

THE NIGERIAN INFORMATION ACT 2011 : A VERITABLE TOOL FOR GOOD GOVERNANCE.

Abstract

Nigeria in 2011, enacted the much awaited Freedom of Information Act. Freedom of information connotes access to information held by public authorities; it is a fundamental element of the right to freedom of expression. Freedom of Information Act is therefore, no doubt an important and indispensable tool for enthroning a democratic and responsible government as it encourages and guarantees openness, transparency and good governance, Prior to the enactment of FOIA of 2011, Nigeria had a plethora of laws shielding civil servants from releasing vital government information on grounds of public interest. These laws also prevented anyone from receiving and reproducing such information, this has of course created a very fertile ground for deep entrenchment of corruption in Nigerian system and has also resulted in unlawful detention and killing of journalists and individuals who violated the law. Little wonder therefore that the passage of FOIA by Nigeria government in 2011 was heralded as another milestone in the country's determination for full democratization. The paper inter-alia examines the historical development and scope of Nigerian Freedom of Information Act 2011; the basis and rationale for the enactment of the Act by the Nigerian government, it also dissects the short comings of the Act and the challenges it has contended with after four years of its implementation. It proffers recommendations on how the Act can fully strengthen the Nigerian democratic process.

Key Words: Freedom of Information; Act, Democracy, Nigeria, Freedom of Expression, Journalists

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1 Introduction

In 2011, the Nigerian government signed the revolutionary Freedom of Information bill into Act. By virtue of this, Nigeria became the ninth country in Africa and among over 90 countries in the globe to enact this Law (Dunu, et al 2014). Freedom of information, especially as it pertains to access to information held by public authorities is a fundamental element of the right to freedom of expression and very vital to the proper functioning of a democracy as it curbs executive, judicial and legislative recklessness. This Act under discourse makes provision for disclosure of information held by public authorities or by person providing service for them (Robert, 2000). The passage of this all important Act was heralded by all and sundry in Nigeria, because it not only reduced the risk of obtaining and releasing information held by government and public institution, the Act equally affords the citizen the opportunity to participate in governance and with this legislation in force the era of official secrecy backed by law has been effectively and decisively dethroned and transparency and accountability enthroned. Stephen Harper, Canadian opposition leader has rightly observed in 2005:

Information is the life blood of a democracy without access to key information about government policies and programs citizens and parliamentarians cannot make an informed decision and incompetent or corrupt government can be hidden under a cloak of secrecy.

The above observation made by Harper, is apparently more pertinent to under- developed countries like Nigeria, where corruption and official secrecy is the order of the day. The Act therefore no doubt is an indispensable tool in the hands of the media; human right activists and the civil society to fight corruption and ensure that public institution in Nigeria adopt a governance process that is not only accountable and transparent but also responsive to Nigerians. This paper therefore as the title depicts aims at discussing the rationale for the enactment and implementation of the Act. The paper also dissects some of the legal decisions or pronouncement on this landmark Act. Finally, the paper highlights some drawbacks, challenge or clogs in the wheels of the Act, which has succeeded in creating a wide yearning implementation gaps. Recommendations shall be proffered on how best Nigerians can harvest the full benefits of this historic legislation

2 The Emergence of Nigerian Freedom of Information Act.

The modern concept of Freedom of Information Act (FOI) is traceable to the United Nation Universal Declaration of Human Right (UNDHR) (Udofa, 2011). Article 19 Of the 1948 Declaration 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 media regardless of frontiers.

