

Freedom of Information Law in Nigeria; Challenges of Implementation

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Introduction

A lot has been written¹ on the importance of access to information law in any society especially in a democracy and the challenges that are commonly faced in the implementation of such laws. But the object of this thesis is not to repeat what has been written about access to information and its relevance in democracy but to address the peculiar challenges Nigeria will face especially in this early stage of implementing the access to information law. The reason for focusing on Nigeria's peculiar challenges is that before Nigeria passed its Freedom of Information Act in May 2011, about 51 other countries already have access to information laws and Nigeria itself is not alien to the concept of access to information law. This is evidenced in the case of *Dr. Basil Ukaegbu v. Attorney General of Imo*² state where the right to information was declared to be the basis for a right to establish a private university by the Supreme Court of Nigeria. The case came about because the government of Imo state challenged the right of Dr. Basil Ukaegbu to establish a university. Similarly, in the case of *Archbishop Okogie vs. Attorney General of Lagos state*³, the Court of Appeal also made the right to information a basis for the right to own a private primary school. The court in that case interpreted the term 'medium'⁴ in section 36 (2) of the Nigerian 1979 Constitution to mean

¹ Ann Florini (Ed) *The Right to Know: Transparency for an Open World* (2007); Beatson Jand Cripps Y (Ed), *Freedom of Information in Honour of Sir David Williams* (published by Oxford University Press 2000); Birkinshaw P, *Freedom of Information; The Law, the Practice and the Ideals* (Butterworth publishing 2001)

² "By virtue of subsections 1 and 2 of section 36 every subject of this Federation has a right to establish an institution "for the dissemination of information, ideas and opinions "; and for this purpose any individual or private agency may establish a university, post primary as well as primary schools..... The right of the subject to establish a university is guaranteed by the Constitution under section 36 aforesaid" (1983) NSCC, 160

³ (1981) NCLR, P. 337 "It will be an infringement on the fundamental rights of the parents to restrict them to a particular type of school to send their children for dissemination of ideas, and also it will be an infringement of the fundamental rights of the children to confine them to a particular institution to which they can receive such ideas" para.7

⁴ First paragraph Section 36 (2) of the 1979 Constitution provides thus "Without prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and manage a medium for the dissemination of information, ideas and opinions"

“...any intermediate agency for the dissemination of information, ideas and opinion and it includes any school or institution for imparting information, ideas, knowledge and opinions⁵”

The 1999 Nigerian Constitution also provides in chapter 4 for a right to information⁶.

The focus on the peculiar challenges Nigeria will face in the implementation of the FoI Act is because there is a difference in the perception of freedom of information during a democracy and under a military rule. For one, exceptions to access to information under a democracy are usually narrowly tailored while in non democracy it is discretionary⁷. As a result it is likely that given its history Nigeria will have peculiar challenges in the implementation of the Act which need to be addressed.

Freedom of information is a concept that is integral to democracy or how else will it be a government of the people by the people and for the people if the people themselves do not have access to information about how they are governed and be able to contribute meaningfully to their governance? The relevance of the freedom of information to democracy was aptly captured in the words of James Madison as follows

“A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or tragedy; or perhaps both. Knowledge will forever govern

⁵ Archibishop Okogie vs. Attorney General of Lagos State (1981) NCLR, 337 para. 12

⁶ Section 39 Constitution Federal Republic of Nigeria, 1999

⁷ The manner of access to information which Nigerians have had before the passage of the FoI Act is out of the benevolence of the government and public bodies instead of access to information as a fundamental right.

ignorance. And a people who mean to be their own governors, must arm themselves with the power which knowledge gives.⁸”

This implies that a true democratic government must not only generate information for the masses but they also have to create access to the information too so that the people can own their governance.

Freedom of information also referred to as the right to know, is a corollary to other rights and duties and has been recognised as the foundation to other rights⁹. Freedom of information fleshes out and thus intertwines with the right to expression hence Article 19 of the Universal Declaration of Human rights provides for a right to obtain and a right to disseminate information. In a democratic society, both a right to information and freedom of expression could be said to be different aspects of the same principle because an important aspect of the freedom of expression is that it gives room for the people to participate in public debates and for them to be able to do so they need access to political, social, cultural, economic and all sorts of information¹⁰ so as to be able to make informed choices. Any restriction on the right to information will somewhat affect the quality of free expression and democratic processes. The right to information serves similar purposes in a society as the right to expression. Aside from serving the purpose of self fulfilment, they serve as a tool for societal reform without having to use violence¹¹.

⁸ Letter from James Madison to W.T. Barry, August 4, 1822, in 9 Writings of James Madison 103 (G. Hurst ed 1910).

⁹ United Nations General Assembly Resolution 59(1) 14 December 1946.

¹⁰ Stuart Hamilton, Niels Ole Pors, ‘Freedom of Access to Information and Freedom of Expression: the Internet as a Tool for Global Social Inclusion’ (2003), Library Management, Vol: 24, Iss: 8, Pp 407 – 416, 409

¹¹ Thomas I. Emerson, ‘Legal Foundations of the Right to Know’ (1976) Washington University Law Quarterly, 3

Freedom of speech in any society is also important and deserves maximum protection so much that the European Court of Human Right in the case of *Handyside v. United Kingdom*¹² stretched this freedom to include both the speech that is favourably received to the ones that offend and shock the government or the society¹³. It goes without saying that free speech will be less meaningful and qualitative if there is no right of access to information. This freedom is not only essential in a society for political purposes but also for economic growth of the society and for self development¹⁴.

However, the right to know serves other purposes aside from complementing the right to expression. This is especially so, as the interest of the one making an expression is not always same as the one obtaining the information hence the need to recognise the right to know as an independent legal right¹⁵. The right to know is important to the public as it enables them to form opinion, make critical assessments and participate in open debate¹⁶.

Freedom of information also plays a role in the exercise of electoral rights because competitiveness during election is fair when there is open access to all to information and for the people to be able to make informed choices as to a suitable candidate. The same free access to information also gives the people the means to hold those they have elected into

¹² 1976 (application no. 5493/72)

¹³ The European Court of Human Rights also noted that freedom of expression constitutes one of the essentials of democratic society, one of the basic conditions for its progress and for the individual development.

¹⁴ Francis Canavan, 'J.S Mill on Freedom of Expression' http://www.mmisi.org/ma/23_04/canavan.pdf> accessed 24 November 2011

¹⁵ Thomas I. Emerson, 'Legal Foundations of the Right to Know' (1976) Washington University Law Quarterly, 3

¹⁶ Stuart Hamilton, Niels Ole Pors, 'Freedom of Access to Information and Freedom of Expression: the Internet as a Tool for Global Social Inclusion' (2003), Library Management, Vol: 24, Iss: 8, Pp 407 – 416, 409

power accountable as to their actions and decisions while in office. The point is buttressed by David M. De Ferranti while discussing transparency as one of the factors to be taken into consideration to improve governance, he stated that the level of transparency in governance is measured amongst others by the nature of record keeping by government, monitoring performance and the disclosure and strength of the access to information law in that country¹⁷.

The right to know by itself is equally important irrespective of other roles it plays for other rights and has an independence of its own. The United Nations has classified freedom of information as a fundamental human right and stated that it is “the touch stone of all other freedoms to which the United Nations is consecrated”¹⁸.

The Inter American Court of Human Right has also recognised the importance of freedom of information as a right on its own when in the case of *Mercel Claude Reyes & Others v. Chile*¹⁹ the plaintiffs brought the action to the court seeking for it to hold that Article 13 of the Inter American Convention grants a right of common access to state held information and that the state government has breached its obligation under the convention. This was as a result of a denial of their request for information from government on a deforestation project that could have an environmental impact. The court in granting their request held that individuals are entitled to state held information and also added that the right is only

¹⁷ David M. De Ferranti, ‘How to Improve Governance’ (2009) Brookings Institute Press, 15

¹⁸ United Nations General Assembly Resolution 59(1) 14 December 1946

¹⁹ (2006) case No. 12.108

restricted by exceptions provided by the convention and that individuals need not prove any personal involvement or direct interest to obtain information²⁰.

The Supreme Court of India also recognised freedom of information as an important right of its own when by its decision in a case which it considered even before the passage of its FoI Act, affirmed that FoI is an important aspect of democracy even when not expressly stated in a Constitution. This it did in the case of *S.P Gupta v. Union of India*²¹ which was brought due to refusal by the Indian government to make available intra-agency communications regarding transfers and dismissal of judges. The court stated thus

“[w]here a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of government. ... The citizens’ right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic State.”²²

Nigeria as a nation has recognised the essence of this freedom and on the 28th May 2011 it joined some of the other nations of the world in passing a freedom of information law. But because freedom of information laws are essential tools in the hands of people in holding the

²⁰ Merce Claude Reyes & Others v. Chile (2006) case No. 12.108 Para. 77

²¹ (1982) AIR (SC) 149 at 232

²² S.P Gupta v. Union of India (1982) AIR (SC) 149 at 232

government accountable and given the history of access to information in Nigeria it is imperative to consider the challenges Nigeria will face (or is already facing) in implementing the just passed law.

Structure and Methodology

The thesis will utilise relevant literature, case law, and oral interviews with key persons from Nigeria who were actively involved in the struggle for the passage of the freedom of information law in Nigeria. Most importantly, it will also make use of ongoing cases concerning the challenges of implementing the law in Nigeria that were obtained from the listserv of a coalition on FoI in Nigeria.

The thesis will consider the challenges the new law has encountered and might yet encounter as it is implemented, draw experiences from jurisdictions that have relatively overcome some of the common challenges that are likely to be encountered in implementing the law and offer possible best practices for Nigeria to adopt to overcome hers.

Chapter One: This part of the thesis will focus on a brief history and background information on Nigeria; look at the legal framework relating to freedom of information prior to the passage of the FoI Act and then detail the story of the struggle for the passage of the law for 18 years. It will finally look at what changed in the political climate to bring about the passage of the FoI Bill into law. The chapter also will discuss the transition of access to information in Nigeria right from the colonial era through the military rule to the present democracy, the varying level of access to information and the access to information laws in

force before the current FoI Act. It will also look at the struggle for the passage of the newly enacted law and examine what factors influenced the present administration to pass the law. Finally it will conclude by looking at the features of the FoI Act, 2011.

Chapter Two: This chapter will look at the various challenges that the recently enacted freedom of information law in Nigeria is facing and will likely face in future. The most obvious ones being the century old culture of secrecy that pervades the civil service of the country and the problem of poor record creation, organising and maintenance. It will also look at the various misconceptions about the law and the challenges it creates in terms of usage and implementation.

Chapter Three will address the challenges discussed in chapter two by proffering possible ways the challenges could be tackled. This it will do by looking at jurisdictions that have the freedom of information law in force particularly the ones that share some similarities with Nigeria, either by way of the system of government they operate, similar historical background or by being of the same continent. It will look at the challenges they faced in implementing their FoI Act and how they overcame those challenges.

Chapter Four looks at the international perspective on access to information through the various conventions and case laws. It then concludes the thesis by reiterating the importance of having access to information in any democratic society, the fact that it is not enough to just have the law but the need to fully implement it so that the set objectives will be achieved. It

will then round up by laying emphasis on ways Nigeria might choose to address the challenges it faces in the implementation of its FoI Act.

Chapter One

Historical Context

This chapter will trace the history of access to information in Nigeria, how its colonial and political history has influenced its development until the present day, the move from military government to civilian regime, how the struggle for the passage of the freedom of information law started and what factors contributed towards the change of heart of those in government which resulted to its final passage into law.

History of Access to Information Law in Nigeria

Nigeria was colonised by Britain during the second half of the 19th Century up till the first decade of the 20th century. The United Kingdom in 1947 introduced the federal system of government under a new constitution which was based on three regions of the east, west and north and the concept was to reconcile the regional and religious tension and to give due consideration to the interest of the different ethnic groups. Nigeria subsequently gained independence on October 1, 1960²³.

The secrecy which the Nigerian system has become accustomed to in the running of its affairs has its roots from the colonial era and this was as a result of the attitude of the British who governed the people without the liberty of choice and in a paternalistic manner²⁴. The belief for adopting a system of secret government was because the British colonial rulers felt that the people they governed lacked the required human capacity to understand the affairs of

²³ Nigeria, History and Politics <http://www.iss.co.za/af/profiles/nigeria/politics.html#top>> accessed 25 November 2011

²⁴ Chidi Odinkalu, 'Freedom of information in Nigeria; Perspectives, Problems and Prospects' (2008), Presented at Text of law and development lecture organised by Bamidele Aturu & Co, Legal Practitioners, Agip Hall, Muson Centre, Lagos (copy on file with author) pg 7

government²⁵. Because the people were considered unequal to their colonisers, a culture of secret governance was cultivated and government during the colonial era was done in secrecy.

After its colonial rule, Nigeria was plagued by military regimes from 1966 – 1979, 1983 – 1999. The military rule was started with the regime of Major Chukwuma Nzeogwu to the takeover coup by Gen. Ibrahim Babaginda from 1985 – 1993 and finally by Gen. Sani Abacha who ruled from 1993 till his demise in 1998²⁶. The various military regimes justified their take over on various reasons from the trouble of the second republic to decaying economy.

Under the military regime, there was not much difference in the secret system of government because the same paternalistic attitude continued but the reason for it was the only thing that changed²⁷. The difference in the attitude of the colonial and military rulers which fostered secrecy in government was best described as moving from “not being human enough to understand to not being citizen enough to ask”²⁸.

²⁵ Chidi Odinkalu, ‘Freedom of information in Nigeria; Perspectives, Problems and Prospects’ (2008), Presented at Text of law and development lecture organised by Bamidele Aturu & Co, Legal Practitioners, Agip Hall, Muson Centre, Lagos (copy on file with author) pg 8

²⁶ Nigeria: Military regimes: 1983 -99, Britannica online encyclopaedia <http://www.britannica.com/EBchecked/topic/414840/Nigeria/214178/Military-regimes-1983-99>> accessed 25 November 2011

²⁷ Chidi Odinkalu, ‘Freedom of information in Nigeria; Perspectives, Problems and Prospects’ (2008), Presented at Text of law and development lecture organised by Bamidele Aturu & Co, Legal Practitioners, Agip Hall, Muson Centre, Lagos (copy on file with author) pg 8

²⁸ Chidi Odinkalu, ‘Freedom of information in Nigeria; Perspectives, Problems and Prospects’ (2008), Presented at Text of law and development lecture organised by Bamidele Aturu & Co, Legal Practitioners, Agip Hall, Muson Centre, Lagos (copy on file with author) pg 8

The resultant effect of having been brought together by the British colonial administration with amalgamation of Nigeria in 1914, which also enacted the Official Secrets Act in 1911 and made it applicable to its colonies and protectorates and the subsequent long period of military rule was that the nation got accustomed to having a government whose activities are shrouded in secrecy. The Official Secret Act which was just amended (with regard to the provisions of Section 1(a), 1(b) & 1(c) respectively dealing with unauthorised disclosure of information or documents held by public institutions) by the passage of the Freedom of Information Act in May 2011 is a good illustration of this. This law was introduced into Nigeria by the British during the colonial era and as Prof. Chidi Odinkalu²⁹ put it “Imperial Britain had no citizens; it had only subjects of the Imperium. Similarly under colonialism there were no citizens”³⁰. Again the fact that the country was almost immediately taken over by the military after its colonial rule did not give it space for the right ideals of citizenship to originate³¹.

Interestingly the Official Secrets Act has been reviewed and amended in Britain and is now applicable to only personnel of the security and intelligence services while it was until now that the law was just amended in Nigeria³². This is a reflection of how deep the government had become accustomed to having its activities shrouded in secrecy. It also shows the unwillingness of the subsequent governments to run a transparent system and to be accountable to its citizens.

²⁹ Chidi Odinkalu works with the Open Society Justice Initiative as a Senior Legal Officer

³⁰ 10 Myths About the FOI Act By Chidi Odinkalu (August 2011)

http://www.r2knigeria.org/index.php?option=com_content&view=article&id=199:10-salient-features-of-the-freedom-of-information-act-2011&catid=62:newsletter&Itemid=318> accessed 25 November, 2011

³¹ 10 Myths About the FOI Act by Chidi Odinkalu (August 2011)

http://www.r2knigeria.org/index.php?option=com_content&view=article&id=199:10-salient-features-of-the-freedom-of-information-act-2011&catid=62:newsletter&Itemid=318> accessed 25 November, 2011

³² For example section 2 of the United Kingdom’s Official Secrets Act has been amended to be more favourable to access to information by removal of disclosure of much of official information from the ambit of criminal liability.

Legal Framework Governing FoI Prior to FoI Act in Nigeria

The Nigerian 1999 Constitution under section 39 (1) stated

“Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference³³”

Within the same section 39 under subsection (3) (b) it also stated

(3) “Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society –

(b) Imposing restrictions upon persons holding office under the Government of the Federation or of a state, members of the armed forces of the federation or members of the Nigeria Police Force or other Government security services or agencies established by law.³⁴”

By these provisions the Nigerian Constitution offers the citizens freedom of information on the one hand and on the other hand removes that freedom by creating room for laws to be enacted which in effect made the exercise of that freedom impossible or burdensome.

