



The Right to Know and the Implementation of Freedom of Information Legislation: Case

Studies of Nigeria and South Africa

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Executive Summary

Nigeria and South Africa are two of the largest and more economically powerful countries in Africa. As a result, the public policies developed and implemented in these countries serve as a benchmark and a model for other African countries. Consequently, any attempt at analyzing and projecting solutions to the numerous challenges facing Africa should include these two countries.

In 2000 and 2011 respectively, South Africa and Nigeria enacted legislations to give their citizens access to information held by government bodies as well as private institutions. Despite this, freedom of information (FOI) is largely seen as a farce in both countries. Because Africa is a continent with high untapped potential, lack of access to information create hindrances to international cooperation, national and regional development as well as adverse corollaries within the African society. This is compounded by the challenges emanating from authoritarian regimes, corruption, conflicts as well as other societal ills. The perceived or actual lack of access to information for the citizenry set against this historical background has led to outcomes like human rights violations, political instability, poverty, and unemployment.

This research work sets out to review the two FOI legislations operating in the two countries - Nigeria's Freedom of Information Act of 2011 and South Africa's Promotion of Access to Information Act of 2000. The research critically examines why Nigeria's FOIA and South Africa's PAIA fail to actualize their set objectives of giving citizens of both countries access to public information and in the case of South Africa including information held by private bodies, particularly as they relate to the right to access information held by public and private bodies.

The paper highlights the strengths and weaknesses of the FOIA and PAIA in terms of their provisions as well as the shortcomings in their implementation, particularly, on the non-compliance by Ministries Departments and Agencies (MDAs). Through the use of content analysis of relevant books, articles/journals, newspapers, websites and other relevant available information, the research brought to the fore the lack of proper implementation of the legislations.

The Attorney General of the Federation (AGF) in Nigeria and The South African Human Rights Commission (SAHRC) in South Africa FOI Acts, the government agencies administering the FOI Acts in the respective countries, were found to be inactive and ineffective in carrying out their statutory responsibilities of ensuring full implementation and enforcement of the laws. In addition, the manner in which public institutions in both countries handled requests for information was found to have contributed immensely to the implementation challenges confronting these legislations. There is no doubt that if well implemented, these legislations have the capacity to empower citizens of both countries in ways that can help ameliorate the situation. As such the research proffers solutions as given below.

Policy and practice recommendations including the ways government and its agencies could be more proactive in the implementation of the Acts adequate training for designated officers, less complicated procedures in requests for information and reviews, ways to ensure maximum disclosure, the need for designated officers to be competence in conflict resolution were provided. However, considering the fact that all the 13 countries in Africa that have enacted FOI laws face similar challenges, these recommendations equally target any of these countries in improving their FOI laws as well as those that are in the process of enacting FOI laws.

Introduction

Before the 20th century, Freedom of information (FOI) was viewed narrowly as just the right of the press to disseminate information. Individual and group rights to access and express information were not recognised. In that period, FOI was only recognised from a professional point of view. It was seen strictly as the realisation of the practice of the Fourth Estate.¹ However, this notion has changed as there is a consensus on the fact that FOI could be enjoyed by individuals, groups as well as the media. In recent times, FOI is being recognized as an integral aspect of human rights. Because information is crucial to decision-making, it affects all other forms of human right. In that, limited or no access to information may have an impact on such rights as liberty and security of person, right to remedial action, political and economic rights among others.

Nigeria's Freedom of Information Act (FOIA) of 2011 and South Africa's Promotion of Access to Information Act of 2000 (PAIA) were enacted to give Nigerians and South Africans respectively, greater opportunity to exercise their right to information. However, several challenges have effectively hindered the implementation of these laws. This particularly relates to public awareness and usage of these laws as well as the very low level of compliance with the two pieces of legislation by government Ministries, Departments and Agencies (MDAs) in both countries but especially so, in Nigeria.²

¹H Brucker, *Freedom of information* (1st, Macmillan Co., New York, 1949) 276.

² 'R2K, Nigeria Celebrates International Right To Know Day, Releases Assessment Report On Implementation Of The Freedom Of Information Act 2011 (FOIA) 18 Months After' (R2K 2012) <http://r2knigeria.org/index.php?option=com_content&view=article&id=259:r2k-nigeria-celebrates-international-right-to-know-day-releases-assessment-report-on-implementation-of-the-freedom-of-information-act-2011-foia-18-months-after-september-28-2012&cat> accessed March 2 2014.

In 2011, only 25 MDAs complied with the annual requirement to report to the Attorney General of the Federation (AGF) as provided by the FOIA. In 2012, only 28 MDAs made these submissions.³ Likewise, the PAIA imposes a duty on public and private institutions to submit reports and details of requests and compliances to the South African Human Rights Commission. Despite this, as research evidence in South Africa shows, in 2007, 51% of public and private institutions did not submit the required reports to the Commission.⁴ These figures demonstrate very low compliance by MDAs, thereby making it practically impossible to measure the success of these Acts.

In recent times, civil society organizations (CSOs), media organizations and individuals in both Nigeria and South Africa have made efforts to invoke the freedom of information act with varied results.⁵ It is pertinent to point out that many public institutions that ordinarily should lead the way in ensuring the success of these Acts have failed to fully recognise the value of the FOIA and PAIA in advancing the strategic objectives and core mandate of such institutions. If they did, they would have fully embraced and enforced the provisions contained in these pieces of legislations. In a nutshell, this situation is not mainly as a result of defects in the laws but rather attributable to the inability of the various agencies vested with the responsibilities to ensure that these laws are adequately implemented.

³ 'A.G's Report Indicates MDAs are failing to Comply with the FOI Act 2011' (foicoation.org 2012) <<http://foicoalition.net/?p=480>> accessed 10 March, 2014

⁴ 'Implementation of the Promotion of Access to Information Act, (Act 2 of 2000) in the Public Service ' (psc.gov.za 2007) <http://www.dfa.gov.za/departament/accessinfo_act.pdf> accessed 22 March 2014.

⁵ Kehinde, 'Information Gathering in Nigeria: Freedom of Information Act to the Rescue' (thelawyerschronicle 2013) <<http://thelawyerschronicle.com/information-gathering-in-nigeria-freedom-of-information-act-to-the-rescue/>> accessed 11 March, 2014.

In this research work, international treaties and conventions serve as the applicable international and regional standards to measure Nigeria's FOIA and South Africa's PAIA. These include both binding and non-binding frameworks such as the Universal Declaration of Human Rights Article 19, the International Convention on Civil and Political Rights (ICCPR) Article 19, UN Special Rapporteur on Freedom of Opinion and Expression, UN Human Rights Committee, The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, the Global Principles on National Security and the Right to Information ("Tshwane Principles") and regional mechanisms (the Convention on Access to Official Documents of the Council of Europe, American Convention on Human Rights, African Charter on Human and Peoples' Rights, the Commission's Rapporteur on Freedom of Opinion and Expression and the Model Law on Access to Information for Africa.

The research critically examines why Nigeria's FOIA and South Africa's PAIA fail to actualize their set objectives, particularly as they relate to the right to access information held by public bodies. It highlights the strength and weaknesses of the FOIA and PAIA in terms of their provisions as well as the shortcomings in their implementation, particularly, on the non-compliance by MDAs.

The research also investigates the following subsidiary questions: is the regime of exceptions/limitations for matters of international affairs and defence justified? Is the apparent ineffectiveness of these information laws a matter of content defect or that of underutilization/misapplication by both individuals and organizations in Nigeria and South Africa? What brought about the success of similar laws in other countries? The paper provides policy and practical recommendations that will help improve freedom of information in Nigeria and South Africa.

Jurisdictions:

The jurisdictions covered in this research are the Federal Republic of Nigeria and the Republic of South Africa. The paper uses international and regional human rights law sources to inform the analysis of the jurisdictions under investigation in the paper. Nigeria and the Republic of South Africa are suitable for the research because these jurisdictions are the two most politically and economically influential nations in Africa and will have multiple positive replicating effects on the continent. A research outcome from Nigeria and South Africa will at the end influence other smaller countries in Africa in terms of freedom of information and its expression.

Methodology and Structure:

This research applies content analysis through relevant books, articles/journals, newspapers, websites and other relevant available information. Further, this research work utilises relevant literature, policy analysis and case laws to establish the present situation of the FOI in the chosen jurisdictions and raises fundamental questions and proceed to put forward recommendations.

The Structure will be as follows:

Chapter one of this research work starts by exploring what FOI is, its scope, and how regional and international organizations as well as experts see it. Also, the research comprehensively examines the necessary limits in a democratic society as covered by international and regional frameworks. In particular, it focuses on the provisions of international and regional mechanisms/frameworks on FOI and their authoritative interpretation by international human rights bodies.

Chapter two offers a brief historical background as well as a summary of the provisions of Nigeria's FOIA. The chapter further pays attention to the provisions and objectives of the Act. In the same vein, the paper summarises and analyses the features of South African's PAIA. Finally, the research undertakes an analysis of the similarities and differences as it relates to the structure and content of the two Acts in order to provide an adequate understanding of the peculiarities of the two laws. It also examines where the two pieces of legislation converge as well as where they diverge.

Chapter three addresses the level of compliance with of these Acts by public bodies in Nigeria and South Africa respectively. It examines the application and utilisation of the two laws in order to ascertain the current level of compliance, particularly as it concerns the public's awareness of their existence and compliance to requests by MDAs in both countries. Among other grounds, the chapter thoroughly addresses the limitations of principles of disclosure on the grounds of national security and international affairs. In sum, the chapter critically assesses the challenges confronting these Acts.

In chapter 4, based on the reviews and analysis of the provisions and implementation of both legislations, policy and practice recommendations were provided. Specifically, it provides recommendations on how both laws could help improve public access to information from public institutions, coordinating responses across government, developing dispute resolution skills by designated officers of governmental agencies and other public institutions in both countries. Furthermore, the research teases out possible answers to what could be the drawbacks in implementing these Acts and how successes in other societies could be replicated in Nigeria and South Africa.

Chapter One

Definitions, International and Regional Treaties and other frameworks on Freedom of Information

What is FOI? Is there a right to FOI? If there is a right to FOI, are there legal, international, regional and national frameworks that protect such a right? In order to have a better understanding of FOI, this chapter critically analyses what constitutes FOI. Most importantly, there is a comprehensive look at how international, regional and national instruments see FOI. In particular, attention will be given to African regional frameworks. Thus, this chapter reviews the guidelines and standards set by the Model Law on Access to Information for Africa developed by the African Commission on Human and Peoples' Rights as well as the reports of the Special Rapporteur on Freedom of Expression and Access to Information in Africa.

1.1 Definition of Freedom of Information

FOI is a term that cannot be holistically described in a single definition. This is due to the fact that it could mean different things to individuals, groups and even governments. Among other things, it could mean having access to information held by public bodies⁶, electronic recordings, company files, secrets revealed in the mass media, and even local gatherings in villages where information on latest happenings in the community are discussed as it is practiced in most African communities. To

⁶'About Freedom of Information' (UNESCO) <<http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/about/>> accessed 10 January, 2014.

others, it may involve documents that have information regarding the person seeking access.⁷ FOI has been generally recognized as an integral aspect of human rights that touches on every other form of human rights because it often forms the foundation on which other human rights are built.⁸

One of the most notable writers on FOI, Patrick Birkinshaw, said that Information in whatever context it is looked at corresponds to human capacity to acquire, use and store such which is very essential for our survival.⁹ However, in this work, apart from the case of South Africa, freedom of information will be looked at from the point of view of access to public institution's records. Citizens have the right to know and this empowers them to hold governments accountable. This can only be achieved when the citizenry has the right of access to official documents.¹⁰

Thus, the right to access public information can be described as “the right of every person to know: to have access to the information he or she needs to make free choices and to live an autonomous life”.¹¹ According to Right2INFO, presently 99 countries of the world have one form of legislations or another on freedom of information that ensures that public bodies are obligated to publish to the

⁷ John Macdonald, Crail, and Jones, *The Law of Freedom of Information* (2nd, Oxford 2003) 5.

⁸ Toby Mendel, 'Freedom of Information as an Internationally Protected Human Right' (Article 19) <<http://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf>> accessed 10 January, 2014.

⁹ Patrick Birkinshaw, *Freedom of Information; The Law, the Practice and Ideal* (4th, Cambridge University Press, 2010) 17.

¹⁰ G Björkstrand & J Mustonen, 'Introduction' in Juha Mustonen (eds), *The World's First Freedom of Information Act* (2nd, Anders Chydenius Foundation, 2006) 4.

¹¹ 'Access to Information: an Instrumental Right for Empowerment' (Article19.org 2007) <<http://www.article19.org/data/files/pdfs/publications/ati-empowerment-right.pdf>> accessed 15 January, 2014.

general public its activities and documents.¹² Further, these laws ensure that public bodies equally furnish a person or an organization with information of its activities on request within a timeframe. FOI may be viewed to be negative right since it tends to place an obligation on the government to avoid any action that will constitute interference in the exercise of freedom of information and expression of information received. Thus, this gives individuals as well as groups the right to challenge the government when its actions contradict this obligation.¹³

At the same time, practitioners, civil society and the media have often argued that right to information also places a positive obligation on the government to ensure that individuals have unhindered access to information, particularly, relating to human rights violations.¹⁴ Thus, if the government does not ensure that the citizenry have unrestrained access to information, it becomes very difficult for them to evaluate government actions, make decisions about the government and most importantly, make informed choices during future elections.¹⁵ The former UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, aligns with this position when he said:

Obstacles to access to information can undermine the enjoyment of both civil and political rights, in addition to economic, social and cultural rights. Core requirements for democratic governance, such as transparency, the accountability

¹² 'Access to Information Laws: Overview and Statutory Goals' (right2info.org 2012) <<http://www.right2info.org/access-to-information-laws>> accessed 15 January, 2014.

¹³ A Robert, 'Structural Pluralism and the Right to Information' [2001] University of Toronto Law Journal, Vol. 51, No. 3, 1, 3.

¹⁴ 'Who Wants to Forget? Truth and Access to Information about past Human Rights Violations' (Article19.org 2000) <<http://www.article19.org/data/files/pdfs/publications/freedom-of-information-truth-commissions.pdf>> accessed 20 January, 2014.

