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**An Analytical Discourse on Nigerian  
Freedom of Information Act 2011**

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**Abstract**

This paper conceives the promulgation of Freedom of Information Act 2011 (FOIA) as a laudable contribution to the democratic principles and ideals of good governance. This explains why such law had long been promulgated in other advanced democratic countries of the world like the United States, Canada and Australia. The paper, therefore, gives a brief review of the contents of the FOIA in Nigeria. It discusses some salient provisions of the Act with a view to emphasizing their contributions towards the filling of the hitherto noticeable vacuum in our legal jurisprudence, particularly with regard to free flow of information between the government and the governed. The paper identifies two unique provisions in the Act, the protection of the minority rights, particularly the illiterates and the disabled, and the recognition of the pre-eminence of the public rights over and above the competing interests of the government and public institutions in any matter concerning publicly held information. The paper equally presents a critique of some provisions of the Act *vis-a-vis* the existing laws and civil procedure in Nigeria. To this extent, the implication of the FOIA provisions on the contradictory provisions in the Federal laws like the Evidence Act, the Official Secrets Act, and also the effect of FOIA on certain sections of the Criminal and Penal Codes being state laws feature in the discussion of the paper. In a similar vein,

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suggestion is made to resolve the apparent conflict between the FOI Act and section 36 (4) (b) of the 1999 Constitution. Finally the effect of FOIA on some established legal principles involved in judicial review like *locus standi* and *mandamus* are briefly analysed while recommendations are made for future amendment of the Act.

### **Introduction**

The clamour by the public for a law that would enable access to information relating to the government's operation is not a recent one. It can be argued that freedom of information is an important tool for ensuring democratic control of government by the public, since it enables the citizens to have the right of access to a broad range of government records, while enhancing a citizen's ability to participate actively in policy deliberations and hold public institutions accountable for their conducts which are undesirable. Jimmy Carter expressed similar sentiment as he observes:

Public access to government-held information allows individuals to better understand the role of government and the decisions being made on their behalf. With an informed citizenry, governments can be held accountable for their policies, and citizens can more effectively choose their representatives. Equally important, access to information laws can be used to improve the lives of people as they request information relating to health care, education, and other public services.<sup>1</sup>

### **Importance of a Freedom of Information Law**

Freedom of information law no doubt has become a 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 setting. For instance, the United States adopted her Freedom of Information Act as far back as 1966, and all its 50 state governments had similar laws by 1984.<sup>2</sup> Canada's federal government adopted the Access to Information Act in 1982, and 11 of its 12 provinces and territories later passed comparable statutes.<sup>3</sup> Many other Commonwealth and Western European governments also have Freedom of Information laws. As of February 2010, it was estimated that not less than 80 countries had established

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<sup>1</sup> See the foreword written by Jimmy Carter to the book *Access to Information, A key to Democracy* L., Neuman (ed.) (New York: Carter Center 2002), p. 3.

<sup>2</sup> A Roberts, "Less Government, More Secrecy: Reinvention and the Weakening of Freedom of Information Law" Vol. 60. Issue: 4 (2000), *Public Administration Review*, p. 1.

<sup>3</sup> *Ibid.*

laws that gave the public access to information which also grants the right of, and procedures for, the public to request and receive government-held information.<sup>4</sup>

The importance of the freedom of information law can further be understood from the historical constitutional development of the democratic process in South Africa. It is on record that one of the rights that were held sacrosanct for the total liberation and emancipation of South African citizens from the apartheid regime was the right of access to publicly held information. In particular, section 23 of the South African Interim Constitution<sup>5</sup> provided: “Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights.”

Even though the South African final constitution makes provision for protection of the freedom of expression,<sup>6</sup> the Republic was neither satisfied nor comfortable enough with this provision. The country therefore entrenched an independent right of access to information in her Bill of Rights.<sup>7</sup> Section 32 of the final Constitution<sup>8</sup> expressly provides:

Everyone has access to information held by the state, and any information held by another person and that is required for the exercise or protection of any rights... a national legislation shall be enacted to give effect to this constitutional right<sup>9</sup>.

In compliance with the directive of the said section, the Promotion of Access to Information Act (PAIA) of 2000 was promulgated in South Africa.<sup>10</sup> PAIA provides for the right of access to information, including the records of public

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<sup>4</sup> See <http://right2info.org/access-to-information-laws> last accessed 3/1/2012 . 4.50 pm.

<sup>5</sup> The Interim Constitution of South Africa, Act 200 of 1993 was the formal constitution of the Republic of South Africa from 1994 to 1996. It was a provisional document, which paved the way for the adoption of a permanent constitution in 1996.

<sup>6</sup> See section 16 of South African Constitution, Act No.108 of 1996.

<sup>7</sup> J. Klaaren, “Access to Information, in Constitutional Law of South Africa,” M. Chaskalson (Pretoria: Juta & Co. Ltd.,1996), p. 24.

<sup>8</sup> Act No.108 of 1996 of the Republic of South Africa.

<sup>9</sup> *Ibid*; Section 32 (1-2).

<sup>10</sup> The South African freedom of information law is cited “The Promotion of Access to Information Act” popularly referred to as PAIA of 2000.

and private bodies.<sup>11</sup> The above therefore greatly underscores the importance of having such similar law in Nigeria.