This is despite the fact that same Constitution³⁵ also stated under its fundamental principles and directives of state policy that sovereignty belongs to the people from whom government gets its power through the Constitution, with a promise that the security and welfare of the

³³ Section 39 (1) 1999 Constitution

³⁴ Section 39 (3) (b) 1999 Constitution

³⁵ Section 14 (2) (a), (b), (c) 1999 Constitution

people is its main concern and further to say that the peoples involvement in governance will be ensured in accordance with its provision.

These provisions of the Nigerian constitution set the context for several other laws affecting the right to free flow of information by making provisions that offers freedom of information and then making it difficult or close to impossible to access information. A review of such laws will reveal the lack of appreciation of the relationship between the citizen, the law and the state by the government. If they did then they would have recognised and given effect to two important dimensions of freedom of information through the laws. The two dimensions being that; one that public official owes a duty to be honest to the citizens and two that it is the duty of the government to ensure that the citizens have access to publicly held information³⁶.

Official Secret Act, 1962

This Act was promulgated for the purpose of public safety and other related purposes. It is applicable to all public officials and in essence prohibits the unauthorised disclosure of official information. Some of the relevant sections will be reproduced for a better appreciation.

Protection of Official Information

(1) “Subject to subsection (3) of this section, a person who

³⁶ Chidi Odinkalu, ‘Freedom of information in Nigeria; Perspectives, Problems and Prospects’ (2008), Presented at Text of law and development lecture organised by Bamidele Aturu & Co, Legal Practitioners, Agip Hall, Muson Centre, Lagos. (copy on file with author) pg 2

- (a) Transmits any classified matter to a person to whom he is not authorised on behalf of the government to transmit it; or
- (b) Obtains, reproduces or retains any classified matter which he is not authorised on behalf of the government to obtain, reproduce or retain, as the case may be, is guilty of an offence.
- (c) A public officer who fails to comply with any instructions given to him on behalf of the government to the safeguarding of any classified matter which by virtue of his office is obtained by him under his control is guilty of an offence.³⁷”

Evidence Act 2011

This Act despite being amended in July 2011 (almost 2 months after the passage of the FOI Act) still retains the provisions of the 1945 version which were quite restrictive of access to information. The relevant provisions are reproduced below.

Official and Privileged Communications

“189. No magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offense, and no officer employed in or about the business of any branch of the public revenue shall be compelled to say whence they got any information as to the commission of any offence against the public revenue.

190. Subject to any directions of the President in any particular case, or of the Governor where the records in the custody of a state, no one shall be permitted to produce any unpublished official records relating to affairs of state, or to

³⁷ Section 1 (3) Official Secrets Act, 1962

give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

191. No public officer shall be compelled to disclose communication made to him in official confidence, when he considers that the public interests would suffer by the disclosure.”

Sections 190 and 191 of the Evidence Act contain a proviso to the effect that such information could only be produced at the order of a court who shall view the said document in private.

It is imperative that there should be a reconciliation of these provisions with the FoI Act.

The Public Procurement Act

This Act contains provisions which are favourable to access to information and also some proactive disclosure provisions which mandates the bureau of public procurement to make public some information³⁸. This is expected because it promotes transparency in the public procurement sector which is important in ensuring the fight against corruption and retaining public confidence. However it contains some provisions which give unfettered discretion to the bureau and other procuring entities as to which documents to withhold back from the public as being classified³⁹. This is despite the fact that it contains provisions which states

³⁸ Edetan Ojo, 'Access to Information under the Public Procurement Act 2007, in Chibuzo C. Ekwewkwo (Ed) Non State Actors and Procurement Watch in Nigeria (2008) pg 22

³⁹ Edetan Ojo, 'Access to Information under the Public Procurement Act 2007, in Chibuzo C. Ekwewkwo (Ed) Non State Actors and Procurement Watch in Nigeria (2008) pg 24

that the provisions of the Act do not apply to the procurement of national defence or national security⁴⁰.

One of the provisions which are restrictive on access to information is reproduced below because of the worrisome content which encourages the bureau or any procurement entity to disregard the order of a court at its discretion.

“S. 38 (1) Every procuring entity shall maintain a record of the comprehensive procurement proceedings.

(2) The portion of the record referred to in this Section shall, on request, be made available to:

(a) any person after a tender, proposal, offer or quotation has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract; and

(b) suppliers, contractors or consultants that submitted tenders, proposals, offers or quotations, or applied for prequalification, after a tender, proposal, offer or quotation has been accepted or procurement proceedings have been terminated without resulting in a procurement contract”⁴¹.

Sub-section (3) of the Section also provides that:

“ (3) A disclosure of procurement proceeding records, prior to award of contract may be ordered by a court, provided that when ordered to do so by a

⁴⁰ S. 15 (2) Public Procurement Act, 2007

⁴¹ Section 38 Public Procurement Act, 2007

court, the procurement entity shall not disclose such information, if its disclosure would:

- (a) be contrary to law;
- (b) impede law enforcement; or
- (c) prejudice legitimate commercial interests of the parties⁴².

It is important to point out that so far no entity has relied on any of the subsections of section 38 to disregard a court order for the release of requested information. In a recent case brought by the Nigerian Contract Monitoring Coalition against the Power Holding Company of Nigeria (PHCN) in an Abuja Federal High Court, the court ordered the PHCN to release the said documents to the coalition and they promptly complied. The coalition which is monitoring a World Bank contract being carried out by the PHCN for the supply and installation of High Voltage Distribution system requested for documents relating to the award of the contract. The court granted them leave to apply for a mandamus to compel PHCN to release the documents and they complied accordingly⁴³.

Other laws that restrict access to information are as follows:

Customs and Excise Management Act 2003

Section 7 – Information and documents to be confidential

- (1) “Without prejudice to the provisions of any other Act concerning official secrets, all information and documents supplied or produced in pursuance

⁴² Subsection (3) Public Procurement Act, 2007

⁴³ A press release by the Nigerian Contract Monitoring Coalition about the case was made on the 16th November, 2012 (a copy on file with the author)

of any requirement of the customs and excise laws shall be treated as confidential, and if any person who is or has been a member of the Board or who is or has been employed in the ministry, communicates or attempts to communicate any such information or the contents of any such document to any person except

- (a) For the purpose of the custom and excise laws; or
- (b) As required by any other enactment; or
- (c) As otherwise authorised by the minister

He shall be liable to a fine of two hundred naira or to imprisonment for six months or to both.

(3). A person who is or has been a member of the board or who is or has been employed by the Ministry may, except with the consent of the Minister be required to divulge to any court any such information or to produce in any court any such document as is referred to in subsection (1) of this section, except as may be necessary for the purpose of carrying into effect any provision of the custom and excise laws or in order to institute a prosecution or other legal proceedings, or in the course of a prosecution or other legal proceedings under the customs and excise laws.⁴⁴

Federal Inland Revenue Services (Establishment Act 2011)

S. 39 – Information and Documents to be Confidential

“(1) Without prejudice to the provisions of any other Act concerning official secrets, all information and documents supplied or produced in pursuance of

⁴⁴ Section 7 (1) & (3) Customs and Excise Management Act, 2003

any requirement of the Act or the laws listed in the first schedule to this Act shall be treated as confidential.

(2) Except as otherwise provided under this Act or as otherwise authorised by the minister, any member or former member of the Board or employee or former employee of the service or ministry who communicates or attempts to communicate any confidential information or the content of any such document to any person, commits an offence and shall be liable on conviction to a fine not exceeding N200, 000.00 or to imprisonment for a term not exceeding 3 years or to both such fine and imprisonment.⁴⁵”

Section 50 – Official Secrecy and Confidentiality

“(1). Every person in an official duty or being employed in the administration of this Act shall regard and deal with all documents, information, returns, assessment list and copies of such list relating to the profits or items of profits of any company, as secret and confidential.

(2). A person in possession of or control of any document, information, return or assessment list or copy of such list relating to the income or profits or losses of any person, who at any time communicates or attempts to communicate such information or anything contained in such document, return, list or copy to any person.

(a) To any person other than a person to whom is authorised by the service to communicate it;

⁴⁵ Section 39 (1) (2) Federal Inland Revenue (Establishment) Act 2011

(b) Otherwise than for the purpose of this Act or of any enactment in Nigeria imposing tax on the income of persons.

Commits an offence under this Act.^{46,,}

The above sections of different laws which were restrictive of access to information in Nigeria meant that any or all sorts of information were made secret. For example, as a result of the elaborate classification powers given to government officials in the Official Secrets Act, even a piece of document containing a law was classified as top secret⁴⁷.

Section 1, 27 and 28 of the FoI Act, 2011 have amended the sections of most these laws that restrict access to information. However some provisions of the National Security Agencies Act⁴⁸ which are not quite favourable to freedom of information in Nigeria have not been amended by the FoI Act because it is saved by section 315 of the Constitution of the Federal Republic of Nigeria for now until that section of the Constitution is amended hopefully during the on-going Constitutional review.

History of the FOI law in Nigeria

The need for transparency in any society is very essential so as to ensure full and equal participation by the populace in the public administration of the country. This was reflected in a working definition of transparency by Ann Florini in which she stated that “transparency

⁴⁶ Section 50 Section 39 (1) (2) Federal Inland Revenue (Establishment) Act 2011

⁴⁷ Chidi Odinkalu in his paper ‘Freedom of information in Nigeria; Perspectives, Problems and Prospects’ (2008), Presented at Text of law and development lecture organised by Bamidele Aturu & Co, Legal Practitioners, Agip Hall, Muson Centre, Lagos’ recounts how in 1991 it took him 9 months to locate a copy of the prison regulation. And the document was marked “Top Secret” even though it was a law meant to be administered by prison officials.

⁴⁸ Section 2 (1)(b)(4)(5), 7(2) National Security Agencies Act

is the extent to which information is accessible to outsiders to enable them to have informed decision and assess the decisions made by insiders”⁴⁹.

It is true that the culture of secrecy which pervades Nigeria was a resultant effect of both the colonial and military rule but nothing stopped the government from making concerted effort to transcend that culture because the idea that members of a community should be involved in informed decision making was not alien to pre-colonial Nigeria⁵⁰. After all the Official Secrets Acts which was introduced into Nigeria by the British has never been reviewed or amended until now while in Britain the same law has been reviewed and amended several times.

For a long time government was unwilling to pass the freedom of information Bill which dates back to 1993 when the struggle for its passage started. The reason for that could be attributed to a lot of factors ranging from the culture of secrecy, the resource curse, corruption and lack of willingness to be accountable to the people. But because “excessive secrecy has a corrosive effect on virtually all aspects of society and governance by undermining the quality of public decision making and preventing citizens from checking the abuses of public power⁵¹” it was only a matter of time before the citizens demands their right.

⁴⁹ Ann Florini, ‘*The Battle Over Transparency*’ in Ann Florini (Ed) *The Right to Know: Transparency for an Open World* (2007) pg 5

⁵⁰ Ayo Obe, ‘*The Challenging Case of Nigeria*’ in Ann Florini (Ed) *The Right to Know: Transparency for an Open World* (2007) pg 143

⁵¹ Joseph E. Stiglitz, ‘Foreword’ in Ann Florini (Ed) *The Right to Know; Transparency for an Open World* (2007)

The struggle for the passage of the FOI Act started during the military regime of Gen. Sani Abacha and being open in governance was not part of his administration⁵². It started on a small scale with Edetan Ojo⁵³, who provided the first spark by engaging the Civil Liberties Organisation and the Nigerian Union of Journalists to present the first Bill to the National Assembly⁵⁴. Chidi Odinkalu⁵⁵ helped by providing a synthesis of FOI Laws around the world and Tunde Fagbohunlu⁵⁶ did the first draft of the Bill. Along the line others joined the struggle in one way or another advocating for the passage of the law.

The advocacy for the passage of the law did not succeed during the military era and in 1999 Gen, Olusegun Obasanjo came into power. Prior to his coming into power and since his retirement from the military and government he had been involved in campaigns for good governance in Africa⁵⁷. So naturally when he became the president, the people felt that their struggle will soon come to an end. But this was not to be, as he first refused to introduce the Bill to the National Assembly as an executive Bill but advised that they could do so as a Private Member's Bill which they did. At this point the Bill had attracted more friends especially amongst members of the legislators and someone like Maxwell Kadiri who became an ardent advocate and recruited others too⁵⁸.

⁵² Chidi Odinkalu, 'Nigeria's Freedom of Information Law: How Friends Launched a Movement' (2011) <http://blog.soros.org/2011/06/nigerias-freedom-of-information-law-how-friends-launched-a-movement/>> accessed 27 November 2011

⁵³ Edetaen Ojo runs an organisation known as the Media Rights which advocates for free expression rights in Nigeria

⁵⁴ ThisDay Newspaper Nigeria, September 28th, 2009

⁵⁵ Chidi Odinkalu is an executive member of the Nigerian Bar Association and a senior legal officer with the Open Society Justice Initiative

⁵⁶ Tunde Fagbohunlu is currently a Senior Advocate in Nigeria

⁵⁷ Chidi Odinkalu, 'Nigeria's Freedom of Information Law: How Friends Launched a Movement' (2011) <http://blog.soros.org/2011/06/nigerias-freedom-of-information-law-how-friends-launched-a-movement/>> accessed 27 November 2011

⁵⁸ Chidi Odinkalu, 'Nigeria's Freedom of Information Law: How Friends Launched a Movement' (2011) <http://blog.soros.org/2011/06/nigerias-freedom-of-information-law-how-friends-launched-a-movement/>> accessed 27 November 2011

The Bill elicited supporters and suspicions on the other hand and eventually failed to make it in the 4th parliament. The struggle continued in the 5th parliament, made it through both Houses of the National Assembly and was presented to the President, Olusegun Obasanjo who publicly swore not to pass the Bill⁵⁹. And so another attempt at having the Bill passed failed⁶⁰.

However at this point it had drawn a lot of attention and garnered support from members of the Nigerian Bar Association, more members of the National Assembly, President of the Commonwealth Lawyers Association⁶¹ and more prominent voices joined in the struggle and it was eventually passed on 28th May 2011 by the Goodluck Jonathan administration.

A look at the review of the parliamentary debate by the coalition of civil society's that advocated for the passage of the law reveal that the two Houses of the National Assembly passed different versions of the Bill that was submitted to them and was later harmonised by a joint committee set up to do so. The review shows that the version of the Bill passed by the Senate indicates that they perceived the passage of the Bill as granting a privilege to the citizens rather than a right⁶². The House of representative on the other hand perceived the Bill

⁵⁹ Chidi Odinkalu, 'Nigeria's Freedom of Information Law: How Friends Launched a Movement' (2011) <http://blog.soros.org/2011/06/nigerias-freedom-of-information-law-how-friends-launched-a-movement/>> accessed 27 November 2011

⁶⁰ Chidi Odinkalu, 'Nigeria's Freedom of Information Law: How Friends Launched a Movement' (2011) <http://blog.soros.org/2011/06/nigerias-freedom-of-information-law-how-friends-launched-a-movement/>> accessed 27 November 2011

⁶¹ Chidi Odinkalu, 'Nigeria's Freedom of Information Law: How Friends Launched a Movement' (2011) <http://blog.soros.org/2011/06/nigerias-freedom-of-information-law-how-friends-launched-a-movement/>> accessed 27 November 2011

⁶² Senate Committee Report on FoI Bill 19/09/08, section 2 pg 1 - 2

as a right as indicated by some of the amendments which they made to the Bill⁶³. One of such changes was the amendment which they made to section 2(1) of the law which is more assertive of a right to access to information than the version passed by the Senate. A further discussion on this particular amendment to section 2(1) follows under the section misconceptions about the FoI Act in chapter two and three below.

Despite what might have been the initial (op)position of the parliamentarians to the passage of the FoI Act it is necessary to point out that they eventually agreed and worked together with the coalition of civil societies in passing the FoI Act.

What Changed?

It is natural for one to be curious in boldly making allusions as to what changed in government that made the passage of the Law possible. Was there a revolution by the masses? What did the advocates for the Bill do differently this time to change the mind of government? What was the political climate? Is there a real intent on the part of the government to run a transparent system?

All these questions were addressed in an interview with two of the key players in the struggle for the passage of the law. The view is that the Bill had at this time gained popular support, the Civil Society also ensured that the Bill was kept alive by introducing it to each new session of parliament since the bill made its way into the parliament since 1999, the age of

⁶³ The Freedom of Information Bill Report of the House of Representative Joint Committee on Information, National Orientation and Justice, section 2(1) pg 2

the Bill also weighed in and the question has become; what really do they have to lose⁶⁴. The Law was passed during an election time and so the politicians did not want to lose out on power and relevance by failing to get on the bandwagon of the FOI and of course it made them look good or better than they were⁶⁵.

Again the consistency of the Civil Society Groups that were neck deep in the struggle for the passage of the Bill also needs to be emphasized. The special efforts of Maxwell Kadiri, Ene Enoche, Ledum Bhule who had to sleep at the National Assembly on some occasion working to come up with a version of the Bill that will retain its core objective and still be agreeable to the members of the National Assembly. The then Speaker of the lower legislative House, Hon. Dimeji Bankole also saw it as a legacy to bequeath to the nation coupled with the fact that he was vying for a political post too⁶⁶.