¹⁵ Mitchell Pearlman, 'The Importance of Freedom of Information at the Sub-National Level' (Connecticut Freedom of Information Commission 2008) <http://www.state.ct.us/Foi/Articles/Sun-National_Artic.Htm> accessed 20 January, 2014.

of public authorities or the promotion of participatory decision-making processes, are practically unattainable without adequate access to information.¹⁶

Thus, both the lack of and the limitation on FOI creates unnecessary hindrances for a populace to enjoy their fundamental rights and have the ability to evaluate the actions of their leaders.

One very important point to note is that the advocacy for the right to FOI has always been based under the right to freedom of expression and there is no doubt that this right enjoys protection in every international human rights instrument.¹⁷ The freedom of information that has its core focus on the potential recipient of the information has also gained a lot of ground and acceptance. There is an acceptance of FOI as part of freedom of expression since the former is a precondition for the full exercise of the latter.¹⁸ In fact, FOI, and more particularly, information held by public bodies remains a “fundamental element” of “freedom of expression”.¹⁹ To highlight the general acceptance which FOI has gained globally, the UN Human Rights Committee in its General Comment No. 34 emphasized that article 19 of the ICCPR “embraces” the spirit of freedom of information, especially as it relates to information held by public institutions. The General Comment equally reminded

¹⁶ Frank La Rue, Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression to the General Assembly on the right to access information submitted on 14th September (A/68/362), (2013), para. 3.

¹⁷ Maeve McDonagh, 'The Right to Information International Human Rights Law' [2013] Human Rights Law Review, Vol. 13 Issue 1, 5.

¹⁸ B Jack and Y Cripps, *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (1st, Oxford University Press, 2000) 4.

¹⁹ Freedom of Information in Southern Africa' (Article19.org 2000). <<http://www.article19.org/data/files/pdfs/publications/southern-africa-foi-no.-16-.pdf>> accessed 20 January, 2014.

states of the need to ensure that individuals have access to their personal information held by public bodies.²⁰

Despite the challenges in ensuring acceptance and enforcement, FOI is making significant progress in the vein of access to government records in countries that hitherto were very hostile to the idea. This has been realized due to the efforts of international intergovernmental organisations like the United Nations and its organs as well as regional organisations and other stakeholders.²¹

Remarkably, the first FOI law was passed by Sweden in 1766.²² However, in this 21st century, the United States has been leading the group of countries that practices and promotes FOI. This scenario could be attributed to the United States' adoption of the Freedom of Information Act of 1966 which is perceived by many countries as a benchmark.²³ Furthermore, the US courts have been very proactive in terms of case laws on FOI. For instance, in the cases of *New York Times Co. v. United States* and *United States v. Washington Post Co*, the Supreme Court of the US clearly declared that the government bears the burden of showing that a restraint on the disclosure of information is justified.²⁴ According to the Court, the US government failed to prove this requirement in the case.

²⁰ General Comment No 34 of the UN Human Rights Committee on Article 19, 11th – 29th July, 2011, para. 18.

²¹ Toby Mendel, 'Freedom of Information as an Internationally Protected Human Right' (Article19.org) <<http://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf>> accessed 10 January, 2014.

²² J. M. Ackerman and I. E. Sandoval-Ballesteros, 'The Global Explosion of Freedom of Information Laws' (ADMIN. L. REV 2006).<http://www.humanrightsinitiative.org/programs/ai/rti/articles/admin_law_review_explosion_of_foi_2006.pdf> accessed 20 January, 2014.

²³ G Björkstrand & J Mustonen, 'Introduction' in Juha Mustonen (eds), *The World's First Freedom of Information Act* (2nd, Anders Chydenius Foundation, 2006) 4

²⁴ *New York Times Co. v. United States* and *United States v. Washington Post Co.* 403 U.S. 713 (1971).

Also, in Europe, particularly in the western part, as well as the EU regional bodies, like the Council of Europe and European Union, the idea of FOI culminating into access to governments' records has been well promoted as evidenced by several decided court cases by the European Court of Human Rights.

Many African countries have also joined in championing the idea of freedom of their citizenry to have access to government's records, although ostensible successes are not in any way measurable to that already achieved in the US and Europe due to some obvious reasons – countries in Africa are either still practicing dictatorial governance, or experimenting with fledgling democracies. Yet, a critical appraisal would show that a significant progress especially in policy formulation has since come visibly to the fore.

By establishing the office of a Special Rapporteur on Freedom of Expression and Access to Information in Africa with the mandate of monitoring compliance, conducting fact-finding missions on violations to the right of expression and access to information, keeping record of violations, engaging in actions that will promote access to information and making interventions where necessary, the African Commission on Human and Peoples' Rights,²⁵ has shown its readiness to give this very important aspect of human rights well-deserved attention.

The Commission has made remarkable progress by drafting a model: the Model Law on Access to Information for Africa in 2011, a document that stands as a yardstick for legislative purposes for the world, with African countries being no exception. Despite the setbacks, it can be said that the

²⁵The mandate of Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Peoples and Human Rights (achpr.org)
<http://www.achpr.org/mechanisms/freedom-of-expression/> accessed 20 February, 2014.

African Commission has made significant progress in bringing Africa on board in the area of the protection and promotion of FOI.

1.2A review of International, Regional frameworks and NGOs views on what constitutes Freedom of Information

i. Universal Declaration of Human Rights

From the early years, the United Nations has recognized the importance of FOI. In 1946, the UN General Assembly passed one of its very earliest resolutions which emphasized the essential and multi-functional nature of FOI. ARTICLE 19, a leading NGO, indicated in one of its manuals, that one of the most historic resolutions of the UN was when it made a declaration that; “freedom of information is a fundamental human right and the touchstone of all freedoms to which the United Nations is consecrated”.²⁶

Furthermore, article 19 of the Universal Declaration of Human Rights states; “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.²⁷ Looking at this description, one could easily point out the very fact that FOI goes beyond seeking and receiving information. It goes on to include developing an opinion based on information given and having the right to express such opinion.

ii. The International Covenant on Civil and Political Rights (ICCPR)

²⁶ 'Freedom of Information Training Manual for Public Officials ' (Article 19)

<<http://www.article19.org/data/files/pdfs/tools/foitrainersmanual.pdf>> accessed 10 February, 2014.

²⁷ Article 19, Universal Declaration of Human Rights, proclaimed on 10th December, 1948.

The International Covenant on Civil and Political Rights (ICCPR) went a step further to add that expression of information could either be in oral form, “in writing, in print, in form of art or through any media” one deems appropriate.²⁸ The definition is extended in article 19 (3) a & b to stipulate duties and responsibilities under which such right will be enjoyed.²⁹ This limitation is basically for the purpose of “respect of the rights or reputations of others and for the protection of national security or of public order (ordre public), or of public health or morals”.³⁰ Thus, the ICCPR brings in the very important issue of limitation in the exercise of FOI and its expression. However, the ICCPR clearly states in article 19, paragraph 3 that this limitation must be in conformity with the stipulations of the law and must be necessary.³¹

iii. UN Human Rights Committee

“The Human Rights Committee is the body of independent experts entrusted with the task of monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR)” by state parties.³² Similar to other UN treaty bodies, the General Comments of the Committee focus on specific themes or the Covenant provisions and these comments serve as the authoritative source of interpretive guidance for the ICCPR.³³ The Committee’s latest General Comment (No. 34) replaced its earlier General Comment (No. 10) on Article 19, ICCPR, which was adopted in 1983.

²⁸Article 19, para 2. International Covenant on Civil and Political Rights (ICCPR) Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976.

²⁹Ibid, at para 3.

³⁰ Ibid.

³¹ Ibid.

³² Office of the High Commissioner on Human Rights on the UN Human Rights Committee <<http://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx>> accessed 10 February, 2014.

³³ Office of the High Commissioner on Human Rights, UN Human Rights Committee General Comments, <<http://www.ohchr.org/english/bodies/treaty/comments.htm>> accessed 10 February, 2014.

Obviously, the former General Comment did not accommodate most of the current realities of a globalised communications environment dominated by information and communication technology (ICT).³⁴ On 21st July, 2011, the Human Rights Committee adopted a new General Comment on Article 19 (freedom of opinion and expression) of the ICCPR. The new General Comment is structured thus: “General remarks”, “Freedom of opinion”; “Freedom of expression”; “Freedom of expression and the media”; “Right of access to information”; “Freedom of expression and political rights”.³⁵ In the application of Article 19(3), it advocates for limitative scope of restrictions on freedom of expression in certain specific areas.³⁶

It restates the connections between freedom of expression and other rights safeguarded by the ICCPR, like privacy, assembly, electoral rights, association, religion and so on. The Comment emphasizes that all components of the state are under an obligation to adhere to freedom of opinion and expression. Another very important aspect of the General Comment was that freedom of opinion cannot be subject to exception or restriction. It does this by using an extensive set of examples to express the broad scope which freedom of expression is expected to be given.³⁷ Like the independence of the media in a democratic state; it makes a clear reference and explicitly calls upon States to guarantee the operational, editorial and financial independence of public institutions that are in charge of the media. States are particularly expected to ensure that individuals have access to the media without any form of bias.³⁸

³⁴Office of the High Commissioner on Human Rights, General Comment No 34 of the UN Human Rights Committee on Article 19, 11th – 29th July, 2011, para. 18.

³⁵Ibid 9 – 20.

³⁶Ibid para. 20- 25.

³⁷Ibid para. 4.

³⁸Ibid para.13 -14.

The General Comment provides that in order to actualize the set objectives of an atmosphere that will promote the freedom of information held by public bodies, states should make it a necessity to recognize such information as being of public interest. Thus, states should ensure “that they make every effort to ensure easy, prompt, effective and practical access to such information”.³⁹

Paragraph 18 emphasizes the need for public bodies to make their records accessible to the public, particularly for individuals to have easy access to records that may contain their personal data. It states:

Every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control his or her files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to have his or her records rectified⁴⁰

The new General Comment also states that restrictions on freedom of expression must be in accordance with the requirements of Article 19(3), it highlighted caution in promulgating conditions with such restrictions and advocates for the promotion of “media pluralism” by state parties.⁴¹ In a nutshell, this latest General Comment helps in placing FOI on the agenda of priorities. One of the key features was its articulation and elaboration of FOI as protected by article 19 of the ICCPR.

In his analysis of the General Comment 34, a member of the Human Rights Committee, Michael O Flaherty states that the General comment certainly “strengthens the framework for protection of the

³⁹Ibid para. 19.

⁴⁰Ibid para. 18.

⁴¹Ibid para. 37.

right” within article 19 of ICCPR of which FOI is an integral aspect.⁴² He also mentioned that the General Comment made a clear allusion to the fact that states have an obligation to proactively ensure the promotion of the enjoyment of the FOI right by operating an open government and ensuring that government records are in the public domain.⁴³

Further, the Open Society Foundation and ARTICLE 19 in their separate comments noted that the latest General Comment emphasized that states have a duty to promote and ensure timely access to publicly held information.⁴⁴ States are expected to put forward in the public domain, information for the purposes of public interest. States are also required to create avenues for appeals of the processes of request for information. All publicly held information is subject to be made public including that of judiciary and legislature.⁴⁵ Thus, in clear terms, the General Comment no 34 places a positive responsibility on the states to ensure that FOI is fully promoted and entrenched.

iv. UN Special Rapporteur on Freedom of Opinion and Expression

In confirmation of the importance of freedom of opinion, expression and information, the Human Rights Council in 1993 appointed an independent expert (Special Rapporteur) to promote and protect right to freedom of opinion and expression. Because of the important role that the special

⁴² M Flaherty, 'Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34' [2012] Human Rights Law Review 627, 651.

⁴³ Ibid.

⁴⁴ 'UN: ARTICLE 19 Welcomes General Comment on Freedom of Expression ' (article19.org 2011) <<http://www.article19.org/resources.php/resource/2631/en/un:-article-19-welcomes-general-comment-on-freedom-of-expression>> accessed 20 August, 2014

⁴⁵ Sandra, 'Article 19: UN Reinforces Right to Freedom of Expression and Information' (opensocietyfoundations.org 2011) <<http://www.opensocietyfoundations.org/voices/article-19-un-reinforces-right-freedom-expression-and-information>> accessed 10 February, 2014

Rapporteur plays in the area of FOI, a summary of the mandate of the office will be most appropriate. Having gone through some modifications, the mandate of the Special Rapporteur as stated in a Human Rights Council Resolution 25/2 reads: “the Special Rapporteur is to gather all relevant information concerning the violations of the right to freedom of opinion and expression, discrimination against, threats or any form of harassment aimed at persons seeking to exercise or to promote the exercise of the right to freedom of opinion and expression, including and importantly, against practitioners in the mass media”.

The Special Rapporteur is also mandated to take seek, receive and respond “to credible and reliable information from governments, non-governmental organizations and any other parties who have knowledge of these cases”. The mandate-holder also has the responsibility “to make recommendations and provide suggestions on ways and means to better promote and protect the right to freedom of opinion and expression in all its manifestations”. Lastly, the Special Rapporteur is mandated to ensure and facilitate the “provision of technical assistance or advisory services by the Office of the United Nations High Commissioner for Human Rights to better promote and protect freedom of opinion and expression”. In one of his reports to the Council on the right to access information, the former Special Rapporteur, Frank William La Rue, explained that global and regional human rights standards do not only help safeguard the right to freedom to impart information, but also the right to freely seek and receive it as part of freedom of expression. He stated that the right to access information is one of the central components of the right to freedom of

opinion and expression and by extension, that of access to information, as established by the UDHR (art. 19), the ICCPR (art. 19 (2)) and provisions of regional human rights treaties.⁴⁶

In a joint statement on Wikileaks, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and the Inter-American Commission on Human Rights Special Rapporteur on Freedom of Expression, notes that “the right to access information held by public authorities is a fundamental human right subject to a strict regime of exceptions”.⁴⁷ The declaration emphasizes the importance of the right to the promotion and sustenance of democracy, especially regarding the ability of the public to demand accountability from their leaders and for the overall political participation of the citizenry.⁴⁸ It restates the fact that it is the responsibility of public bodies and their employees to safeguard classified information and that journalists and civil society personnel who receive such information and deem it fit to disseminate on the conviction that such information is vital to public interest should not be liable unless it was received fraudulently.⁴⁹ Furthermore, it states that every act of government interference on the right to information, through means such as motivated court cases, blacklisting of websites and any other methods be prohibited by law.⁵⁰

⁴⁶ Frank La Rue , Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression to the General Assembly on the right to access information submitted on 14th September (A/68/362), (2013), para. 2.

