

The Freedom of Information Act: Creating a Template for Good Governance in Nigeria?

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Abstract: The paper examines Nigeria's Freedom of Information Act, 2011 on access to information in the context of the entrenched culture of secrecy in the conduct of government business, the resultant exclusion, lack of responsible government, endemic corruption, massive infrastructural gaps, grim poverty, underdevelopment and growing insecurity in the country. The paper analysed the freedom of information legislation, the high expectation that greeted the coming into effect of the norm setting law and its potentials in serving as a template for fostering inclusion, transparency and accountability in public service towards the enthronement of good governance in Nigeria. The paper concludes that the freedom of information law has potential to foster inclusion and good governance in Nigeria if properly utilised. The paper however recommends, among others, that if freedom of information is to be taken seriously in Nigeria, there is need for government to deploy massive resources towards the promotion and education on freedom of information law in order to encourage its effective use and bring about the desired positive changes in public service and governance; and that judicial officers should be trained on access to information rights and implementation of the Nigerian legislation in order to build their capacity to efficiently adjudicate on cases that may be brought before them.

Keywords: Access, Governance, Information, Transparency

Introduction

The conduct of government business and affairs in a transparent, accountable, participatory and responsible manner is the bedrock of good governance.¹ For this reason, many countries of the world have pieces of legislation on freedom of information.² In Nigeria, since the colonial era till date, the conduct of government business has been shrouded in secrecy,³ thereby breeding a culture of exclusion, lack of accountability, endemic corruption and impunity.⁴ This has in turn led to the absence of good governance with the attendant massive

¹ See Resolution 2000/64 para 1.

² See Media Rights Agenda, "Unlocking Nigeria's Closet of Secrecy: A Report on the Campaign for a Freedom of Information Act in Nigeria", (Lagos: Media Rights Agenda, 2000) p. v.

³ See Diso, L.I., "Insistence and resistance: the NGO's struggle for access to government information in Nigeria", paper presented at the International Seminar on the Strategic Management and Democratic Use of Government Information in Africa, held on Thursday, 30 March 2006 at the United Nations Conference Centre, Addis Ababa, Ethiopia, p. 12.

⁴ See Oyeboade, A., *Law and Nation-building in Nigeria: Selected Essays* (Lagos: Centre for Political and Administrative Research, 2005) p. 176; Adekoya, C.O., "The Renewed Battle against Money Laundering in Nigeria", *Malawi Law Journal*, 1(1) (2007) p. 82; Adekoya, C.O., "Structuring Money Laundering Control as Mechanism for Controlling Corruption in Nigeria: Need for Enhanced International Cooperation", *International Journal Liability and Scientific Enquiry*, 1(3) (2008) p. 275; Igbenedion, S.A., "Deconstructing the Edifice of Corruption in Nigeria", *Unib Law Journal*, 1(2) (2011) p. 175; Adekunle, A, *Proceeds of Crime in Nigeria: Getting Our 'Act' Right*, Nigerian Institute of Advanced Legal Studies, 2011 p. 6; Akinseye-George, Y., "Constitutional

infrastructural gaps, grim poverty, underdevelopment and growing insecurity in the country.⁵ The coming into effect of the Freedom of Information Act, (FoIA) 2011, which provides for any person to have access to information in the custody or possession of any public official, agency or institution,⁶ has been greeted with high expectations.⁷ But what are the potentials of this legislation?

In the light of the above, this paper seeks to assess the problem of lack of good governance in Nigeria and how the FoIA, as a norm setting legislation, can set the template for good governance towards the objective of fostering inclusion and accountability in governance in Nigeria.

This paper is divided into seven parts; with part one introducing the discourse. Part II examines the concept of good governance; Part III reviews the culture of secrecy in governance and public service; Part IV discusses background to the Freedom of Information Act; Part V evaluates the Freedom of Information Act; Part VI examines the Freedom of Information Act as a template for good governance in Nigeria; while Part VII captures the conclusion and recommendations.

Good governance

Governance has been described as the process whereby public institutions conduct public affairs, manage public resources and guarantee the realization of human rights, in a manner essentially free of abuse and corruption, and with due regard for the rule of law. The true test of "good" governance has been said to be the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights, and that the key question is: are the institutions of government effectively guaranteeing the right to health, adequate housing, sufficient food, quality education, justice and personal security.⁸ With transparent, responsible, accountable, participatory and responsive government at the national level, national institutions are able to respond more effectively to the will of the people.⁹

In other words, good governance is depicted by a conducive socio-political environment where the cardinal purpose of governance is the protection of human rights, observance of the rule of law and the running of public institutions on the basis of accountability and absence of corruption.¹⁰ It has been recognized that transparent, responsible, accountable and participatory government, which is responsive to the needs and aspirations of the people, is the foundation on which good governance rests.¹¹

The ACC Matrix of Governance set out policy measures in the area of democracy and participation, equity, environmental protection and management, human rights, the rule of law, public administration and service delivery, transparency and accountability, security, peace-building and conflict management, informed citizenry, and electronic governance (e-governance).¹² These have been used as the basis of a good governance benchmark in the world - under the World Bank's Worldwide Governance Indicators (WGI) project.¹³

Framework for Accountability in Nigeria", *Unib Law Journal*, 1(1) (2011) p. 70; Ayoade, M.A., "Evaluating the Legal Architecture on Corruption in Nigeria", *The Nigerian Journal of Contemporary Law*, 1 (2012) p. 40.