The most crucial in all of these is if there is a really intent on the part of the government to be more transparent in the affairs of governance. Despite the opinions a real test of this will be seen when the Law is put into use and this will be done in the second chapter of this thesis where the challenges of implementation will be considered using actual experiences of persons who have tried to utilise the Bill.

⁶⁴ Interview with Prof. Chidi Odinkalu, Senior Legal Officer, Open Society Justice Initiative and one of the leading members of the coalition on the FOI in Nigeria (via e-mail in November 2011)

⁶⁵ Interview with Prof. Chidi Odinkalu, senior legal officer, Open Society Justice Initiative and one of the leading members of the coalition on the FOI in Nigeria (via e-mail on 24th November 2011)

⁶⁶ Interview with Maxwell Kadiri, Associate Legal Officer, Open Society Justice Initiative, (via e-mail on 23rd November 2011)

The Nigerian Freedom of Information Act, 2011

The FoI Act that was passed into law in May 2011 has all the features that a standard access to information law should possess. Aside from the fact that the drafters of the Bill drew from access to information law standards of other countries and international human right organisations, the Nigerian law makers also made some changes to the Bill which enhanced its features. Some of the changes made by the National Assembly which enhanced the features of the FoI Act are as follows;

- i) Section 2(1) of the Bill submitted to the National Assembly read thus:

‘Subject to the provisions of this Act but notwithstanding anything contained in any other Act, Law, or Regulation, every citizen of the Federal Republic of Nigeria, *has a legally enforceable right to, and shall, on request, be given access to record under the control of a government or public institution*⁶⁷,

But the version of that same section which was passed into law read thus;

“Notwithstanding anything contained in any other Act, Law or Regulation, the right of any person to access or request information, *whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is hereby established*”⁶⁸.

The reason for the amendment according to the background information contained in the version of the Bill as passed by the National Assembly is first, to harmonise (the italicized part of the above) expression used in the Bill with those contained in chapter 4 of the 1999 Constitution dealing with fundamental human rights⁶⁹. Secondly, to make the law applicable

⁶⁷ Emphasis supplied

⁶⁸ Emphasis supplied

⁶⁹ The section 4 of the Nigerian 1999 Constitution contains all the fundamental human rights

to all sorts of information irrespective of how they are kept or the institution in charge of it and to extend the scope of the law to non Nigerians too.

- ii) The words “requester” and “requested” contained in Section 2(2) and other sections of the Bill was replaced with “applicant and “applied” to bring the Bill in line with such expressions contained in the Nigerian Constitution⁷⁰. The words “government institutions” was replaced with “public institutions” all through the sections of the Bill because the latter words were considered more encompassing than the former⁷¹.
- iii) A new section 2 (3) was introduced and read thus:

“Any person entitled to the right to information under this Bill, shall have the right to institute proceedings in a Court to compel any public institution to comply with the provisions of this Act⁷².”

The new section was inserted to emphasize the fact that the right granted by the law is legally enforceable and they felt the need to insert it so as to be able to manage the likely challenges that will arise because of the accustomed secrecy in public affairs⁷³.

- iv) New section 3 (1) and (2) was inserted into the Bill which read thus:
 - a. “A public institution shall ensure that it records and keeps information about all its activities, operations and businesses⁷⁴.”

⁷⁰ The Freedom of Information Bill Report of the House of Representative Joint Committee on Information, National Orientation and Justice (Copy on file with author)

⁷¹ The Freedom of Information Bill Report of the House of Representative Joint Committee on Information, National Orientation and Justice (copy on file with author)

⁷² Section 2 (3) Nigerian Freedom of Information Act, 2011

⁷³ The Freedom of Information Bill Report of the House of Representative Joint Committee on Information, National Orientation and Justice (copy on file with author)

- b. “A public institution shall ensure the proper maintenance of all information in its custody in a manner that facilitates public access to such information⁷⁵”

The above new sub sections were introduced into the Bill to combat the poor record keeping and maintenance culture prevalent in the public institutions⁷⁶.

These amendments and numerous others were made to the Bill for various reasons but geared towards one objective of strengthening the Bill and bringing into compliance with international standards.

Subsequently, the Bill that was passed into law in May, 2011 meets the standards of the access to information law stipulated by Article 19, states best practices and international organisations standards⁷⁷. These principles are based on state best practices, the standards on which freedom of information laws should conform, set out by the United Nations Special Rapporteur on Freedom of Expression and Opinion in his Annual Report in 2000 and the 2002 recommendations of the Council of Europe Committee of Ministers⁷⁸. A side by side review of the Article 19 principles⁷⁹ and the Nigerian FoI Act will also reveal same.

⁷⁴ Section 3 (1) Nigerian Freedom of Information Act, 2011

⁷⁵ Section 3 (2) Nigerian Freedom of Information Act, 2011

⁷⁶ The Freedom of Information Bill Report of the House of Representative Joint Committee on Information, National Orientation and Justice (copy on file with author)

⁷⁷ Article 19, ‘The Public’s Right to Know: Principles of Freedom of Information, International Standard Series (1999)

⁷⁸ ‘Features of Freedom of an Information Regime’ <http://www.article19.org/pages/en/freedom-of-information-more.html>> accessed 2 April 2012

⁷⁹ Article 19, ‘The Public’s Right to Know: Principles of Freedom of Information, International Standard Series (1999)

Utmost Disclosure: The number one principle which is titled ‘maximum disclosure’ encourages the availability of all types of government information to not just the citizens but to anyone and that whoever that is requesting for information need not make a justification for doing so. The freedom of information Act in Nigeria meets the requirement as it has made provisions for public bodies to make information accessible to the public⁸⁰ and has also made exceptions for when the exercise of this right could be limited⁸¹. Similarly, the Indian’s Right to Information Act provides likewise making it possible for one requesting for information from a public authority not to give any reason for doing so⁸².

A duty to Publish: Principle two states that public bodies should be obligated to publish key information. Section 2, subsections 3 and 4 of the Nigerian Freedom of Information Act charge public institutions to publish key information about them and gives a list of such information to be published. The importance of this provision is that public institutions are made to publish key information about them and by listing the type of information to be published it ensures that the public is not either overwhelmed by too much information or starved of information. This is good as too many information may have same effect as no information⁸³.

Promoting Transparency in government: Principle three states that the law has to promote open government. It explains this to mean that the law should include two or more such provisions like training of public officials, publication of annual reports on FoI regime, criminal penalties for those who lawfully obstruct access to information in anyway,

⁸⁰ Freedom of Information Act, 2011 s. 1

⁸¹ Ibid (n FoI Act, 2011) s.1, 11, 12, 14, 15, 16, 17, 19,

⁸² Section 6(2) Indian Right to Information Act, (2005)

⁸³ Danish Institute of Human Right, ‘An Introduction to Openness and Access to Information’ (2005) p.16

publication of a simple guide on ways to present an information request, better record maintenance by public bodies etc. The access to information law in Nigeria contains more than two of such provisions⁸⁴. With this provision contained in the Nigerian FoI Act, it means that the law recognises the need to change the orientation of the civil servants and to enlighten them. Failing to do this would mean that the civil servants could pose the greatest challenge to implementing the law⁸⁵.

Narrowly Tailored Exceptions: Principle four states that exceptions to the access to information law should be clearly and narrowly set out and subject to strict harm and public interest test. Sections 11,12,14,15 and 19 of the Nigeria Freedom of Information Act provide for exceptions when a public institution can refuse access to information. Few of such exceptions include exemption from disclosure information that may be injurious to the conduct of international affairs and the defence of the Nation and personal information etc⁸⁶. The above sections also contain common provisions which are that such exceptions could be waived for the purpose of public interest. Often, laws with exceptions lay down the principle under which the exception could be made and even when it lists circumstances it does not cover all possible situations that might arise. The listed situations usually guide the court in the interpretation of such sections when necessary. Therefore how clearly and narrowly the exceptions to the Nigerian Freedom of Information Act are, remain to be seen in time through the cases. But until then one can still argue that they are clearly and narrowly drawn as they contain similar exceptions as most countries with the access to information law.

⁸⁴ Ibid s. 2,9, 10, 13

⁸⁵ Article 19, 'The Public's Right to Know: Principles of Freedom of Information, International Standards Series (1999) p. 4-5

⁸⁶ Sections 11 & 14 Nigeria Freedom of Information, Act 2011

Speedy Response to Request: Principle five states that requests for information should be attended to quickly, fairly and an independent review of any refusal made available. The freedom of information law in Nigeria in section 1 (3) gives access to judicial review to anyone denied access to information by a public body, Section 4 and 5 of the Act also provides for a speedy response to such request and Section 20 provides for a 30 days' timeframe within which such review should be made to the court and Section 21 provides that the judicial review for denial of access to information should be done summarily. This provision is crucial to the entire legislation because it will be pointless if the right granted by the Act cannot be fully enjoyed by having an independent body with the powers to mandate the release of denied information after a proper review⁸⁷.

Costs: Principle six states that excessive cost should not be used to discourage individuals from making access to information request. The FoI Act in Nigeria provides that fees shall not be more than the normal charges for reproducing documents where necessary⁸⁸. The presumption here is that since the public officers salary is paid from the public purse (tax revenue) then the cost of attending to information requests should be seen as part of their daily work⁸⁹.

Disclosure Takes Priority: Principle eight states that laws that are contrary to the principle of utmost disclosure should be amended. The FoI Act provides that notwithstanding any other thing contained in any other Act, Law or Regulation that the right of anyone to access to

⁸⁷ Article 19, 'The Public's Right to Know: Principles of Freedom of Information, International Standard Series, p.7 (1999)

⁸⁸ Section 8, Nigeria Freedom of Information, Act 2011

⁸⁹ Danish Institute of Human Right, An Introduction to Openness and Access to Information (2005) p.18

publicly held information is established⁹⁰. One of the biggest challenges to access to information in Nigeria prior to the enactment of the FoI Act is the Official Secrets Act but by implication the above provision of the FoI Act supersedes the Official Secrets Act. The FoI Act goes further in section 27 to make provision for the protection of any public officials who makes available information despite the provisions of the Official Secrets Act and other related laws and Regulations.

Protect Whistleblowers: Principle nine states that whistle blowers should be protected from any legal or administrative sanction. The Nigerian FoI Act makes provision in section 27 for the protection of whistle blowers. This means that public officials who release information in good faith to expose abuse of power, misuse of public funds and corruption are protected against sanctions and reprisals⁹¹.

Section 29 of the Nigerian FoI Act needs to be mentioned here because of its peculiar provision. The section directs that all public institutions submit a report in each fiscal year which will contain the number of access to information requests granted or denied access by the institutions, the number of such denied request that went on appeal and the ruling on it, the total number of access to information requests made etc. The Attorney General is also required to make such reports available to the public and the members of the National Assembly. The probable interpretation to that section could be to say that the office of the Attorney General has been charged with the oversight function for the implementation of the just passed access to information law.

⁹⁰ Section 1, Nigeria Freedom of Information, Act 2011

⁹¹ Ene Enonche '10 Salient Features of the Freedom of Information Act, 2011' (R2K Publications) p4

Conclusion

History showed that one of the greatest challenges of the FoI Act which is combating a culture of secrecy was bestowed on the nation as a result of colonial rule. Consequently, other laws were enacted which restricted access to information and further encouraged a culture of secrecy. But with democracy came a natural yearning for the people to be part of governance and this led to the struggle for a passage of the FoI Act. The FoI Act came into force eventually on May 2011 and a look at the various sections of the law reveals that its provisions are up to international standards on what an access to information law should entail. To address the challenges that the Act will encounter in its implementation would require creatively making use of the provisions of the FoI Act to overcome the challenges.

Chapter Two

Challenges

The passage of the freedom of information law is not an end in itself but a means to an end.

With a proper implementation of the FoI Law, transparency and accountability in governance could be achieved. After the passage of the law comes implementation and how well the access to information law is enforced depends on political will, governments motive in passing the law⁹² and partly on other factors which includes the level of awareness created while campaigning for the passage of the law and the involvement of civil societies and non-governmental organisations in monitoring the implementation. It is not unexpected that there will be challenges in the implementation of the freedom of information law and there is need to address the challenges because no matter how well drafted the law on freedom of information is, it will fail to meet the objectives if not well implemented⁹³.

Nigeria having recently passed a freedom of information Law will surely face some challenges in the implementation of the law for its objective to be fully actualised. Considering the background and political history of the nation, the likely challenges the nation will experience in the implementation of the new law are record creation, keeping and maintenance, combating the culture of secrecy and misconceptions about the law. This chapter will discuss these challenges for a better appreciation of what Nigeria will have to deal with for a proper utilisation of the just passed freedom of information law.

⁹² Laura Neuman and Richard Calland 'Making the Law Work; Challenges of Implementation' in Ann Florini (ed) *The Right to Know; Transparency for an Open World* (2007) OUP p. 180

⁹³ Laura Neuman and Richard Calland 'Making the Law Work; Challenges of Implementation' in Ann Florini (ed) *The Right to Know; Transparency for an Open World* (2007) OUP p.182

Culture of secrecy and review of existing civil service rules and procedure

As the brief history of Nigeria discussed previously indicated, the colonial history of the nation and the subsequent long years of military rule have bequeathed the country with a culture of secrecy. This has made the civil service of the nation and government parastatal to become accustomed to running the affairs of the state in secrecy. They deny citizens even the most innocuous information⁹⁴ and virtually all government information are classified as top secret despite the provision in the Nigerian Constitution which (though limited) guarantees access to information. Governments have also taken advantage of the culture of secrecy to run a non-transparent system and not be held accountable to the people.

The habit of running a non transparent system in Nigeria is so bad that information are also withheld from other government officials, reports of commissions of inquiry set up to investigate for corruption are never made public, declaration of assets form by the President are denied to the public under the guise of lack of no law making any provision for that and attempts by a civil servant to show the audited report of government account is met with adversity⁹⁵.

The damaging effect that such non transparency and culture of secrecy could do to a nation comprised of diverse ethnic groups and with its peculiar history of colonialism followed by long years of military rule is manifold. An example of such effect is the long years of ethnic

⁹⁴ Media Rights Agenda "Unlocking Nigeria Closet of Secrecy: A report on the Campaign for a Freedom of Information Act in Nigeria" (2000) Media Rights Publication
<<http://www.foicoalition.org/PDF%20Files/Unlocking%20Nigeria's%20Closet%20of%20Secrecy.pdf>> accessed 13 March 2012

⁹⁵ Ayo Obe, 'Challenging case of Nigeria' in Ann Florini's (Ed) 'The Right to Know; Transparency for an Open World' (2007) CUP, 161 - 164

clashes in Plateau State with massive loss of lives and properties⁹⁶. For most people not living in or around Jos, there has been a misconception that it was a religious crisis⁹⁷. This misconception went on for years until in 2011 during one of the heated crisis, a coalition of 32 Civil Societies came together to advocate for an intervention. One of the objectives of the coalition was to make public the report of the various commissions of enquiry that was been set up by both the Federal and State government to find the cause of the crises⁹⁸. The various commissions met and submitted reports to the governments which were never made public nor used to hold anyone accountable. Some of the commissions were set up as far back as 1994 but it was the coalition that finally made public the reports which has been shrouded in secrecy. It was then people found out that the crisis was a result of identity issues arising out of defective citizenship laws.

The culture of secrecy is one that is not gotten rid of so easily and this is because once a state has imbibed such culture it redefines the relationship between the government and the governed. In the United Kingdom, even though the Official Secrets Act, 1989 has repealed and replaced section 2 of the Official Secrets Act, 1911 in an attempt to improve the free flow of information, one finds that as at 2000, British writers still were still worried about transforming the culture of secrecy that was so prevalent in the United Kingdom⁹⁹.

But this is not to discourage attempts on transforming the culture of secrecy but rather to show that it is something which needs attention right from the start if a reasonable headway

⁹⁶ "White Paper on the Report of the Justice Niki Tobi Judicial Commission" para. 6 and 93
<http://www.r2knigeria.org/PDF/NikkiTobbiReportWhitepaper.pdf>> accessed 3 April 2013

⁹⁷ Crisis Group Africa Report No 196 'Curbing Violence in Nigeria: The Jos Crisis' (2012) pg 12

⁹⁸ I was the Programme Officer at one of the organisations (The Nigerian Bar Association) working on the project at the time

⁹⁹ Jack Beatson and Yvonne Cripps (Eds) *Freedom of Expression and Freedom of Information* (OUP 2000) 249

would be made in the implementation of the FoI Law. The aim at transformation should also be consistent and continuous till the much needed effective implementation can be progressively achieved. The importance of doing so cannot be overstated because aside from an open government being a vital characteristic of a democratic society, there is also the expectation on the part of the citizens to be able to participate in or be able to influence government policy making¹⁰⁰. And one of the sure ways of doing that is to eradicate every law, habit or system that promotes a culture of secrecy.