Nigeria, prior to 2011, enshrined, the right to freedom of speech in section 39 of her Constitution. However, there was a spectrum of Law in place in Nigeria which hindered the media and public from having access to records of the government and vital information that were classified as official and thereby privileged. These Laws in question criminalized the act of civil servants divulging official facts and figures to the Public or Journalist. They were apparently relics we inherited from our colonial masters. Ironically, the laws in question have since been over-hauled in Britain but for a long time Nigeria kept on clinging unto these obsolete laws. For example, the Nigerian Official Secret Act which has been amended expressly by Section 27 Fol Act, made it an offence for a civil servant to give out government information, furthermore section 190 and section 191 of Evidence Act made certain communications as regards state affairs to be privileged. Section 190, provides for instance that before the production of records pertaining to the affairs of the state, the directions of the President or that of the State governor as the case may be must be sought. Section 191, equally provides that a public officers cannot be compelled to disclose communication made to him in official confidence if he consider that doing so will jeopardize public interest. However, the Evidence Act happily provides a proviso to the effect that the head of the Ministry, Department or Agency may be ordered by the court to provide the document to the judge alone in chambers. Furthermore, both the Nigerian Criminal and Penal Codes, also made it a crime for a person to divulge public information without proper authority (The lawyer's Chronicle)

It was against this backdrop of the prevalence of draconian laws that hindered the rights of the public to access government information that the Fol Act 2011, came into existence. The idea of Freedom of Information Act, was conceived sometime in 1993 by three different organisation independently; the Media Right Agenda (MRA), Civil Liberties Organisation (CLO) and the

Nigerian Union of Journalist (NUJ), they agreed to work together on a campaign for the enactment of a Freedom of Information Act. The main objective of the campaign was to lay down as a legal principle the right to access documents and information in the custody of the government or its officials and agents as a necessary corollary to the guarantee of freedom of expression. It also was aimed at creating mechanisms for the effective exercise of this right (Ali Yusuf, 2014) .Following extensive research, Media Right Agenda Legal Directorate headed by Mr. Tunde Fagbohunmi of the Law firm of Aluko and Oyebode produced a draft bill in 1994 entitled “Draft Access to Public Records and Official Information Act” this eventually translated into Freedom of Information Act after going through a lot of modifications.

After 5 years journey through legislative process, the Freedom of Information Act was passed into law on 28th May 2011. The Act, established a “Right to know” legal process, which allows request to be made for government held information, which could be received at the payment of standard charges for document duplications and transcription where necessary. On the passage of the bill, it created the record of being the oldest and most controversial standing Bill that had ever come before the Nigerian National Assembly. It would be recalled that the bill would have been passed in November 2006, but the then Nigerian President, Obasanjo refused to give his assent, on the ground that it constituted security threat and he also quarreled with the title of the Bill. It was not until 2011, that President Goodluck Jonathan gave his assent. It is quite glaring that Nigeria had prior to 2011, regarded Fol Act as a luxury only practicable in Western world and other established democracies.

3 Salient Innovations of Nigerian Fol Act 2011

With the emergence of the Fol Act 2011, the era of official secrecy backed up by Law was effectively jettisoned. The Fol Act inter-alia succeeded in amending sections of the Secret Act 1911, which impedes the right of any person to access information which is in the custody or possession of any public official, agency or public institution. By virtue of section 1(2) of the Fol Act, an applicant need not demonstrate any specific interest in the information being applied for. Again, the Act ensures access to public information to all irrespective of age, race, status or gender. Also the reason for wanting that information was made irrelevant. Another important feature of the Fol Act is the criminalization by the Act of destruction of records under section 10. The Act in section 2(4) equally mandates public institutions to proactively disclose information within its custody. The Act also protects “whistle blowers” in public service who release in good faith any information pursuant to Fol Act, especially where there is failure of public duty, abuse of power or mismanagement of public resources or corruption. The Fol Act provides in section 13 for the government or public institution to provide appropriate training for its officials on the public’s right to access information or records held by government for the effective implementation of the Act. The Act creates reporting obligations in compliance with the Law for all institutions affected by it. Reports are to be made annually to the Federal Attorney – General office, which will in turn make them available to both the National Assembly and the Public. The Act, furthermore, in section 29(5) requires the Federal Attorney- General to oversee the effective implementation of this duty to the Parliament annually. (Afolayan, 2012).

