

## **The law of freedom of information in Nigeria**

**Felicia Kemi Segun**

Adepetun Caxton-Martins Agbor & Segun, Lagos  
ksegun@acas-law.com

On 28 May, 2011, Nigeria's President Goodluck Jonathan signed into law the Freedom of Information ('FOI') Act (the 'Act'). With the coming into force of the Act, every person now has a legal right of access to information, records and documents held by government bodies and private bodies carrying out public functions.<sup>1</sup> This revolutionary law provides a good opportunity to put to test the wider issue of the government's commitment to transparency, accountability and good governance.

### **Introduction to the Freedom of Information Act**

The concept of a FOI law for Nigeria became popular in 1993 by the activities of different civil rights organisations.<sup>2</sup> The objective was to establish as a legal principle the right of access to documents and information in the custody of the government. It was seen as a necessary corollary to the guarantee of FOI.<sup>3</sup> The absence of a clear and defined framework led to several constraints and challenges in the efforts of civil society to realise the entrenchment of transparency and accountability as pillars of responsible governance. The FOI Bill was first submitted to Nigeria's fourth National Assembly in 1999 and its progress in the legislative process was very slow. In all, the FOI Bill spent over 11 years in the legislative process before it finally received presidential assent.

Before the promulgation of the Act, Nigeria had no law which guaranteed access to public records and information. On the contrary, many Nigerian laws have secrecy clauses prohibiting the disclosure of information, for example, the Official Secrets Act, the Criminal Code, the Penal Code, the Evidence Act, etc. The Official Secrets Act,<sup>4</sup> for instance, prohibits the unauthorised transmission of any information which has been classified by any government branch as being prejudicial to the security of Nigeria.<sup>5</sup> As such, the arbitrary classification of any information was sufficient to deprive the public of relevant information.

Similarly, the Evidence Act<sup>6</sup> recognised that material evidence may be withheld from the court where such evidence was within government custody and constituted unpublished official records relating to affairs of state, except with the permission of the officer at the head of the department concerned, who had the discretion to give or withhold such permission as they saw fit.<sup>7</sup> Also, the courts lacked the jurisdiction to compel a public officer to disclose communications made to him in official confidence where the concerned public officer considered that the public interest would suffer by the disclosure. Therefore, it was a matter falling within the sole discretion of the concerned public officer.<sup>8</sup>

Overall, Nigerian public servants easily embraced the entrenched culture of secrecy and arbitrariness in civil and political administration. To obtain information from any government agency often proved very difficult. Former President Olusegun Obasanjo, for instance, had earlier declined the presidential assent to the FOI Bill on the grounds that it would have negative implications on national security.

It was against this background that the Act came into existence. The virtue of the new law is aptly captured in its preamble which reads as follows:

‘An Act to make Public Records and Information more freely available; provide for public access to public records and information, protect public records and information to the extent

consistent with the public interest and the protection of personal privacy, protect serving public officers from adverse consequences for disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and for related matters.’

It is important to state at this stage that the Act expressly supersedes any preceding legislation which is inconsistent with its force and tenor.<sup>9</sup> The Act also specifically addresses and overrides the inconsistent requirements of the Official Secrets Act<sup>10</sup>

### **To whom does the Act apply?**

The Act primarily applies to two classes of persons:

- An applicant; and
- public institutions.

#### *An applicant*

The term ‘an applicant’ is used to describe any person who applies for information pursuant to the Act.<sup>11</sup> It is significant that the Act’s definition of ‘person’ includes a corporation and persons, whether they are corporate or not, acting individually or as a group. This is consistent with the definition of ‘person’ as provided under the interpretation statute. Thus, it would appear that no limitations are placed on the nationality of a person who is legally entitled to request and receive information, and also have access to public records. While it is not clear that this is a case of poor draftsmanship, a decision of the Nigerian courts in this regard would provide a more conclusive answer on the matter.