⁴⁷ The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and Inter-American Commission on Human Rights Special Rapporteur on Freedom of Expression, ‘Joint Statement on Wikileaks’ (2010), para 1
<<http://www.oas.org/en/iachr/expression/showarticle.asp?artID=829>> accessed on 20 August 2014.
48 Ibid.

⁴⁹ Ibid para 3.

⁵⁰ Ibid para 4.

1.3 Regional Frameworks

i. Council of Europe

Europe has always stood out in terms of drafting legal frameworks that promotes and protects access to information and its expression. The European Convention on Human Rights (ECHR), 1950 of the Council of Europe remains one of the best legal instruments that advocate for access and freedom of expression. In its article 10, it guarantees freedom of expression including the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.⁵¹ Most cases on freedom of expression and freedom of information at the European Court of Human Rights (ECtHR) in Strasbourg are based on this article.

In a case of FOI brought to the European Court of Human Rights (ECtHR) in Strasbourg, the Hungarian Civil Liberties Union (HCLU) v Hungarian Government, a member of the Hungarian legislature and other individuals challenged the constitutionality of an amendment to a drug law at the Hungarian Constitutional Court. As the proceedings went on, the HCLU requested a copy of the petition of the case from the Constitutional Court and the lower domestic courts, a request the courts turned down on the grounds that the documents requested were “personal data” and that it could only be released to a requester on the permission of the petitioners.⁵² The HCLU commenced proceedings in the ECtHR under Article 10 of the ECHR regarding a violation of its right to freedom of expression which guarantees its right to receive and impart information.

⁵¹ Article 10, European Convention on Human Rights, adopted in Rome, 4XI, 1950.

⁵² Hungarian Civil Liberties Union v. Hungary, judgment of the ECtHR, (2009), HUDOC, para. 1 - 16.

The Court for the first time declared that Article 10 ECHR which focuses on freedom of expression guarantees the freedom to receive information under the custody of public bodies. Further, the Court was of the view that when public bodies held information that is of public interest, it is obliged to release such information to individuals or groups that request it. The court maintained that any restriction on the flow of information by a public body must strictly meet the requirement of Article 10(2).⁵³

In its decision, the Court declared the action of the Hungarian Constitutional Court to have violated Article 10 of the Convention. Notably, the decision in this case has been instrumental to the success of FOI in Europe. It did not only recognise the need to release information held by public authorities, but more importantly, it made it clear that Article 10 guarantees right to access such information.

Another very important document that explicitly advocates for the right to access information in Europe is the Convention on Access to Official Documents of the Council of Europe adopted in 2009, (hereafter referred to as “the convention”). Though, at present, the Convention has only 14 signatories and 6 countries that have ratified it, it gave FOI a new shape and wider acceptance across Europe and beyond. Prior to the coming into force of the Convention, most of the existing international human rights instruments were not as explicit in the protection to the right to information as the Convention did.⁵⁴ The Convention has gone a long way in giving FOI as a right a very big boost. As indicated in the preamble, “the right of access to official documents is also

⁵³Ibid, para. 36.

⁵⁴ Maeve McDonagh, 'The Right to Information International Human Rights Law' [2013] Human Rights Law Review, Vol. 13 Issue 1, 4.

essential to the self-development of people and to the exercise of fundamental human rights. It also strengthens public authorities' legitimacy in the eyes of the public, and its confidence in them.”⁵⁵The Convention gave step-by-step guidelines on how information could be generated from public institutions in the member states.

ii. Organisation of American States

The American regional body, Organisation of American States (OAS) has also made efforts in propagating freedom of information in the continent. In the American Convention on Human Rights adopted in 1967, “article 13, the right to freedom of thought and expression is guaranteed, this right includes freedom to seek, receive and impart information and ideas of all kinds without interference by public authority and regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other of one's choice”.⁵⁶ Though, this Convention which is also known as the Pact of San Jose, may not have made as much success on access to information and freedom of expression as the ECHR, it has brought about significant progress. Further, the Inter-American Court of Human Rights has made significant progress in the area of FOI. One notable example is the case of Claude-Reyes et al. v Chile.

The case was submitted to the Inter-American Commission on Human Rights and later to the Inter-American Court of human Rights by Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero. They sought that the Court declare void the action of the Chilean Government in refusing to provide all the information the applicants sought from public bodies on matters that could be of importance to the safety of the environment. In particular, they stated in the application that the

⁵⁵ The preamble of Council of Europe Convention on Access to Official Documents, adopted in Tromsø, 18.VI, .2009

⁵⁶ Article 13, American Convention on Human Rights, “Pact of San Jose, Costa Rica”,(1967)

refusal was done without legal justification and that there were no grounds to seek remedy for such violation of right to access to information in Chile.⁵⁷

In its judgment, the Court declared that Article 13 of the American Convention on Human Rights ‘protects’ the right to information in the custody of public institutions. According to the Court, a person or organisation seeking information from a public body is not required to prove any interest therein before such information is released. The Court also emphasized that States are obligated to develop national legislations that accommodate the provisions of the Inter-American Convention.⁵⁸ The decisions of the Commission and Court in this case served as a catalyst in the issue of freedom of information in that region.

iii. African Union

As stated previously, Africa is not excluded in drafting legal frameworks on FOI. Its umbrella body, the African Union, through its Commission, has made considerable progress in the area of freedom of expression and information. The African Charter on Human and Peoples’ Rights in article 9 (1) and (2) provides that every individual shall have the right to receive information to express and disseminate his opinions within the law.⁵⁹ The Commission carries out its functions as it relates to freedom of expression and information through its Special Rapporteur on Freedom of Expression and Access to Information. Consequently, the paper will now examine the mandate of the Special

⁵⁷Claude-Reyes *et al.* v. Chile Judgment of Inter-American of Human Rights, 2006, Series C, para. 1-2.

⁵⁸*Ibid* para.60.

⁵⁹ Article 9, African Charter on Human and Peoples’ Rights, Adopted in Nairobi June 27, 1981, entered into Force October 21, 1986.

Rapporteur as it relates to the promotion of freedom of expression and access to information in Africa and by extension in Nigeria and South Africa.

The Special Rapporteur on Freedom of Expression and Access to Information in Africa

Like the UN Human Rights Council, the African Commission, through the Rules of Procedure, is empowered to create a set of subsidiary mechanisms such as special rapporteurs, committees and working groups. In consideration of the importance of freedom of expression and information in the African continent, the Commission in 2004, with the adoption of Resolution 71 at the 36th Ordinary Session, held in Dakar, Senegal created the post of the Special Rapporteur on Freedom of Expression and Access to Information in Africa.⁶⁰

The mandate of the Special Rapporteur is very important to this work considering that it directly relates and focuses on its objectives. It calls for the mandate-holder:

To analyse national media legislation, policies and practice within Member States; monitor their compliance with freedom of expression standards and advise Member States accordingly; undertake investigative missions to Member States where reports of massive violations of the right to freedom of expression are made and make appropriate recommendations to the African Commission; undertake country missions and any other promotional activity that would strengthen the full enjoyment of the right to freedom of expression in Africa; make public interventions where violations of the right of freedom of expression have been brought to his/her

⁶⁰ African Commission on Human and Peoples' Rights, the mandate of the Special Rapporteur on Freedom of Expression and Access to Information (achpr.org) <<http://www.achpr.org/mechanisms/freedom-of-expression/>> accessed 10 February, 2014.

attention; keep a proper record of violations of the right of freedom of expression and publish this in his/her reports submitted to the African Commission (...)⁶¹

At the 42nd session held in Brazzaville, Republic of Congo in November 2007, the Commission made a great progress by expanding the mandate of the position to include “Access to Information” which has helped to produce a more practical approach to the work of the incumbent.⁶² The most important outcome of the expansion was the drafting of the Model Law on Access to Information in Africa.

The Model Law on Access to Information in Africa

In furtherance to the Article 1 of the African Charter on Human and Peoples’ Rights (“African Charter”) which obliges States’ Parties to formulate legislative, or other measures to give effect to the rights, duties and freedoms provided therein, the African Commission on Human and Peoples’ Rights has taken steps to ensure that it develops “soft law” particularly as it concerns freedom of expression and information.⁶³ One of these soft laws is the Declaration of Principles on Freedom of Expression in Africa, which was adopted by the African Commission in 2002. It was a move specifically directed at the enhancement of article 9 of the African Charter which focuses on the right to receive information and of expression.⁶⁴ Thus, the Commission during its 48th Ordinary Session held from 10 to 24 October 2010, and following its Resolution 167 (XLVII), mandated its

⁶¹ Ibid.

⁶²The African Commission on Human and Peoples’ Rights, Resolution 122 on the Expansion of the Mandate and Re-appointment of the Special Rapporteur on Freedom of Expression and Access to Information meeting at its 42nd Ordinary Session held from 15 - 28 November 2007, in Brazzaville, Republic of Congo (achpr.org) <<http://www.achpr.org/sessions/42nd/resolutions/122/>> accessed 10 February, 2014.

⁶³The African Commission on Human and Peoples’ Rights, the Draft Model Law on Access to Information of the African Commission on Human and Peoples’ Rights (ACHPR), (2013) 7.

⁶⁴ Ibid.

Special Rapporteur on Freedom of Expression and Access to Information to take a further step to draft a Model Law on Access to Information for AU Member States.⁶⁵

This Model law which took two and half years of hard work by all the stakeholders in Africa led by the Special Rapporteur⁶⁶ could best be described as a set of provisions representing comprehensive requirements and standards of different international and regional mechanisms and standards on the right to freedom of expression and information in the African continent.⁶⁷ It was developed with the aim of advancing the adoption of national legislation among the AU member states.⁶⁸ Thus, even though the model law is not binding, in drawing up their national legislations on right to information, States Parties are expected to incorporate the standard as provided in the model law and then proceed to formulate a legislation that will be suitable to their local peculiarities.⁶⁹ This helped to guard against the previous situation where African countries had to rely on foreign legislations in drafting its access to information legislations which in most cases did not recognise local peculiarities/realities.⁷⁰ One cannot overemphasize the importance of the Model Law to AU member States, and in particular Nigeria and South Africa, the area of coverage for this research.

Firstly, considering the very disturbing concerns in Africa like dictatorial regimes, corruption, human rights violations and other similar deficiencies, drawing up a proactive and a well suited model for the continent becomes imperative. It is obvious that freedom of information that gives individuals and groups in Africa the legal backing to seek and express information, particularly, as

⁶⁵ Ibid.

⁶⁶ Ibid p.8.

⁶⁷ Ibid p.7.

⁶⁸ Ibid p.10.

⁶⁹ Ibid p.11.

⁷⁰ Ibid pp. 8 – 9.

held by public institutions, remains a possible solution to these concerns. That is exactly what the model intends to achieve.⁷¹

Secondly, due to the fact that most societies in Africa are in transition from authoritarian political regimes or are emerging from conflict, there are public quests for information about human rights violations that took place in these societies. However, governments may be reluctant to release such information or to investigate past human rights violations, arguing that “reconciliation” is a higher priority than justice or disclosure of information.⁷² However, through its emphasis on issues like right to access, request for access, responses to request, extension of request, transfer of request, deferral of request, form of access and so on, the model law remains the pinnacle to the success of freedom of expression and information in the African continent.⁷³

As the Special Rapporteur rightly puts it in the introduction to the Model law:

The adoption of this Model Law has the potential to highlight the importance of access to information within specific national contexts, thereby bringing to the fore the need for the adoption of access to information legislation or the review of existing legislation. The Model Law therefore aims to serve as a tool for access to information advocates across Africa to stimulate public debate on access to information at the national level.⁷⁴

Prior to the time of drafting the Model Law in 2010, only five African countries had adopted Access to Information Laws, South Africa being the first to do so. Fortunately, through the awareness

⁷¹Ibid pg 9.

⁷² 'Freedom of Information Training Manual for Public Officials ' (Article19.org) <<http://www.article19.org/data/files/pdfs/tools/foitrainersmanual.pdf>> accessed 10 February, 2014.

⁷³The African Commission on Human and Peoples' Rights, the Draft Model Law on Access to Information of the African Commission on Human and Peoples' Rights (ACHPR), (2013) 12-16

⁷⁴Ibid p. 10.

created during the drafting and the influence it has had since its adoption, more African countries have enacted access to information laws, Nigeria included.⁷⁵

1.4 Contributions from Civil Society Organisations

Civil society organizations play pivotal role in the promotion of FOI. They do this through advocacy, demanding for states to enact FOI laws and most importantly, by drawing up principles that guide states in developing this type of legislation and making amendments to FOI laws. Some of these principles include:

i. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information

An important set of principles that have played a pivotal role in the promotion of freedom of information all over the world is the Johannesburg Principles. The document was adopted in 1995; drafted “by a group of experts in international law, national security, and human rights,” ARTICLE 19 and other NGOs that focus on freedom of expression and access to information convened the conference that created the principles in Johannesburg, South Africa. The document has been endorsed by notable Organisations and experts, which includes the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression, Organisation for Security and Co-operation in Europe, Representative on Freedom of the Media.

⁷⁵ Pansy Tlakula, “Presentation on the Draft Model Law for African Union Member States on Access to Information” (actionnamibia.org).
<<http://www.actionnamibia.org/sites/default/files/Commissioner%20Pansy%20Tlakula%27s%20Speech%20on%20the%20First%20Day%20of%20the%20ACTION%20Namibia%20Conference.pdf>>
accessed 10 February, 2014.