### **Freedom of Information Act (FOIA) in Nigeria**

In Nigeria, different civil society groups and other non-governmental organisations that are committed to democratic principles, accountability and transparency in governance have long advocated and worked assiduously for the passage of the Freedom of Information bill.<sup>12</sup> It was, therefore, a huge success for the group when on the 24 May 2011; President Goodluck Jonathan signed the long awaited bill into law herein referred to as the FOIA.<sup>13</sup> The promulgation of the Act obviously represents a landmark achievement by the civil societies and public critics, who felt that the law was long overdue in the country. The objective and general overview of the Act generally recognizes and grants any person the right to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution. The applicant needs not to establish any specific interest he has while making the request for the information. Where the request is denied, the applicant even has the right to apply to court to compel the concerned officers or institution of government to provide such information.<sup>14</sup> The information is provided free to the requester but he may be asked to pay only expenses covering postage, photocopying etc., where applicable.<sup>15</sup>

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<sup>11</sup> The aim of the law in the preamble is to promote transparency, accountability and effective governance of all public and private bodies, by empowering and educating everyone to understand their rights in terms of PAIA so that they are able to exercise their right in relation to public and private bodies, to understand the functions and operation of national spheres/public bodies, and to effectively scrutinize, and participate in decision making by public bodies that affect their rights. See the preamble to South African “Promotion of Access to Information Act” 2000.

<sup>12</sup> These groups have worked under various human rights umbrellas including the “Right to Know Movement, Nigeria” “Media Rights Agenda” and the “Open Society Justice Initiative” *etc.*

<sup>13</sup> The opening Memorandum of Explanation of the Act states the basic purpose and scope of the Act as follows: “The Act makes 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.” The above lines may also be referred to as the long title of the FOIA 2011.

<sup>14</sup> See generally section 1 of the FOIA.

<sup>15</sup> Section 8 of FOIA.

### **Scope of the Act**

Generally, the corpus of the FOI 2011 law may be succinctly summarized as follows:<sup>16</sup>

1. Guaranteeing the right of access to information held by public institutions, irrespective of the form in which it is kept.
2. Requiring all institutions to proactively disclose basic information about their structure and processes and mandates them to build the capacity of their staff to effectively implement and comply with the provisions of the Act.
3. Providing protection for whistle-blowers.<sup>17</sup>
4. Making adequate provision for information needs of illiterate and disabled applicants, etc.<sup>18</sup>

### **Salient Provisions of the Act**

The Act contains 32 sections in all.<sup>19</sup> By virtue of Section 1 of the Act, an applicant requesting any information need not demonstrate any specific interest in the information being applied for.<sup>20</sup> The implication of this is that the applicant does not need to prove any overriding interest to have access to the records. The institution concerned shall respond within 7 days and make such information available to the requester.<sup>21</sup> Where such institution does not provide the information within the specified days, it is deemed as refusal.<sup>22</sup> The Act in section 2 generally mandates public institutions to make records and keep information about all its activities, operations and businesses. In addition, every public institution shall ensure the proper organisation and maintenance of all information in its custody in a manner that facilitates public

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<sup>16</sup> See “Freedom of Information Act Signals Consolidation of Nigeria’s Democracy” A Press Release by Open Society Justice Initiatives Foundations, signed by Dayo Olaide on May 31, 2011.

<sup>17</sup> Any person who reports any anomalous act which is under cover in the interest of the public may qualify as a whistleblower. These include exposing corruption and corrupt practices and any act which may be detrimental to the interest of the public.

<sup>18</sup> The law further recognizes a range of legitimate exemptions and limitations to the public’s right to know, but it makes these exemptions subject to a public interest test which, in deserving cases, may override such exemptions. It also requires the Federal Attorney General to oversee the effective implementation of the Act, and report on execution of this duty to Parliament annually.

<sup>19</sup> Section 31 is devoted to interpretation of certain provisions of the Act while section 32 gives it a short title “Freedom of Information Act, 2011”.

<sup>20</sup> Section 1 of the FOIA 2011.

<sup>21</sup> Section 7 of FOIA.

<sup>22</sup> *Ibid*; section 7(4) of FOIA.

access to such information.<sup>23</sup> They are to ensure that information is widely disseminated and made readily available to members of the public through various means, including print, electronic and online sources, and at the offices of such public institutions.<sup>24</sup> It is necessary to highlight that a person may demand for information from even private bodies that are providing public services, exercising public functions or utilising public funds.

Section 3 generally lists various information, records and documents, rules and reports relating to management and organisation of public institutions that must be published and made available to the public on demand. Significantly, section 3 (e)<sup>25</sup> deals specifically with information relating to contracts awarded by the government. This ensures transparency, accountability and good governance.

An obligation is further imposed on the government or public institution concerned to indicate whether the information or record exists or not.<sup>26</sup> In case the government or public institution refuses to give access to any record requested for under the Act, such institution shall state in the notice which must be given to the applicant the grounds for the refusal.<sup>27</sup> The institution that denies access shall state the names, designation and signature, of each person responsible for the denial of such application. In exercising the right of judicial review, the applicant can bring an application to court and the court shall hear and determine the application based on the refusal summarily. Apparently in order to ensure adequate and effective compliance with the Act and in view of the fact that it is a new law in the country without any precedent as guidance, the Act prescribes necessary training for government

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<sup>23</sup> *Ibid*; section 2, sub-sections 1 and 2.

<sup>24</sup> *Ibid*; section 2 (4).

<sup>25</sup> The public is entitled to inspection and knowledge of a list of documents which include: (i) files containing applications for any contract, permits, grants, licenses or agreements, (ii) reports, documents, studies, or publications prepared by independent contractors for the institution, and (iii) materials containing information relating to any grant or contract made by or between the institution and another public institution or private organization.

<sup>26</sup> Section 7(3) of FOIA.