Comparatively speaking Nigeria has not made much progress with overcoming this culture of secrecy as when compared to other countries with such experience like Britain (where they imbibed the culture) and India (a country also colonised by Britain). In Britain the Official Secrets Act which was first enacted in 1889 has undergone many amendments¹⁰¹ with some of such amendments making room for a more free flow of information. As of 1955 the level of secrecy was still high in the United Kingdom as evident in the case of *Glasgow Corp. v. Central Land Board*¹⁰²; one of the issues raised in the case was whether the courts have an inherent power to override a certificate of a minister submitted to the courts to the effect that it was against the public interest to produce a particular document before the court. Viscount Simond speaking on behalf of the court of appeal who dismissed the appeal stated thus

“Granted, then, that this inherent power exists and, moreover, that it has been preserved by section 47 of the Crown Proceedings Act, 1947, the next question is whether in the present case it should have been exercised.... The power is essentially a discretionary one, and I see no ground for saying that in refusing to exercise it any

¹⁰⁰ Stephanie Palmer, ‘Freedom of Information: The New Proposals’ in Jack Beatson and Yvonne Cripps (Eds) ‘Freedom of Expression and Freedom of Information’ Essays in Honour of Sir David Williams (2000) OUP, 5

¹⁰¹ The Law has been amended in 1911, 1920, 1939, and 1989

¹⁰² (1956) S.L.T 41

wrong principle has been applied. There I am content to leave it, for it would be vain to add one more to the attempted definitions of the circumstances in which the power should be exercised. Rarely, very rarely in recent times, has it been exercised; its exercise has been refused even where the result has been the prejudice of the private individual: the paramountcy of the public interest has been recognised and preserved¹⁰³,”

From the above judgement it would be seen that though the United Kingdom courts were empowered to examine a document which a state agent has refused to produce before the court, for it to determine if the disclosure of state information will cause more harm to the state or to the private individual but they were unwilling to do so. They were more favourable to accept a state agent’s certificate presented to it alleging that it will be prejudicial to public interest to produce such a document in court rather than carry out the required balancing of interest to ensure that there is no unreasonable withholding of information by the state.

However, progress was made towards less secrecy in governance when in 1972 a committee was set up to review the Official Secrets Act. The Committee amongst other things recommended that restricted official information under section 2 of the Act was too general and needs to be narrowed down categorically so that not all disclosure of official information will amount to a crime¹⁰⁴. Though the recommendations were not transformed into law but subsequent bills were sent to the parliament with a similar aim of making official information more accessible. And an amendment was finally made to the Official Secrets Act in 1989

¹⁰³ Glasgow Corporation v. Central Land Board (1956) S.L.T 41 pg 7

¹⁰⁴ Lucinda Maer & Oonah Gay, ‘Official Secrecy’ (2008) <http://www.fas.org/irp/world/uk/secrecy.pdf>> accessed September 18, 2012

which incorporated the recommendations and reduced the possibility of less secrecy in government¹⁰⁵. It reduced secrecy by removing the disclosure of most of the official information from the ambit of criminal prosecution but left the following six categories of information liable to criminal prosecution if disclosed; “security and intelligence, national defence, international relations, information obtained in confidence from other states or international organisation, information likely to result to an offence or likely to impede detection and specific investigations under statutory warrant¹⁰⁶”. The United Kingdom has since then enacted other laws¹⁰⁷ which promote access to information amongst which is the Freedom of Information Act, 2000.

India which like Nigeria was under British colonisation as at the time of the enactment of the first Official Secrets Act, has also made more progress towards an open society as evidenced by a 1975 case decided way before the enactment of India’s Freedom of Information Act 2005. In the case of *U.P v. Raj Narain*¹⁰⁸, the Supreme Court of India stated that a responsible government accountable for its conduct does not operate in secrecy. It went even further to say that the citizens of India have a right to know about every public act undertaken by the government in carrying out their functions¹⁰⁹.

The case came about when the Respondent who lost in an election brought this action in a high court summoning some government officials for the production of official documents

¹⁰⁵ Lucinda Maer & Oonah Gay, ‘Official Secrecy’ (2008) <http://www.fas.org/irp/world/uk/secrecy.pdf>> accessed September 18, 2012 pg 6

¹⁰⁶ Lucinda Maer & Oonah Gay, ‘Official Secrecy’ (2008) <http://www.fas.org/irp/world/uk/secrecy.pdf>> accessed September 18, 2012 pg 6

¹⁰⁷ One of which is the Public Interest Disclosure Act, 1998

¹⁰⁸ 1975, SCC (4) 428

¹⁰⁹ *U.P v. Raj Narain*, 1975, SCC (4) 428 at 22

that would help prove his case. The Home Secretary sent an officer to appear in court with the document but to claim privilege not to disclose the content of the document relying on section 123 of the Evidence Act. As a result, the court had to give a proper interpretation and scope of section 123 and 162 of the Evidence Act. Section 123 of the Act provides that a person has to obtain the permission of the officer of the head of a department before giving evidence relating to any unpublished official record of the state and that the head of the department can decide to grant such permission or not as he so desired. While section 162 provides for the conditions for which a document might not be presented in court for public interest purposes.

The Supreme Court of India while making the order for the High Court to reconsider the case afresh by reviewing the document in issue to ascertain whether it is injurious to public interest or not, stated that mere classification of a document by the executive as a state affair does not automatically make it one entitled to protection¹¹⁰.

Though India's Freedom of Information Law was enacted in 2005 but there was already recognition of the people's right to government held information and the need to move away from so much secrecy in governance by the apex court.

A Republican system of governance is established as an agreement between the citizen and the State. Nigeria being a republic has granted the government through its citizen's exclusive control of certain essential resources and the information accumulated in deploying those

¹¹⁰ U.P v. Raj Narain SCC (4) 428 at 24

resources¹¹¹. This means that information obtained and held by public officials is debatably Nigeria's most strategic public resource. Therefore when the citizens demanded for freedom of information law they are affirming that secrecy has no place in a Republican government set up by them¹¹².

The review of the existing civil service rules to be compliant with the provisions of the new Freedom of Information law and to get rid of every habit that promotes secrecy is one of the changes which have to be carried out for an effective implementation of the law. However to do this, it would require that the person or office charged with the oversight function of the implementation of the law sees to it that this is actually carried out.

Record Creation, Keeping and Maintenance:

The importance of proper record creation and management need not be overstated as it is relevant for the public sector to be open and accountable thereby ensuring effective work output and increasing services to the citizens¹¹³.

The new access to information law makes it mandatory for public institutions to keep records and information about all their activities. The law also requires such information to be well arranged so that there will be easy access to such information and that they proactively publish information about them in print, online and electronic versions¹¹⁴. These are very

¹¹¹ Chidi Odinkalu "Freedom of Information in Nigeria; Perspectives, Problems and Prospects" (2008) Pg 3

¹¹² Chidi Odinkalu, "Freedom of Information in Nigeria; Perspectives, Problems and Prospects" (2008) Pg 4

¹¹³ Lucinda Maer & Oonah Gay, 'Official Secrecy' (2008) <http://www.fas.org/irp/world/uk/secrecy.pdf>> accessed September 18, 2012 pg 6

¹¹⁴ Freedom of Information Act, 2011, s. 3

laudable provisions but the challenge is how to actualise it considering the long history of poor record creation, keeping and maintenance in Nigeria civil service and public offices.

The poor record keeping and maintenance in Nigeria was described thus

“At present, there is hardly any systematic approach to keeping records and statistics. The population of the country itself is a matter of projection or guess work. Some junior government officials survive on the income they get from being encouraged to find files that are otherwise lost. As one commentator observed, one has to engage in virtual espionage to secure even the most basic information”¹¹⁵

The description above should not really come as a surprise considering the culture of secrecy with which various governments have run the affairs of the nation, the lack of willingness to be accountable to the people all have led to poor record keeping. This is also a common feature with states that their government have previously operated in secrecy. For instance the United States (comparatively speaking) could be considered as one of the countries where progress has been made in terms of record keeping and granting access to information¹¹⁶ but this was not so as of 1999 when one of its key officials was quoted to have said that, government is not in business to keep information so that historians can write their master theses, in an article discussing the poor record keeping attitude and maintenance by public institutions by David Plocher¹¹⁷.

¹¹⁵ Ayo Obe, ‘Challenging case of Nigeria’ in Ann Florini’s (Ed) ‘The Right to Know; Transparency for an Open World’ (2007) CUP, 163.

¹¹⁶ This is so when compared to other countries without an access to information law or with a strong culture of secrecy .

¹¹⁷ David Plocher ‘ The Digital Age: Challenges for Records Management’ (1999) Government Information Quarterly, Vol. 16/No. 1/1999, p 63

The access to information law is premised on the understanding that proper creation and management of records helps government achieve openness, transparency, trust and accountability in the public sector¹¹⁸. Governance entails amongst other things that those reposed with public trust should be accountable to the people by being transparent and allowing access to information¹¹⁹. Freedom of information as a tool for accountability is only possible where records are well kept, so that not just that the public could have access to it, but that when there is a perceived breach of accountability or corruption there will be credible evidence to rely on¹²⁰.

Therefore, if there is to be a proper implementation of the FoI Act, then the first step to it is to keep a proper record. This requires a re-orientation and training on the need for proper record keeping. The training of public officials on access to information laws are usually one of the next step after an access to information law is passed in any state previously run under a system of secrecy.

The need for the training of public officials on ways of making information accessible to the public was also recognised by the Inter-American Court of Human Rights when it ordered Chile to make sure that its public officials are trained on the rules and standards governing public access to information in the first ever case of the regional court hearing on public access to information case brought to it against Chile by an NGO¹²¹. The order was made

¹¹⁸ Stephen Mutula and Justus Wamukoya 'Public Sector Information Management in East and Southern Africa: Implications for FoI, Democracy and Integrity in Government' (2009) IJIM 333

¹¹⁹ Stephen Mutula and Justus Wamukoya 'Public Sector Information Management in East and Southern Africa: Implications for FoI, Democracy and Integrity in Government' (2009) IJIM 334

¹²⁰ Piers Cain, Alan Doig, Rachel Flanary and Kimberly Barata 'Filing for corruption: Transparency, openness and record keeping' in *Crime, Law & Social Change* (2001) Kluwer Academic Publishers,

¹²¹ *Claude-Reyes v Chile* (2006) IACHR 119

after the court upheld the commission's decision which was in favour of the applicant, an NGO who was seeking for information on environmental issues from the government. The case was referred to the court by the commission and one of the applications made by the commission to the court was the request for an order to the Chilean government to put into place mechanisms that will guaranty freedom of information.

The court's judgement is quite commendable for several reasons. First, the fact that this was the courts first access to information case and yet they were able to recognise that refusal or failure to comply with an access to information request by public officials could stem from lack of knowledge of ways to handle such request and not necessarily because they do not want to comply. The facts of the case showed that the relevant public official made some information available to the applicants but the information was incomplete and late. There was also no written decision which explained the reason for the exempted part of the information by the relevant official. Therefore, it is quite commendable on the part of the court to order, in addition to asking the information to be made available to the applicants, for Chile to carry out training on access to information for its public officials.

Secondly, the court judgement is commendable as it could be said to be one of the compelling reason for Chile's passage of the access to information law in 2008. This is because the orders contained in the judgement expanded the right to information contained in the Constitution of Chile¹²² and in the convention of the Inter-American Court of Human

¹²² Article 8, Constitution of the Republic of Chile, 2005

Right¹²³. The judgement contained directions relating not just to the present application but any future access to information request.

Record keeping is usually not one of the top priorities of governments all over the world including the developed and non developed ones as governments usually channel their energy into taking actions and decisions¹²⁴. But an accountable and effective record keeping is necessary for a successful implementation of access to information laws. For a successful implementation of the access to information law therefore, one of the oversight functions will be to see to it that there is a proper record keeping system. In doing so, the Attorney General¹²⁵ will have to put into consideration not only the short term challenges of having to meet the constant request for information from the public but also the long term goal that records are kept by writing down every evidence of the decision making process and activities of public officials¹²⁶.

Aside from the record keeping, there is also the need for proper archiving and maintenance of information generated by government and other public bodies and institutions especially considering the huge amount of information generated by government and other public bodies. Experience from other countries show when there is poor record keeping and maintenance it could lead to the burning of critical documents as was the case in Bolivia¹²⁷ or

¹²³ Article 13, American Convention on Human Right "Pact of San Jose" Costa Rica, 1969

¹²⁴ Laura Millar 'The Right to Information – the Right to Records; The Relationship between Record Keeping, Access to Information, and Government Accountability' (2003)

¹²⁵ Section 29 (6) of the Nigerian Freedom of Information Act provides that the Attorney General of the Federation shall have oversight function of the law.

¹²⁶ Laura Millar 'The Right to Information – the Right to Records; The Relationship between Record Keeping, Access to Information, and Government Accountability' (2003)

¹²⁷ Laura Neuman and Richard Calland 'Making the Law Work; Challenges of Implementation' in Ann Florini (ed) *The Right to Know; Transparency for an Open World* (2007) OUP 197

in Jamaica where there has also been a long history of secrecy but low emphasis on document retention which was passed down from the British during the colonial rule there. The practice of keeping all records has led to obsolete and dormant records being kept together with current files which further compounds the problem of timely retrieval of information¹²⁸.

Some of the approaches adopted by some Common wealth countries to develop an effective record management system include having a harmonised system of record keeping across the institutions and managed as a whole, following approved procedures and policies regarding record keeping and maintenance, proper management of all types of records including paper records, electronic records, visual maps etc, adopting the society's usual manner of exchanging information¹²⁹ and record keeping while ensuring that efficiency and accountability are its goal¹³⁰. It has also been suggested that another way to encourage record creation and management is to make use of the information generated by steady demand for information by the public as it compels public bodies to keep and manage records properly so as to supply the demand¹³¹.

¹²⁸ Laura Neuman and Richard Calland 'Making the Law Work; Challenges of Implementation' in Ann Florini (ed) *The Right to Know; Transparency for an Open World* (2007) OUP 197

¹²⁹ This means using the society's peculiar way of communication before they adopted a more modern means of communication. For example, in the eastern part of Nigeria where important information affecting the people's lives were announced to them via a town crier, such a means could be adopted to pass important information requiring the people's participation in governance.

¹³⁰ Laura Millar 'The Right to Information – the Right to Records; The Relationship between Record Keeping, Access to Information, and Government Accountability' (2003) 5

¹³¹ Piers Cain, Alan Doig, Rachel Flanary and Kimberly Barata 'Filing for corruption: Transparency, openness and record keeping' in *Crime, Law & Social Change* (2001) Kluwer Academic Publishers, 422

According to an archive and record consultant, Laura Millar¹³² records (when properly created and maintained) are a critical asset of government, “a precious resource and the heart of society’s memory of itself”¹³³.

Misconceptions About the Law

It would be difficult to utilise the access to information law if there is no proper understanding of the law and what it is about, the huge potential in it and if the various myths surrounding the law are not clarified. Some of these misconceptions about the law will be considered below.

Shortly after the passage of the Freedom of Information Act in Nigeria in May 2011, a professional body Public Administration and Management Development Institute (PAMDI) organised a two day conference titled ‘Freedom of Information Act 2011 and the fight against Corruption and Corporate Fraud in Governance’ with the purposing of dissecting the law and how it can be successfully implemented. After the event, the Director General of the institute, Pastor Elijah Ogbuokiri wrote an analysis of the event which was published in one of Nigeria’s Daily Newspaper, The Daily Trust. In the analysis, he described the law as having so many deficiencies and as being a “half cake”¹³⁴. He also stated that only two sections of the Law grants access to information while as many as ten sections made provisions for

¹³² Laura Millar has worked with International Records Management Trust and the World Bank on “accountability, transparency and record keeping in the public sector”

¹³³ Laura Millar ‘The Right to Information – the Right to Records; The Relationship between Record Keeping, Access to Information, and Government Accountability’ (2003)

¹³⁴ Pastor Elijah Ogbuokiri ‘Nigeria: The Limits of Freedom of Information Act’
<http://allafrica.com/stories/201110110632.html>> accessed 2 April 2012

exceptions. In the concluding part of the analysis he then also lists the Official Secrets Act as overriding the access to information law¹³⁵.

I beg to disagree with the above assertions and to see them as misconceptions about the law which might hinder its implementation if taken at face value. The Nigerian Freedom of Information Act, 2011 cannot be correctly described as such because it meets all the requirements of the principles of freedom of information law based on best practices which were published by Article 19¹³⁶. These principles are based on state best practices, the standards on which freedom of information laws should conform, set out by the United Nations Special Rapporteur on Freedom of Expression and Opinion in his Annual Report in 2000 and the 2002 recommendations of the Council of Europe Committee of Ministers¹³⁷.

It is difficult to see how the Act with all the features of the necessary principles of access to information laws discussed in chapter one could be described as being half baked.

There are also other misconceptions and myths about the FoI Act which has been going on long before its passage into law and which if not addressed and the true objectives and principles of the law made public might hinder its implementation.

¹³⁵ Pastor Elijah Ogbuokiri 'Nigeria: The Limits of Freedom of Information Act' <http://allafrica.com/stories/201110110632.html>> accessed 2 April 2012

¹³⁶ "Principles on Freedom of Information" <http://www.article19.org/data/files/pdfs/standards/righttoknow.pdf> accessed 14 March 2013

¹³⁷ 'Features of Freedom of an Information Regime' <http://www.article19.org/pages/en/freedom-of-information-more.html>> accessed 2 April 2012

The FoI Act is for the Press: One of such early misconceptions about the FoI Act is that it is a media law and this misconception was even held amongst prominent people in Nigeria who are expected to know better. The misconception was held amongst some members of the National Assembly who felt that the law is meant for the media and should not be passed because the media already had too much power¹³⁸. This is despite the fact that there was no mention of the media nor journalist in the Bill but gives right of access to information to Nigerians¹³⁹.

