section 5 provides for the transfer of an application by the public institution to which the application is made to another public institution which it considers to have greater interest in the information and this transfer must be made within 3 days, but not later than 7 days after the application is received.

Section 6 of the Act gives two circumstances under which the time limit set for granting or refusing an application may be extended. It provides that: (a) if the application is for a large

number of records and meeting the original time limit would unreasonably interfere with the operations of the public institution; or (b) consultations are necessary to comply with the application which consultations cannot reasonably be completed within the original time limit, the public institution may extend the time limit by not more than 7 days and give notice of the extension to the applicant stating that the applicant has a right to have the decision to extend the time limit reviewed by the court. Section 13 of the Act requires every government or public institution to ensure that appropriate provision is made for the training of its officials on the public's right to access to information or records held by government or public institutions.

3. The third object of the Act is “to protect public records and information to the extent consistent with the public interest and the protection of personal privacy”.

Sections 11, 12, 14, 15, 16, 17 and 19 provide for various circumstances under which public records and information are protected from access. They provide consecutively as follows:

- Section 11 (Exemption of International Affairs and Defence)
 - A public institution may deny an application for any information or records the disclosure of which may be injurious to the conduct of international affairs and the defence of the nation: Provided that such denial shall not be permissible where the public interest in disclosing the information outweighs whatever injury that disclosure would cause.
- Section 12 (Exemption of Law Enforcement and Investigation) – A public institution may deny an application for any information or records which contains:
 - (a) Records compiled by any public institution for administrative enforcement proceedings and by any law enforcement or correctional agency for law enforcement purposes and investigation if, and only if, the information or records requested would (i) interfere with pending, or actual, or reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency; or (ii) interfere with pending administrative enforcement proceedings conducted by any public institution; or (iii) deprive a

person of a fair trial or impartial hearing; or (iv) unavoidably disclose the identity of a confidential source; or (v) constitute an invasion of personal privacy such as trade secret, etc., as stipulated under section 15; or (vi) obstruct no ongoing criminal investigation; and

- (b) Information and the disclosure of which could reasonably be expected to be injurious to the security of penal institutions.

In any of (a) or (b) above, section 12(2) provides that an application for information or records shall not be denied for whatever reason where the public interest in disclosing the information or records outweighs whatever injury that disclosure will cause.

Furthermore, section 12(3) empowers a public institution to deny an application for information or records if the granting of it could reasonably be expected to facilitate the commission of an offence.

- Section 14 (Exemption of Personal Information) – This section exempts many categories of personal information from disclosure. It provides that such information as:
 - (a) Files and personal information maintained with respect to clients, patients, residents, students or other individuals receiving social, medical, educational, vocational, financial, supervisory or custodial care or services directly or indirectly from public institution;
 - or
 - (b) Personal files and personal information maintained with respect to employees, appointees or elected officials of any public institution or applicants for such positions;
 - or
 - (c) Files and personal information maintained with respect to any applicant, registrant or licensee by any government or public institution cooperating with or engage in professional or occupational registration, licensure or discipline; or
 - (d) Information required of any tax payer in connection with the assessment or collection of any tax unless the disclosure is otherwise requested by the statute; and
 - (e) Information revealing identity of a person who files

complaints with, or provides information to administrative, investigative, law enforcement or penal agencies on the commission of any crime.

However, in any of the above situations, a public institution is required under section 14(2) to disclose any such information that contain personal information if: (i) the individual to whom it relates consents to the disclosure; or (ii) the information is publicly available.

Again, under section 14(3) where disclosure of any such personal information as are referred to in paragraphs (a) to (e) above would be in the public interest, and if public interest in the disclosure of such information clearly outweighs the protection of the privacy of the individual concerned, the public institution to whom a request for disclosure is made shall disclose such information if the individual concerned consents to the disclosure or the information is publicly available.

- Section 15 (Exemption of Third Party Information) – This section, among other things, empowers a public institution to deny an application for information or records that contains:
 - (a) Trade secrets and proprietary commercial or financial information, privileged or confidential information; or
 - (b) Information the disclosure of which could reasonably be expected to interfere with the contractual or other negotiations of a third party; and
 - (c) Proposal and bids for any contract, grants or agreement (including information) which if it were disclosed would frustrate procurement or give an advantage to any person.
- Section 16 (Exemption of Professional or remedies/Privileges Conferred by Law) – This section empowers a public institution to deny an application for information or records that is subject to the following privileges:
 - (a) Legal practitioner - client privileges;

- (b) Health workers - client privileges;
 - (c) Journalism - confidentiality privileges; and
 - (d) Any other professional privileges conferred by an Act.
- Section 17 (Exemption of Course or Research Materials) – Under this section, a public institution may deny an application for information or records which contain course or research materials prepared by faculty members.
 - Section 19 (Denial of Disclosure of Certain Records by Certain Public Institution) – This section empowers the public institution to deny an application for information or records that contains information pertaining to:
 - (a) Test questions, scoring keys and other examination data used to administer an academic examination or determine the qualifications of an application for a license or employment; or
 - (b) Architects' and engineers' plans for buildings not constructed in whole or in part with public funds and for buildings constructed with public funds, to the extent that disclosure would compromise security; and
 - (c) Library circulation and other records identifying library users with specific materials.