The document touches on several aspects of FOI. For example, in Principle 11, the document makes it clear that restriction should be enforced only on the condition that the government proves that a restriction on the ground of national security is prescribed by law and is necessary in a democratic society.⁷⁶ Principle 14 emphasises the need for governments and public institutions to have measures in place to ensure that a denial to grant access to certain information requested by an individual is subjected to a review process by an independent body. Furthermore, provision for a form of judicial review should be made in order to ascertain the legality of such denial.⁷⁷ Principles 15 and 16 protect from any harm, a person who disseminates information legally received or which is already in the public domain, on the grounds of national security interest.⁷⁸ Principle 19 advocates that any form of limitation on the dissemination of information must not defeat the aims of “human rights and humanitarian law”. Particularly, the Principle emphasises that governments should not put measures that could prevent journalists and civil society organizations from doing their jobs, especially in areas where there is a likelihood of human right violations.⁷⁹ States are expected to incorporate and adhere to the provisions of the Principle while drafting and implementing their FOI legislations.

ii. The Global Principles on National Security and the Right to Information (“Tshwane Principles”)

In 2013, there came another important step towards the movement to ensure that FOI develops a very strong footing in the world through the drafting of the Global Principles on National Security and the Right to Information. These principles, which were drafted by a group of 22 organisations

⁷⁶The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996).

⁷⁷Ibid, Principle 14.

⁷⁸Ibid Principles 15 and 16.

⁷⁹Ibid Principle 19.

including the UN special rapporteurs with mandates that focus on freedom of expression and media freedom, academic centres and experts numbering over 500,⁸⁰ could be described as a model law. The following organisations and bodies have endorsed the Principles: OAS, African Commission on Human and Peoples Rights; the European Parliament, Parliamentary Assembly of the Council of Europe, UN Special Rapporteurs on Freedom of Expression and on Counter-Terrorism and Human Rights, the OSCE Representative on Freedom of the Media. Like the Johannesburg Principles, the document was drafted in Tshwane, South Africa.

As the latest among such principles which form the best practices and standards for legislation and implementation of FOI, this paper will review principles that are directly relevant to this work.

The first Principle advocates for the right to information, to seek, receive and impart. Also those business enterprises within the national security sector are equally obligated to disclose information, particularly when such information has the capacity of encroaching on the enjoyment of human rights. Further, the Principle indicates that it is only in situations of “limited exceptions prescribed by law and necessary to prevent specific, identifiable harm to legitimate interests, including national security” that these requests could be denied and that only public authorities whose duty it is to protect national security may do so.⁸¹ This principle is in agreement with the principle of maximum disclosure that Article 19, the NGO, has been advocating through its principles on freedom of information legislation.⁸²

⁸⁰ Global Principles on National Security and the Right to Information, (2013), p.1.

⁸¹ Ibid, principle 1.

⁸² Principles on Freedom of Information Legislation, published by Article 19, (1999), p.8.

In the second Global Principle, it advocates that given the fact that national security and international relations serve as the two most profound grounds against which requests for information is denied, such denials must at least meet the standard for such restrictions and that it should be precisely defined in the country's legal framework as necessary in a democratic society.⁸³

The fourth Principle makes it very clear that the burden of proving the legitimacy of any restriction rests squarely with the public authority that wishes to withhold information and that while the right to information should be interpreted and applied broadly, restriction should be narrowly interpreted. This burden, as stated in the fourth principle, should include the provision of specific and substantive reasons to support such assertion.⁸⁴

The fifth Principle declares that no public authority including security forces, arms of governments, among others, are exempted from disclosing information as required. It goes on to say that that information being generated simply by one state or with a foreign state may not be a plausible basis of national security under which to restrict such information.⁸⁵

The eighth principle outlines that during a state of emergency in a country, in accordance with international practice; the state may derogate from its obligation to disclose information only due to the "exigencies" of the situation and should not involve any discrimination.⁸⁶ Once again, these principles give us a very clear view of how comprehensive FOI could be when fully implemented.

⁸³ Global Principles on National Security and the Right to Information, principle 2 , (2013).

⁸⁴ Ibid principle 4.

⁸⁵ Ibid, principle 5.

⁸⁶ Ibid, principle 8.

The two Principles and the calibre of organizations that have endorsed them give credence to the importance of FOI in any given society. They serve as reference materials for states in the process of drafting new FOI legislation or in making amendments to existing ones.

1.5 Conclusion

From the preceding analysis, it is clear that the right to freedom of information which can be exercised in the form of access to public records in particular, is clearly recognized in international and regional law. Several international, regional and national frameworks and legislations that accommodate and protect this right exist. Freedom of information held by government and public institutions which is the focus of this work, is the right of every person who should know and have access to the information he or she needs to make free choices.

The UN has been proactive on the promotion of the right to FOI. It has done this by explicitly making provisions for the protection and promotion of this right in its frameworks/treaties such as the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), the activities of the Human Rights Committee as well as the mandate of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression.

In addition, regional bodies such as the Council of Europe, OAS and the African Union, in recognition of the vital nature of FOI, have all come up with mechanisms that protect and promote FOI.

At the national level, FOI is a form of negative right which tends to place an obligation on the government to refrain from any act that could constitute interference in the exercise of the right to access and/or in the expression of information received. At the same time, it places a positive obligation on the government to ensure that individuals have unrestricted access to information, particularly, as it concerns human rights violations. Thus, governments are expected to enact legislations that will protect and promote right to information. Not only should the government enact FOI legislations so that it is on the books, but there is also a positive obligation on the government for ensuring that there is the proactive disclosure of the information. Having comprehensively examined international and regional mechanisms on FOI, in order to help this research respond to its questions, there will now be an examination of the national FOI legislations in Nigeria and South Africa.

Chapter Two

Features of Nigeria's FIOA and South Africa's PAIA

2.1 Freedom of Information Law

Having looked at what FOI is from the point of view of scholars, practitioners, international and regional frameworks, it is crucial to take a look at what FOI law is in order to have a better understanding of FOI in the two jurisdictions covered in this work as well as to advance a better understanding of the questions this research examines. Furthermore, the paper also provides a summary as well as a critical look at some relevant provisions of Nigeria's Freedom of Information Act 2011 that are vital to this research work. In the same vein, it summarizes and analyses relevant features of South African's Promotion of Access to Information Act 2000 which will be of great importance to the actualization of the aims of this research work. The focus shall be on the provisions and the objectives of the two Acts. Further, this chapter emphasises the similarities and differences in terms of structure and content of the two Acts.

A FOI law is a legislation that gives the right to access documents held by government.⁸⁷ It is fundamentally the ground on which all information held by governments and governmental institutions are made public unless specifically exempted by the law itself.⁸⁸ It serves as the facilitator of the right to know, without which, it will be difficult for citizens to exercise this right.

⁸⁷'Freedom of information' (2013) <<http://www.agd.sa.gov.au/citizens/your-rights/freedom-information>> accessed 2nd March, 2014.

⁸⁸'About Freedom of Information (FOI)' (UNESCO) <<http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/about/>> accessed 10 January, 2014.

As Ackerman and Sandoval-Ballesteros put it: “FOI laws imply a change in the principle of provision of government information from a “need to know basis” to a “right to know basis”⁸⁹.

2.2 Summary of Nigerian Freedom of Information Act 2011

The FOIA was passed into law on May 28 2011; the bill that culminated into that law remains one of the longest legislative debates in Nigeria. The bill was developed through the efforts of a network of civil society organizations working in Nigeria. These include individuals, civil rights organisations and other NGOs that spearheaded the campaign for the successful passage of the bill.⁹⁰ The law aims at enabling the general public to have access to information held by public authorities and institutions. It aims to make public records and information more freely available to individuals and groups. It is also expected to “protect public records and information in accordance with public interest and protection of personal privacy”⁹¹.

Considering the high level of corruption and mismanagement in Nigeria, the drafters of the bill that became law had in mind a law that will enable citizens to hold the government accountable for its activities⁹² The law does not only aim to give legal backing to those seeking information but “also seeks to protect officials from undue interference in their private lives as a result of carrying out their

⁸⁹ J. M. Ackerman and I. E. Sandoval-Ballesteros, ‘The Global Explosion of Freedom of Information Laws’ (ADMIN. L. REV 2006).

⁹⁰ Odinaka Odinkalu, ‘Nigeria’s Freedom of Information Law: How Friends Launched a Movement’ (opensocietyfoundations 2011) <<http://www.opensocietyfoundations.org/voices/nigeria-s-freedom-information-law-how-friends-launched-movement>> accessed 10 March, 2014.

⁹¹ ‘Freedom of Information Act Signals Consolidation of Nigeria’s Democracy’ (opensocietyfoundations 2011)<<http://www.opensocietyfoundations.org/press-releases/freedom-information-act-signals-consolidation-nigeria-s-democracy>> accessed 11 March 2014

⁹² Ibid.

official duties.⁹³In order to gain a better understanding of the Act, the ensuing section summarises the provisions that are very relevant to this research.

i. Right to access to Records

This comes under section 1 of the Act and it stipulates that by virtue of the law, every citizen of Nigeria is entitled to have access to any records under the “custody” of the government or public institution, provided that the person applies to have access to the information. The section goes further to indicate that the citizen requesting the information does not need to indicate any specific interest to the information being applied for. Section 1(3) provides that a person who is entitled to access information according to the law but is denied such information has the legal right to institute legal proceedings in order to have the court compel the public institution holding the information to comply with the provisions of the Act regarding access to records.⁹⁴

ii. Request for Access to Records

This falls under section 3 of the Act. It stipulates that any application for access to records shall preferably be made in writing by the person who seeks to have access to records. However, person(s) who, due to one reason or the other, cannot put their request in writing are permitted to make oral applications. According to Section 3 (4), it is the duty of an authorized official of the public institution concerned to put such oral application into writing. Also, section 4 of the Act provides that within seven(7) working days after an applicant meets the required criteria of

⁹³ Section 27, Nigerian Freedom of Information Act 2011, laws of the Federation.

⁹⁴ Ibid, section 1.

application, the public institution concerned is expected to forward the required information to the applicant. The timeframe can only be extended in exceptional cases as indicated in section 6 of the Act. In these situations, no more than fourteen(14) working days from the date of application is required to make the information available. In addition, according to Section 4 (b), where access to information is refused by a government agency or public institution, the Act requires that the agency or institution inform the person seeking the information about the refusal. The requester then has the right to petition that the refusal be reviewed by a competent court of law.⁹⁵

iii. Destruction or falsification of record

In section 10, the Act states that it amounts to a criminal offence which is “punishable on conviction by the court with a minimum of 1 year imprisonment for any officer or the head of any government or public institution who intentionally destroys, alters or doctors any records kept in his/her custody before they are released to any person or group of people applying for it”.⁹⁶

iv. Refusal of disclosure of record on the ground of International Affairs and Defence

Section 11 is dedicated to the issue of the grounds on which an application for information may be denied by a government institution for the so called very important issues of international affairs and defence. Section 11 particularly emphasizes that a government agency or public institution may refuse to disclose any record requested provided that the provision of the information will be detrimental to the conduct of “international affairs or the defence” of the Federal Public of Nigeria”. However, in section 11 (2), the Act provides that such a ground should be overridden when the

⁹⁵ Ibid sections 3 to 7.

⁹⁶ Ibid section 10.

interest of the public in having the information disclosed outweighs the injury its disclosure may cause.⁹⁷

v. Other possible Grounds of Refusal

In section 12 (1), the Act delineates some of the important records that government agencies or any public institutions may refuse to disclosure, which includes information that will: interfere with the work of a law enforcement agency and its investigations; interfere with ongoing administrative proceedings of a government or public institution including criminal investigation; contribute to the possibility of depriving a person from fair trial; amount to the disclosure of a confidential source.⁹⁸ Further, requests that unduly invade the personal privacy of others unless where otherwise permitted in the Act, or requests that are against the economic interest of the Federal Republic of Nigeria could be denied.⁹⁹

vi. The role of the court/judiciary in ensuring that the Act fulfils its objectives

Section 20 empowers an applicant who was denied access to information o apply for a court review of the matter. This should be done within 30 days of the date of the denial Sections 21 to 25 provide steps that the courts are expected to undertake in adjudicating cases that may arise from the Act, particularly when an application is denied.¹⁰⁰

⁹⁷ Ibid section 11.

⁹⁸ Ibid, see all subsections of section 12.

⁹⁹ Ibid sections 14 -15

¹⁰⁰ Ibid sections 20 – 25.

vii. Submission of Reports by Public Institutions to the Office of the Attorney General of the Federation (AGF)

Section 29 (1) of the Act requires that each public institution in Nigeria submit an annual report of the numbers of applications denied, appeals made, court decisions on such denials, number of “applications for information pending before the institution as of October 31 of the preceding year”, number of applications received and proceeded, the median number of days it took to process such request/application, the total amount of fees collected within the time under review and the number of staff the public institution assigned to the processing of the application to the Attorney-General of the Federation on or before February 1 of each year. This section explicitly empowers the Attorney-General of Nigeria to ensure the full implementation of the law. The Attorney General is also empowered to take certain actions that will promote freedom of information in the federation.

2.3 Brief History and Summary of South Africa’s PAIA Act No 2 of 2000

It is common knowledge that the political, social and economic structure of the apartheid system in South Africa was shrouded in secrecy and extensive absence of transparency which led to the violation of basic human rights.¹⁰¹ In fact, the entire struggle against apartheid in South Africa was basically, a struggle for the “democratic reclamation” of those human rights which were hitherto violated.¹⁰² As the South African Human Rights Commission (SAHRC) states on its website:

¹⁰¹ The Preamble of Promotion of Access to Information Act No 2 of 2000, Cape Town, 3 February, 2000.

¹⁰² McKinley D T, The State of Access to Information in South Africa Research report written for the Centre for the Study of Violence and Reconciliation (2003), p.1.