Firstly, the purpose of the law is aimed at open government so that anyone interested in knowing how government operates can do so with minimal effort. The rights in the Act can be exercised by individuals and corporations not just the journalists. The law is meant to guarantee everyone equal engagement with and access to governance¹⁴⁰. It is also hoped that the law will help individuals in making informed decisions and to be able to hold government and public officials accountable.

But this is not to say that the law will also not be of use to the journalist because if they are to play their part as the society's watchdog¹⁴¹, then they have to do so based on verifiable information. As a matter of fact, it is also expected that the law will improve the standard of

¹³⁸ Nduka Irabor 'Freedom of Information: Balancing the Public Right to Know against the Individual's Right to Privacy' <http://www.foicoalition.org/news/2008/aelexlecture.htm>> accessed 7 April 2012

¹³⁹ Yemi Ogunbiyi 'Freedom of Information: Balancing the Public Right to Know against the Individual Right to privacy' <http://www.foicoalition.org/news/2008/aelexlecture.htm>> accessed 7 April 2012

¹⁴⁰ Chidi Odinkalu 'Understanding the Freedom of Information (FoIA 2011) Series' (R2K Publications) p6

¹⁴¹ Bladet Tromsø A/S and Pal Stensaas v. Norway App. No. 21980/93 (ECHR 20 May 1999)

journalism, increase effort in verifying facts that are part of the public records and stop reliance on rumours¹⁴².

The European case of *Bladet Tromsø & Stensås v. Norway*¹⁴³ properly illustrates the importance of access to information to the press if they have to play their role as the public watchdog. The case, which arose out of series of publications by the media concerning the report of seal hunting by an inspector who travelled with the hunters in the 1988 hunting expedition. The report contained some information which amounted to allegations of crime on the part of the seal hunters was not published by the government ministry that appointed the inspector because they wanted to verify the information contained in the report. However, they did not also outrightly reject the report. When they eventually rejected the report, it has already been published by the media house and the hunters brought an action in the domestic court for defamation against the newspaper and the inspector who wrote the damaging report against seal hunters.

The domestic court found in favour of the hunters and held that there was defamation. The media house and the inspector then alleged a breach of their Article 10 (freedom of expression) by the domestic court's decision. The European Court of Human Rights in determining the case looked into and pointed out some key points that buttress the need of the press to be the watchdog of the society.

¹⁴² *Bladet Tromsø A/S and Pal Stensaas v. Norway* App. No. 21980/93 (ECHR 20 May 1999)

¹⁴³ App. No. 21980/93 (ECHR 20 May 1999)

- That in carrying out their test of necessity of the states action in a democratic society they have to determine if there is a corresponding social need and they have to keep in mind the margin of appreciation granted to states in such cases.
- That the nature of this case has circumscribed the national margin of appreciation granted to the state by the interest of the democratic society to allow the press play their role as the watchdog and impart information to the public.
- That in playing the role of public watchdog that the press has a duty to respect the reputation of individuals but that it should not be a deterrent to their role as they have a responsibility to impart the information and the public has a corresponding right to a knowledge of such information of public interest.
- Finally the court considered that the media in making the reports gave room for different views of the story to be published including that of the inspector, the seal hunters and the ministry and based on that the court concluded that the reporting of the stories by the media was not aimed at accusing seal hunters of crime. But that it was contributing to a debate that is of local, nation and international interest as at that time.

The points made above by the court show that access to information is vital to the press in carrying out their duty as the public watchdog so that the information they supply to the public is verifiable. Just like the press in the present case relied on the report submitted to a government ministry and at same time gave room to information from other sources to be published so as to give a balanced view of an issue of public interest.

To consider the law solely as a media law is to undermine its potential and limit its implementation. The essence of access to information laws all over the world is amongst others to give citizens, nongovernmental organisations, the civil society and even the media the tool with which to play their role as the society's watchdog as recognised by the European Court of Human Rights¹⁴⁴ when it recognised the NGO, s and the media as those who should be the watchdog for society.

The FoI Bill was made weaker by the National Assembly before being passed into Law: This was another misconception trailing the Bill since its passage into Law. The two Houses of the National Assembly passed different versions of the Bill on different dates but as is part of parliamentary routine the two versions had to be harmonised before being passed into law. This did not in any way water the Bill down because the difference in the versions passed by the different Houses of the National Assembly was all about the different approach they adopted towards the Bill. The House of Representatives adopted a rights based approach to the access to information Bill while the Senate approached the access to information Bill as a privilege¹⁴⁵. In all there were about 12 of such differences in the various sections of the Bill and they were not that consequential to have watered down the law. For instance one such difference was in Section 2 (1) of the Bill dealing with Right of Access (National Security).

The Senate version read

“Every citizen of the Federal Republic of Nigeria, has a legally enforceable right to, and shall, on application be given access to any information or record

¹⁴⁴ Tasz v. Hungary App. No. 37374/05 (ECHR 14 April 2009)

¹⁴⁵ Chidi Odinkalu 'Understanding the Freedom of Information (FoIA 2011) Series' (R2K Publications) p6

under the control of a government or public institution or private companies performing public functions, provided the disclosure of such information or release of such record(s) shall not compromise national security.^{146,,}

While the House of Representative version read

“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 hereby established.^{147,,}

The difference between the different versions of section 2(1) of the Bill passed by the different Houses of the National Assembly is that while the Senate version gives a right of access to information to Nigerian citizens only, the House of Representative gives a broad right to anyone in the world to request for information from Nigerian public officials. But these differences was reconciled with a stronger version of the Bill (than what was passed by any of the Houses of Assembly) which passed into Law. This was made possible by the civil society coalition on the FoI who submitted recommendations favouring the rights based approach to the Conference Committee of both House of Assembly set up to reconcile the differences. Eventually, a stronger version of what currently is the Law was passed by both Houses on the 24 May 2011.

¹⁴⁶ FoI Coalitions recommendation to the Conference Committee of the National Assembly

¹⁴⁷ FoI Coalitions recommendation to the Conference Committee of the National Assembly

The FoI Act Poses a Threat to National Security: The claim of threat to National Security by governments often times amounts to a cover up¹⁴⁸, a suppression of the kinds of speech that provide protection against government abuse¹⁴⁹ and can amount to weakening institutionalised safeguards against government abuse. Surely, there are genuine concerns about National Security because there are instances when it clashes with access to information and freedom of expression like some very sensitive state defence information. Often when government allege a threat to national security it usually amounts to nothing more than mere apprehension or a cover up for not wanting their bad decisions exposed. This is evidenced by some celebrated cases like the UK *Spycatcher case*¹⁵⁰, the U.S.A case of *New York Times Co. v. United States*¹⁵¹. This is because in those cases the dreaded information still ended up in the public knowledge with no damage to the national security as such.

However, this thin line between protecting access to information and averting an actual threat to National Security poses a big dilemma. States find themselves having to strike a balance between the two as a decision favouring any of the sides might either lead to an actual aversion of threat to national security or a gradual slide to cover up for government abuses. The need to help nations balance this competing interest was what led to the drafting of the Johannesburg principles in 1995 by Article 19, the Centre for Applied Legal Studies at the University of Witwatersrand and 16 leading experts from different regions of the world¹⁵². The Johannesburg principle sets out guidelines to the extent to which government can legitimately withhold information from the public on the grounds of national security.

¹⁴⁸ *New York Times Co. v. United States* 403 U.S 713 (1971)

¹⁴⁹ Coliver, Sandra "Commentary on the Johannesburg Principle on National Security, Freedom of Expression and Access to Information" (Human Rights Quarterly)

¹⁵⁰ *Attorney General v. Heinemann Publishers Australia PTY. Ltd and Wright* (1989) 2 F.S.R. 349

¹⁵¹ 403 U.S 713 (1971)

¹⁵² Agnes Callamard 'Burying the Truth Under the Cloak of National Security' (3 May 2007)

<http://www.article19.org/resources.php/resource/2748/en/burying-the-truth-under-the-cloak-of-national-security>> accessed 8 April 2012

Some of the guidelines include principles stating that any restriction based on national security interest should be provided by law that such protection is justifiable in a democratic society and that government bears the burden of proving that there is a genuine national security interest to protect¹⁵³. The proof requires that government should show there is a real threat to national security, that the restriction imposed is the least restrictive and that it is compatible with democratic principles¹⁵⁴. Also that such law should be clearly and narrowly drawn and a prompt judicial review of restriction made available to avoid abuse¹⁵⁵. Other relevant principle include that states should not punish anyone for the disclosure of information based on national security reasons if there is no actual harm caused, if it is decided that the public interest outweighs the national security interest and that once the information has been leaked to the public there should not be any ban on further publications¹⁵⁶.

Despite the seemingly variance between the two concepts, they are not so fundamentally at odds with each other. According to Sandra Coliver¹⁵⁷, an objective review of recent history would point to the fact that in reality, protection of legitimate national security interest is better done when the public and the press examine government decisions than when governance is done in secrecy. When scrutiny of government action is possible in this way, it

¹⁵³ Principle 1 (d) <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>> accessed 27 October 2012

¹⁵⁴ Principle 1.3 (a – c) <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>> accessed 27 October 2012

¹⁵⁵ Principle 1.1 (a & b) <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf> > accessed 27 October 2012

¹⁵⁶ Principle 15 & 17 'National Security, Freedom of Expression and Access to Information' <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>> accessed 27 October 2012.

¹⁵⁷ Sandra Coliver was a former Law Programme Director at Article 19 and presently the Legal Advisor of the Bosnia Office of the International Crisis Group

serves as a safe guard against government abuse, thereby forming a crucial component of national security¹⁵⁸.

This particular misconception is not as surprising as it is usually the most common concern amongst nations with the access to information law. But the Nigerian Freedom of Information Act, 2011 does not contain provisions that might in anyway compromise the national security. It has rather made provisions which would enhance it by the various exceptions to the access to information rights contained in the Act. The Act has made provision for exemptions on National Security grounds including protection of whistle blowers¹⁵⁹ from section 11 – 19 and 26. Some of these provisions include exemption from disclosure those information which can affect the defence and conduct of external affairs of the state¹⁶⁰ and the disclosing of information which could hinder on-going criminal investigation and law enforcement¹⁶¹. The provisions emphasis the National Security Agency's Act of 1986 contained in the 1999 Constitution of Nigeria¹⁶² which can only be amended by the provision of s.9(2) of the Constitution. There are also other agencies that protect the security of the nation created by the National Security Agency Act¹⁶³.

Nigeria Needs the Official Secrets Act: The history of the Official Secrets Act and how it was introduced into Nigeria is not one that portrays democracy. The Official Secrets Act of Nigeria is the same one which was introduced by Britain during the colonial rule and has never been amended till the passing of the Freedom of Information law in 2011. The sort of

¹⁵⁸ Coliver, Sandra "Commentary on the Johannesburg Principle on National Security, Freedom of Expression and Access to Information" (Human Rights Quarterly) 2

¹⁵⁹ S. 27 Freedom of Information Act, 2011

¹⁶⁰ S. 11 (1) Freedom of Information Act, 2011

¹⁶¹ S. 12 (1) Freedom of Information Act, 2011

¹⁶² S. 315 (5) (c) Constitution Federal Republic of Nigeria 1999

¹⁶³ The protection of the internal security is by the State Security Service (SSS), the Defence and Military Related matters handled by the Defence Intelligence Agency (DIA) and the protection of Nigeria external intelligence and Security by the National Intelligence Agency (NIA)

information which the Act¹⁶⁴ seeks to keep secret from the public are usually the sort which contribute to viable discussion in the public and information of that sort are the life blood of democracy¹⁶⁵. For instance, in the UK, such law was used to threaten the press by the Attorney General if they should publish the contents of an internal memo which discloses a disagreement between Bush and Blair during the Iraq war and the targeting of Al Jazeera¹⁶⁶.

There are safeguards and laws¹⁶⁷ in existence in Nigeria which are intended for the due protection of the National Security, including the exemptions contained in the Freedom of Information Act. Government is entitled to punish public officials who violate legitimate rules and regulation regarding information it has a right to keep secret. But citizens also deserve to know what their elected officials and institutions are doing and the only way to ensure this is through the Freedom of Information Act¹⁶⁸. For a proper promotion and maintenance of democracy there has to be citizen's participation, transparency in governance and accountability. This much was recognised by the African Union by the wordings of its constitutive Act pledging commitment to principles of democracy, general participation and good governance¹⁶⁹. These underlying principles were also reflected in their subsequently adopted normative framework which had as their principle objectives "promotion of transparency, accountability and effective participation and good governance"¹⁷⁰.

¹⁶⁴ S. 1(2) (3), s. 9(1) of the Official Secrets Act 1962 all make provisions relating to government classified information

¹⁶⁵ Thomas I. Emerson 'Why We Don't Need the Official Secrets Act' (The Nation; March 10 1979) 263

¹⁶⁶ Agnes Callamard 'Burying the Truth Under the Cloak of National Security' (3 May 2007) <http://www.article19.org/resources.php/resource/2748/en/burying-the-truth-under-the-cloak-of-national-security>> accessed 8 April 2012

¹⁶⁷ The National Security Agency's Act, 1986

¹⁶⁸ Chidi Odinkalu 'Understanding the FOIA; R2K Series' http://www.r2knigeria.org/index.php?option=com_content&view=article&id=200&Itemid=313> accessed 12 April 2012

¹⁶⁹ Article 3(g) Constitutive Act of the African Union

¹⁷⁰ Article 2(5) and 3(3) of the African Union Convention on Preventing and Combating Corruption and Article 3(7), 3(8) and 12(1) of the African Charter on Democracy, Elections and Governance

Granting citizens' access to information held by public officials helps them past the veil of secrecy which often times hides the decision process of their elected/public officials¹⁷¹. It also helps the citizens ensure there is an equitable and fair use of the national resources as well as be involved in the making and implementation of policies that affect their lives¹⁷².

The FoI Act will Encourage Breach of Privacy: The concern that the FoI Act will lead to breach of privacy is one that is understandable considering the usual conflict that exists between the right to information and privacy protection. The misconception is brought about by the fear that with the FoI Act, there will be more access to private information especially by the media and that armed with such information which they might make public and breach privacy.

The right to privacy just like the right to information is also universally recognised. The right to privacy is recognised by the Universal Declaration of Human Rights¹⁷³, by the International Covenant on Civil and Political Rights¹⁷⁴, by the European Convention on Human and Peoples Right¹⁷⁵ and in the U.S the right has been given due recognition in its case law in *Nixon v. Administrator of General Service*¹⁷⁶ where the Constitutional Right to privacy was reiterated by the court by stating that President Nixon had a constitutional privacy interest with regard to records of his private communication with his family.

¹⁷¹ Ololade Shyllon-Adeyeoluwa 'The Draft African Charter on the Values and Principles of Public Service and the Administration in Africa; New Opportunity for Access to Information in Africa' (June 2010) AfriMap Open Society Institute

¹⁷² Chidi Odinkalu 'Understanding the FoIA; R2K Series'
http://www.r2knigeria.org/index.php?option=com_content&view=article&id=200&Itemid=313> accessed 12 April 2012

¹⁷³ Adopted 10 December 1948 UNGA RES 217 A(III) (UDHR) art 12

¹⁷⁴ Adopted 16 December 1966 entered into force 23 March 1976, 999 UNTS 171 (ICCPR) art 17

¹⁷⁵ European Convention on Human Rights (ECHR) art 8.

¹⁷⁶ 433 U.S 425, 457 (1977)

Private information is a key aspect of the individual's right to respect to privacy because it forms part of our identity¹⁷⁷ and has also been recognised as one of the exceptions to the right to information imparted on the public by the media¹⁷⁸. Two of the grounds for the restriction on what information the press could impart to the public (ie the protection of the reputation of others and preventing the disclosure of information received in confidence) are both aspects of respect to right to privacy¹⁷⁹.

However, there is also a global recognition of the public interest override which is to be balanced in considering the limitation of right to privacy imposed on the right to receive and impart information. The approach of the European Court on Human Rights in relation to this is that while the press must not overstep their boundaries in the interest of the protection of the reputation or right of others, it is nevertheless expected to impart information and ideas of public interest¹⁸⁰. What constitutes public interest ranges from public figures to persons touched by public events and this was well explained by Litska Strikwerda in her article 'Information Privacy, the Right to Receive Information and (Mobile) ICTs' where she explained that private information will be of public interest when information is about a subject of public interest (a public official or ordinary citizen affected by issue of public incident) or where the information has a connection between the public role of the subject of public interest (a public person) and the event the public subject is affected by¹⁸¹.

