



A CRITICAL OVERVIEW OF NIGERIA'S FREEDOM OF INFORMATION

ACT 2011

BY

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Abstract

Just as oxygen is to the continuous survival of mankind, information is more than just a necessity for every democratic society; it is crucial for effective governance. The Freedom of Information Act 2011 marks a transformative step in Nigerian democratic journey, granting the legal authority to access public information with a view to enhancing transparency and accountability in governance. However, thirteenth (13th) years after the passage of the Freedom of Information Act 2011, there is still much to be done. The mystery and/or secrecy associated with accessing public information in Nigeria has continued to question the very existence of the Freedom of Information Act 2011. Using the doctrinal research approach, this paper, therefore, gives a brief overview of the key aspects of the Freedom of Information Act 2011; its scope and application, thereby noting the challenges that have been affecting its manifestation within the Nigerian public service. The self-limiting nature of the Act is one of its greatest undoing, and the impracticable seven days' timeframe of responding to an applicant's request, are the Act greatest challenge as well as lack of awareness about the existence of the Act. The paper proposes the need for reforms in order to strengthen the implementation of the Act in Nigeria.

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Keywords: Freedom of Information Act 2011; Nigeria; Right to access information; Legal Framework; Implementation Challenges.

1.0 Introduction

Knowledge is, indeed, power and transparency is the remedy to the darkness under which corruption and abuse thrive.¹ The success of every meaningful democracy depends largely on knowledgeable citizenry whose access to a broad range of information enables them to participate fully in public life, help determine priorities for public spending, receive equal access to justice and hold their public officials accountable.²

On the other hand, poor public access to information breeds corruption. Secrecy allows back-room deals to determine public spending in the interest of very few rather than the general public. Lack of information impedes citizens' ability to assess the decisions of their leaders and even to make informed choices about the individuals they elect to serve as their representatives. The right to information is usually enshrined by governments in access to information or freedom of information legislation and regulations.³ These and a lot of other reasons orchestrated the passage of the Freedom of information Act 2011.

The Freedom of Information Act (FOIA), Laws of the Federation of Nigeria (LFN) is the primary law on access to public information in Nigeria. Owing to its peculiarity and indispensable nature for every thriving democratic society, the enactment of this law in Nigeria attracted so much interest, particularly from members

¹ Madubuike-Ekwe N J & Mbadugha J N, 'Obstacles to the Implementation of the Freedom of Information Act, 2011 in Nigeria' available at <<https://www.ajol.info/index.php/nauij/article/view/168833/158299>> accessed 20/10/2024.

² Neuman L. (ed.), Access to Information: A Key to Democracy, The Carter Center at <<http://www.cartercenter.org/documents/1272.pdf>> accessed 24/10/2024.

³ Madubuike-Ekwe N J & Mbadugha J N (n1).

of the Government on one side and non-governmental organizations and civil society's organizations, on the other side.⁴ The Act was signed into law by the then President Goodluck Ebele Jonathan, President of the Federal Republic of Nigeria, on the 28th day of May, 2011.

The Freedom of Information Act is built on the presumption of openness, by placing on those who wish to keep public information away from the people, the onus of justifying why they have to do so, and explaining why the Freedom of Information Act supersedes the Official Secrets Act (OSA), originally enacted in 1911 and later Official Secrets Act of 1962, which forbade the unauthorized transmission, obtaining, reproduction, or retention of any classified matter. The Act applies not only to public institutions but also to private organizations providing public services, performing public functions or utilizing public funds.⁵

The underlying philosophy of Freedom of Information is that public servants are custodians of a public trust on behalf of a population who have a right to know what they do. In particular, the FOIA promises to remove the aura of mystery and exclusion with which public servants cloak the ordinary operations of government and public institutions. It also seeks to change the manner in which public records and information are managed.⁶ As well as protects serving public officers from adverse consequences for disclosing certain kinds of official information without authorization and establishes procedures for the achievement of those purposes.⁷

⁴Okogbule N S and Kokpan B, 'An Overview of the Law and Practice of the Freedom of Information Act in Nigeria: Lessons From Uk and Ghana' (February 10, 2024). *Brooklyn Journal of International Law* (2) (4) 2024, available at SSRN: <<https://ssrn.com/abstract=4722220>> accessed on the 11th October, 2024.