It is a well known fact that pre 94', South Africa was ruled by a sovereign regime whose only check and balance was itself, policies and laws had been enacted to shield the elitist of that time and to control the majority and the marginalized¹⁰³

Therefore, based on very high level of controlled information and vast secrecy which prevailed during the apartheid period, certainly, the inclusion of a constitutional right of access to information in section 32 of the South African Constitution of 1996 and the subsequent passage of the Promotion to Access to Information Act in 2000, was motivated by a desire not to fall prey once again to the ugly situations that took place during the apartheid regime. Thus, one very important right contained in the South African Constitution that “sybiotically connects all other rights, is freedom of information”.¹⁰⁴

Though stakeholders and practitioners in the area of media and advocacy in South Africa were disappointed in the omission of some aspect of what that was intended to be part of the access to information legislation, the passage of the PAIA in 2000 and its coming into force in 2001 was a stepping stone on the right to access to information and documents of public and even private institutions in South Africa.¹⁰⁵ Thus, despite its shortcomings in a few areas, as the SAHRC rightly indicated, “South Africa can be seen as setting the bar very high having adopted a Constitution which is generally accepted as one of best around the world and thereafter taking a bold step by

¹⁰³South Africa Human Rights Commission ‘Compliance for Public Bodies: An Information Officer’s Understanding of PAIA’ (sahrc.org)
<http://www.sahrc.org.za/home/index.php?ipkContentID=26&ipkMenuID=46>.

¹⁰⁴McKinley D T, The State of Access to Information in South Africa Research report written for the Centre for the Study of Violence and Reconciliation (2003), p.1

¹⁰⁵ Ibid.

giving effect to one of the most important human rights laws, right to access information which is effectively seen to be the Olympic Torch”.¹⁰⁶

In order for a better understanding of this law, the next section summarizes the provisions of the PAIA that are relevant to this work:

i. Scope and limitation of the Act:

Section 3 of the Act outlines that its provisions apply to all records held by public and private bodies, their contractors inclusive. However, in section 7, the Act indicates that it does not apply to records that are being used in criminal or civil proceedings. As stated in part 2, chapter 1, section 12, the Act does not apply to cabinet ministers and committees, members of parliament or of the provincial legislature, courts particularly in their judicial capacity, records obtained in a way that violates the procedure laid down in subsection 1 of the Act, some other investigative tribunal as well as part applicability as in situations outlined in section 8.¹⁰⁷ These sections set a limit to the scope of the legislation.

ii. Right to Access Information Held by Public Bodies

In part 2 chapter 1, section 11, the Act provides that all public bodies are required to appoint persons referred to as information officers who have the duty of handling requests for access to information from the general public. Inasmuch as a request for information/records does not contravene the requirements of the Act or another law, access to information held by a public body is required to be granted despite the reason for the request.

¹⁰⁶South African Human Rights Commission, An Information Officer’s Understanding of PAIA. Available at <http://www.sahrc.org.za/home/index.php?ipkContentID=26&ipkMenuID=46>.

¹⁰⁷ Sections 1, 3, 7, 8, and 12 of South African Promotion of Access to Information Act, no. 2, Cape Town, 3 February, 2000.

In section 14 of part 2 chapter 2, all public bodies are required to compile and make available a manual in at least three official languages in South Africa, the manual is also required to include information on its structure, functions and contact details as well as instructions on how to request access to records/information, a description of services offered and the remedies available if the public body fails to fulfill its functions.¹⁰⁸

Section 24 grants the information officer the powers to delay release of information which is prepared for submission to the legislature or is meant to be published within 90 days of the request. In this case, the information officer must notify the person in writing of the period for which access is to be deferred. However, if the deferral will result in the requester suffering substantial prejudice, the Act stipulates that access must be granted. Sections 25 and 56 provide that Information officers/head of the public body must respond within 30 days after a request was made. However, as stated in section 26, the response could be delayed for/extended to 60 days if there are a large number of applications or the request requires a search for records in another city.¹⁰⁹

iii. Denial of Access to Information Requested

Chapter 4 generally provides a number of cases in which requests for access to information may be denied. These include: When a person's privacy is to be protected; information which is protected by the South African Revenue Service Act of 1997; commercial information about a third party, or information deemed confidential; disclosure that has the capacity of endangering a third party or their property; information that is being used in legal proceedings; information that its disclosure might negatively affect the security and international relations of the Republic of South Africa;

¹⁰⁸ Ibid section 14.

¹⁰⁹ Ibid, sections 22, 24, 25, 26 and 56.

information that protects the economic interest of South Africa. However, as indicated in section 46 of the same chapter, regardless of these instances on which requests may be denied, the Act provides that any information that is clearly in the public interest must be disclosed.¹¹⁰

iv. Third Party Notification

As provided in section 47, if a request for information concerns a third party, the information officer must take every concrete step necessary to inform the person concerned as soon as possible, but ideally within 21 days. If necessary, they may reveal the name of the person seeking information to the third party. If the information officer considers that the information might be protected in terms of the Act, he or she must inform the third party and explain the law to him/her. As provided in section 48, in a situation where the third party fails to consent to the request for access to information about him/her, he/she has the right to seek that the information remains undisclosed. However, the third party must request non-disclosure within 21 days of being informed of the request.¹¹¹

v. Appeal against Decisions by Requesters

Section 74 stipulates that a requester may decide to take legal steps in a situation where he/she feels that the grounds on which an information officer of a public body refuses him/her access to a record is contrary to the provisions/requirements of the Act. The Act makes a provision in section 75 to 76 for an internal appeal procedure which must be exhausted before the matter may be taken to court. Furthermore, sections 76 and 77 provide that in a situation where a request for access to a record of a

¹¹⁰ Ibid, sections 33 – 46.

¹¹¹ Ibid sections 47 -48.

public body has been refused a person has a right to make an internal appeal to the relevant authority.¹¹²

vi. Applying to Court

Section 78 of PAIA provides that in a situation where requester fails to succeeding an internal appeal to the relevant body , or is dissatisfied by the outcome of the appeal, or is aggrieved by any other action of the information officer/the pubic body involved in any way, he/she may within 30 days, and by way of an application, apply to a court for consideration and appropriate relief sought. However, as indicated previously, a requester or third party may only apply to the court for relief after he/she has “exhausted the internal appeal procedure against a decision of the information officer as applicable”.¹¹³

vii. Accessing Information Held by Private Bodies

Section 50 of the Act empowers South African citizens to access any information under the custody of a private body if that information is needed to exercise or protect any right, and the person requesting the information adheres to the correct process for the request. Similar to the requirements imposed on public bodies, section 51 requires private bodies to compile a manual that includes information on their structure, functions and contact details as well as information about the PAIA guide and information on instructions on how to request access to records.¹¹⁴

¹¹² Ibid, sections 74 – 77.

¹¹³ Ibid section 78.

¹¹⁴ Ibid, sections 50 – 51.

viii. The South African Human Rights Commission (SAHRC)

Part 5 section 83 of the Act deals with the duties of the South African Human Rights Commission. The Commission has a duty to increase the public's understanding/awareness of the PAIA and is required to set up educational programmes that will help in explaining how to make use of the rights enumerated in the Act. Further, section 84 mandates the Commission to submit an annual report to the National Assembly where each public body is expected to indicate all its activities concerning access to its records.¹¹⁵

ix. Actions that amount to Offences

Section 90 enumerates those actions which amounts to offences and is punishable by imprisonment for a period not exceeding two years. These include: the act to destroy, damage or change a record with the intent of denying access to information; to conceal a record and to falsify a record or to make a false record.¹¹⁶

2.4 Similarities and Differences

Having given a detailed summary of the two pieces of legislation, there is a need to expatiate on the similarities and differences of both Acts. The two legislations differ but in some areas share a lot in common. Even though the South African PAIA is more detailed than Nigeria's FOIA, both aim directly at ensuring that citizens of both countries enjoy the right to access information, particularly information held by public institutions/bodies.

¹¹⁵ Ibid, sections 83 – 84.

¹¹⁶ Ibid section 90.

Both Acts makes it a punishable offense for any person to intentionally destroy and/or unlawfully change of information. They pay adequate attention to access to the records of public institutions and mandate these bodies to keep updated records of their activities. By this provision, public institutions and their officials are required to ensure that records are not in any way tampered or altered. Furthermore, this will help in the promotion of FOI as it ensures that information accessed is authentic.

Both Acts require public institution/bodies to designate officers that will be responsible for ensuring that applications for information are dealt with. Despite making extensive provisions for denial of access to information when a request contradicts the conditions stipulated under the Acts for granting access, both Acts have a common ground in emphasizing that where the interest of the public to have the information disclosed is an overriding concern, it must be granted. When a request has the capacity to negatively affect international relations, security/defence, personal/private information as well as national economic interests, both legislations recognized these identified interests as grounds on which to deny access to information. Therefore, even though the need for exemptions are recognized and provided for in the Acts, public interested is placed above any form of restriction in accessing public held information and that of private bodies in South Africa.

Further, both pieces of legislation harmonize as it relates to the need to refer an application to another institution deemed to be best placed to offer information on the request made. In addition, they make provisions for applicants to approach the court when dissatisfied with the outcome of their application. These provisions help ensure that organizations with the best capacity and access to the requested information treats such request. Also, by making provision for application to the law

courts in the event of denial of access to information, the Acts ensure that all possible kinds of arbitrariness from public and private bodies is not left unchecked.

On the other hand, while Nigeria's FOIA is divided into 32 sections, South Africa's PAIA is divided into 7 chapters and 93 sections. The South Africa's PAIA has a strong constitutional backing; it is fully recognised by the country's Bill of Rights. Specifically, sections 8 and 32 of the South African Constitution directly address the PAIA, its scope and its application. However, the Nigerian FOIA does not enjoy such important recognition or coverage in the Constitution of the Federal Republic of Nigeria. This certainly constitutes a lacuna in the Nigerian FOI legislation.

The South African Act has a preamble that explicitly concedes to the fact that prior to the emergence of democracy in the country; government dealings and records were shrouded in secrecy. Further, under section 9 of the PAIA, the object of the Act is given in details. These include: giving effect to the constitutional right to access information, substantiating the effect to the constitutional obligations of the government in promoting a culture of human rights and social justice and so on. However, the Nigerian Act does not have a detailed preamble but only a brief introduction. The detailed nature of the preamble of PAIA helps give an overview of what the legislation aims sets out to address and achieve. However, by limiting its preamble to a brief introduction, the FOIA requires an intending user to read through the entire legislation in order to understand what it sets out to address and achieve.

Further, both Acts differ in the number of days for processing application. While that of Nigeria stipulates 7 days and at most 14 days, the South African legislation makes provision for 30 and 60 days respectively.

PAIA also explicitly includes access to information held by private bodies/entities, but FOIA doesn't make such provision. The South African Act stipulates that public/private bodies write annual reports to the country's Human Rights Commission; the Nigerian legislation requires that these bodies forward their annual reports to the Attorney General of the Federation. In fact, Nigeria's FOIA did not assign any responsibility to the Nigerian Human Rights Commission in ensuring the implementation of the legislation. The PAIA made a provision for internal appeal which is absent in Nigeria's FOIA. PAIA gives South Africans wide scope to access information even if the institution in possession of such information is privately owned. However, by limiting its scope to information held by public bodies alone, Nigeria's FOIA denies Nigerians the right to access information held by private bodies that may be of public interest. As the governmental agency with the major responsibility of promoting human rights in Nigeria, it is rather unfortunate that the FOIA did not accord the National Human Right Commission any recognition or responsibility in the implementation of the Act.

South Africa's PAIA included a criminal provision for failure by public and private bodies to develop a manual for the use of the Act in at least 3 languages. However, this has received a lot of criticisms as civil penalties or a charge of a fee would have been more appropriate than a criminal

provision that has failed to make a meaningful impact in the implementation of the Act.¹¹⁷ On the other hand, Nigeria's FOIA does not impose such a strict penalty. The South African Act mandates that requesters use government gazette forms¹¹⁸ while the Nigeria legislation do not make such provision. Finally, PAIA outlines the role of a third party in the event that the need arises but FOIA do not explicitly make any such provision.

2.5 Conclusion

Nigeria and South Africa have taken bold steps, at least in enacting legislations on FOI. In fact, it is encouraging to see South Africa, a country that only made progress beyond the very unfortunate period of apartheid regime in 1993 being the first African countries to enact such law at the dawn of the new millennium. While Nigeria's Freedom of Information Act, 2011 focuses on public institutions, South Africa's Promotion to Access to Information Act 2000 covers public and private bodies.

As indicated in the review, the two legislations have gaps that need to be amended; for Nigeria's FOIA, particularly in the areas of expanding the scope to private held information, giving the legislation a constitutional backing, creating procedures for internal appeal etc, while the PAIA tends to have gone overboard by stipulating a criminal penalty for failure of public and private bodies to carry out their responsibilities as provided in the Act.

¹¹⁷ 'Active and Passive Resistance to Openness: The Transparency Model for Freedom of Information Acts in Africa –Three Case Studies' (2013)
<http://www.right2info.org/resources/publications/active-and-passive-resistance-to-openness_africa_2013> accessed 20 August, 2014

¹¹⁸ Ibid 10

Nevertheless, both legislations recognise the importance of access to information as provided in all the selected international and regional mechanisms reviewed in this research, as they substantially emphasize the supremacy of public interest in any given situation in the process of accessing information.

Further, these international and regional mechanisms recognise access to public held information as necessary for the safeguard of human rights and open governance. However, for better access to information and in compliance with maximum disclosure these mechanisms promote, particularly, the two Principles, expanding the scope of the legislation to include information held by private bodies is important. Therefore, the decision of the framers of the PAIA to make a wider scope of access to information through the inclusion of access to information held by private bodies is commendable

Among other things, both Acts make provisions on manners of access, grounds for refusal, timeframe for granting or refusing access, the primary nature of public interest in any matter of request and access, exemptions, responsibilities of officers designated for access to records, and the need for public institutions to forward reports to the appropriate authorities. It can be concluded that in terms of content, the two legislations are of good quality.