¹⁷⁷ *Pretty v. United Kingdom* App. No. 2346/02 (ECHR 29 April 2002) 61

¹⁷⁸ European Convention on Human Right (ECHR) art 10

¹⁷⁹ Litska Strikwerda 'Information Privacy, the Right to Receive Information and (Mobile) ICTs' (2010) *Nordic Journal of Applied Ethics*, Vol. 4 issue 2, p. 27 - 40

¹⁸⁰ *Busuioc v. Moldova* App. No. 61513/00 (ECHR 21 December 2004) 56

¹⁸¹ Litska Strikwerda 'Information Privacy, the Right to Receive Information and (Mobile) ICTs' (2010) *Nordic Journal of Applied Ethics*, Vol. 4 issue 2, p. 27 - 46

A recent analysis of UK and the European Court of Human Rights cases by Steve Foster¹⁸² reveal three circumstances when the public interest defence can override breach of privacy claims¹⁸³. One of such instances is when the publication is a proof that an illegal act has been committed¹⁸⁴. Second is when there is a genuine public interest and such interest is triggered especially when the person published about is a public figure and the subject of publication goes to the suitability of his holding such post¹⁸⁵. Interestingly in this second instance, a distinction is made between issues of public interest (i.e. issues that contribute to public debate) and issues that the public will be interested or curious to know about¹⁸⁶. The former is what this second instance is about while the later is not and does not override privacy claims. Lastly, another instance when public interest defence will override privacy claims is by the previous acts of the person like when the person has made publicly made assertions as to his reputation¹⁸⁷. In such instance a reasonable disclosure to correct a false impression made to the public will be allowed.

Most often access to information laws do not mandate absolute disclosure and usually make room for exemptions which often include protection of individual privacy¹⁸⁸. The Freedom of Information Act in Nigeria is one such access to information law as it provides for exceptions

¹⁸² Principal lecturer in law, Coventry University CL

¹⁸³ Steve Foster "The Public Interest in Press Intrusion into the Private lives of Celebrities: The Decision in *Ferdinand v. MGN Ltd*" (2011) pg 1

¹⁸⁴ Steve Foster "The Public Interest in Press Intrusion into the Private lives of Celebrities: The Decision in *Ferdinand v. MGN Ltd*" (2011) pg 6

¹⁸⁵ Steve Foster pg 6; This instance was shown in the case of *Lord Browne v. Associated Newspaper Ltd* (2007) 3 WLR 289, when the Court of Appeal refused to uphold an interim injunction against the publication of information which showed the appellants homosexual relationship with a young man especially after he lied to the court as to how he met the young man.

¹⁸⁶ The European Court of Human Rights in the case of *Von Hannover v. Germany* (2005) 40 EHRR 1 made the distinction between issues of public interest and issues the public will be interested to know about.

¹⁸⁷ Steve Foster "The Public Interest in Press Intrusion into the Private lives of Celebrities: The Decision in *Ferdinand v. MGN Ltd*" (2011) pg 6

¹⁸⁸ Daniel J. Solove 'Access and Aggregation: Public Records, Privacy and the Constitution' (2002) Minnesota Law Review; Vol. 86:1137

for public institutions to deny applications which contain personal information¹⁸⁹ and the protection of information that is given in confidence like that between doctor/patience, lawyer/client¹⁹⁰. The constitution of the Federal Republic of Nigeria also provides for the protection of individual privacy¹⁹¹ and provides for the protection of information received in confidence as a limitation to the right to expression, to hold opinion and to receive or impart ideas or information¹⁹².

The Supreme Court of Nigeria has also sought to strike a balance between the right to private life and legitimate public interests. The court in the case of *Joseph Mangtup Din v. African Newspapers of Nigeria Ltd*¹⁹³ held that it was a fair comment in the public interest and that it is a matter that the public have a right to be informed in relation to a publication made about a military officer who was dismissed from the force but still addresses himself as a captain. The appellant brought this action claiming defamation but the courts considered that the defence of fair comment and justification claimed by the respondent is available to them by a cumulative reading of section 9 (1) (2) paragraph 14 of the Defamation law 1961. This is because the appellant has failed to prove that the statements published by the respondent was made out of malice or that he has given them a more accurate account of that statement to be published in their newspaper which they have failed to do. The court reasoned that the appellant has made his reputation a matter of public interest when he publicly asserted that he retired as a meritorious captain in the Army when in fact he has been dismissed and sentenced to over 12 months in imprisonment. Therefore the public deserved to be informed of the truth by the press whose duty it is to do so.

¹⁸⁹ S. 14 Freedom of Information Act, 2011

¹⁹⁰ S. 16 Freedom of Information Act, 2011

¹⁹¹ S. 37 Constitution of the Federal Republic of Nigeria 1999

¹⁹² S. 39 Constitution of the Federal Republic of Nigeria 1999

¹⁹³ (1990) SCN 44/1986

The misconception, though understandable, is not well founded as there is existing protection for individual privacy long before the passage of the FoI Act and the Act also makes exceptions for it too.

The FoI Act is not Applicable in the States.

Another misleading conception about the FoI Act is that it is not applicable in the states of the federation and therefore has a limited reach and impact. This is totally a misconception and a misinterpretation of the Constitution because according to a Senior Advocate of Nigeria, Mr Felix Fagbohunge federal laws are superior to state laws and that the FoI Act had to be complied with by the states¹⁹⁴.

The issue has been one of debate in the nation even amongst the Senior Advocates of Nigeria with some arguments to support both sides¹⁹⁵, however a careful consideration of the provisions of the Constitution of the Federal Republic of Nigeria and with other prominent legal opinion¹⁹⁶ weighing in on it, demonstrates that it is a misconception.

Paragraph 3(c) of the 3rd Schedule to the Constitution gives power to the National Assembly to make provision for the modalities of accessing information on the asset declaration by public officials. Item 60 (a) of the 2nd schedule which is on the exclusive legislative list empowers the National Assembly to make laws for the promotion and enforcement of the Fundamental Objectives and Directive Principles of state policy under chapter II of the

¹⁹⁴ Davidson Iriekpen 'Fol Act; one more hurdle to cross says top lawyers' (ThisDay Newspaper 02 June 2011) <http://www.thisdaylive.com/articles/foi-act-one-more-hurdle-to-cross-say-top-lawyers/92484/>> accessed 16 April 2012

¹⁹⁵ Davidson Iriekpen 'Fol Act; one more hurdle to cross says top lawyers' (ThisDay Newspaper 02 June 2011) <http://www.thisdaylive.com/articles/foi-act-one-more-hurdle-to-cross-say-top-lawyers/92484/>> accessed 16 April 2012

¹⁹⁶ Chidi Odinkalu 'Understanding the FoIA; R2K Series' http://www.r2knigeria.org/index.php?option=com_content&view=article&id=200&Itemid=313> accessed 12 April 2012

Constitution¹⁹⁷. Under chapter II of the Constitution, section 14 (2) (a) states that the sovereignty of the nation belongs to the people and government derives its power and authority from them, also section 14 (2) (c) requires that it be ensured that the people participate in their governance. The National Assembly complies with all these responsibilities by the provisions of the FoI Act. Under the concurrent legislative list, Item 4 part II in the second schedule of the Constitution provides that “The National Assembly may make laws for the Federation or any other part of it with respect to the archives and public record of the Federation¹⁹⁸”.

A proper consideration and interpretation of the above provisions would be that states are not excluded from making laws relating to the public records but that when there is conflict between any such laws and the federal law, the federal law takes precedence¹⁹⁹. It means that states can chose to enact their own access to information law but it should be consistent with the FoI Act and when it is not, the federal law supersedes and until states chose to enact their own access to information law, the FoI Act applies to them.

Conclusion

The struggle for open, transparent and accountable governance in Nigeria through an access to information law has come a long way and the eventual passage of the FoI Act is one move towards the right direction. However, for a successful utilisation and implementation of the law to achieve its set objectives, there is a need to consider and tackle the challenges likely to be encountered in the process. The challenges discussed are not such that it is impossible to overcome them when there is a political will to do so. It just requires a commitment on the

¹⁹⁷ Item 60 (a) of the 2nd schedule to the Constitution, 1999

¹⁹⁸ Item 4, Part 2, Second Schedule to the Nigerian Constitution, 1999

¹⁹⁹ Chidi Odinkalu ‘Understanding the FoIA; R2K Series’

http://www.r2knigeria.org/index.php?option=com_content&view=article&id=200&Itemid=313> accessed 12 April 2012

part of all stakeholders to overcome these challenges, implement the law and to progressively move towards an open, transparent and accountable government.

Chapter Three

Addressing the Challenges

Having discussed the likely challenges that Nigeria might encounter in the implementation of its just passed access to information law has been listed, it is a necessary follow up to discuss ways that these challenges could be addressed separately or collectively. The challenges discussed shows that what gave rise to them are tied to political, social and historic life of the country. This means that there is no specific or already set down formula in addressing the challenges but that what needs to be done is to draw experience from other countries of the world and consider the solutions that have worked for them in addressing the challenges they faced with implementing their access to information laws. Then such solutions will be adapted to the Nigerian situation where necessary and applied to address the challenges discussed in chapter two that the country might face in the implementation of the FoI Act.

This chapter will therefore discuss the probable means of addressing the challenges by comparatively looking at the experience of other countries and coming up with the best possible option for Nigeria to address hers.

Review of Existing Civil Service Rules and Procedure

The Nigerian Civil Service can be described as the life blood of the country's system and they generate the majority of the information which the FoI Act seeks to be made accessible to the public. Therefore if the culture of secrecy in the running of the countries affairs has to be effectively tackled it has to start with reviewing the public service rules to ensure that it is in compliance with the FoI Act. Though the FoI Act overrides any other laws and regulation

in Nigeria²⁰⁰ but the Nigerian Public Service Rules still needs to be reviewed. Aside from the reason of the review being for the purpose of compliance with the FoI Act, it will also serve to awaken the consciousness of the civil servants to their obligation under the Act.

For example section 27 of the FoI Act, 2011 provides to the effect that no criminal or civil penalty will be levied against any public civil servant or anyone acting for such institution who discloses information in good faith. But rule 030416 of the public service rules provide otherwise as it penalises any public servant who discloses information except with the permission of government or in accordance with official routine²⁰¹. This means that the public service rule takes away the protection given to whistleblowers by the FoI Act and this needs to be reviewed so as to be compliant with the FoI Act. So that Nigeria will move away from a culture of secrecy to a more transparent and accountable governance just like the other nations of the world who are transiting from a culture of secrecy to openness in governance.

If the current provision of the Civil Service Rules of Nigeria is not reviewed to be in conformity with the FoI Act, then Nigeria will be lagging behind when compared to the other nations of the world who are moving away from a culture of secrecy or to transparency standards set by international courts. In the United Kingdom, they currently have a law enacted for the benefit of whistle blowers²⁰² which was even before the enactment of their freedom of information Act in 2000. Again the courts also recognised the need for such disclosures for public interest sake when the Court of Appeals in the 1988 UK case of

²⁰⁰ Section 1, Freedom of Information Act, 2011

²⁰¹ Rule 030416, Nigeria Public Service Rules, 2008 Edition

²⁰² Public Interest Disclosure Act, 1998

*Attorney General v. Guardian Newspapers & Ors*²⁰³ while varying the blanket injunction barring all media houses from the publication of any reports from former intelligence officers stated that a free society requires that the government activities are open to criticism²⁰⁴.

The above case came about as a result of the publication of a tell all book by a former UK secret service agent which alleged wrong doings by the UK government and disclosed the running of the secret service. The Attorney General of UK then successfully brought an action by way of injunction barring the media from the publication of the story. An appeal was then brought to the court of appeal who revoked the blanket injunction against the media but unfortunately still granted some injunctions against such publications. The case finally made its way to the European Court of Human Rights who held the UK government had violated the right of the media to freedom of speech by the said injunction during some certain period after the book has been published in other countries²⁰⁵.

The case which was before the passage of the Public Interest Act of 1998 showed the United Kingdom's struggle towards moving away from a culture of secrecy which involved having to balance the public interest in having a right to scrutinise and criticise the affairs of government and national security issues. The subsequent passage of the Public interest Act of 1998 and the subsequent passage of the Freedom of Information Act is an indication of how well they are overcoming the culture of secrecy.

²⁰³ (1990) 1AC 109

²⁰⁴ 'Troubled History of the Official Secrets Act' (18 November 1998)

http://news.bbc.co.uk/2/hi/uk_news/216868.stm > accessed 30 September, 2012

²⁰⁵ *Observer & Guardian v. United Kingdom*, App No. 13585/88 (ECHR, 26 November 1991) para. 84

The progress made by the United Kingdom in overcoming a culture of secrecy by the protection of whistle blowers is surpassed by the U.S.A which was evidenced by the judgement of the Supreme Court in the case *New York Times Co. v. United States; United States v. Washington Post Co*²⁰⁶. The case which shares similarity with the facts of the UK case also involved an attempt by government to stop the publication of classified information by a former government official. The Supreme Court of the U.S despite the very seemingly danger to national security posed by such publication still held in favour of the disclosure of the information for the sake of public interest. Though one might argue that the refusal of the U.S Supreme Court to allow an injunction against the publication of the pentagon papers was out of the need to protect free speech but that is not entirely so. It is equally necessary to keep in mind that a very important aspect of freedom of speech is that it helps supply the people with the much needed information with which to hold government accountable. And that is a core aspect of access to information which the media as the societies watchdog is fulfilling their role as such in this instance.

Finally, the fact that the court dismissed all the charges against the whistle blower²⁰⁷ as a result of government's misconduct could also be argued to be based on their willingness to protect him especially given the nature of the information he released to the public about government activities. It is also worthy of note that the U.S.A subsequently enacted a law for the protection of whistle blowers²⁰⁸.

²⁰⁶ (1971) 403 U.S 713

²⁰⁷ Daniel Ellsberg is the person who released the pentagon papers to the press.

²⁰⁸ The Whistle Blowers Act, 2007

The importance of access to information to a democratic society cannot be over emphasized, the role it plays in ensuring citizens participation in governance and in holding government accountable are few of the reasons why every effort has to be made for a successful implementation of the new FoI law. And one of the starting points for doing so will be by the review of the existing public civil service rules to be compliant with the FoI law.

Proactive Disclosure by All Public Bodies

Another way of overcoming the challenge which the implementation of the FoI Act will encounter is in the area of proactive disclosure. The objective of the principle has been captured thus;

“The principle of proactive disclosure (i.e. that information be publicly available prior to public request) is instrumental in achieving transparency and greater openness in government. Proactive disclosure (also known as affirmative publication) ensures that information seekers get immediate access to public information and avoid the cost of filing a request or engaging in administrative procedures²⁰⁹.”

One of the main objectives for advocating for access to information laws is to ensure openness in governance and to promote accountability. And one way to accomplish these objectives is through proactive disclosure and the quotation above aptly captures the reasoning behind the principle. Proactive disclosure is when information is made available to the public by public body initiative without a request being filed²¹⁰. Aside from ensuring transparency and accountability, proactive disclosure also reduces the burden on public bodies from constant FoI request. It also levels the playing field for what amount of

²⁰⁹ OECD (2011) ‘Proactive Disclosure of Information’ in OECD Government at a Glance 2011, OECD Publishing, p.142

²¹⁰ Helen Dabishire ‘Proactive Transparency; the future of the right to information?; A review of standards, challenges and opportunities’ (WBI Governance Working Paper Series 2010) 3

government information is held by the sections of the society by making the information available to all in the society as opposed to responding to individual requests thereby creating information inequality²¹¹.

Section 2 (3) – 2(6) of the FoI Act mandates all public institutions to make proactive disclosures which they are to make readily available to the public through various means including electronically or by print, it also lists what to publish and gave anyone entitled to receive information under the Act the power to enforce this provision in a law court against any public institution who fails to comply.

For institutions that are used to running their affairs in secrecy and who are not used to proper record keeping, organising, maintenance and archiving, this provision will surely pose a challenge to them. It would require a planned approach on how to meet this particular challenge keeping in mind that the provision is one of the core aspects of the access to information law. Proactive disclosure has also been described by some experts as the future of access to information laws²¹². How well this is implemented could also be a pointer to government's readiness to adopt an open system of governance and be accountable to their electorates. Although so far there are still big gaps in complying with provisions of the Act and according to Associated Press²¹³ (AP) the nation is still plagued with a culture of secrecy

²¹¹ Helen Dabishire 'Proactive Transparency; the future of the right to information?; A review of standards, challenges and opportunities' (WBI Governance Working Paper Series 2010) 3

²¹² Helen Dabishire 'Proactive Transparency; the future of the right to information?; A review of standards, challenges and opportunities' (WBI Governance Working Paper Series 2010) 7

²¹³ An American News Agency

and bureaucracy²¹⁴ but it is understandable as the law is coming to change an age long culture of secrecy in the public sector²¹⁵.

Mr. Mathew Omagara, Chairman of the House of Representatives Committee on Reform of government's institutions during a two day sensitisation workshop on Freedom of information (FoI) Act assured Nigerians that the lawmakers are fully committed to the implementation of the Act and that it will not suffer a set back and end up in the archives like some laws did. Most importantly, Omagara pointed out that a proper implementation of the Act should be based on the proactive disclosure provision of the Act²¹⁶. The attitude of government and some of its key officials seems to indicate willingness on their part to move away from the culture of secrecy and run a transparent system of governance²¹⁷. How far they are willing to go in being transparent however remains to be seen over time.