<sup>27</sup> Section 7(1) of the Act. It further stipulates that where the government or public institution fails to give access to information or record applied for under this Act or part thereof within the time limit set out in the Act, the institution shall, for the purposes of the Act, be deemed to have refused to give access.

officials on the right to information so as to ensure an effective implementation of the Act.<sup>28</sup>

### **The Novelty of the Act**

The act is very novel in its outlook. Two of its sections are unique. The first one recognises the right of the less privileged or what can be called the ‘rights of the minority’ in the society – the illiterates and the disabled. Particularly, the Act makes provision for the right of disabled persons and the illiterates to apply for information through a third party.<sup>29</sup>

Second, the Act gives primacy to the Nigerian public in requesting for information *vis-a-vis* the right reserved by the authority to refuse disclosure or to withhold information. The Act in ensuring this *i.e.*, giving priorities to the public right of access to information, contains a clause which is repeated in different sections thus: “Notwithstanding anything’ contained in the Act, an application for information shall not be denied where the public interest in disclosing the information outweighs whatever injury that disclosure would cause.”<sup>30</sup>

It is equally noteworthy that even where the disclosure has a tendency to impugn on the personal right of an individual<sup>31</sup> nevertheless, the Act still permits the disclosure in circumstances where the right of the public to know is considered to be more important and outweighs the privacy of such individuals.<sup>32</sup> This is a welcome development in Nigerian jurisprudence in that this law confirms and aligns with the constitutional provision which suggests that sovereignty belongs to the people of the Federal Republic of Nigeria.<sup>33</sup>

### **Penalty in the Act**

Where a case of wrongful denial of access is established, the defaulting officer or institution shall on conviction be liable to a fine of N500, 000.00.<sup>34</sup> It is also

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<sup>28</sup> Section 13 of the FOIA.

<sup>29</sup> *Ibid*; see section 3 (3).

<sup>30</sup> See for instance section 11 (2) and section 12 (2) and section 14 (3) of FOIA.

<sup>31</sup> Section 14 (1) a-e. Disclosure of personal information can only be obtained where it has been made publicly available or where the person consents to its release. See further section 14 (2) a and b.

<sup>32</sup> Section 14 (3) of the FOIA.

<sup>33</sup> Section 14 of 1999 Constitution.

<sup>34</sup> Section 7(5) of FOIA.

an offence punishable on conviction with a minimum of 1 year imprisonment for any officer of the public institution to wilfully destroy any record kept in his custody or attempt to doctor or otherwise alter same before they are released to any person, entity or community applying for it.<sup>35</sup>

The Act does not stipulate any other penalty a court of law may impose in case of non-compliance with the provision of the Act by the public institution. However, section 25(2) of the Act confers on the court the power to impose any additional penalty or conditions as it may deem appropriate in the circumstances.<sup>36</sup> It is therefore submitted that the provision of this section impliedly grants courts the power to impose any other sanction apart from those statutorily prescribed. The Act may also confer some benefits on the applicant who may be awarded damages, the cost of litigation, or any other relief the applicant may ask for from the court.

### **Burden of Proof**

Under the Act, the burden of proof lies on the institution that is denying the information. Such public institution must establish in court that it is authorised to deny the application for information presented by the requester.<sup>37</sup> Putting the burden of proof on the public institution or government by FOIA is in line with what obtains in some other jurisdictions. For instance, the United States' Freedom of Information Act, in case of refusal, also places the burden of proof on the Government, not the "requester." In the case of *Vaughn v. Rosen*,<sup>38</sup> the Court of Appeal for the District of Columbia found that the requester typically did not have any knowledge of Information being withheld, and thus could not effectively contest the decision.<sup>39</sup> As a result, the court held that the government must present a detailed justification for withholding information and to specify which exemption it was employing for each portion of a document it chose to withhold.<sup>40</sup> The court reasoned further that this information would provide a requester with sufficient knowledge to contest the government's use of an exemption clause.<sup>41</sup>

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<sup>35</sup> *Ibid*; section 10.

<sup>36</sup> Section 25 (2) states: "Any order the Court makes in pursuance of this section may be made subject to such conditions as the Court deems appropriate".

<sup>37</sup> *Ibid*; section 24.

<sup>38</sup> 484 F.2d 820 (D.C. Cir. 1973).

<sup>39</sup> *Ibid* at 823-24.

<sup>40</sup> *Ibid* at 826.

<sup>41</sup> *Ibid* at 828.

### **Exemption of Certain Information from Freedom of Information Act (FOIA)**

Disclosures of certain information are exempted by the Act. These include the following: Information relating to international affairs and defence<sup>42</sup>, information involving the law enforcement agent and investigation<sup>43</sup>, personal information<sup>44</sup>, third party information<sup>45</sup>, and information that has to do with course or research material<sup>46</sup>. The provision of section 16 allows public institution to deny an application for information that is subject to the following professional privileges:

- (a) Legal practitioner-client privilege;
- (b) Health workers-client privilege;
- (c) Journalism confidentiality privileges; and
- (d) Any other professional privileges conferred by an Act.

### **Brief Comments on the Exemptions**

It must be pointed out that right to have access to information has never been absolute, therefore the law in every jurisdiction always contains provisions for exemption. In the United States, there are nine basic exemptions contained in the Freedom of Information Act. However the courts have always maintained that those exemptions must be construed narrowly.<sup>47</sup> In the case of *John Doe*

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<sup>42</sup> Section 11 permits that an application may be rightfully denied in circumstances where the disclosure would be injurious to the conduct of international affairs and the defence of the Federal Republic of Nigeria.

<sup>43</sup> By virtue of section 12 (1) and (2), a public institution may deny an application for any information which contains records compiled by any public institution for administrative enforcement proceedings and by any law enforcement or correctional agency for law enforcement purposes or for internal matters of a public institution, but only to the extent that disclosure would affect the following:

- (i) enforcement proceedings conducted by any law enforcement or correctional agency,
- (ii) a pending administrative enforcement proceedings conducted by any public institution,
- (iii) depriving a person of a fair trial or an impartial hearing,
- (iv) disclosure of the identity of a confidential source, *etc.*

<sup>44</sup> See section 14 of FOIA. However, the Act provides that a public institution shall disclose any information that contains personal information if,

- (a) the individual to whom it relates consents to the disclosure; or
- (b) the information is publicly available and where disclosure of such information would be in the public interest, and if the public interest in the disclosure of such information clearly outweighs the protection of the privacy of the individual to whom such information relates.