⁵Nigerian Export Processing Zone Authority, 'The Freedom of Information Act' available at <https://nepza.gov.ng/foia/> accessed on the 11th October 2024.

⁶ Ibid.

⁷ The Explanatory Memorandum to the FOI Act.

The freedom of information is more popularly known and conveniently referred to as, “Freedom of expression and the press” as aptly captured in the Constitution of the Federal Republic of Nigeria 1999 (as amended);⁸ it is one of those rights seen as very essential and fundamental to the development of a civilized society. It is the foundation for the enforcement of other rights, encroachment of which must be made known by expression. A major determinant of a nation's respect for the rights of its people is the extent to which they can express themselves,⁹ and are dutifully informed of the working of the various private and public agencies for a democratic consolidation.

This article examines the Freedom of Information Act 2011 and its impact on the Nigeria legal system. The article is organized into five sections. Part I contains the introduction of this research, Part II reviews the historical development of the provisions of Constitution of the Federal Republic of Nigeria 1999 (as amended) and other legal instruments that gave rise to the eventual passage of the Freedom of Information Act 2011. Part III discusses the scope and application of the aforesaid Act as well as the judicial attitude of the courts. Part IV discusses implementation and enforcement challenges facing the Act, while Part V and VI conclude the article with some remarkable recommendations.

2.0 Historical Development and Legal Framework of the Act

Freedom of information, no doubt, is an essential feature of democratic governance and it enjoys a universal appeal in many democratic countries of the world. A peep into a few jurisdictions confirms the prominence of this right in a democratic

⁸Section 39 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

⁹ Freedom of Expression and the Press <<https://www.learnnigerianlaw.com/learn/human-rights/expression>> accessed on 26th October, 2024.

setting.¹⁰ The first access to information legislation was the Sweden Freedom of the Press Act, enacted in 1776,¹¹ Since then, more than fifty countries worldwide have implemented legislation to improve access to records for journalistic research and for other national development. The United States adopted her Freedom of Information Act as far back as 1966.¹² In Nigeria, the Freedom of Information Act was passed into law on the 28th day of May, 2011.

The origin of the Freedom of Information Bill in Nigeria can be traced back to 1993, during General Sani Abacha's regime. Notable groups that initiated the campaign for the enactment of the Freedom of information Act were three (3) organizations, namely: the Media Rights Agenda (MRA), the Civil Liberties Organization (CLO), and the Nigerian Union of Journalists (NUJ).¹³ Their agitations were made legitimate by the existence of the various international legal instruments that validate their actions, owing to the universal nature of the right in question. Accordingly, Universal Declaration of Human Right 1948 provides:

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.¹⁴

Still, within the global context, the International Convention on Civil and Political Rights also recognized this variety of right, which goes to buttress the relevance of this category of right and its indispensable nature, in the following words:

1. Everyone shall have the right to hold opinions without interference.

¹⁰Adeleke F.R.A, 'An Analytical Discourse on the Freedom of Information Act 2011' available at <<file:///C:/Users/FACULTY%20OF%20LAW/Downloads/2060-2750-1-PB.pdf>> accessed on the 25/10/2024.

¹¹ Omotayo, F O, (2014) 'The Nigeria Freedom of Information Law: Progress, Implementation Challenges and Prospects,' Library Philosophy and Practice (e-journal), Paper 1219 at <<http://digitalcommons.unl.edu/libphilprac/1219>> accessed on the 24/10/2024.

¹²David B, 'Freedom of Information and Access to Government Public Records Laws around the World' <https://www.ndi.org/sites/default/files/freeinfo_010504.pdf> accessed on the 25/10/2024.

¹³Madubuike-Ekwe J N and Mbadugha N J (n1).

¹⁴ Article 19 of the Universal Declaration on Human Rights 1948.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - a) For respect of the rights or reputations of others;
 - b) For the protection of national security or of public order (ordre public), or of public health or morals.¹⁵

Within the Nigerian context, the Constitution of the Federal Republic of Nigeria, 1999 (as amended) being the grundnorm; laid a firm foundation for the recognition, promotion and protection of such an essential right, as can be seen from the express and emphatic provisions of section 39 of the Constitution and for the avoidance of doubt, the said provisions is herein reproduced hereunder:

1. Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.
2. Without prejudice to the generality of Subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions, provided that no person, other than the government of the federation or a state, or any other person or body authorized by the president on fulfillment of a condition laid down by an Act of National Assembly, shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever.