Chapter 3

Practical Implementation of the Legislations in Nigeria and South Africa

3.1 Application and Compliance with Nigeria's FOIA

The passing into law of the Nigerian FOIA in 2011 by the Country's National Assembly brought a tremendous optimism among the Nigerian public on the possibility of Nigerians enjoying their right to FOI. Not only can this state of confidence, excitement and optimism with which Nigerians received the new law be attributed to the long wait but it may have also been a derivative of the experience of Nigerians - particularly, journalists, social activists and NGOs - during the long military era. In fact, on its own, the mere passage and signing into law of the legislation was a great achievement. Prior to the passage of the FOIA, it was as if public authorities and institutions in Nigeria never understood what the right to FOI entailed. To several of these bodies, public institution's dealings are private and documents are government properties. Therefore, they held the belief that this type of information and documents should be kept secret. In a nutshell, the public institutions never anticipated the changes in the laws as it was against the tradition of secrecy which they had succeeded in entrenching in their dealings with the public. As noted by a group of Nigerian experts in information science in their work on FOI in Nigeria; "virtually all government information in Nigerian is classified as top secret and this veil of secrecy makes it difficult to obtain information from any state agency".¹¹⁹

¹¹⁹ Emmanuel Anyanwu, Pearl and Victor, 'Freedom of Information Bill, Its Relevance and Challenges in National Development: the Nigerian Experience' (Libraries at University of Nebraska-Lincoln 2013) <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=2492&context=libphilprac> accessed 10 July, 2014.

Surprisingly, the FOIA is not the first or only law in Nigeria that focuses on the right to FOI, but based on its comprehensive nature, Nigerians saw it as the only escape from the secrecy that had shrouded government activities in Nigeria.

A famous Nigerian human rights lawyer, Chidi Odinkalu, listed some of the very important laws that directly touched on access to information in Nigeria, and which were in existence prior to the enactment of the FOIA:

I should clarify at the onset that the FoIA in Nigeria is not the only piece legislation that mandates access to information in Nigeria. Others include the Environmental Impact Assessment Act; the Fiscal Responsibility Act; the Nigeria Extractive Industries Transparency (NIEIT); the Public Procurements Act; and the Archives Act. The Public Complaints Commission and National Human Rights Commission Acts supplement the mechanisms for implementing compliance with the Act.¹²⁰

To many Nigerians, only the new FOIA law will automatically guarantee them unhindered access to government-held information, including that of the MDAs. Most importantly, Nigerians see this law as the greatest tool to use in the fight against the menace of corruption that has remained endemic in the country.¹²¹

¹²⁰ Chidi Odinkalu, 'Two years of the freedom of information act: Challenges and Prospects' (Right2know 2013) <<http://yiaga.org/resources/9fad1721730c0df8d78f5a9381833881.pdf>> accessed 15 July, 2014.

¹²¹ Emmanuel Anyanwu, Pearl and Victor, 'Freedom of Information Bill, Its Relevance and Challenges in National Development: the Nigerian Experience' (Libraries at University of Nebraska-Lincoln 2013) available at

3.2 Efforts to Ensure the Full Implementation of the Act:

i. The Government

The federal government of Nigeria has taken some steps to ensure that the legislation is implemented and that its MDAs comply with the provisions of the law, particularly on requests for information contained in government records. These steps include: training senior public servants and others that will be in charge of complying with the provisions of the law, disseminating updated guidelines by the federal ministry of Justice and the creation of a website that helps Nigerians to ascertain the level of compliance by public institutions. The legislature, particularly the two chambers of the National Assembly, constituted a committee with the mandate to oversee the compliance with the FOIA by public institutions.¹²²

The judiciary has made little effort in ensuring the implementation of the FOIA. So far, very few favorable decisions that have helped to consolidate FOI have been handed down. The following are some of the successes. In the case of *Uzoegwu F.O.C. v. Central Bank of Nigeria*, the Federal High Court ordered the Central Bank of Nigeria to allow an applicant to access the emoluments of its senior staff. The Court's order overruled the insistence of the bank that information requests such as these would be exempted under the personal information provision of the Act.¹²³

<<http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=2492&context=libphilprac>> accessed 10 July, 2014.

¹²² 'FOIA Nigeria' (foia.justice.gov.ng)

<<http://www.foia.justice.gov.ng/index.php?page=reports&content=highlights¶meter>> accessed 20 July, 2014.

¹²³*Uzoegwu F.O.C. Esq v. Central Bank of Nigeria & HAGF, FHC/ABJ/CS/1016/2011.*

In another case at the Federal High Court in Abuja, the Court ordered the Power Holding Company of Nigeria (PHCN) PLC to allow the applicant, Public and Private Development Centre (PPDC), access to information, relating to documents requested on procurement and contracts in that institution.¹²⁴

Further, in the case of the Legal Assistance and Aid Project v the Clerk of the National Assembly, the Court accepted the applicant's plea that the Office of the Clerk furnish the requester with the remuneration of Nigeria's federal legislators.¹²⁵

Prior to the FOIA in Nigeria, these successes in accessing information from public bodies could not have been possible. If not for the FOIA, it would have amounted to mere fantasy for anybody to believe that these public institutions will open their files on such matters so that the general public could have access.

ii. Civil Society Organisations (CSOs)

Civil society organizations, human rights groups and individuals have also successfully used the FOIA to access government-held information. Some of the notable cases include Falana and Falana Chambers' successful utilization of the FOIA to access information from several public institutions since the law took effect.¹²⁶ In the same vein, the chamber of the late human rights lawyer, Bamidele

¹²⁴Public & Private Development Centre LTD/GT v. Power Holding Company of Nigeria (PHCN) PLC & HAGF, FHC/ABJ/CS/582/2012.

¹²⁵ Legal Defence & Assistance Project (Gte) Ltd v. Clerk of the National Assembly, FHC/ABJ/CS/805/2011.

¹²⁶ Chidi Odinkalu, 'Two years of the freedom of information act: Challenges and Prospects' (Right2know 2013) <<http://yiaga.org/resources/9fad1721730c0df8d78f5a9381833881.pdf>> accessed 15 July, 2014.

Aturu, successfully accessed information on the remuneration of the Governor of Central Bank of Nigeria. Also, one of leading human rights NGOs in Nigeria, The Committee for the Defence of Human Rights (CDHR), successfully accessed information from the Police Service Commission on the circumstances that led to the retirement of the former Chairman of Nigeria's anti-corruption body.¹²⁷ Further, a youth group led by Youth Initiative for Advocacy Growth and Advancement, (YIAGA) and the Human Rights Volunteer Initiative (HURVI) has made successful use of the FOIA to access information from the Office of the Secretary to the Federation Government (SFG) on the compensation of families of victims of the 2011 post-election violence.¹²⁸ Another breakthrough was the successful access to information on dredging of the popular River Niger in 2012.¹²⁹

3.3 Challenges facing the Implementation of Nigeria's FOIA

As good as the relief and excitement the successful passage and signing into law of the legislation brought to Nigerians in its implementation and despite the little achievements made so far, the reality is that this very important legislation is yet to achieve its set objective of giving individuals and groups in Nigeria the right to access the full range of government-held information, as appropriate under the law. Some of the challenges to the full implementation of the Act include:

i. Concentration at Federal Government Level

One of the major challenges facing the implementation of legislation today is its concentration at the federal government level. Though the Nigerian National Assembly has the powers to make laws for

¹²⁷Ibid.

¹²⁸Ibid.

¹²⁹Ibid.

the federation (including states), states are expected to pass a corresponding legislation at the sub national levels.¹³⁰ In fact, the issue of whether states are to implement the law in the current version or to enact a separate one at the state level is currently a source of confusion among legal luminaries in Nigeria.¹³¹ Unfortunately, 3 years after the FOIA has been in effect in Nigeria; only 6 out of 36 States have taken steps towards implementing this important requirement of including the Act as a vital piece of law among the corpus of legislation at the local level.¹³² According to a newspaper report, Oyo State Government declared that it will not domesticate the Act. The State insists that the Act falls under the concurrent list and therefore is not binding on states.¹³³ When one considers that over 60 percent of governmental activities in Nigeria are executed at state and local government levels, this is a concern of the gravest magnitude. If states fail to implement the Act, this will have a negative impact on the successful implementation of the FOIA in Nigeria.

ii. Non Compliance by Public Institutions

Secondly, the momentum that greeted the passage of the FOIA bill into law seems to have disappeared as Nigerians still experience difficulties in accessing records held by the government and its bodies. It is a common scenario for government officials and MDAs to intentionally ignore requests for information within their custody. The fact that, individuals and groups in Nigeria often resort to instituting court cases on the issue of access to information is a testament that most public

¹³⁰Oluwasegun, 'The Next Step for Nigerian FOIA: Compliance/Enforcement Stupid!' (freedominfo.org 2014) <<http://www.freedominfo.org/2014/07/next-step-nigerian-foia-complianceenforcement-stupid/>> accessed 10 October 2014.

¹³¹ Ibid.

¹³² Emmanuel Anyanwu, Pearl and Victor, 'Freedom of Information Bill, Its Relevance and Challenges in National Development: the Nigerian Experience' (Libraries at University of Nebraska-Lincoln 2013). <<http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=2492&context=libphilprac>> accessed 10 July, 2014.

¹³³'Applicability of FoI Act in Nigeria' Daily Independent Newspapers (Lagos, 15 April, 2013).

bodies are not willing to open up their documents to requesters.¹³⁴As rightly observed by Dunu and Ugbo, ‘compliance’ by public institutions remain the greatest hindrance to the successful enforcement of this comprehensive and well drafted legislation.¹³⁵As required under section 29 (1) of the FOIA, public institutions in Nigeria are to report to the AGF on the number of requests and compliances. Unfortunately, in 2012, only 28 MDAs out of over 800 submitted these reports. This serves as a pointer to the level of indifference MDAs and other public institutions in Nigeria have towards freedom of information. To demonstrate the nonchalant attitude of the Attorney General of the Federation towards the Act, the office is yet to release the report for 2013 to the public.

iii. Illiteracy, Poverty and Lack of Training of Designated Officers

Another challenge towards the full implementation of the FOIA is the high level of illiteracy among the ordinary Nigerians which has negatively affected the level of awareness of the existence of the Act. Public servants are not excluded; they often perceive individuals and groups seeking access to information from their institution’s records as enemies who are doing so for the purpose of witch-hunting. Most MDAs have shown unwarranted levels of indifference to the full implementation of the Act. In some MDAs, designated officers are not adequately trained and this has obviously hindered the level of compliance.¹³⁶ Interactions with most of the officers always show lack of knowledge about the guidelines which was developed by the AGF as well as lack of knowledge of individual responsibility of these designated officers. To worsen the situation, none of the designated

¹³⁴ 'Nigeria’s Access to Information Law is Not Working' (newsdiaryonline 2012) <<http://newsdiaryonline.com/nigerias-access-to-information-law-is-not-working-icirng/>> accessed 24 July, 2014.

¹³⁵ I. Dunu and G. O. Ugbo, ‘The Nigerian Journalists’ Knowledge, Perception and Use of the freedom of information (FOI) law in journalism practices’ (2014) *Journal of Media and Communication Studies* 1, 9.

¹³⁶E.O. Omonowa, 'Some of the Challenges in Implementing the Current Guidelines on the Freedom of Information Act, 2011' (foia.justice.gov.ng 2012) (2-7).

officers who have failed to adhere to the provisions of the Act has been sanctioned as provided in section 7 (5) under the penal sanctions. Poverty just like illiteracy constitutes another factor that negatively affects the enforcement of the Act. Of course, most Nigerians are preoccupied with struggles of life and thus perceive invoking the Act for accountability and anti-corruption from public bodies and institutions as frivolous and unbeneficial activity.¹³⁷ This results in less utilization of the Act by majority of Nigerians.

The most surprising aspect of these challenges is the inability of most journalists and media outlets to lead in this struggle to have the government open its records to the public. It has been noted that most journalists in Nigeria have failed to familiarise themselves with the provisions of the Act. As a result, many of them have never made a single request for information from any public body. In addition, most of them do not know what to do when a request is denied.¹³⁸

iv. Record Keeping and Information Management

Another challenge is the system of storing public records by public institutions in Nigeria. The majority of MDAs in the country still store documents only in hard copies and this slows down the rate of compliance with the Act. Perhaps, this is in violation of the provision of section 2(4) of the Act which provides that information should be given in different forms including electronically.¹³⁹ It

¹³⁷ O. O. Onakoya, 'Freedom of Information Act: a Paradigm shift in Press Freedom in Nigeria?' (2013) OIDA International Journal of Sustainable Development 60, 66.

¹³⁸ 'Stakeholders Bemoan Poor Implementation Of FOI Act' (thetideonline) <http://www.thetidenewsonline.com/2013/03/11/stakeholders-bemoan-poor-implementation-of-foi-act/> accessed 10 August, 2014.

¹³⁹ E.O. Omonowa, 'Some of the Challenges in Implementing the Current Guidelines on the Freedom of Information Act, 2011' (foia.justice.gov.ng 2012) (2-7).

sometimes makes it impossible for designated officers to respond to requests for access to public records.

v. Exemptions and Restrictions

Those requesting access to information held by public institutions also face the uphill task of restrictions placed on accessing some documents on the grounds of national security and international affairs as provided in section 11 of the Act. It is noteworthy to emphasize here that the major reason the former President of Nigeria, Chief Olusegun Obasanjo, blatantly refused to sign into law the FOI Bill that was passed by the National Assembly in 2007 was his reservations that it will negatively affect the national security of Nigeria.¹⁴⁰ Though national security of a given country is obviously sensitive and important, the Obasanjo administration did not make adequate efforts to balance these concerns with public interest and the right to access information. A critical look at the 2011 Act which was eventually signed into law reveals that more sections restricting access to information exists than those that actually grant access to information held by public bodies.¹⁴¹ Unfortunately, most designated officers' capitalise on the loopholes created by these restrictions by denying requests that meet the requirements of the Act.

Based on section 11 (2) of the Act, in most cases, public institutions as well as other government bodies emphasize that information on these two grounds can only "be divulged if the public interest outweighs whatever injury that disclosure would cause". This often results to a state of confusion on what actually constitutes public interest and often disregard for this important term.¹⁴²

¹⁴⁰Edetaen Ojo, 'Freedom of Information: Current Status, Challenges and Implications for News Media'

(2013)<http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/WPFD2009/pdf/wpfd2010_background_World+Press+Freedom+Day+2010+Presentation+-+EO.pdf> accessed 25 August 2014.