See further, section 14 (2) FOIA.

<sup>45</sup> *Ibid*; section 15.

<sup>46</sup> *Ibid*; section 17.

<sup>47</sup> See *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, (1989).

*Agency v. John Doe Corp*<sup>48</sup>, the court noted that the limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.<sup>49</sup> Additionally, in the United States, even concerning those exemptions from disclosures that are based on privacy interest, it has been suggested and rightly too, that the exemptions are permissive, not mandatory, so that agencies can choose not to withhold information that satisfies an exemption.<sup>50</sup> It is therefore equally suggested that all sections relating to exceptions from the FOIA in Nigeria should also be construed narrowly and permissive rather than being mandatory in order not to defeat the basic essence of the Act.

### **Limitations on the Applicability of the Act**

Section 26 of the Act stipulates that the Act does not apply to three different categories of information which are: (a) Published material or material available for purchase by the public; (b) Library or museum material made or acquired and preserved solely for public reference or exhibition purposes; or (c) Material placed in the National Library, National Museum or non public section of the National Archives of the Federal Republic of Nigeria on behalf of any person or organization other than a government or public institution.

### **A Critique of the Act**

#### **Judicial Review as a Result of Refusal**

Judicial review of wrongful refusal of information requested for is provided in section 20 of the FOIA. An applicant must apply to court within 30 days of refusal or when the application is deemed to have been refused. The wordings of the Act in section 20 state thus:

Any applicant who has been denied access to information, or a part thereof, may apply to the Court for a review of the matter within 30 days after the public institution denies or is deemed to have denied the application, or within such further time as the Court may either before or after the expiration of the 30 days fix or allow.

It is submitted that this provision is self-limiting in that it prescribes a specific time a person must apply to court for review of the refusal. This may ultimately be counter-productive to the intent and purpose of the Act, which is

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<sup>48</sup> *Supra*.

<sup>49</sup> *Ibid*; 151.

<sup>50</sup> M. Bunker and S. Splichal, "Relational Privacy Cases and Freedom of Information" *Newspaper Research Journal*. Vol.18. Issue 3-4. (1997) p.112.

disclosure. Any application filed beyond 30 days after refusal may shut the applicant out of justice due to the fact that such application becomes statute barred. It is a fundamental requirement of the law that when a statute prescribes the time for suing for an act, failure to do so within the stipulated period renders the action unenforceable for being statute barred.<sup>51</sup>

Commenting on Public Officer Protection Act which similarly prescribes a 3 month period for an applicant to apply for judicial review, a learned author, the Ese Malemi remarked that statute prescribing a limitation period removes the right of action, the right of enforcement, and the right to judicial relief in a plaintiff, if the action is instituted outside the statutory period allowed by law.<sup>52</sup> The court has also held that the effect of an action which is statute barred is that the person/plaintiff would have an empty action which no court will enforce.<sup>53</sup>

It should be noted that even the rules of court in many states for instance, Lagos State High Court Rules allow application for judicial review which is brought within a period of 3 months (90 days) after the date of occurrence of the subject matter of the application.<sup>54</sup> The point being made here is that such a prescribed period of just 30 days grace given by FOIA for an applicant to apply for judicial review is too restrictive and may frustrate an applicant during court proceedings. It has the tendency of provoking serious legal arguments and contestable litigation especially when the applicant sues an uncooperative public institution that insists on non-disclosure.

#### **Extension of Time under the Act – the use of “may” instead of “shall”**

It is necessary to note that section 20 of FOIA empowers the court to entertain the case within such further time as the Court *may*<sup>55</sup> either before or after the expiration of the 30 days fixed or allowed. The use of the word “may” in this Act does not expressly request the court to grant extension rather it gives the

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<sup>51</sup> See the case of *Obiefuna v Okoye*, (1961) All NLR 357 where an action for damages in negligence was brought against a police officer after the statutory three-month time limit. The defendant sought protection under the Public Officer Protection Act which prescribed three months limit for such action against a public officer; the court held that the action was statute barred.

<sup>52</sup> See. E Malemi, *The Nigerian Constitutional Law* (Ikeja Lagos: Princeton Publisher, 2006), p.469.

<sup>53</sup> *Egbe v Adefarasin* (1987) 1 NWLR p.47.

<sup>54</sup> Rule 4 of the High Court of Lagos State (Civil Procedure) Rules, 2004.

<sup>55</sup> Emphasis mine.

court discretion to do so based on the circumstance surrounding the case before it. This is the position of the law regarding the use of the words ‘*may*’ and ‘*shall*’ under the Nigerian legal jurisprudence and even in most commonwealth countries.

For instance, the Interpretation Act of New South Wales of 1997 expressly provided that in any Act or instrument the word “may” appears, if used to confer a power, indicates that the power may be exercised, at the person’s discretion. Conversely, in any Act or instrument, the word “shall”, if used to impose a duty, indicates that the duty must be performed.<sup>56</sup> Similarly, in the Nigerian case of *Kaigama v. A G Borno State*<sup>57</sup> the court held that the word “may” as used in section 12 *Local Government Edict of Borno State 1976*, connotes a discretion to act. Similarly, the use of “*may*” in Order 3 Rule 6 (1) of Supreme Court Rules 1995 was held to be, at most, persuasive and directive but not mandatory and as such it may be overlooked.<sup>58</sup>

It may nevertheless be argued that the above section of FOIA invariably allows the court to extend the time of the application (either by directive or mandatorily). Yet one needs to point out that this duty placed on the court to allow the application filed out of time is discretionary and not mandatory. Though the court in many cases would tilt on the side of the applicant by granting an extension, this is not automatic. It has been held that:

When there is an application for extension of time within which to do certain things or take certain procedural steps prescribed by the rules of court, the court should always bear in mind that rules of court must *prima facie* be obeyed, and in exercising his discretion, there must be some materials upon which to base such exercise of discretion.<sup>59</sup>

Also, the court in *General Oil Ltd v. Odunta*<sup>60</sup> confirms this by stating thus: “It must be stressed that the principles guiding extension of time within which to do any act is not granted as a matter of grace but on very good and substantial grounds shown in the applicant’s affidavit. And where good reasons for delay do not exist, the application will be refused.<sup>61</sup>” It is, therefore, suggested that

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<sup>56</sup> See section 9 of the Interpretation Act of New South Wales Consolidated Act 1997.