The position of the Nigerian Court is not at variance with the above cited position of the land. The Courts have reiterated the indispensable nature of the above cited provisions for the progress and development of a democratic society and have amplified the essential nature of this position in landmark cases, prominent of which are; In *IGP v ANPP*,¹⁶ the Court of Appeal described freedom of expression as the bone of democracy, and permit this researcher to add, the spinal cord of a democratic society.

¹⁵Article 19 of The International Convention on Civil and Political Rights.

¹⁶ (2007) 18 NWLR (Pt. 1066) 457 at 498-499, Per Adekeye, JCA (as he then was).

Flowing from the foregoing discussion, a critical analysis of all the above cited legal instruments clearly revealed how imperative this category of human rights is, in a thriving democratic society and the combined effect of the above cited legal instruments, goes to show the nature and scope of the right of freedom of expression and the press, which include free speech, the right to disseminate information and to received information, as well as impart.

3.0 Scope and Application of The Freedom of Information Act

The Freedom of Information Act (FOIA) is an Act of the National Assembly that gives citizens, groups, institution, association or organization the right to access information from Government Agencies, Parastatals, Federal Civil Service, Private and Public sector organizations providing public services, for the purpose of bringing accountability to the forefront of records and information, to allow the flow of information which will ordinarily impair democratic tenets and accountability.

Consequently, the Freedom of Information Act aptly placed the responsibility on every public institution to ensure that they keep records of information about their activities, operations and businesses, as well as the Act also requires them to maintain properly organized information and records to facilitate easy access to such information.¹⁷

The Freedom of Information Act has many features, prominent amongst which is the right that accrued to any person demanding for information from a public institution. The Act, by virtue of its passage, establishes the right of any person to apply for information or records in the possession of a public institution.¹⁸ These rights include:

¹⁷ Section 2(1) of the Freedom of Information Act 2011.

¹⁸ Section 1 and 2 of the Freedom of Information Act 2011

- a) The right to access or request any information or record that is in the custody or possession of any public institution or private bodies providing public services, performing public functions or utilizing public funds.
- b) The right to be informed whether the information or record exists or not.
- c) The right to have the requested information or record released, if the information or record is in the custody or possession of a public institution.
- d) The right not to demonstrate any specific interest or purpose in the requested information or record.
- e) The right to receive information that public institutions are obliged to proactively disclose under the Act.
- f) The right to take legal action in Court to compel any public institution to comply with the provisions of the Act; vide a writ of mandamus upon the failure to discharge their proactive disclosure obligations under the Act. Section 10 of the Act makes it a criminal offence for any officer who has custody of a record to willfully alter, doctor or destroy the record. Anyone found guilty of any one of these offences is liable to a minimum term of imprisonment for one year. There is no maximum ceiling for sentencing for any of the aforementioned offences and there is no option of a fine. In view of these provisions, it is incumbent on public institutions to ensure that adequate measures for safeguarding against the tampering of records are observed. Where a case of wrongful denial of access to a public record is established, the Act makes it mandatory for the defaulting party or institution to pay a fine of Five Hundred thousand Naira (~~₦~~500, 0000.00), as a penalty for wrongful denial of access.¹⁹

¹⁹ See Section 7 (5) of the Freedom of Information Act 2011.

The Responsibilities of the Public Servants to sustain a viable and effective administration of the Freedom of Information Act are as follows:

1. To keep, organize and maintain records and/or data bank that helps in ensuring that information or records can be effectively preserved, quickly identified and retrieved easily when the need arises.
2. To effectively discharge the disclosing obligations under the FOIA or answering applications for information promptly is a shared responsibility within the relevant public institution.
3. To ensure that people in your institution as well as members of the public know who is responsible for dealing with applications for information under the Act.
4. To transfer without delay any request for information which is not part of your official responsibility.

3.1 Documents Exempted from Granting Access to the Public

Access to public records and information is the centre piece of the Freedom of Information Act 2011. However, just as the popular saying goes, ‘to every general rule, there is always an exception’ in this regard, the Freedom of Information Act 2011, equally provides some exceptions, to the certain documents that are discreet and cannot be made public. These exempted certain information and records from public access. These exceptions include;

- a) Information of which could be damaging or injurious to the conduct of international affairs and defence of the Federal Republic of Nigeria.²⁰
- b) Information on administrative law enforcement proceedings and investigation; personal information;²¹

²⁰ Section 11(1) of the Freedom of Information Act 2011.