¹⁴¹ Elijah Ogbuokiri, 'Nigeria: The Limits of Freedom of Information Act' (allafrica.com 2011) <<http://allafrica.com/stories/201110110632.html>> accessed 5 August, 2014.

¹⁴² Ibid.

In his article on the prospects and challenges of the Nigerian FOIA, Ajebo puts it this way;

First of these is the challenge of consensual interpretation of the slimy but important concepts that appear in the Act. One of such concepts is “public interest”. In the Act, nearly everything depends on or revolves around “public interest”. For example, even defence information as well as information on the conduct of government affairs can be divulged if the “public interest outweighs whatever injury that disclosure would cause” (Section 11 (2)). Similar weight is given to “public interest” in Sections 12 (2); 14 (3); 15 (4) and 19 (2). Yet this is a concept that is difficult, if not impossible, to define. What is public interest? Whose definition of public interest is the definition? How do we weigh public interest in a case in order to compare it with “injury that disclosure would cause”?¹⁴³

The confusion created by this misunderstanding, particularly, as it concerns defense and international affairs has often resulted in court cases seeking the interpretation of the phrase. This comes with its own hazard of unnecessarily protracting the process of access to information.

3.4 Application and Compliance with South Africa’s PAIA

South Africa can best be described as a country that passed through a horrifying apartheid system that did not only violate the rights of the people but particularly promoted extreme secrecy in all aspects of governance. The post-apartheid leadership of South Africa took pragmatic steps in ensuring that the high level of secrecy that existed in that country was drastically reduced. The first step geared towards bringing the new state of South Africa close to true democracy and human rights

¹⁴³ A. Ojebo, 'Nigeria’s Freedom of Information act: Provision, Strength, Challenges' [2011] Africa Communication Research 267, 280.

protection was the adoption of the South African Constitution in 1996.¹⁴⁴ This Constitution, which possesses one of the best drafted Bills Of Rights in the world, has played a critical role in highlighting South Africa's democracy positively to the world.

A more direct step towards removing the secrecy with which the apartheid system was shrouded was taken in 2000 when the PAIA became law. Like in most other countries that adopted access to information laws, the processes of drafting the bill and the signing into law of PAIA was seen by most South Africans as a positive action that signaled shifting from "affirmation to realization" particularly, as it concerns the right to freedom of information.¹⁴⁵ It is pertinent to state that unlike in some countries, PAIA applies to both public bodies and the private sector records.¹⁴⁶

3.5 Efforts to Ensure the Full Implementation of the Act:

i. The Government:

Successive governments in South African have taken steps for the implementation of the provisions of the Act. Some of the steps taken to ensure that the aims and objectives of the Act are achieved include establishing different bodies with the mandate to ensure full implementation by the government. These include: (i) the South African Human Rights Commission (SAHRC), whose mandate falls under section 83 of the PAIA to educate/enlighten the public on the provisions of the Act by reproducing the Act in different local languages, to assist individuals and groups wishing to exercise their right of access to information, to train officials of public institutions that will be saddled

¹⁴⁴D McKinley, 'The State of Access to Information in South Africa' [2003] CSV 1, 2.

¹⁴⁵*ibid* 5.

¹⁴⁶ *Ibid*.

with the responsibility of handling requests from the public, to receive reports and updates from public and private bodies on access to information and to submit annual report on access to information to the South African National Assembly;¹⁴⁷ (ii) the Public Service Commission (PSC) with the mandate to promote constitutional principles and values in public administration, ensure that the public have access to information as and when due, to monitor whether in reality the public are having access to public held information;¹⁴⁸ (iii) the Government Communications and Information Service (GCIS), located in the presidency - as stipulated in section 16 of the Act, the GCIS has the mandate to create awareness on right to freedom of information and promote issues of communication between the government and the general public, its Director General is required to publish the contact details of the information officers of all the public bodies in South Africa;¹⁴⁹ (iv) The Minister of Justice and Constitutional Development - the occupier of the position as provided in section 92 is required to create regulations that will guide the implementation of the PAIA, to ensure uniformity in administrative and procedural processes in the implementation of the Act, receive and publish information at his disposal without any form of request by the public and approval of exemptions of individuals or groups from paying fees for request as well as determining the structure of fees to be paid.¹⁵⁰ These bodies and offices have played pivotal roles in the successes that the PAIA has achieved since its adoption in 2000.

The South African judicial system has also played significant role in the implementation of the PAIA. It has done this through decisions in cases brought before the courts for freedom of

¹⁴⁷Implementation of the Promotion of Access to Information Act, (Act 2 of 2000) in the Public Service ' (psc.gov.za 2007) <http://www.dfa.gov.za/departments/accessinfo_act.pdf> accessed 10 March 2014.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ ibid

information. One of the outstanding and most recent cases is *BHP Billiton PLC Inc v De Lange*, an appeal against a High Court decision that ordered a public institution, Eskom and another company Billiton to allow access to information of the contract the two companies entered into. The Appeal did not only uphold the order of the lower court that the information sought be provided but also ordered Eskom to pay the cost to the defendants.¹⁵¹

However, the courts in South Africa have since taken decisions that could be described as having inhibited progress in the implementation of PAIA. One of these cases was *PFE International Inc (BVI) and Others v Industrial Corporation of South Africa*, the Constitutional Court of South Africa. In this case, which bothered on the exact legislation that is legally guiding the regulation of the exercise of freedom of information held by public bodies/state after legal proceedings has commenced in a court. While the applicants argued that that these types of matters fall under the PAIA, the respondent contended that the Rule 38 of the Uniform Rules of Court should apply. The High Court decided the case in favour of the applicants, a decision that was overturned by the Supreme Court of Appeal.¹⁵² The Constitutional Court surprisingly upheld the decision of the Supreme Court of Appeal. Nevertheless, the South African judiciary has contributed significantly to the success the Act has made so far.

ii. Civil Society Organisations (CSOs)

South Africa has one of the best coordinated group of civil society organisations in the continent of Africa. This can be seen in the manner CSOs played critical roles in the drafting and implementation of the PAIA across the country. One of the most outstanding contributions of the CSOs came from

¹⁵¹*BHP Billiton PLC Inc v De Lange* (189/2012) [2013] ZASCA 11 (15 March 2013).

¹⁵²*PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd*, CCT 129/11 [2012] ZACC 21.

the PAIA Civil Society Network (PAIA CSN), a coalition of organizations advocating for the full implementation of the PAIA. The network monitors the implementation of the Act. It does this by “compiling and analysing” data gathered by the members of the network. The network also comes up with an annual report known as PAIA Shadow Report; it is a compilation of the experience of member organizations while on the enforcement of the provisions of the Act by public and private bodies in the previous calendar year. This report has become very reliable and has greatly complemented the work of the SAHRC.¹⁵³ South African NGOs are active members of an initiative known as the Open Government Partnership (OGP), a global movement geared towards openness and transparency in the activities of government and its institutions.¹⁵⁴ Through this initiative, NGOs in South Africa have ensured that public and private bodies adhere to the provisions of the PAIA.

3.6 Challenges facing the Implementation of the South Africa’s PAIA

Like in most African countries, in South Africa, laws and policies often exist only on paper. As a notable South African activist, Dr. D. T. McKinley indicated;

Nowhere more has this been the case in South Africa than as applied to the gap between the content of 'paper' legislation and the content of practical implementation of that legislation. PAIA stands out as a classic example of just how far South Africans must still travel to turn the corner from affirmation (of a human right) to realization¹⁵⁵

¹⁵³ 'the Proposed Amendments to the Rules of Procedure for Application to Court in Terms of the Promotion of Access to Information Act, 2000 (Act 2 of 2000)'

<http://foip.saha.org.za/uploads/images/Proposed_Amendments.pdf> accessed 20 August, 2014.

¹⁵⁴ Ibid.

¹⁵⁵ D McKinley, 'The State of Access to Information in South Africa' [2003] CSVR 1, 10.

i. Lack of Awareness and Education

McKinley further emphasized that lack of proper education and awareness creation for the populace on the existence and relevance of the PAIA constitutes one of the greatest challenges to the implementation of the Act in South Africa. According to him, a report of a survey conducted by Open Democracy Advice Centre (ODAC), one of the NGOs working on the implementation of the PAIA found out that 50 percent of South Africans expressed lack of knowledge of the existence of the PAIA.¹⁵⁶ Secondly, less attention has been paid to the aspect of human resources development, particularly for officials who are required to address requests for information. Obviously, the PAIA remains one of the very comprehensive and technically advanced legislations in South Africa that requires constant and broad-based administrative and technical training for such officials. Presently, this is not given the required attention.¹⁵⁷ To buttress this point, a survey published by the South African Public Service Commission reported that lack of adequate training of Deputy Information Officers (DIOs) adversely affects the implementation of the Act.¹⁵⁸ Further, in his latest work on the right to know, McKinley emphasized that the majority of civil society organizations that made requests for information have been unsuccessful. But for the successful few, information provided was either “partial or poor in quality.”¹⁵⁹

ii. The Actions of Public and Private Bodies

Another issue that slows down the implementation of the PAIA is the noncompliance of departments’ in submitting reports of all their activities on the implementation of the PAIA to the

¹⁵⁶ Ibid.

¹⁵⁷ Ibid 11.

¹⁵⁸ ‘Implementation of the Promotion of Access to Information Act, (Act 2 of 2000) in the Public Service ’ (psc.gov.za 2007) <http://www.dfa.gov.za/departments/accessinfo_act.pdf> accessed 10 March 2014.

¹⁵⁹ D McKinley ‘The Right to Know; the Right to Live’ (2012) ODAC 1, 9.

SAHRC as provided for in Section 32 of the Act. Unfortunately, a majority of the departments have either intentionally ignored this important requirement of the law or do not attach much importance to it.¹⁶⁰ Hence, it has become a herculean task for SAHRC to properly carry out its required function of compiling all the activities (requests made - granted and refused) by public bodies and private organisations on access to information held by such bodies. Also, a majority of these entities do not comply with the requirement to produce manuals that contain a description of their structure and contact details and to distribute these to the public in order to facilitate access to information.¹⁶¹

iii. Procedural Challenges

The issue of internal appeals and litigation procedure that is extremely costly and complex makes it near impossible for the masses that often lack the financial capacity and legal expertise to engage in such exercise. This has resulted in very few cases reaching the courts of law, thereby denying citizens the right to freedom of information.¹⁶² The public are not enlightened on the opportunity provided for internal appeal procedure of the PAIA, particularly, as provided in Section 74. The importance of educating the public on the internal appeal procedure is very pivotal when the cost of court action is considered.

iv. Exemptions and Restrictions

Another area that has constituted a hindrance to full implementation of the Act is the often unnecessary restrictions placed on security matters. It is surprising that until now, issues that relate

¹⁶⁰Implementation of the Promotion of Access to Information Act, (Act 2 of 2000) in the Public Service ' (psc.gov.za 2007) <http://www.dfa.gov.za/departments/accessinfo_act.pdf> accessed 10 March 2014.

¹⁶¹Ibid.

¹⁶² C Givin 'National Security and the Right to Information: the Case of South Africa' (2013) University of the Witwatersrand 1, 10.

to security are treated with lots of secrecy in South Africa. The singular attempt of introducing a bill to limit access to information on matters that concern security in 2010, *Protection of State Information by the Ministry of State Security*, speaks volume of the desperation with which the governments wants to deprive the public the right to access information on security matters.¹⁶³ It is also very worrisome that the exemption in PAIA includes records of the cabinet, courts as well as that of tribunals and individual legislators.¹⁶⁴ However, the Act provides that refusal that emanates from such exemption be proven to have the capacity to cause harm. In most cases, a mere demonstration of any kind of possible harm is all that is required to refuse information that falls under these areas. Further, it has been noted that most public bodies apply such exemptions indiscriminately when compared with the effort they put in providing access to information, which is the objective of the Act.¹⁶⁵

3.7 Examination of the level of Compliance with International and Regional Frameworks in the Implementation of the Two Acts

As indicated previously, both countries have made significant progress in drafting and passing into law these very important legislations. However, in many respects, the implementation of both legislations has fallen short of the international standard of freedom of information.

So far, the enforcement of the FOIA and PAIA fall short of the requirement of article 19 of Universal Declaration of Human Rights as well as article 19 of the ICCPR, both of which advances

¹⁶³Ibid 11.

¹⁶⁴Abongile Sipondo, 'Compliance with PAIA by the Private Sector in South Africa' <http://www.docstoc.com/docs/72934150/COMPLIANCE-WITH-PAIA-BY-THE-PRIVATE-SECTOR> accessed 20 August, 2014.

¹⁶⁵'Promotion of Access to Info Act: Access Denied' <http://www.da.org.za/docs/527/PAIA_document.pdf>accessed 22 August 2014.

that the full obligation of State is to ensure that the public has access to publicly held information as well as the right of the public to seek, receive and to form opinion based on such information. As expatiated in this chapter, public institutions in both countries have failed to recognize these important international standards on freedom of information in their implementation of the Acts. This is often based on their acts of antagonism towards requests and refusals under very flimsy grounds of access. This has greatly reduced the recognition accorded to these legislations enacted by two leading African countries at the international level.

Further, the level of compliance in both countries does not meet the standard set by international institutions and offices like the UN Human Rights Committee and UN Special Rapporteur on Freedom of Opinion and Expression, particularly, as it concerns the abuse of the exemptions.¹⁶⁶ By their acts of abuse of the provisions on exemptions, public bodies in both countries, fail to adhere to the obligation of the two countries to the United Nations and its treaties of which they are parties. Also against the stance of the Committee and Special Rapporteur, there is lack of awareness creation/education for the public on the existence and usefulness of the Acts as well as the issue of personal files/information of individuals that may be held by public institutions in both countries.