<sup>57</sup> *Kaigama v. A G Borno State* (2001) 18 NWLR 94.

<sup>58</sup> See the case of *A.G. Federation v. A.G. Abia State* (2001) 11 NWLR, 689 at 735.

<sup>59</sup> See *John v. Black* (1998) 6 NWLR (Pt 555) 524.

<sup>60</sup> (1990) 7NWLR (Pt. 163) 123.

<sup>61</sup> *Supra*.

future amendment of the Act should extend the time within which to apply for judicial review to 3 months and also grant the court express power to consider the application even though it is filed out of time. Insertion of a simple clause like this may suffice.

Notwithstanding the prescribed period for doing of any act in this law, a court of law shall exercise its inherent power to entertain any matter before it pursuant to the Act, provided such extension would not occasion any injustice to the other party.

### **Significance and Implication of Some Provisions of the FOIA**

Among the 32 sections contained in the FOIA, it is imperative to analyse and discuss few of the sections in view of the implications and significant effect those sections may have on the existing laws in Nigeria. To this end, this paper shall briefly discuss a few of such provisions as presented hereunder *seriatim*.

Section 22 FOIA provides:

Notwithstanding anything contrary contained in the Evidence Act, or any regulation made under it, the Court may, in the course of any proceeding before it arising from an application under section 20 of this Act, examine any information to which this Act applies, that is under the control of a public institution, and no such information may be withheld from the Court on any ground.

In the same manner, the Act provides in Section 27(1) as follows:

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

### **Analysis of the above Provisions *Vis-a-Vis* the Evidence Act, Official Secrets Act and Criminal and Penal Codes**

The Evidence Act classifies some information under the rule of state and privileged communication. As a result, several provisions of the Evidence Act

deal with circumstances when the state may withhold evidence of official and privileged communication from being given during court proceedings.<sup>62</sup>

Similarly, the *Official Secrets Act*<sup>63</sup> recognises and classifies some information as official secrets which must not be disclosed. In particular, section 1 of the Official Secrets Act makes it an offence for any person to transmit any classified matter to a person to whom he is not authorised on behalf of the government.

It is necessary to stress that both the Evidence Act and Official Secrets Act are federal laws like the FOIA Act itself. Therefore in a situation whereby the provisions of the two Acts run contrary to the provision of the FOIA, the ultimate question is how to determine the superiority between the two; in other words, which of the Acts will take precedence? It appears reasonable to suggest superiority of the FOIA over both the Evidence Act and Official Secrets Act on the following three grounds: First, FOIA is the latest law of the three and it is plausible to infer that a later law may have the tendency of correcting or curing any notable defect of any of the existing laws. Second, the concerned provisions in the two laws have been specifically mentioned as inapplicable to the operation of the FOIA. Third, the language of the relevant sections of the FOIA reveals the intention of the lawmakers without any ambiguity in suggesting that the FOIA provisions takes superiority. Particularly with the use of the wordings like, *notwithstanding anything in the Evidence Act, Official Secrets Act, nothing contained in the Official Secrets Act shall prejudicially affect...etc.*

One may therefore conclude that the significant implication of sections 22 and 27 of FOIA is that all the provisions in the Official Secrets Act and Evidence Act which are *prima facie* contradictory to FOIA provisions have been whittled down and rendered inoperative.<sup>64</sup> In the same vein, under the

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<sup>62</sup> The relevant sections include sections 167, 168, 175, 219 and 220 of the Evidence Act.

<sup>63</sup> *Official Secrets Act*, Cap 03 Laws of Federation of Nigeria, 2004.

<sup>64</sup> Section 27(2) of FOIA specifically provides:

Nothing contained in the Criminal Code or Official Secrets Act shall prejudicially affect any public officer who, without authorization, discloses to any person, an information which he reasonably believes to show:

- (a) a violation of any law, rule or regulation;
- (b) mismanagement, gross waste of funds, fraud, and abuse of authority; or
- (c) a substantial and specific danger to public health or safety, notwithstanding that such information was not disclosed pursuant to the provision of this Act.

Criminal Code, it is a crime for any person who is employed in the public service to communicate any fact which comes to his knowledge by virtue of his office except he is bound to disclose such information.<sup>65</sup> It is submitted that concerning those provisions in both Penal and Criminal Codes<sup>66</sup> (both of them being state laws) which are inconsistent with the FOIA, two far-reaching implications are envisaged. The first is that those provisions become void by virtue of section 4 (5) of the 1999 Constitution which provides that if any Law of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other law shall, to the extent of the inconsistency, be void.<sup>67</sup> It is therefore a settled law that provisions in criminal code or any state laws for that matter that may be inconsistent with the FOIA will be void.

In the alternative, the doctrine of covering the field will automatically apply to render those provisions in both Penal and Criminal Codes perpetually inoperative even though they continue to exist in our penal laws.<sup>68</sup> Our position here is being given judicial attestation by the court while distinguishing between covering the field and inconsistency rule in the case of *AG Federation v. AG of the 36 States*<sup>69</sup> as follows:

Where the doctrine of covering the field applies there is no inconsistency in the strict sense of that word. To be inconsistent, the two legislations that is, the Federal legislation and that of the State must be mutually repugnant or contradictory of each other so that both

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Section 27(3) provides that no civil or criminal proceedings shall lie against any person receiving the information or further disclosing it.