Another salient innovation of the Fol Act is the recognition of a range of legitimate exemptions and limitation to the public right to know. Under Sections 11(1), 12(1) and 16 Fol Act, some

information may be withheld in order to protect certain interests which are allowed by the Act. If this is the case, the public authority must explain why the information is withheld or provide the information within 7 working days. Section 28, equally prohibits the initiation of civil or criminal proceedings against any person receiving the information or further disclosing it.

Finally non- denial of right to access information is now actionable, any applicant under section 20 of the FoI Act who has been denied access to information or a part thereafter may apply to the court for a review of the matter within 30days after the public institution denies or is deemed to have denied the application.

4 An Overview and Legal Analysis of Judicial Decision on Fol Act after 4 years of Implementation

At this juncture, it is pertinent that the paper takes a look at how our courts have tried to enforce the strict implementation of this Act after four years of its enactment in 2011. The Federal High Court in Lagos had the first opportunity to interpret and apply Fol Act in the case of Boniface Okezie v Central Bank of Nigeria, the facts of the case were that in 2012, the Progressive Shareholders Association of Nigeria represented by Boniface Okezie wrote to the Central Bank requesting information relating to the recovery of Oceanic Bank Plc assets. The CBN refused to disclose the information requested by the Association. A suit was instituted under Fol Act by the association requesting the court to compel the bank to publish its handling of approximately N191 billion worth of assets forfeited by Ibru. In a landmark ruling the court held that the CBN, as a public institution has a duty under the Act to provide details of such information and that the bank's refusal to disclose the information on request by the association was unlawful. Justice Mohammed Idris therefore, ordered the bank to comply with the association's request by

releasing the information sought. The judge observed: “The Act is intended to promote transparency and prevent corruption therefore all public institution must ensure that they comply with the Fol Act in the interest of transparency justice and development”. The court however declined to compel the bank to disclose the information relating to fees and commissions paid to the Law firms representing the bank as such client / legal Practitioner’s information is privileged under the Evidence Act.

In 2014, in an unreported suit, filed by Legal Defence and Assistance Project, some States of the Federation (Lagos, Imo, Rivers, Akwa Ibom and Delta). The application to the court arose as result of the States refusal to disclose information to the plaintiffs bordering on the amount raised and received by the respective States from the Nigerian capital market through public offers or private placements between 2007 and 2011. The applicant’s prayer essentially was for the court to compel the aforesaid States (defendant) to provide the requested information pursuant to section 2 of the Fol Act 2011.

The Federal High Court in Lagos presided over by Justice Okon Abang in a very disturbing judgment stated that the Fol Act 2011 was not binding on the 36 states of the Federation. Given the importance of the Act under discourse it is quite upsetting that the court should pass such a retrogressive verdict. The importance of this Act can never be over-emphasized; it guarantees the freedom of Nigerians to obtain information from the government and it’s agencies it also checkmates the cankerworm called corruption in governance, therefore any clog at all in enforcing the Act nationwide would be definitely counter- productive and would negate the whole essence of the Act. Happily, the Enugu State Federal High court in a case filed by liberties

organization (CLO) against Enugu state Health Commission held that states are bound to obey the Fol Act.

Despite, this positive legal development the fact still remains that this area of the Law is still in a state of confusion, and unsettled as the two conflicting decisions were delivered by courts of coordinate jurisdiction. It is time the Nigerian Court of Appeal came up with an overriding decision in order to put to rest this issue of non-applicability of the Fol Act to all the federating States of Nigeria

5. Challenges Hindering the Full Implementation of Fol Act 2011

While it is conceded that the journey so far is quite encouraging, there are still many hurdles that need to be surmounted; many yearning enforcement gaps that need to be filled. In a nutshell there are still numerous challenges hindering the full harvest of the benefits of this innovative Act. The challenges or draw backs are hereunder discussed.