At the regional level, particularly, when Africa regional framework is considered, both countries have failed to meet the requirement of the Model Law on Access to Information in Africa in their implementation of right to freedom of information. These border on almost all sections of the model law. For instance, as provided in section 6, under duty to create, keep, organise and maintain

¹⁶⁶ Frank La Rue , Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression to the General Assembly on the right to access information submitted on 14th September (A/68/362), (2013), para. 39.

information, most of the public bodies do not adhere to this requirement, neither do they respect the requirement for proactive disclosure as provided in section 7.¹⁶⁷ Same goes for sections 10 to 12 on designation of information officers and right of access to information.¹⁶⁸ Of particular interest is the attitude of designated officers towards section 14; while the model law in that section requires a designated officer to assist a requester who may have not been able to properly make an application, in reality, the attitude of most officers is to refuse request on such flimsy ground. It is always in exceptional cases that section 15 that emphasizes on the need for timely response and related matters to requests for access to information is adhered to by public bodies in both countries.¹⁶⁹

Another area both countries have failed to comply with the provisions of the Model Law is on exemptions. It is obvious that priority is often given to the sections that advocate for exemptions like sections 27 to 37 while sections 25 and 26 that emphasized on the importance of public interest which should always be a priority and the fact that classification of information does not automatically exempt it from access are overlooked. The act of refusal principally on the grounds of classification of documents is also against the best practices that have been advocated by NGOs and experts in area of freedom of information. According to the Tshwane Principles under principle 2, restrictions on any of the grounds including national security and international relations should at minimum meet the standard set for such restriction as outlined in the Principles. These standards include principle 3 which requires that restrictions on national security be “prescribed by law, necessary in a democratic society”, and for the “protection of a legitimate national security

¹⁶⁷Draft Model Law’ on Access to Information of the African Commission on Human and Peoples’ Rights (ACHPR), (2013) sections 6 and 7.

¹⁶⁸ Ibid sections 10 – 12.

¹⁶⁹ Ibid section 14.

interest”¹⁷⁰ Further, principles 4 and 5 placed the burden of proof for restrictions on requests on public authorities and emphasizes that no exemption be accorded to a public authority.¹⁷¹ Also, principle 12 of the Johannesburg Principles points out that designation of security exemption is narrowed.¹⁷² Unfortunately, in the implementation of FOIA and PAIA, these provisions of the Principles are disregarded.

3.8 Conclusion

It can be said that Nigeria and South Africa have failed to fully implement the legislations. Due to actions which are driven by human beings, after all, the Acts are yet to fully actualize their set objectives.

Issues like federal and state government’s conflicts of interest, nonchalant attitude of public institutions towards the implementation of the laws, lack of awareness on the existence and usefulness of the Act, inadequate training of designated officers, inability of public institutions to properly keep records, abuse of exemption provisions and so on constitute the greatest challenges to the implementation of the FOIA. Likewise, the PAIA has been hindered by the lack of awareness of South Africans about the Act particularly on procedural aspect of the law, deliberate actions of designated officials in refusing access to information on flimsy grounds and also the abuse of exemptions and restrictions. In particular, the abuse of the exemptions under the grounds of national security and international affairs in both countries cannot be justified. In most cases, the national security rational advanced by the institutions from which information is being requested is trivial to align with the exemption provided under the Act.

¹⁷⁰Global Principles on National Security and the Right to Information, (2013), principle 3.

¹⁷¹Ibid principles 4 and 5.

¹⁷²The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996), principle 12.

Regrettably, both countries are parties to international and regional treaties, conventions and principles that obligate them to ensure that right to freedom of information is entrenched. They have fallen short of these obligations in the implementation of the Acts.

In countries like the US, UK, Canada, Germany, Sweden, and many others government understands of the importance to FOI and its entrenchment in such countries as well as the efforts to promote public awareness of their right has positively influenced development and human rights protection, a fact that Nigeria and South African should emulate.

Chapter 4

Policy and Practice Recommendations

4.1 Nigeria and South Africa

As it has been expatiated in chapter one of this work, right to freedom of information is an important right. Its absence adversely affects the enjoyment of other rights. Right to freedom of information has come to be accepted globally as a right that is closely related but distinct from freedom of expression. Nigeria and South Africa, the two biggest economies in Africa have enacted FOI laws that are comprehensive but proper implementation poses a serious challenge to the achievement of the objectives of the Acts.

The following recommendations are offered for the government, public institutions, NGOs and the public on the possible ways of improving the current situation:

- i. There is a need for each arm of government to understand its assigned role and ensure that it carries out its functions effectively. For instance, the Acts in both countries assign oversight functions to the legislature including amendment of the Acts when the need arises. As such, the legislature in both countries should ensure that MDAs are effectively and transparently implementing the legislations. The executive on its own should play a pivotal role in the day to day implementation of the Acts, particularly, the office of the AGF in Nigeria and the SAHRC in South Africa. They should be empowered to make regulations that will ensure compliance by public bodies.

- ii. The office of the AGF in Nigeria and SAHRC in South Africa should be more proactive in the review of freedom of information reports from MDAs. There is a need for them to ensure that MDAs make their FOIA regulations as and when due.¹⁷³ Authorities in both countries should put in place stronger measures on the manner MDAs impose fees on FOIA/PAIA requesters and bring about uniformity in that regard. Further, pressure should be put on MDAs to ensure compliance with time on requests. Most importantly, there is a need to put in place a tracking system that will enable requesters to know the status of their requests and thus reduce the conflicts that arise due to delays and misunderstandings that often occur.

- iii. There is a need for both countries to put in place measures that will ensure that processes of treating requests are comprehensive, efficient and easily accessible to groups and individuals. In particular, there is a need to introduce internal review mechanism in Nigeria. While in South Africa, Public and private bodies should make the internal review to be more proactive, further complains after the internal review should be handled by an independent administrative body and most importantly court processes that involves request for information should be less cumbersome and expensive¹⁷⁴ These processes will help ensure that access to information is facilitated at all levels.

¹⁷³"The Freedom of Information Act (FOIA): Background and Policy Options for the 113th Congress' (ircsofia.wordpress.com 2013) <<https://ircsofia.wordpress.com/tag/freedom-of-information-act/>> accessed 10 October 2014.

¹⁷⁴ The Public's Right to Know Principles on Freedom of Information Legislation, article 19, (1999) principle 5.

- iv. The Office of the AGF in Nigeria and SAHRC in South Africa should engage in comprehensive awareness creation on the existence and benefits of the Acts for the public, particularly, journalists who in most cases serve as the eyes of the public on access to information held by government.¹⁷⁵ The public should be made to understand all the application and procedural requirements of the Acts. This will help the public make the best use of such avenues instead of resorting to the often protracted litigation. They should also ensure that contact details of MDAs and private organization in the case of South Africa are easily accessed by the public for the purposes of accessing information. In fact, the law should make provision for such education to be obligatory on the regulatory governmental bodies. Further, there is a need to put into consideration local realities; thus in areas where the population is not educationally advanced, town hall meetings should be initiated in order to ensure that people at the grassroots are not left out. This will not only make the work of the two offices saddled with the responsibility of implementing the Acts easy but will also help ensure that the objectives of the legislations are achieved.¹⁷⁶ In the same vein, designated officers should be trained and retrained on the best ways to implement the guidelines of the Acts through collaborations between the supervisory governmental institutions, MDAs and private organizations in South Africa.

¹⁷⁵ D Ifeoma and U O Gregory, 'The Nigerian Journalists' Knowledge, Perception and Use of the freedom of information (FOI) law in journalism practices' (2014) *Journal of Media and Communication Studies* 1, 9.

¹⁷⁶ 'OGIS Policy Recommendations for Improving Freedom of Information Act procedures and the Administration of the Office of Government Information Services' (Office of Government Information Services (OGIS) 2012)

<<http://www.archives.gov/about/organization/summary/ogis.html>> accessed 10 October 2014.

- v. There is a need for the creation and training of FOIA/PAIA information/designated officers on dispute resolution. This mechanism should be created in the form of appointment of information commissioners by each MDA, who will be assigned the duty of ensuring that disputes and misunderstandings that arise in the process of treating requests are promptly and amicably settled internally.¹⁷⁷ Also, in order to make this easier and effective, MDAs should be mandated to provide a comprehensive freedom of information trainings for their staff.¹⁷⁸ This will help put all civil servants in the position to help enlighten those that may come to them officially or otherwise for assistance in matters of FOI.

- vi. The office of the AGF in Nigeria and SAHRC in South Africa should ensure that MDAs and private organizations in South Africa have in place record management policies that ensure efficient management for easy access of their records in case of requests from the public.¹⁷⁹ This will help forestall situations where requests are protracted due to bad record keeping.

- vii. There is a need for MDAs to adopt the stance of maximum disclosure.¹⁸⁰ By this, organisations will have the presumption that all information could be disclosed thereby limiting refusals to cases that strictly meet exemption grounds. Further, refusal of

¹⁷⁷Ibid.

¹⁷⁸ The Public's Right to Know Principles on Freedom of Information Legislation, article 19, (1999) principle 3.

¹⁷⁹ 'Freedom of information regulatory action policy' (Information Commissioners Office 2012) <http://ico.org.uk/what_we_cover/taking_action/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/freedom_of_information_regulatory_action_policy.ashx> accessed 10 October 2014.

¹⁸⁰ The Public's Right to Know Principles on Freedom of Information Legislation, written by Article 19, (1999) principle 1.

requests should strictly meet the “3 part test” for the limited scope of exemptions as stipulated in Article 19: “the information must relate to a legitimate aim listed in the law; disclosure must threaten to cause substantial harm to that aim; and the harm to the aim must be greater than the public interest in having the information”.¹⁸¹ This will help erase the current presumption by most designated officers’ that requesters are enemies that every effort should be made to refuse their requests.

- viii. There is a need for programmes in the form of training and retraining courses for judges and other judicial workers in Nigeria and South Africa and indeed in other African countries that have enacted FOI laws on the technical peculiarities of these laws in each country and as well as the universal standard that the judiciary is expected to maintain. Some African countries have taken up this initiative with positive outcomes.¹⁸² Therefore, others need to emulate this noble initiative.
- ix. There is a need for a more robust interaction and partnership between governmental institutions responsible for the implementation of the Acts, the media and civil society organizations for better and efficient implementation of the Acts.¹⁸³ This will help ensure that public bodies as well as governmental agencies responsible for the implementation of the legislations are proactive. Further, apart from the suggested interaction, the media and

¹⁸¹ Ibid, principle 4.

¹⁸² Chidi O and Maxwell K, Making Progress on Freedom of Information in Africa (opensocietyfoundations 2014) <http://www.opensocietyfoundations.org/voices/making-progress-freedom-information-africa> accessed on 10 September, 2014.

¹⁸³ Chidi Odinkalu, ' Two years of the freedom of information act: Challenges and Prospects ' (Right2know 2013) <<http://yiaga.org/resources/9fad1721730c0df8d78f5a9381833881.pdf>> accessed 15 July, 2014.

civil society organizations need to monitor agencies in the implementation of FOI laws including those assigned with the role of oversight functions to ascertain their level of effectiveness and independence and where such agency, office or public body is found wanting in the discharged of its duties, civil society organizations and the media should raise alarm.

- x. The Nigerian FOIA requires amendment in the areas of the scope it covers as information held by private bodies that are of public interest need to be open to access by the public. Like in the case of PAIA that has a strong background in the country's Bill of Rights, the FOIA should enjoy such provision in the Nigerian Constitution. The FOIA also needs to provide procedure for a more comprehensive internal appeal process in the event of denial of request. The National Human Rights Commission should be recognised and given responsibilities in the implementation of the FOIA. As a federating nation, states in Nigeria that are yet to commence the full implementation of the Act or domesticate it should do so without further delays as such action amounts to the violation of the rights of Nigerians resident in such states from accessing information held by public bodies within the jurisdiction of the states.
- xi. The implementation of the PAIA will be enhanced if the SAHRC prioritises educating the public on the benefits of the comprehensive internal review mechanism that has been provided by the PAIA. This will help reduce public apathy towards the Act occasioned by fear of engaging in possible protracted legal proceedings in the event of denial of request.

- xii. It is time that Nigeria and South Africa make optimal use of available principles on FOI. In particular, if the issue of insecurity and terrorism which currently ravages most of the African countries is put into consideration, the usefulness of the Tshwane Principles in the implementation of FOI legislations in both countries cannot be over emphasized.¹⁸⁴
- xiii. Though, this research work focuses on Nigeria and South Africa, the identified challenges in the implementation of the legislations are common among all the 13 African countries that have enacted freedom of information laws.¹⁸⁵ Therefore, these recommendations are applicable to all of such countries for better implementation of their FOI legislations. Most importantly, considering the significant progress made so far in Nigeria and South Africa through these laws, particularly in the practice of open governance, other African countries that are yet to enact any form of FOI law are encouraged to without further hesitation put in motion processes that will bring about such legislations.
- xiv. Lastly, having looked at the implementation of these two legislations from the two biggest economies in Africa and bearing in mind the impact a well implemented FOI legislation could have on the current challenges facing most countries in the African

¹⁸⁴ Chidi O and Maxwell K, 'Making Progress on Freedom of Information in Africa' (opensocietyfoundations 2014) <http://www.opensocietyfoundations.org/voices/making-progress-freedom-information-africa> accessed on 10 September, 2014.

¹⁸⁵ Ibid.

continent like corruption, conflicts, authoritarian regimes etc, further research could be carried out in order to ascertain the impact of the implementation of FOI laws on these challenges in all or some of the African countries that have enacted freedom of information laws.

4.2 Conclusion

For Nigeria and South Africa to properly implement their FOI legislations like some of the older democracies that have succeeded in entrenching robust FOI, both countries must develop new strategies and follow same diligently. This research work has provided some of the workable strategies in form of policy and practice recommendations which if adopted by both countries will help improve the deficiency in the implementation of the legislations.

There is a need for all the stakeholders, particularly, MDAs in Nigeria and South Africa to ensure that the Acts are effectively implemented. In practice, they can do this by creating and regularly updating websites, electronic and print material that appropriately discloses information. On their own, the AGF and SAHRC should ensure that public bodies and private organizations in the case of South Africa are made to understand their obligations under the legislations. They should also ensure that they publish all the reports at their disposals for public consumption.

There is a need for the public to get acquainted with the content of the Acts particularly as it relates to their right to FOI. They need to know that it is their duty to ensure that they engage in oversight function of ensuring that the Acts are adequately implemented. If all these measures are put in place, the implementation of the Acts in the two countries will certainly be effective and successful.

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