<sup>65</sup> See generally section 97 of the Criminal Code, cap. C38 Laws of the Federation 2004 which provides: (1) Any person who, being in the public service, communicates any fact which comes to his knowledge by virtue of his office, and which is his duty to keep secret or any document which comes to his possession by virtue of his office and which it is his duty to keep secret, except to some person to whom he is bound to publish or communicate it, is guilty of a misdemeanour and is liable to imprisonment for two years.

(2) Any person who, being employed in the public service, without proper authority abstracts, or makes a copy of any document the property of his employer, is guilty of a misdemeanour and is liable for imprisonment for one year.

<sup>66</sup> Criminal and Penal Code, Cap 38 and p.3 respectively, Laws of Federation of Nigeria 2004.

<sup>67</sup> See generally section 4 of 1999 Constitution as amended.

<sup>68</sup> It is obvious that both the inconsistency rule and doctrine of covering the field are distinguishable; it is our submission that the operation of both may have similar consequential effect, which means that it may render the affected law which is inconsistent either void or inoperative.

<sup>69</sup> (2002) 5 MJSC 1 p. 89.

cannot stand. The acceptance or establishment of one implies the abrogation or abandonment of the other. The doctrine renders the paramount legislation predominant and the subordinate legislation goes into abeyance and remains inoperative...<sup>70</sup>

### **FOIA's Apparent Conflict with Constitutional Provision**

Section 36 (4) (b) of the 1999 Constitution of the Federal Republic of Nigeria, provides that:

If in any proceedings before a court or such a tribunal, a Minister of the government of the federation or a commissioner of the government of a state satisfies the court or tribunal that it would not be in the public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangements for evidence relating to that matter to be heard in private and shall take such other actions as may be necessary or expedient to prevent the disclosure of the matter.

This provision which allows withholding of information appears contradictory to the object of the Freedom of Information Act. It is unfortunate that this provision being a constitutional provision which is a superior law shall prevail over any other law including the FOIA Act.<sup>71</sup> However, the court may confront this apparent impasse or conflict by giving priority to the right of the public to access information over and above the right of the government to withhold information. In this way, a balance would be struck between the right of the state to withhold information and that of the individual citizen to access information.

It is pertinent to mention that prior to the promulgation of FOIA, courts had faced a similar instance whereby there was a need to balance the interest of the state and that of the public. In the case of *Senate v. Momoh*<sup>72</sup>, the Court of Appeal stated that a court has a duty to ensure fair hearing and as the exclusion of relevant evidence may prejudice the right to a fair hearing, a Minister instead of certifying against the production of an evidence, might leave it to the court to decide whether the evidence is relevant<sup>73</sup>. It is, therefore, suggested that the same position should be consistently maintained where there is apparent conflict between the FOIA and the above cited

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<sup>70</sup> *Supra*, paragraphs D-F.

<sup>71</sup> Section 1 and 1(3) of the 1999 Constitution.

<sup>72</sup> (1983) 4 NCLR 269.CA.

<sup>73</sup> *Supra*.

constitutional provision relating to disclosure of information. It is equally submitted that the constitutional provision relating to freedom of expression may also be invoked alongside with the FOIA to negate the provisions in section 36 (4) (b). This may easily be achieved if the court gives a broad meaning to the provision relating to freedom of expression which entitles a person to receive and impart information. It has been noted by the Supreme Court in *Rabiu v. The State*<sup>74</sup> that relevant sections of the constitutional provision should be interpreted broadly in a way that will tally with reason.<sup>75</sup>

It is also trite that where the constitution has used an expression in broader and narrower sense, the Supreme Court will lean on the broader interpretation, unless there is something in the text or in the rest of the constitution to indicate that the narrower interpretation will best carry out the objects and purposes of the constitution<sup>76</sup>. It is therefore submitted that giving a broad meaning to the constitutional provision of freedom of expression will extend to cover right to freedom of information in most cases of apparent conflict with any other constitutional provision.

### **Effect of FOIA on Some Legal Principles Involved in Judicial Review**

#### **FOIA and Mandamus<sup>77</sup>**

It is a fundamental requirement of law that before an order of mandamus can be issued by the courts, an applicant must first seek the leave of court. This is largely guided by rules of the courts of the individual states in Nigeria. For instance, under the Lagos State High Court (Civil Procedure) Rules, it states: “no application for judicial review shall be made unless the leave of the court has been obtained in accordance with this rule”.<sup>78</sup> It is not clear whether an applicant will still be faced with this procedural requirement before he seeks redress in court when he is refused access to information. However, on the face of it, it appears that the FOIA seeks to make the court accessible to every applicant straightaway where such applicant has been refused access to the information he is seeking. Section 2 (6) of the FOIA states that “a person entitled to the right of access conferred by this Act shall have the right to institute proceedings in the Court to compel any public institution to comply

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<sup>74</sup> (1980-) 8 – 11 SC 130.

<sup>75</sup> *Supra* at pp. 151 and 195, paras. E-G.

<sup>76</sup> *Ibid.*

<sup>77</sup> Section 1(3) of FOIA.