(a) Non-domestication of Fol Act by the Federating States of Nigeria

From our foregoing discourse, it is evident that unless the Federal Court of Appeal comes up with a definite decision on the enforceability of Fol in all the 36 states of Nigeria, the rationale behind the enactment of the Act would have been defeated. According to (Shosanya, 2015), stakeholders are worried about the conflicting judicial ruling dished out by our Federal High Courts. These divergent interpretations according to him would not only have a dysfunctional effect on the Act, but would also succeed in shutting citizens out of what is happening in government circles. As at 2014, only three states in

Nigeria, namely; Lagos, Ekiti and Delta had adopted FOI Act. This is certainly not encouraging.

(b) Exemption of certain Information from Public Disclosure

It has been observed in some quarters and rightly too, that the content of the Bill was watered down before President Goodluck Jonathan agreed to give his assent. For instance, it has been argued that section 28 of the Act, now gives Public Officers the discretion to classify certain information as not being covered by the Act and therefore not to be disclosed. Furthermore, it is equally argued that sections 11 to 17 of the Fol Act contain exemptions which ought to be covered by the Act (Ladan, 2012). It would be recalled that the rationale for establishing the Fol was to unveil the secrecy with which the public servants conceal the ordinary operations of the government and public institution. It is therefore submitted that such exemptions defeat the spirit behind the enactment of the Act.

(c) Increased Violent Attack of Journalists

While applauding the passage of the Fol Act, it has been observed that the publication of such hitherto hidden information has led to increased incidences of extra judicial killing, harassment and other forms of human rights violation on members of the public, especially the journalists who have been previously given under access to government information. For example since 2011, This Day newspaper and a Media organization in Nigeria have suffered bomb attacks at Abuja and Kaduna respectively, occasioning human and material losses. There is therefore an urgent need for the Nigeria government to beef up the state of security in the country, in order to create a violence free

environment that will facilitate or encourage reportage of information received without fear of any form of molestation or harassment.

(d) Unwillingness of Public Officials to divulge Government Information.

Outright, unsubstantiated refusal or inordinate delay by government officials to disclose information has been observed in some government institutions. Most officials will always reply “no comment” or switch off their phones thereby circumventing the full implementation of the Act. Besides, government workers that have tried to be compliant with the provision of the Act, have faced severe sanction from their superiors. Furthermore, out- right denial of access to government information has invariably led to expensive and protracted litigation.

(e) Lack of Awareness of the Import of the Act by a Majority of the Public.

Many Nigeria are unaware of the existence of Fol Act as a result of lack of awareness raising programmes to enlighten the Public on the import of the Act. The Act should be widely published and circulated, in order to facilitate easy access by the public through street book vendors

(f) Non- compliance with Proactive Disclosure of Information by Public Institutions.

Besides the statutory requirement of expeditious response of Public institutions to the demand by the Public to access information in their custody, section 2 (3) of the Act also compels Public institutions to proactively publish extensive information about their operations and structure, however, the truth of the matter is that most public institutions in Nigeria have not fully complied with this provision. The need for proactive disclosure is very crucial under this new dispensation. Where public institutions comply with this requirement of proactive disclosure, they are more likely to experience drastic reduction in the volume of

requests for information that ordinarily would have come to them for disclosure. Udofa, opines that such proactive disclosures will boost the confidence and trust of citizens in the government and governance.

(g) Poor Record keeping by Public Institution.

It is quite disheartening that despite the present computer age, most public institutions have failed to computerize their records. Their records are still only paper based. This invariably makes it practically impossible for them to comply with the mandatory 7 days statutory period of releasing information to an applicant. Most of these institutions also lack proper cataloguing and archiving.

(h) Low Compliance with Yearly Mandatory Reporting Obligations by Public Institutions.