²¹ Section 12 (1) a of the Freedom of Information Act 2011.

- c) Any act that will facilitate the commission of crime.²²
- d) Personal information of a third party, such as trade secrets and commercial or financial information. Information and records pertaining to professional privileges, journalism confidentiality, legal practitioner and health worker privileges.²³

3.2 Who is Responsible for Responding to an FOIA Request?

The Legal Services Department of the Authority is responsible for responding to an FOIA request. To get information under the FOIA, a request must be made either electronically (e.g. email, online form) or by letter in written form, describing the information sought for, and the preferred format of the response, in as much detail as possible.²⁴

Under the Act, there is a requirement to provide a substantive response to any application for information promptly and in any event within 7 days. There is some scope to extend this period by a maximum of 7 days if the requested information is for a large number of records; and the consultations that are necessary to comply with the application cannot be reasonably completed within the initial 7-day period.²⁵ If the application needs to be transferred to another institution, the transfer should be done as quickly as possible in any case not later than the initial 7 days and notice of the transfer and the right of judicial review must be given to the applicant within this period.²⁶

It is imperative to note that the 7-days' time limit begins as soon as a request for information or record is received by a public institution. Within this period, a public

²²Section 12(3) of the Freedom of Information Act 2011.

²³ Section 14(1) (a) to (e) of the Freedom of Information Act 2011.

²⁴ Ministry of Defence, 'Freedom of Information Act' <<https://defence.gov.ng/freedom-of-information-act/>> accessed on the 12th October 2024.

²⁵ Freedom of Information Act <<https://nepc.gov.ng/about-us/about-nepc/freedom-of-information-act/>> accessed on the 13th October 2024.

²⁶ Section 5 of the Freedom of Information Act 2011.

institution must either provide the information or explain, in detail, why it is unable to do so based on the provisions of the FOIA.²⁷

3.3 Judicial Approach to Some Provision of the FOIA

The Freedom of Information Act 2011 has been subjected to judicial interpretation in the case of *SERAP v Code of Conduct Bureau*.²⁸ As well as the case of *SERAP v Minister of Power*,²⁹ where SERAP had approached the Federal High Court for a writ of an order of mandamus to compel the Federal Government/Ministry of Power to urgently disclose whether is an ongoing investigation.

Under the Act, public institutions must ensure that they keep, organize and maintain information or records about all their activities, operations and businesses in a way and manner that facilitates the public right to access such information or records that are in its custody.³⁰

The Freedom of Information Act protects whistles blowers receiving information from being compelled to disclose the source of his information or his informant. Accordingly, the Court held, inter alia, in *Oyegbemi and Others v Attorney-General of the Federation*, where the Court held:

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

²⁷ Section 4 and 5 of the Freedom of Information Act 2011.

²⁸ FHC/L/CS/1019/2019, See also SERAP VS A.G Federation FHC/L/CS/1497/2017

²⁹ FHC/L/CS/105/19

³⁰ Section 2(1) & (2) and 9(1) & (2) of the Freedom of Information Act 2011.

The Court of Appeal pronounces on the scope and application of the Freedom of Information Act 2011 in the case of *Prof. Ernest Ojukwu (SAN) vs the Registered Trustees of the Nigerian Bar Association & Ors*³¹ when it held:

Let me state at this outset that by section 1(2) of the Freedom of Information Act, the Appellant does not have to demonstrate any information he applied for. The crux of this appeal is whether the Nigerian Bar Association is an organization to which the stipulation of freedom of information Act, which provide for public access to public records and information applied. Put differently, whether the Nigerian Bar Association is a public institution as provided for under the freedom for information Act. In this wise, it is agreed on all side that the Nigerian Bar Association is registered as not for profit organization under the relevant provisions of the Companies and Allied Matters Act. Section 1(1) of the freedom of information Act establishes the right of any person to access or request information which is in the custody of possession of any public official, agency of institution howsoever described. So, the right as establish as applicable to the Nigerian Bar Association where it is a public official, public agency or public institution. It is not confuted that the Nigerian Bar Association is neither a public official or a public agency. Per Ogakwu JCA.