<sup>78</sup> Order 40 Rule 3(1) of the High Court of Lagos State Civil Procedure Rules 2004.

with the provisions of this section”. It is our view that by virtue of the above provision in the Act, leave for mandamus should be dispensed with. Generally, one of the reasons for seeking the leave of court in mandamus is to ascertain the interest of the applicant: whether he has sufficient interest in the matter he is about to litigate. Since FOIA has specifically provided that an applicant needs not establish any interest before the court while requesting for information,<sup>79</sup> it may be safely assumed that the requirement of leave to apply for mandamus may not be necessary any longer in cases relating to seeking judicial review pursuant to FOIA. There is no doubt that if an applicant does not need to obtain any leave of court before he approaches the court of law for the purpose of enforcing his right to access information, a lot of advantages will accrue to both the plaintiff and defendant in terms of time saving, and reduction in the cost of litigation, thereby ultimately accelerating the course of justice.

### **FOIA and Locus Standi**

The term *locus standi* means the right of a person to sue in a court of law or judicial tribunal. In Senator *Adesanya v. President of Nigeria*<sup>80</sup>, the Supreme Court, per Bello, JSC, defined *locus standi* briefly as the right of a party to appear and be heard on the question before the court or tribunal.<sup>81</sup> An aggrieved party who is applying to court for redress must show the court that he is directly affected by the act he is complaining about before he can be given audience in court. It must be an assertion of a right which is personal to him, and the right must have been infringed or there is a threat of infringement.<sup>82</sup> In cases of public litigation, it is not sufficient for a person to say that he suffers in some indefinite way in common with the members of the public in general. He must establish sufficient interest that he suffers or about to suffer a detriment over and above others. This is the fundamental requirement of our law in Nigeria before a person can be heard in court. The courts have reiterated this principle many times.<sup>83</sup> In line with the principle of *locus standi*, Rule 3 (4) of High Court of Lagos State (Civil Procedure) Rules similarly provides: The judge shall not grant leave unless he considers that the applicant has a sufficient interest in the matter to which the application relates.

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<sup>79</sup> See section 1 of the FOIA.

<sup>80</sup> (1981) 2 NCLR 358 at 380.

<sup>81</sup> See also *Fawehinmi v. IGP* (2002) 7 NWLR Pt 767, p.606 SC.

<sup>82</sup> E. Malemi, *The Nigerian Constitutional Law* (Princeton Publishers, 2006), p.378.

<sup>83</sup> See *Olawoyin v. AG Northern Region of Nigeria*, (1961) 1 All NLR, 337, *Gani v. IGP*, *supra*, *Adesanya v. President of Nigeria*, *supra*.

Fortunately, the FOIA 2011 has done away with the requirement of *locus standi* by stating expressly that an applicant need not demonstrate any specific overriding interest before invoking the Act. This is the implication of section 1 (2) of the Act. Equally, the Act allows a third party to file the case for review on behalf of a disabled or illiterate person.<sup>84</sup> Thus, the possible challenge of *locus standi* as established in practice and procedures which can constitute a clog in the wheel of the judicial review that may arise in the implementation of the Act has been carefully taken care of.

### **Is Any State of the Federation Required to make any law to Incorporate FOIA?**

Even though it has been suggested by various persons that there is need for each state of federation to incorporate or domesticate the FOIA at the state level for it to take effect in the state. It is contended that such need does not arise. An in-depth analysis of relevant constitutional theories clearly suggests otherwise as herein below presented.

In the first instance, much reliance has been placed on the fact that the legislative power to make law on matters relating to public record is on the concurrent list of the 1999 Constitution. Specifically, Items 4 and 5 of the Concurrent List provide as follows: “The National Assembly may make laws for the Federation or any part thereof with respect to the archives and public records of the Federation;” and “A House of Assembly may, *subject to paragraph 4 thereof*, make laws for that State or any part thereof with respect to archives and public records of the Government of the State”<sup>85</sup>.

In line with the theories of constitutional interpretation, the power to make law on public record is vested in both federal and the state; however the constitution has expressly made the legislative power of the state subject to the power granted to the federal government. This implies the application of inconsistency rule in that, where state makes law on similar subject matter, such law must not be inconsistent with any of the provisions of the federal law.<sup>86</sup> However, it must be pointed out that nothing in the above item 5 of the

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<sup>84</sup> Section 3(3) of FOIA.

<sup>85</sup> Emphasis mine.

<sup>86</sup> Section 4 (5) of the 1999 *Constitution (as amended)* provides: If any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National

Concurrent List precludes state from making ancillary laws that may be supplemental to any law already passed by the federal government pursuant to item 4 above.

With due respect to those advocating for separate legislation with respect to FOIA at the state level, their misconception possibly arises from their limited knowledge of the workings of the federal system of government. It is not in all cases that matters that fall on Concurrent List can be legislated on by both states and federal government. The power of the states to legislate on any item in the list is still circumscribed by two limiting factors among others. The first relates to the inconsistency rule which is expressly provided in the Constitution particularly section 4(5) of 1999 Constitution,<sup>87</sup> while the second limiting factor stems from the constitutional doctrine of covering the field. This doctrine is peculiar to the federal system of government, in that where the federal government has legislated on a particular subject-matter, in which both federal and state have joint interest and power to legislate on, provided that the law made by the federal is comprehensive and exhaustive thereby covering the entire federation, then no state government has the power to legislate on the same matter. It will be presumptuous to make law on the same issue by the state. If it does, the law of such state will not be said to be inconsistent but rather be inoperative. There is need to distinguish inconsistency rule from the doctrine of covering the field; the former implies invalidity of the subordinate law while under the latter, the state law may not be declared inconsistent (if it is not so in any material particular), it is merely inoperative when the federal law is in operation. The said state law however revives in the event of the federal law ceasing to have force.

The origin of the doctrine is found in the United State's constitutional jurisprudence, and some other countries have adopted the same from the United States. In Australia where such doctrine also operates, the doctrine simply means that where there is a conflict between the legislation of a state and the federal parliament on a matter in the Concurrent Legislative List, an inconsistency arises; and as between the two laws so passed, the one passed by the federal parliament prevails and that of the state is rendered inoperative during the lifetime of the federal law. First, it would be too presumptuous of a

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Assembly, the law made by the National Assembly shall prevail, and that other law shall, to the extent of the inconsistency, be void.