Section 29(3) of the FoI Act, makes provision for yearly reporting to the Attorney-General by the Public institutions of compliance with the provisions of FoI Act. This is expected to serve as a way of checkmating compliance with the provisions of the Act. A request, however, made by Right to know (R2K) between April and June 2012, 18 months after the Implementation of the Act revealed that only 23 Ministries submitted annual compliance report to the Attorney - General and only 11 out of the 23 ministries have designated staff to handle FoI requests. This lackadaisical attitude of our government officials has been roundly criticized by (Udofa, 2012) as not acceptable. Udofa further stressed that public institutions ought to view more seriously their obligations under the FoI Act in order to ensure the realization of the intendment of the Act, which is open democracy and governance.

(i) Protracted and Expensive Cost of Litigation

Non-disclosure of public information on requests invariably leads to protracted and expensive litigation thereby defeating the intendment of the Act. Udofa, has opined:

That the dragging of requests for information through the long application process from the High court all the way to Supreme Court has a potentially negative effect on the utility of the information requested.

Therefore proactive disclosure or voluntary disclose is the better option that will facilitate the growth and smooth implementation of this Act.

(6) Recommendations and Conclusion

From the foregoing discourse it is quite glaring that access to information is very fundamental to the health and development of democracy, it not only ensures that the citizens make responsible, informed choices, it equally ensures the elected representative or government officials carry out the wishes of the citizens. For journalist it is a veritable indispensable tool, as the era of speculative reportage is gone. The Fol Act has given journalist access to the information they want, subject to few exemptions. As observed earlier however, in the course of implementation of this Act, after four years of its enactment, it has been observed that many constraints or obstacles have been encountered. It is highly imperative that these challenges are dealt with decisively in order to achieve the lofty ideals of the Fol Act. To this extent the paper proffers the following recommendations that will ensure that Nigerians reap the full benefits of the Act:

1. Public institutions should proactively disclose all classes of information mandated by Fol Act.
2. Public institutions should create and update their web sites at very frequent intervals in order to reduce incessant and endless requests from the public.
3. Public institutions should ensure non- destruction of government record irrespective of the age of the document.
4. Public institutions should timeously comply with all the requirement of the Fol Act concerning submission of reports and compliance with annual compliance report.
5. The Attorney – General should ensure public institutions are on their toes concerning compliance with the provisions of the Act in order to avoid unnecessary litigation.
6. There should awareness raising programmes on the existence and import of the Act. The public should be enlightened.
7. The Court of Appeal should come up with specific pronouncements on the applicability of the Fol Act to every state in Nigeria.
8. The Nigerian government should beef up security in the country in order to stem the tide of violence that often follows the reportage of sensitive government information.
9. Public institutions should timeously disclose information requested by the public. In fact it is quite amazing and ironical that the National Assembly which passed the Fol Act has legally challenged the Federal High Court decision compelling it to respond to the requests for information about their salaries and emoluments. Public institution are advised to proactively and routinely comply with the provisions of Fol Act on proactive disclosure disclose in order to reduce the volume of requests that they will entertain.

10. All the records of Public Institutions should be computerized and updated at regular intervals. There should also be proper archiving and cataloguing in order to facilitate an easy and prompt disclosure.

(7) Conclusion

It is indisputable that, Fol Act is an important tool for an accountable and transparent governance and democratic process. In fact research undertaken by the World Wide Governance Indicators Projects at the World Bank has observed that freedom of speech and the process of accountability that follow it, has a significant impact on the quality of governance of the country (The lawyers chronicle) .The citizens of Nigeria have the right to know how their government officials and the people they elected are handling their affairs. Nigeria like many countries of the world have in 2011, enacted an Act to guarantee this right. What remains is the need for full implementation of the Act so that all and sundry, especially the media can bountifully harvest the benefits of the Act without fear or molestation from any quarters. It is hoped that the observed challenges would be effectively taken care if the recommendation proffered in this paper are fully implemented.

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