The court consequently dismiss his appeal after holding that the Nigerian Bar Association was a not a public institution within the meaning of the Freedom of Information Act. This decision of the Court clearly shows that the Freedom of Information Act is applicable to only public officials, public agency and public institutions. The implication is that other organizations that do not fall within the definition of Section 2 of the Act are excluded from its application.

4.0 Implementation and Enforcement Challenges

- 4.1 The Act has some notable lacuna capable of resulting in abuse by mischievous applicants. The FOIA in breach of the provisions of the Constitution of the Federal Republic of Nigeria 1999 (as amended) declared itself superior to every other law. This, in itself is an outright aberration, that should be address in the light of the provisions of

³¹ (2022) LPELR 57895 (CA).

section 1(1) & (3) of Constitution of Federal Republic of Nigeria 1999, (as amended), which grants supremacy to only the groundnorm, to wit, the Constitution.

4.1.1 *The Federal Nature of the Act:* States have continued to hold the firm views that the Act being the law made by the National Assembly does to apply to public records and/or information under the state, owing to it lack of domestication by the most of the states of the Federation, Ondo State inclusive. This was the contention of the Speaker of the Ondo State House of Assembly in the case of *Martins Alo v Speaker, Ondo State House of Assembly & Anor.*³² However, the Court of Appeal has its judgment disagree with this contention, where it held that the Freedom of Information Act is binding on all states of the federation, whether the Act has been domesticated or not. Nigerian states have no powers to deny requests filed under the Freedom of Information Act (FoI), the Court of Appeal has rightly ruled.

4.1.2 *Exemption Clauses:* In the entire 32 sections of the Act, only sections 1 and 3 of the Act provides for records/information that can be granted access to, whereas for the exemptions there are over ten sections that itemized documents or information that cannot be granted access to. This in our well-considered opinion is a serious challenged, that manifestly undermined the importance of the Act, as presently constituted.

4.1.3 *Impracticable timeline:* The FOIA imposes unrealistic timelines of seven (7) days on public officials without considering the usual bureaucratic bottlenecks in most public offices and unrealistic nature of achieving the said task within just seven (7). Days.

4.1.4 *Lack of disclosure of reason for the information sought:* Another challenge in the Freedom of Information Act arises in the right and blank check given to an applicant to

³² (2018) JELR 38362 (CA).

ask for information and public records without indicating his reason or interest in the information sought.

4.1.5 *High Level of Ignorance:* Within the Nigeria Society, there is high level of ignorance about even the existence of this Act which has been in existence for over a decade now. Unless more is done to sensitized the general public about the existence of Act, the rights that are inherent therein and their relevance for the attainment of good governance and accountability, within the Nigeria's Political space.

4.1.6 The absence of effective enforcement mechanisms that must be in place to facilitate the workability of the Act and to guarantee the transition from sheer legislation to effective practice of the Act.

5.0 Conclusion

Thirteenth (13th) years have gone by since the enactment of Freedom of Information Act (FOI Act) 2011 in Nigeria, yet on of the nagging questions that has continued to beg for answers from legal experts, Civil Organization Societies, political commentators and social analysts is; whether the Freedom of Information Act 2011, has succeeded in unravelling the unnecessary secrecy and/or mystery that has overtime been associated with accessing public information in Nigeria? From the foregoing discussion and in answer to the preceding poser, it is a valid contention that the passage of the Act, and despite also the provision of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the passage of Freedom of Information Act is but a doubtful improvement. It has not translated into a meaningful outcome for most Nigerians. Therefore, all hands must be put on deck to ensure the effective workability of the Act.

6.0 Recommendations:

- 6.1 Owing to the lack of knowledge about the existence of the Act, there is need for awareness campaigns and sensitization about the existence of the Freedom of Information Act 2011 and the implication of not adhering same in the light of the express provisions of the Act.
- 6.2 There is need to balance various institutions, to wit; public, private, security and government interest for effective enforceability and attainment of the set objective of the Act and to promote good governance for the better of the generality of the entire public.
- 6.3 Reduction of bureaucratic bottleneck for discharging official function that relates to the applications made under the freedom of information Act 2011, for timely response and the attainment of the set objectives in accordance with the objectives of the Act.
- 6.4 Amendment of the Freedom of Information Act to reflect a robust and future- proof legislation.
- 6.5 Effective Mechanism for the enforcement and workability of Act.
- 6.6 The judicial proceedings with regards to obtaining public information should be by way of motion *ex parte* in order to accelerate and fastrack access to public information.