<sup>87</sup> *Ibid.*

lower legislative body to legislate on the same subject matter already covered by the higher legislative body and second, to subject a citizen to obedience to two laws at the same time on the same subject may appear too oppressive.

One needs to stress further that in Australia, it is not in all cases that the doctrine of covering the field would apply to *estop* the state from making law on the same subject-matter. According to Dixon J, in *ex-parte Maclean*<sup>88</sup>, “it is not always the case that at any time a federal and a state law exist the doctrine applies. There must be an intention in the federal law to completely and exhaustively cover the field.” Therefore, in an Australian case of *Clyde Engineering Co Ltd v. Cowburn*,<sup>89</sup> where a federal Act had made provisions on hours of work and a state entered upon the same field to make its own provisions, the High Court of Australia held the state law inoperative.

### **Character and Content of the FOIA**

The second argument against having separate legislations by individual states may be understood from the character and content of the FOIA itself. Section 1 of the FOIA provides that: “Notwithstanding anything contained in any other *Act, law or regulation*, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established.”<sup>90</sup>

Section 22 (1) further states:

Notwithstanding anything contained in the *Criminal Code, Penal Code, the Official Secrets Act, or any other enactment*, no civil or criminal proceedings shall lie against an officer of any public institution, or against any person acting on behalf of a public institution, and no proceedings shall lie against such persons thereof, for the disclosure in good faith of any information, or any part thereof pursuant to this Act, for any consequences that flow from that disclosure, or for the failure to give any notice required under this Act, if care is taken to give the required notice.<sup>91</sup>

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<sup>88</sup> *Ex Parte Maclean* [1930] HCA 12, 43 CLR 472, 482.

<sup>89</sup> (1926) 37 CLR 466.

<sup>90</sup> Emphasis mine.

<sup>91</sup> Emphasis mine.

It is submitted that it would be abnormal for any state law to contain the above kind of expression. The *notwithstanding* clause as used within this context envisages that none of the existing laws, whether federal (Act) or state laws, would override the provision of the FOIA. In other words, particular provisions of such act or laws found to be inconsistent with sections 1, 20 or 27 of FOIA are automatically null and void to the extent of their inconsistency. This means that such act or laws for that purpose are inferior to the FOIA provisions. It is trite that a state law cannot override the provision of any federal law and in so far as the Evidence Act and Official Secrets Act, being federal Act, have been expressly mentioned in these sections of FOIA, then it stands to legal logic that the FOIA intends coverage of the whole country without the necessity of a separate adoption by individual states. The simple example would be that, assuming Lagos State domesticates FOIA and it is called Freedom of Information Law of Lagos State, will these sections (1, 20 and 27) operate as state laws to override the provisions of the Evidence Act and Official Secrets Act? The extant provisions of the constitution which have automatically granted superiority to federal laws would apply thereby rendering such state law to be null and void. In advanced constitutional law theory, a *notwithstanding clause* as used in section 22 (1) above means that the content of the law or passages referred to in the clause are inferior to the content of the clause.

### **Conclusion and Suggestion**

Nigerians should make good and effective use of this law so as to reap its promising benefits. It is our submission that the Act continues to be applicable in every part of Nigeria, being a federal law. The doctrine of covering the field automatically applies, and as a result, there is no need to domesticate this law at the level of each state. The character and content of the FOIA has clearly portrayed it as a law that is meant for the whole Nigeria.

### **Suggestion**

In the implementation of similar Freedom of Information Law in the United States, there is an establishment of the Information Commissioner's Office, (ICO) which serves as overseer of the Freedom of Information Act. ICO may be asked to review the decision of the public authority that refuses to give the information required.<sup>92</sup> Applicant still has the right to go to the court for

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<sup>92</sup> In the United States, the ICO is an independent body that enforces the Freedom of Information Act. The ICO requires copies of all the correspondence between the individual

judicial review if he is dissatisfied with the ICO's final decision. It is suggested that the office of ICO is important and in future amendment to the Nigerian FOIA Act, such an office may be created. It will allow an immediate review of the decision of the authority that refused the information before approaching the court as the final arbiter. The existence of such an office also allows for effective monitoring and compliance with the law. It is equally important that an applicant who is indigent is saved the cost of litigation if he gets what he wants through the interference of ICO.

Lastly, the promulgation of FOIA is a laudable act which has a promising positive effect on Nigerian nascent democracy. It can curb the menace of corruption in public service by promoting transparency and accountability in governance. This has been noted several decades ago by the former President of United States when he made the following assertion:

Now many other countries are passing legislation to combat corruption and increase public confidence in government. Access to information is a crucial element in the effort to reduce corruption, increase accountability, and deepen trust among citizens and their governments.<sup>93</sup>

What Nigeria needs is effective implementation of the Act by all sectors of government and virile judiciary to interpret the law in a way that conforms to its aspirations.

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requesting information and the local authority refusing to give it. Complaints are supposed to be allocated to a caseworker within one month of receiving the complaint. If the ICO cannot resolve the complaint, it will issue a decision notice. This outlines the Commissioner's final assessment as to whether or not the public authority has complied with the legislation. If the ICO finds the local authority has not given the information the enquirer is entitled to, it can instruct it to do so. The authority can appeal against this decision. If the public authority ignores the decision notice, the ICO can apply to the High Court. The court will investigate and may deal with the authority as if it has committed contempt of court. The punishment may be a fine or even imprisonment. See generally, Denise Worsfold , "Freedom of Information: a Case Study" *Perspectives in Public Health* Vol. 126. Issue: 5. (2006) p.231.

<sup>93</sup> Jimmy Carter, *op. cit.*, p.2.