If government really intends to fully implement the provisions of the FoI Act on proactive disclosure, one way to that is to look at how other governments who are moving towards a transparent and accountable system of governance handled their proactive disclosure. The advent of technology has made document distribution far cheaper and easier and so governments have adopted the e-model of access to information law²¹⁸. This means that they

²¹⁴ Yinka Ibukun and Jon Gambrell 'New Nigerian Freedom of Information Changes Little' (2012) ABC News <http://abcnews.go.com/International/wireStory/nigeria-free-information-law-16085396#.T4sTQFH9Ms0>> accessed 15 April 2012

²¹⁵ Interview with Maxwell Kadiri, Associate Legal Officer, Open Society Justice Initiative, (via e-mail on 23rd November 2011)

²¹⁶ NAN 'NASS Promises Accelerated Implementation of the FoI Act' *Business Day* (29 March 2012) 1

²¹⁷ The Attorney General of the Federation has also issued a circular to public institutions on the reporting section under section 29 of the FoI Act. http://www.r2knigeria.org/index.php?option=com_content&view=article&id=240:r2k-commends-the-honourable-attorney-general-of-the-federations-circular-on-compliance-with-the-freedom-of-information-act-2011-to-ministries-departments-and-agencies-of-government&catid=72:release&Itemid=319> accessed 15 April 2012

²¹⁸ Alysia Davies and Dara Lithwick 'Government 2.0 and Access to Information: 1. Recent Development in Proactive Disclosure and Open Data in Canada (2010) 4

publish their documents and data online and these are easily accessible to the public. This approach has been adopted by the USA, UK and other governments using different terms like e-government, e-governance, e-participation or open government but whatever the name the goal still remains to proactively disclose public information and to give the people a chance at participating in governance²¹⁹.

What governments do in this sort of initiative is to develop a web portal where government documents and data are uploaded online. In the United States, when their “Open Government Initiative” was launched in December 2009, the President made a commitment to run an open, citizens participatory type of government²²⁰. The government also issued a directive to federal government agencies to take immediate steps towards an open, participatory and collaborator system²²¹. In the United Kingdom, it is called “Smarter Government”, in Mexico it is called ‘Portal de Obligaciones des transparencia’ (Portal of transparency and access to government public information) and its aim is to meet the provisions of Article 7 of the access to information law²²². The Mexico example is unique in the sense that they are using a central portal as one stop shop for accessing all information required by law to be proactively disclosed. India also has a searchable portal database where government publishes online public information²²³.

These are commendable initiatives by the governments on ensuring more access to information and it is worthy of emulation.

²¹⁹ Alysia Davies and Dara Lithwick ‘Government 2:0 and Access to Information: 1. Recent Development in Proactive Disclosure and Open Data in Canada (2010) 4

²²⁰ <http://www.whitehouse.gov/open/about>> accessed 15 April 2012

²²¹ Department of Justice Guide to Freedom of Information Act
http://www.justice.gov/oip/foia_guide09/proactive-disclosures.pdf> accessed 15 April 2012

²²² <http://www.portaldetransparencia.gob.mx/pot/>> accessed 15 April 2012

²²³ <http://india.gov.in/documents.php>> accessed 15 April 2012

Helen Dabishire²²⁴ has also listed some key guiding principles in her article ‘Proactive Transparency: The future of the right to information?’ which governments wishing to move towards a more proactive disclosure regime should keep in mind. The first of such principle is availability, and it is advised that governments should aim at proactively disclosing through multiple communication channels so as to reach all the sectors of the society. Second, is to make the information proactively disclosed to be easy to find and this requires that it be properly organised. Third, is to disclose information that is of value and relevant in an organised way. In this instance they could make consultation with stakeholders to determine what is relevant per time. Fourth, is to ensure that the relevant disclosed information is also done in full and in a comprehensive manner. If possible such information should be produced at relevant local or regional languages. Fifth, government should not charge money for the disclosure of such information especially the ones the law has mandated them to disclose and especially if made available electronically. If they need to charge money, it should be minimal and should relate to information other than that, they have been mandated to disclose. Lastly, the proactive disclosure should be on time and correct keeping in mind the perishable nature of certain information. The information should be dated and regularly made up to date.

The Nigerian government can adopt a similar initiative towards running a transparent and accountable system of government but there will still be some challenges with it. First will be to address the question of how many civil servants or staff of public institutions are computer literate, which might require having to conduct a training for them or for some key persons that will be responsible for the proactive disclosure of information online. Secondly, will be

²²⁴ Helen Dabishire is the Executive Director of Access Info Europe, she has previously worked with Article 19, Open Society Institute and has provided support and expertise to the Council of Europe, European Union and World bank in the adoption and implementation of access to information laws.

that this type of initiative will require dedication and time. Some other jurisdictions like in the US when it was initially started, there was an underestimation of the number of personnel it would require²²⁵. This means that public institutions can learn from that and will have to employ additional personnel for this purpose. Third, will be what class of people will be able to access this information, how many Nigerians have access to internet especially those in the rural areas. This can still be taken care of if in addition to the posting of information online on designated websites, public bodies and institutions can also use alternative means of publications, official gazettes, radio and television broadcasts. Fourth, is to make budgetary allocation for funds to do this because adopting a proactive disclosure regime usually carries with it high cost though the cost requirement is subsequently diminishes²²⁶. Lastly, keeping in mind all the challenges that need to be overcome to achieve this, it might be realistic if at the initial take off it is aimed at progressive implementation. Different standards could be set for different levels of public bodies depending on their capacity and then progressively improved²²⁷.

Dr. John Alabi²²⁸ during the two days sensitisation workshop on the FoI Act pointed out one useful fact which is that the extent the Act is implemented also depends on the willingness of the civil servants. This is very much true as the attitude the civil servants adopt towards the Act may either go to promote or slow its implementation. They can also benefit from a positive attitude towards it, for instance the Police force can make use of the proactive disclosure to manage or improve their image in the country²²⁹. The police in England and

²²⁵ Cooke Louise and Sturges Paul 'Police and Media Relations in an Era of Freedom of Information; Policing and Society' (2009) LU pp. 406-424, 7

²²⁶ Helen Dabishire 'Proactive Transparency; the future of the right to information?; A review of standards, challenges and opportunities' (WBI Governance Working Paper Series 2010) 33

²²⁷ Helen Dabishire 'Proactive Transparency; the future of the right to information?; A review of standards, challenges and opportunities' (WBI Governance Working Paper Series 2010) 33

²²⁸ One of the resource persons at the two day sensitisation workshop on the FoI Act,

²²⁹ This is not to mean that their image is the only thing that requires reforming

Wales have used the management and sharing of information to create a rapid change of their image in recent time²³⁰. The present image or perception of the Nigerian police currently is one that requires a makeover²³¹ and just like their counterparts in England and Wales who were also accused of not being open to public scrutiny²³² they could take advantage of the proactive disclosure provision in the FoI Act to put useful information about them rather than taking the option of harassing individuals who make public statements about the deplorable state of the Force²³³.

Individuals, NGO, s and Civil Society can assist in accelerating the proactive disclosure of information by public bodies by taking advantage of the provision of the FoI Act in section 2(6). The section empowers anyone who is entitled to request and receive information under the Act to sue for the enforcement of the proactive disclosure by public institutions in a law court. They should also develop advocacy campaign on compelling public bodies to comply with the affirmative disclosure.

The implementation of the proactive disclosure provision of the FoI Act is very important to the realisation of the objectives of the law. Proactive disclosure will help bring the benefit of the access to information law to the common man. When implemented, it gives even the people at the grassroots and rural area the means to question how the representatives they

²³⁰ Cooke Louise and Sturges Paul ' Police and Media Relations in an Era of Freedom of Information; Policing and Society' (2009) LU pp. 406-424, 5

²³¹ ' Torture, Abuse and Extra-Judicial Killings by the Nigerian Police Force' , NOPRIN and Open Society Justice Initiative (2010)

²³² Cooke Louise and Sturges Paul ' Police and Media Relations in an Era of Freedom of Information; Policing and Society' (2009) LU pp. 406-424, 6

²³³ It was reported today by the Associated Press and other media houses on the press release made by a Nigerian lawyer, Mr. Bamidele Aturu on the harassment of the National Human Rights Commission Chairperson, Mr. Chidi Odinkalu concerning a statement he made about the extra-judicial killings of the Nigerian Police Force.
http://hosted2.ap.org/OREUG/86053d8662944f7698388c63189f97c6/Article_2012-04-16-AF-Nigeria-Human-Rights/id-e48f3ab43ba44db5bb50c6653342a356> accessed 16 April 2012

have voted for, say in the National Assembly is utilising the resources allocated to them. Though there might be challenges in implementing this particular section of the law like overcoming years of culture of secrecy, learning how to create, manage and maintain records, having willingness on the part of the civil servants to be transparent and grant access to information etc but they are not such challenges that could not be overcome if the government and public institutions are willing to learn from the experiences of other jurisdictions. Individuals and the civil society also should compel them to comply with the provisions when necessary by using the enforcement provisions. They should also create awareness and draw the public's attention to this important provision contained in the FoI Act.

Creating Awareness;

Making awareness of the FoI law might sound like the least means of addressing the challenges or even overcoming a culture of secrecy but the fact is that it is one of the key ways of a successful implementation and reaching the objectives of the law. This is so for many reasons, one of it being that in addressing the culture of secrecy in the public civil service, there is need to change their mindset to understand that they have to abide by the Act and such knowledge should guide their everyday decision regarding information management²³⁴. This strategy was proposed by stakeholders who reviewed the implementation of the access to information law in Canada where one of the challenges of implementing the law was found to be a culture of secrecy²³⁵.

²³⁴ David Zussman, Nancy Averill, & Geneviève Lépine, *Report on Consultations to Review the Access to Information Act and its Implementation (May-June 2001)*, (N.p.: Public Policy Forum, 2001) at 22 and 26, online: Public Policy Forum < http://www.ppforum.com/ow/ow_e_05_2001.pdf>. Accessed 7 October, 2012

²³⁵ Marc-Aurele Racicot & Frank Work Q.C., 'The Access to Information Act; A Canadian Experience' (2005) Commonwealth Human Rights Initiative pg 15 http://www.humanrightsinitiative.org/programs/ai/rti/implementation/general/canada_ai_act_may05.pdf> accessed 7 October 2012

Secondly, from the human rights perspective if there is grass root awareness of the access to information law, then even the ordinary citizen in the most remote part of the state can use it to enforce their individual right. When the Right to Information law of India was passed, it was adjudged to be one of the most ambitious transparency laws because of its promise to a right of access to government information to over a billion citizens a large percentage of which are poor²³⁶. Yet the access to information law was used by Satbir Sharma²³⁷ to expose the corrupt practices of a local mayor and the access to information law still remains his only hope of justice for the killing of his wife by the exposed mayor in India²³⁸.

The story of Satbir Sharma is an indication of what difference could be made if there is grass root knowledge of the uses of the access to information law. After Sharma exposed the local mayor using the access to information law, the mayor allegedly retaliated by attacking Sharma's family. And it was still with the access to information that Sharma was able to show to higher authorities that the local police are charging the mayor with a lower crime than that which he allegedly committed. As a result of this persistent use of the access to information law the mayor was then properly charged and the access to information still remains Sharma's hope of following up to ensure that justice is done²³⁹.

²³⁶ Alasdair Roberts, 'India Right to Information Act; First Four Years' (2010) <http://www.freedominfo.org/2010/01/indias-right-to-information-act-the-first-four-years>> accessed 7 October 2012

²³⁷ Satbir Sharma is an Indian living in the rural areas who was one of those interviewed by Martha Mendoza (A reporter with Associated Press) who did a research on the implementation of access to information laws in the world.

²³⁸ Martha Mendoza, 'Right to Know Laws Often Ignored' (AP, 2011) <http://cnsnews.com/news/article/ap-impact-right-know-laws-often-ignored-0>> accessed 8 October, 2012

²³⁹ Martha Mendoza, 'Right to Know Laws Often Ignored' (AP, 2011) <http://cnsnews.com/news/article/ap-impact-right-know-laws-often-ignored-0>> accessed 9 October, 2012

Other reports have also shown that the law has been used by some rural people to question politicians on non-delivery of their obligations and for example to show that a public official had stolen rice meant for distribution to the poor²⁴⁰. In Nigeria where the citizens have been bemoaning the fact that chapter two²⁴¹ of the Constitution is not justiciable, the knowledge that the new access to information law empowers them to have evidence with which to question the non performance of the politicians will be comforting. Also, such awareness will empower those people that have been rendered homeless by the recurrent house demolitions that take place in Nigeria by the federal and state governments without due notice to the people or without alternate accommodation been provided²⁴². The access to information law will help the victims and others carrying out investigation to get justice.

The access to information law is a means to so many ends; it brings transparency in governance leading to accountability and to healthy democracy. But that's not all as a good consciousness about the law can be a powerful tool in tool the hands of the people especially those in the rural areas who are often not as well informed of the affairs of the government. The country's officials and the judiciary need a proper understanding and appreciation of the law for proper utilisation.

Training of Public Officials

Most countries, especially the ones moving away from a culture of secrecy after the enactment of their access to information laws, follows it up with a training of the public

²⁴⁰ Alasdair Roberts, 'India Right to Information Act; First Four Years' (2010) <http://www.freedominfo.org/2010/01/indias-right-to-information-act-the-first-four-years>> accessed 7 October 2012

²⁴¹ The Chapter two of the Nigerian Constitution makes provision for socio-economic rights but the provisions were made non justiciable.

²⁴² Jude Igbanjo, 'National Human Rights Commission to Investigate Demolition' (ThisDay Live, 7 August 2012)

officials. Some countries take it a step further by developing a training manual so that subsequent public officials can keep up to date with it and consult the manual when need be. In Canada, the minister overseeing the implementation of the access to information law aside from establishing guidelines for public officials and publishing an implementation report, they also made available a training program for public officials²⁴³. The same initiative was adopted in the United Kingdom and they have also developed a training guide for public officials²⁴⁴. While in India, the training and the subsequent manual developed is not meant only for public officials but also for appellate bodies who decide on any denial of access to information²⁴⁵.

The Attorney General of the Federation of Nigeria who is currently in charge of seeing to the implementation of the law has produced guidelines for public civil servants to guide them in the implementation of the FoI Act. A further step could be taken by the Attorney General or the head of the Nigerian Civil Service to organise a training workshop which will be training on proper documentation, IT training, proper classification of information, proactive disclosure and how to respond to request for information.

Training of public officials should also include the judiciary who are the appellate bodies that decides on any denial of information. They need a proper understanding of the policy and objective behind the access to information so as to deliver the right judgement and the proper

²⁴³ Marc-Aurele Racicot & Frank Work Q.C, 'The Access to Information Act; A Canadian Experience' (2005) Commonwealth Human Rights Initiative pg 14
http://www.humanrightsinitiative.org/programs/ai/rti/implementation/general/canada_ai_act_may05.pdf>
 accessed 7 October 2012

²⁴⁴ Department of Constitutional Affairs,
<http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/foi/guide2nl.pdf>> accessed 8 October 2012

²⁴⁵ Right to Information Cell,
http://www.humanrightsinitiative.org/programs/ai/rti/implementation/general/yashada_rti_completion_report_2004.pdf> accessed 8 October 2012

balancing of interest when necessary. If the Nigerian judges who are the appellate bodies under the FoI Act do not have a good understanding of the law, then it would hamper its implementation. In October 2011, an NGO filed a suit at a Lagos High Court, Ikeja for the denial of access to requested information on the overhead cost of the Lagos state House of Assembly from 1999 – 2011. The presiding judge denied the application on three grounds one of which was that the FoI Act does not apply retroactively as it was passed in May 2011 while the information requested for dates back to 1999²⁴⁶.

This is an improper interpretation of the FoI Act because section 1 of the Act clearly states 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 established²⁴⁷.”

This means that it gives Nigerians the right to access information irrespective of when it was produced whether in written form or not but with the exceptions listed in sections 11 – 17 of the FoI Act. A further look at the provisions of the Act where it provides for the type of document which public institutions are to provide shows that the law purposes that there is an access to information in existence before the passage of the law²⁴⁸. This is not to say that the presiding judges reasoning is totally absurd as there are states that their access to information

²⁴⁶ Channels Television News, <http://www.channelstv.com/home/2012/03/14/court-dismisses-ngos-foi-request/>> accessed 9 October 2012

²⁴⁷ Section 1 Nigerian Freedom of Information Act, 2011

²⁴⁸ Section 2 (3)(b) Nigerian Freedom of Information Act, 2011

law gives access to information that are already in existence and in written form. This is so in Mexico where the law in essence provides for access to public records or documents rather than information²⁴⁹, although in practice government institutions create documents to satisfy an access to information request²⁵⁰.

The reason access to information laws in some states provides as such is so that the public offices are not overwhelmed with access to information requests within the first few years of enacting the law²⁵¹. However, experiences have also shown that this could be a loophole for the civil servants to claim that much of the requested information is not in documentary form or even in existence²⁵². In Canada this loophole has been somehow taken care of by making that part of the law a transitional provision and by giving the public officer discretion to make available such information considering the year of the production²⁵³.

The enactment of such transitional provision in an access to information law helps public officials during their capacity building phase until they are well capable of meeting up the demands and volume of information requests.