There is no need for an applicant to demonstrate any specific interest in the information being requested,<sup>12</sup> and illiterate or disabled applicants may request information through a third party.<sup>13</sup>

#### *Public institutions*

These are persons with the corresponding legal duty to provide an applicant with the information or copies of records sought. They include any public official, agency or institution as well as public institutions. A ‘public institution’ is defined to mean any legislative, executive, judicial, administrative or advisory body of the government, including boards, bureau, committees or commissions of the state, and any subsidiary body of those bodies including but not limited to committees and subcommittees which are supported in whole or in part via public funding or which expends public funds and private bodies providing public services, performing public functions or utilising public funds.

Public institutions are further defined to include all corporations established by law and all companies in which government has a controlling interest.<sup>14</sup> Private companies utilising public funds, providing public services or performing public functions are equally classified as public institutions.<sup>15</sup>

The categories which are recognised as public institutions give greater force and meaning to the spirit and intent of the Act.

### **Freedom of information**

The right of any person to access or request information which is in the custody or possession of any public official, agency or institution, whether or not such information is contained in written form, is recognised and established by the Act.<sup>16</sup> This right is not to be prejudiced by the existence of other

contrary laws or regulation.<sup>17</sup> In order to facilitate the unimpeded exercise of this right, all public institutions are required to keep records of all their activities, operations and businesses,<sup>18</sup> in such a manner as to enable the public to gain access to it should the need arise.<sup>19</sup>

In addition, certain categories of information in the possession of the public institutions are to be widely disseminated and made readily available to members of the public through various means, including print, electronic online sources and physically at the offices of such institutions.<sup>20</sup> The information in these categories relate to:

- descriptions of the relevant institution and their functions; classes of records under its control;
- employee manuals and directions;
- judgments given in the adjudication of cases;
- policies, reports and substantive rules of the institution;
- the remuneration scheme and dates of employment of all personnel;
- listings of applications for any contract, permit, grants, licences or agreements and related materials; and
- a description of the appropriate officer of the institution to whom an application for information is to be directed.<sup>21</sup>

The published information is to be reviewed periodically and updated when necessary.<sup>22</sup>

The Act sets time limits within which government and public bodies are to release the requested information,<sup>23</sup> and fees payable by an applicant are limited to standard charges for document duplication and transcription, where necessary.

As a further compliance guarantee, public institutions are mandated to build the capacity of their staff to effectively implement and comply with the provisions of the Act and to specifically ensure the provision of appropriate training for its officials on the public's right to access to information or records held by government or public institutions.<sup>24</sup> It is also important to note that adequate measures are taken in the Act to protect government whistleblowers.

Additionally, reporting obligations on compliance with the law are imposed on all institutions affected by the Act.<sup>25</sup> These reports are to be provided annually to the Federal Attorney General's office, which will in turn make them available to both the National Assembly and to the public. The Federal Attorney General has the responsibility to oversee the effective implementation of the Act and report on execution of this duty to Parliament annually.<sup>26</sup>

It is a criminal offence punishable by a minimum term of one year imprisonment to alter, destroy or falsify records kept in the custody of a government official for the purposes of misinforming an applicant.<sup>27</sup>

## **The exceptions**

The Act recognises a range of legitimate exceptions and limitations to the public's right to know, but it makes these exceptions subject to a public interest test that, in deserving cases, may override such limitations. For instance, a public authority is empowered to decline an application for information on the grounds that such disclosure will be injurious to the conduct of international affairs and defence.<sup>28</sup> However, the refusal of such an application would be wrongful where the public interest in disclosing the requested information outweighs the injury expected to result from such disclosure.<sup>29</sup>

Also, an application may be declined where the disclosure of the information would result in undue interference in the administration of justice.<sup>30</sup> However, like the other exception, this is also subject to the public interest test.<sup>31</sup> Generally, the disclosure of personal<sup>32</sup> and third party information<sup>33</sup> do not fall within the matters to be easily accessed under the Act and, similarly, neither does information connected with professional privilege<sup>34</sup> or relating to academic research materials prepared by faculty members of an institution.<sup>35</sup> Notwithstanding, an applicant may still rightfully access the information or materials where public interest ‘clearly’ outweighs the protection of the individual’s privacy.<sup>36</sup> Individuals or institutions may also consent to provision of the requested information.

It is noteworthy that the Act does not define ‘public interest’. It will fall to the Nigerian courts to clarify the concept and provide a definitive delineation of its parameters.