Subsection (2) of the section provide that notwithstanding anything contained in the above exemptions of section 19(1), an application for information or records shall not be denied where the public interest in disclosing the information or records outweighs whatever injury that disclosure would cause.

Again, in all the above cases of denial of application for information or records under section 19, sections 20 and 21 of the Act empower the affected applicant, by summary proceedings, to apply to the court for review of the matter within 30 days of the denial or within such further time as the court may allow before or after the expiration of the 30 days fix or allow. In any such proceedings, section 22 empowers the court to examine any

information or records to which the Act applies that is under the control of the public institution and no such information may be withheld from the court on any ground.

4. The fourth object of the Act is “to protect serving public officers from adverse consequences, etc”.

Section 27 of the Act provides, among other things, that notwithstanding anything contained in the Criminal Code,⁴ Penal Code,⁵ the Official Secrets Act,⁶ or any other enactment, no civil or criminal proceedings shall lie against an officer of any public institution, or against any person acting on behalf of a public institution, and no proceedings shall lie against such persons thereof, for the disclosure in good faith of any information, or any part thereof pursuant to this Act, for any consequences that flow from that disclosure, or for the failure to give any notice required under this Act, if care is taken to give the required notice.

5. The fifth and final object of the Act is “to establish procedures for the achievement of the purposes of the Act”.

Two of such procedures may here be stated:

First, under section 28, the fact that any information in the custody of a public institution is kept by that institution under security classification or is a classified document within the meaning of the Official Secrets Act does not preclude it from being disclosed pursuant to an application for disclosure thereof under the provisions of the Act, but in every such case, the public institution to which the application is made shall decide whether such information is of a type referred to in the exemption sections of the Act discussed above, namely, sections 11, 12, 14, 15, 16, 17, 19, 20 or 21 of the Act.

Second, it is provided in section 26 that the Act does not apply to

⁴ Cap. C38 LFN, 2004.

⁵ Cap. P3 LFN, 2004.

⁶ Cap. 03 LFN, 2004.

- (a) Published material or material available for purchase by 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 or other than a government or public institution.

III. Concluding Remarks

Having now seen the general provisions of the FoI Act 2011 as they really are, we are in a better position to evaluate the many contributions which the Act is expected, or believed to be able, to make in our national life.

- For Press and Media Practitioners, it seems clear that their job of disseminating information to the public concerning the activities of government and of other people and organizations based on full, concrete and properly investigated facts has now been made possible and easy. The Press, it may be said, can now more readily access information from public servants and the generality of Nigerians.
- For the nation at large, it is believed that the Act will greatly assist in the fight against corruption which is, and remains, Nigeria's 'Public Enemy Number One' in her aspiration for economic development and exemplary social services delivery.
- For the public service, it is also believed that the era of classifying virtually all government files and information as 'top secret' is over as the Act has pulled away and torn to pieces the obnoxious veil of secrecy from government business. Openness in government is key to reducing corruption which is currently Nigeria's open wound affliction.

- Finally, and again for the general public, it is hoped that the Act will progressively establish an open and transparent governance in the country, which is capable of promoting human rights of the citizens. Access to information, it may be emphasized, encourages transparency in government.

Nothing can be more edifying to the country than the realization of all the above pious expectations from the Freedom of Information Act.

But it must be cautioned that it is too early in the day to feed on the above, and other, expectations from the Act. One needs only to very closely and critically look at the third and fourth objects of the Act – all the seven exemptions and additional protections offered to serving public officers – as examined in detail in this paper, to begin to wonder and worry whether, at the end of the day, the Freedom of Information Act in its present form is not just a mere fancy offered to the Nigerian public with one hand to assuage the frequently expressed desire of the Print and Electronic Media for open administration in the country, and taken away with the other hand in the form of those exemptions and denials of access and really leave the country in its status quo ante. Only time will tell.

For now, we can only –

- (i) Repose our confidence in the important role and ability of the courts, through its interpretative powers, to sincerely enforce the spirit and intent of the Freedom of Information Act;
- (ii) Urge the Media and Civil Rights groups in the country to remain focused and steadfast in demanding the enforcement of the Act in its true spirit; and
- (iii) Strongly suggest that the Federal Government urgently establishes a plan of action to go beyond the provisions of section 27 of the Act and carefully review, amend or repeal aspects of all the existing laws such as the Official Secrets Act, the Federal Commissions (Privileges and Immunities) Act, the Public Complaints Commission Act,

the Evidence Act, the Criminal Code and Penal Code, which contain provisions or clauses capable of forbidding the disclosure of official information by public officials.

Finally, one needs to appeal for restraint from all stakeholders so that the ‘baby’ – the Freedom of Information Act – is given time to grow and develop, and not thrown away with the dish water.