²⁴⁹ Article 3 (iii) (v) Mexican Federal Transparency and Access to Governmental Public Information Act, 2006

²⁵⁰ The Mexican Transparency Law; Design and Implementation Experiences, pg 5
http://www.humanrightsinitiative.org/programs/ai/rti/implementation/general/mexican_transparency_law_may05.pdf> accessed 9 October 2012

²⁵¹ The Access to Information Act; A Canadian Experience, pg 5
http://www.humanrightsinitiative.org/programs/ai/rti/implementation/general/canada_ai_act_may05.pdf> accessed 9 October 2012

²⁵² The Mexican Transparency Law; Design and Implementation Experiences, pg 12
http://www.humanrightsinitiative.org/programs/ai/rti/implementation/general/mexican_transparency_law_may05.pdf> accessed 9 October 2012

²⁵³ Section 27 (1) Access to Information Act, Canada

Conclusion

Addressing these challenges which Nigeria is likely to encounter in the implementation of the FoI Act is imperative if the laws objective is to be achieved. The experiences of other states in overcoming their challenges discussed should serve as a learning point while keeping in mind the peculiar situation of Nigeria.

Chapter Four

Comparative International Perspective

This chapter will look at the international standards for access to information law with the purpose of appreciating the international view on the need for access to information law and how challenges of implementation has been overcome in other jurisdiction. It will do these by comparatively looking at the international provisions on access to information and case laws. Most importantly this chapter seeks to show how the history of a nation or region can influence the court's interpretation of laws and how that might turn out to be the greatest challenge the implementation of a particular law might face.

The right to information is an internationally recognised right and practically all the international and regional instruments on human right have provisions granting access to information. The Universal Declaration on Human and Peoples Right included the right to seek and receive information as part of everyone's right to freedom of opinion and expression²⁵⁴. The International Convention on Civil and Political Rights also provides same but with the addition of such right being to all kinds of information irrespective of what form they exist²⁵⁵. Though both provide the right to information within the purview of freedom of expression and opinions but effort has been made by the United Nations to clarify the fact that it includes also a right to access information²⁵⁶.

The regional organisations are not left out in setting out provisions for access to information laws as the Council of Europe recommended minimum standard to governments for enacting

²⁵⁴ Universal Declaration of Human Rights (adopted 10 December, 1948) UNGA Res 217 A(III) (UDHR) Art. 19

²⁵⁵ International Convention on Civil and Political Rights (adopted 16 December 1966) 999 UNTS 171 (ICCPR) Art. 19(2)

²⁵⁶ Report of the Special Rapporteur on Freedom of Opinion and Expression, Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc. E/CN.4/2000/63, 18 Jan. 2000

access to information legislations²⁵⁷. Article 13 of the American Convention on Human Rights (ACHPR) makes provision for a right to information. The Organisation of American States did not stop at the above provision as they also set out comprehensive principles on freedom of expression in 1997 which made the assertion in its preamble on how freedom of information promotes transparency and accountability in governance²⁵⁸. Article 9(a) of the African Charter on Human and Peoples Right also provides for an access to information. Aside from this provision, the African Union has also adopted some declarations²⁵⁹ and Charter which promote access to information. These declarations sought to promote core principles of access to information law like proactive disclosures by public bodies, protection of whistle blowers and refusal to comply with an access to information request being subject to review by an independent body²⁶⁰.

Aside from subsequent resolutions and declarations being adopted to elaborate further on the principles and limitations of access to information by the various international and regional human rights instruments, the African Charter on Human and Peoples Right provision on access to information law can be said to be the most advanced. This is because Article 9 (1) of the Charter expressly provides for every individual's right to access information. The right to access information granted under that Article was not attached under any other right or in conjunction or in elaboration of any other right as is the case with the other international and regional provision on access to information. All the other international and regional provisions on access to information law was couched in similar terms and made part of the

²⁵⁷ Recommendation Rec. (2002) of the Committee of Ministers to members states on access to official documents, adopted by the Committee of Ministers on February 21, 2002 at the 784th meeting of the ministers deputies.

²⁵⁸ Preamble, Inter American Declaration on Principles of Freedom of Expression (1997)

²⁵⁹ 32nd Ordinary Session of the African Commission on Human and Peoples Right, 2002, Banjul, Gambia

²⁶⁰ Resolution on the Adoption of Declaration on Principles of Freedom of Expression in Africa at the 32nd Ordinary Session of the African Commission on Human and Peoples Right, (2002)
<http://www.achpr.org/sessions/32nd/resolutions/62/>> accessed 3 April 2013

provision for freedom of expression. Also one could also argue that the other international and regional instruments are less protective of access to information law because a court unwilling to find in favour of the access to information can refuse to make a finding of access to information under those provisions unlike the African Charter provision which expressly provides for a right to information.

Case Law

A state/region's history is usually reflected, through the courts, in its attitude towards certain rights and principles as evidenced by a study of the case law especially in relation to freedom of expression and access to information. The United States of America with a history of what it suffered in the hands of the United Kingdom and its subsequent emancipation leans more towards protection of individual rights in the interpretation of such laws. The Council of Europe on the other hand with its objective of maintaining legal standards and human rights amongst the European countries leans more towards a balancing of all rights involved in the interpretation of such provisions through one of its institution, the European Court of Human Rights. In Nigeria with its long history of a culture of secrecy one finds out that the attitude of the public bodies to request for information since the passage of the FoI Act is not encouraging as they still question the right of citizens to request for any sort of information from them²⁶¹.

To illustrate this point one finds out that in the European case of *Jersild v. Denmark*²⁶² which share similar facts with a United State's case of *R.A.V v. City of St. Paul*²⁶³ one finds out that though both cases are on freedom of expression, racial in nature, contains hate speech and

²⁶¹ This was gotten on 5 April 2013 in an interview with Seember Nyager, a Senior Programme Officer with the Public and Private Development Centre, an organisation involved in procurement monitoring as part of fulfilling their objective. <http://www.procurementmonitor.org/index.php?page=About>>

²⁶² Application no. 15890/89 judgement of 23 December, 1994

²⁶³ 505 U.S 377, (1992)

that in both cases the courts agree there has been an interference with free speech but their approach to reaching to that conclusion differs. While the European Court of Human Right gave its reason as being that the applicant was contributing to a public debate and that the speech was not made directly by him, the U.S Supreme Court was of the view that the state law went beyond mere content discrimination to view point discrimination by restricting speakers who express opinion on disfavoured subjects. The difference in the approach of the courts is that while the European court is concerned with balancing of two competing rights, the U.S court is more concerned about the Constitutionality of the state law. One might be compelled to draw the conclusion that this is so because given the history of the U.S under the British rule, they have always been wary of government invasion on individual rights.

When the above is compared to Nigeria, one finds out that a similar occurrence is taking place, which is, a nation being influenced by its history. One can argue that the greatest challenge facing the implementation of the FoI Act is overcoming a culture of secrecy imbibed in the society. The years of colonial rule and military rule where subjects/citizens were treated as not deserving of a right to know what goes on in governance has left its toll in the state. This is evidenced by the fact that despite the passage of the FoI Act most often individuals/organisations need to use the courts to compel public bodies to comply with their request to access even the most innocuous documents²⁶⁴. An interview with two Programme Officers of the Public and Private Development Centre reveal that they have had to resort to going to the court to get some of the public bodies to respond to their request to access to their procurement monitoring process. A very recent case being that filed against the Power

²⁶⁴ A Federal High Court sitting in Abuja has just scheduled 3rd April 2013 for the hearing of suit for access to asset declaration form filed by the President and other government officials. This suit has been filed since July 2012 and the refusal to make accessible the requested document was based on the fact that it contains private information about the President and will therefore infringe on his privacy. This is despite the provisions of the FoI Act and paragraph 3(c) of the Third Schedule, Part 1 to the Constitution of the Federal Republic of Nigeria which mandates the Code of Conduct Bureau to make accessible to anyone the asset declaration.

Holding Company of Nigeria (PHCN) which the court ordered for the release of the documents before they complied²⁶⁵. Also in a recent report released by the Right to Know²⁶⁶ in which they accessed the implementation of the FoI Act, they made mention of how much effort has been made to create awareness for this law and how much more awareness is needed to ensure that the law is utilised²⁶⁷. It might be argued that taking the public institutions to court is good because it sets precedence and helps with the interpretation of the Act but this also has a damaging effect if it has to be done often to get public bodies to comply with the law, it says a lot about their attitude towards the law and can also be strenuous on requesters who has to go through such a rigorous process to get information²⁶⁸.

A Shift in the European Region

As of 1955, the courts in the U.K were unwilling to exercise their power to compel the state to present before it a document which will aid them to decide if the disclosure of such information is more harmful to the state or private individual but rather relied on the state agents assertion that the disclosure is harmful to the state²⁶⁹.

Initially, the European Court of Human Right has been hesitant in finding a right to information under Article 10 of the European Convention on Human and Peoples Right (ECHR) as evidenced by the case below but two other recent cases below however point to a gradual shift in the direction of more access to information.

²⁶⁵ <http://www.procurementmonitor.org/index.php?page=News&id=76>> accessed 3 April 2013

²⁶⁶ An organisation which was actively involved in the advocacy for the passage of the Freedom of Information Law in Nigeria, <http://www.r2knigeria.org/>>

²⁶⁷ R2K 'Implementing the Nigerians Freedom of Information Act 2011 – The Journey So Far' (2012) pg 2,

²⁶⁸ R2K 'Implementing the Nigerians Freedom of Information Act 2011 – The Journey So Far' (2012) pg 4 -5

²⁶⁹ Glasgow Corp. v. Central Land Board (1956) S.L.T 41

The European Court of Human Right in the case of *Leander v. Sweden*²⁷⁰ which came about when the applicant was dismissed from his work for breach of security check but when he applied to the Sweden government for the release of the documents indicting him, the government refused to disclose it to him. The court was however unwilling to find an obligation on the part of the government under Article 10 to provide access to information and rather held that the classification of government files as confidential did not interfere with access to information²⁷¹.

In the case of *Tarsasag a Szabadsagjogokert v. Hungary*²⁷², the applicant was refused access by the Hungarian government to a complaint pending before the Constitutional court which related to request by a parliament to review the amendment to the criminal code with regard to drug related offences²⁷³. The court was willing to hold that the right to information is included under Art 10 ECHR especially when it helps to inform a public debate²⁷⁴. In another case involving the Hungarian government, the courts once again found a right to information under Art.10 ECHR²⁷⁵. In this present case, the European Court of Human Right reasoned that the states refusal to comply with the domestic's court judgement to grant the applicant unrestricted access to the document sought for his historical research affected his freedom of expression²⁷⁶.

What Caused the Change?

There was nothing really in the cases to indicate the reason for the change in attitude of the European Courts towards an elaboration of the right to access information. One could argue

²⁷⁰ (1987) 9 EHRR 433, Para. 74

²⁷¹ *Leander v. Sweden* (1987) 9 EHRR 433, Para. 74

²⁷² (2009) EHRR Application no. 37374/05

²⁷³ *Tarsasag a Szabadsagjogokert v. Hungary* (2009) EHRR Application no. 37374/05

²⁷⁴ *Tarsasag a Szabadsagjogokert v. Hungary* (2009) EHRR Application no. 37374/05

²⁷⁵ *Kenedi v. Hungary* (2009) EHRR Application no: 31475/05

²⁷⁶ *Kenedi v. Hungary* (2009) EHRR Application no: 31475/05 para. 43

that the real reason for the change was a conscious effort on the part of the court to interpret in favour of a right to access information. This much was admitted by the courts in the case of *Tarsasag a Szabadsagjogokert v. Hungary* (2009) EHHR Application no: 37374/05. The court while giving judgement in favour of a right to receive information warned that there was no general right to receive information contained in government administrative data from the convention²⁷⁷.

A further comparative look at the *Leander v. Sweden* case (where a refusal to grant an a right to access information decision was made) and the case of *Tarsasag a Szabadsagjogokert v. Hungary* case (where a decision to grant a right to access information was made) will reveal there was not much difference in the facts of both cases but only a conscious effort to interpret in favour of a right to access information was made by the court in the later case.

- ✓ In both cases the information sought involved the release of personal data thereby touching on privacy issues.
- ✓ In both cases too there were existing domestic laws banning the release of such data
- ✓ In both cases the court maintained that Article 10 of the European Convention on Human Rights does not confer a right to any person to documents containing his personal data nor any obligation on the part of the government to release such information to the person²⁷⁸. But interestingly stated of their advance move towards a broader interpretation of “freedom to receive information²⁷⁹” in the later case of *Tarsasag a Szabadsagjogokert v. Hungary*²⁸⁰.

²⁷⁷ *Tarsasag a Szabadsagjogokert v. Hungary* (2009) EHHR Application no. 37374/05 para. 35

²⁷⁸ *Leander v. Sweden* (1987) 9 EHRR 433, para. 75, *Tarsasag a Szabadsagjogokert v. Hungary* (2009) EHHR Application no. 37374/05 para. 35

²⁷⁹ *Tarsasag a Szabadsagjogokert v. Hungary* (2009) EHHR Application no. 37374/05 para. 35

²⁸⁰ *Tarsasag a Szabadsagjogokert v. Hungary* (2009) EHHR Application no. 37374/05 para. 35

- ✓ One might argue the fact that in the *Leander's*²⁸¹ case that a concern for national security might have tilted the courts towards a finding of no right of access to information and that also in the case of *Tarsasag*²⁸² that the fact that the information was sought to help contribute to a public debate might also have helped the court to make a finding in favour of a right to access information. But it should be kept in mind that the right to privacy is as much important as the need for national security and the right to contribute to public debate and that the domestic law (Section 2 Personal Control Ordinance) in the *Leander's*²⁸³ case which provided for the entry of personal information into the police data also prohibited an entry only on the ground of the person's political affiliation or opinion. And if such information is prohibited from being accessible, how will a person be able to tell that his right has been infringed in that regard.

There are experiences to be taken away from both regional courts, from the Inter-American Court they should learn to be more proactive and progressive to find in favour of a right to information as the court did when they were quick to make a finding in favour of access to information founded under its provision to a right to freedom of expression in the celebrated case of *Claude Reyes and others v. Chile*. This is commendable especially when one keeps in mind that the European court²⁸⁴ was first established long before the Inter-American court²⁸⁵.

They should also learn from the European Court a proper balancing of conflicting rights and that there should be a concerted effort not to be held back by its history of colonisation and long military rule. This they could do by emulating the conscious effort made by the

²⁸¹ *Leander v. Sweden* (1987) 9 EHRR 433,

²⁸² *Tarsasag a Szabadsagjogokert v. Hungary* (2009) EHHR Application no. 37374/05

²⁸³ *Leander v. Sweden* (1987) 9 EHRR 433,

²⁸⁴ Established in 1950

²⁸⁵ Established 1979

European court in the case of *Tarsasag a Szabadsagjogokert v. Hungary*²⁸⁶ towards advancing for a broader interpretation of right access information. This lesson is not only for the Nigerian courts but for the public bodies also especially as the Nigerian FoI Act has met up to the international standard by containing provisions which leaned more towards access to information and at the same time gave room for a proper balancing of rights by providing clarity in the area of the exceptions to access to information and also provide for a public interest override²⁸⁷. This is in keeping with the international three part test to make sure information is not unnecessarily withheld and at the same time that proper exceptions are made to access to information.

Conclusion

The importance of access to information law in any society especially a democratic one cannot be over emphasized. There cannot be any true democracy if there is no access to information because democracy requires everyone to participate in the governing system and the people cannot genuinely be said to be in participation if they are kept in the dark about the affairs of the government. Aside from helping the people to participate in government through the electoral process and serving as a tool to hold government accountable and ensure transparency, access to information also helps in the full enjoyment of the fundamental right of freedom of speech. It also helps the press play their role as the public watchdog and contribute to public debate.

The struggle and the eventual passage of the FoI Act in Nigeria are because Nigerians wants to actualise all the benefits that come with access to information law. But having an FoI Act does not automatically guarantee the fulfilment of the set objectives as there will be

²⁸⁶ *Tarsasag a Szabadsagjogokert v. Hungary* (2009) ECHR Application no. 37374/05

²⁸⁷ Section 13 – 17 Freedom of Information Act, 2011

challenges that will be encountered in the implementation of the law. This is so especially in Nigeria where there has been colonisation followed by long years of military rule and these are not the sort of governance that favours transparency or openness. Therefore the nation has become accustomed to being run in secrecy and the giving of information to the masses is seen as a privilege or out of the benevolence of the public service.

The challenges which include overcoming a culture of secrecy, record creation, keeping, organising and maintenance, misconceptions about the law could easily be tackled if there would be a training of public officials, proactive disclosure of information by public bodies, review of existing civil service rules and creating awareness for the public to be aware of the powerful tool of accountability that has been put in their hands by the passage of the FoI Act. The international perspective on access to information law is that it is a fundamental right which every state has to ensure its citizens are guaranteed of it but case law reveal that the approach to ensuring this right differs. While the European Court of Human Rights could be said to be hesitant at first to include a right to information under the provision of Article 10 and subsequently they did but with a focus on balancing the grant of a right to information with other rights which are involved in a particular case. The Inter-American court on the other hand interprets it as a very important individual right.

Nigerian has a lesson to learn from the two regional courts in order to overcome the challenges and achieve the set objectives of the FoI Act. Above all more dedication is required on the part of the Civil Society Organisation, stakeholders and the entire public to focus invest more skill, energy and time towards changing the mindset of politicians and government.

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