## **Remedies**

Every applicant is empowered with a legal right to institute proceedings in the court to compel any public institution to comply with the provisions of this Act.<sup>37</sup> The essence of this is to obviate the technical constraints of the traditional *locus standi*. Furthermore, a procedure is prescribed for the refusal of access by the public official.<sup>38</sup>

Any applicant who has been denied access to information may apply to the court for a review of the matter and where a case of wrongful denial of access is established, the defaulting officer or institution commits an offence and is liable on conviction to a fine of ₦500,000<sup>39</sup> (naira).<sup>40</sup>

## **Conclusion**

With the advent of the Act, it is expected that the lack of transparency and accountability in public administration and impediments to the right of ordinary citizens to access public records and information will be a thing of the past.

The Act provides a veritable framework for the civil struggle against corruption, incidents of abuse of government power and facilitates the establishment of a responsible government, as it enables Nigerian citizens to exert some degree of control over the actions of national leaders and monitor the use of public resources.

The scope and remit of the Act is not however limited to its social justice objectives; it encompasses a broad spectrum of issues impacting on education and socio-cultural development.

It is important that the law is implemented in such a manner so that it brings real benefits to people’s daily lives. A vital step would be to sensitise the general public to the implications of the Act. In this regard, the media and civil society organisations have key leadership roles in ensuring a successful implementation of the Act.

Finally, the courts also have a very significant part to play in guaranteeing that the objectives are realised. Their ability to balance the exceptions in the Act against what constitutes ‘public interest’ in each given case would be the measure of their position as the last recourse of ordinary citizens.

---

## **Notes**

<sup>1</sup> The Act, section 1.

<sup>2</sup> See: [www.foicoalition.org/publications/foi\\_advocacy/background.htm](http://www.foicoalition.org/publications/foi_advocacy/background.htm).

---

<sup>3</sup> Constitution of the Federal Republic of Nigeria (the 'CFRN') 1999 CAP C23 LFN 2004, section 39(1) provides for the right of every person to the freedom of expression, including the freedom to hold opinions and to receive and impart ideas and information without interference.

<sup>4</sup> CAP O3, LFN 2004.

<sup>5</sup> *Ibid*, section 1(1).

<sup>6</sup> CAP E 14, LFN 2004.

<sup>7</sup> Evidence Act, section 167.

<sup>8</sup> *Ibid*, section 168.

<sup>9</sup> The Act, section 1.

<sup>10</sup> *Ibid*, section 28.

<sup>11</sup> *Ibid*, section 31.

<sup>12</sup> *Ibid*, section 1(2); while this provision is laudable; we are also mindful of its potential for abuse by mischief makers and the resulting harassment of public workers.

<sup>13</sup> *Ibid*, section 3(3).

<sup>14</sup> *Ibid*, section 2(7).

<sup>15</sup> *Ibid*.

<sup>16</sup> *Ibid*, section 1(1).

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid*, section 2(1).

<sup>19</sup> *Ibid*, section 2(3); see also section 9.

<sup>20</sup> *Ibid*.

<sup>21</sup> *Ibid*.

<sup>22</sup> *Ibid*, section 2(4).

<sup>23</sup> *Ibid*, section 3(4).

<sup>24</sup> *Ibid*, section 13.

<sup>25</sup> *Ibid*, section 29.

<sup>26</sup> *Ibid*.

<sup>27</sup> *Ibid*, section 10.

<sup>28</sup> *Ibid*, section 11.

<sup>29</sup> *Ibid*, section 11(2).

<sup>30</sup> *Ibid*, section 12.

<sup>31</sup> *Ibid* section 12(2).

<sup>32</sup> *Ibid*, section 12.

<sup>33</sup> *Ibid*, section 15.

<sup>34</sup> *Ibid*, section 16.

<sup>35</sup> *Ibid*, section 17.

<sup>36</sup> *Ibid*, section 14.

<sup>37</sup> *Ibid*, section 1(3).

<sup>38</sup> *Ibid*, section 7.

<sup>39</sup> About US\$3,225 at today's exchange rate.

<sup>40</sup> ₦ is the symbol of the Naira, Nigeria's local currency.