⁵ See Oyebo, *op. cit.* pp. 176, 182 and 184; Ayoade, M.A., *op. cit.* p. 43; Igbenedion, S.A., *op. cit.* p. 175; Adekoya, C.O., "Lifting Nigerians from Extreme Poverty: Grave Human Rights Challenge for Government", *Akunba Law Journal*, 1(3) (2009) p. 37 and Adekoya, C.O., "Navigating the Hurdle of Justiciability and Judicial Review of Socio-economic Rights in Nigeria", *Journal of Public Law*, 1(1) (2011) pp. 1-2.

⁶ See section 1 of the FoIA.

⁷ See Dunu, I., and Ugbo, G.O., "The Nigerian Journalists' Knowledge, Perception and use of the Freedom of Information (FoI) Law in Journalism Practices", 6(1) (2014) *Journal of Media and Communication Studies*, p. 2.

⁸ See OHCHR, *Human Rights in Development*, at <<http://www.unhchr.ch/development/governance-01.html>> last accessed 3 September 2007.

⁹ *Ibid.*

¹⁰ See the International Forum on the Eradication of Poverty, an inter-agency and multi-stakeholder event to mark the end of the First United Nations Decade for the Eradication of Poverty, Report of the Meeting, United Nations Headquarters, New York 15-16 November, 2006 p. iii.

¹¹ See Resolution 2000/64 para 1, available at: <http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2000-64.doc> last accessed 15 November, 2014.

¹² This was approved in 200 by the UN Consultative Committee on Programme and Operational Questions (CCPOQ) on behalf of the Administrative Committee on Coordination (ACC). See OHCHR, *Human Rights in Development*, at <<http://www.unhchr.ch/development/governance-01.html>> last accessed 3 September 2007.

¹³ See World Bank, WGI 2006: Worldwide Governance Indicators covering the period 1996-2005 at

In the World Bank 2006 World Governance Indicators, covering the years 1996-2005, with the six measurements of political stability/no violence, government effectiveness, regulatory quality, voice/accountability, rule of law and control of corruption, Nigeria performed abysmally low scoring between 0 and 10 percent, and position varying between 10th and 25th in four areas. It was only in two areas, regulatory quality and voice/accountability that Nigeria scored between 25 and 50 percent.¹⁴ The indicators mean that there is bad governance in Nigeria and the situation has remained substantially the same.¹⁵

Culture of Secrecy in Governance and Public Service

Since the colonial administration in Nigeria and till now, governance and activities in public service have been essentially characterized by a culture of secrecy, whereby there is lack of transparency, openness and accountability on the part of those running the business and affairs of government. In this type of closed system of governance, information about government activities is kept secret and shielded from the public. Consequently, the people cannot participate in government thereby leading to exclusion, inequality, discrimination and lack of accountability.¹⁶

The Official Secrets Act,¹⁷ which protects official information and criminalizes any unauthorized disclosure, nurtures this culture of secrecy which is over a century old in Nigeria.¹⁸ These secrecy laws are designed to provide a veil over the actions of government and immune officials of government from accountability.¹⁹ Officials of government therefore shield access to information because of the suspicion that such information may be used against them.²⁰ Thus, where there are allegations of fraud, abuse of power and human rights abuses, over-invoicing, etc, against officials of government, it will become impossible to establish them in the absence of credible information.²¹

For most of the 54 years of Nigeria's independence, the military had dominated governance, having ruled for about 30 years. The incursion of the military into governance further entrenched the culture of secrecy and closed governance. With the often claim of "national security", the military ran a totally unaccountable and corrupt regimes.²² In spite of the civil rule that has been in place in Nigeria since 1999, the culture of secrecy which has permeated the public and security services has assumed frightening dimensions.²³

The culture of secrecy has led to the absence of good governance with the attendant endemic corruption among top government officials, collapse of state apparatus, massive infrastructural gaps, grim poverty, increased cost of governance, inefficient public utilities, underdevelopment, growing insecurity,²⁴ exclusion, inequality, injustice, lack of accountability and political destabilization in the country.²⁵ Since 2012, for example, Nigeria has been consistently classified among the failed states in the world.²⁶

<http://info.worldbank.org/governance/kkz2005/sc_chart.asp> last accessed 20 March 2007.

¹⁴ *Ibid.*

¹⁵ See note 3 above.

¹⁶ See Media Rights Agenda, "Unlocking Nigeria's Closet of Secrecy: A Report on the Campaign for a Freedom of Information Act in Nigeria", (Lagos: Media Rights Agenda, 2000) p. 1; Diso, L.I., *op. cit.* p. 12.

¹⁷ See section 1 of the Official Secrets Act, Cap. 03, Laws of the Federation of Nigeria, 2004. The Act was first enacted in 1962 after independence.

¹⁸ See Official Secrets Ordinance No. 2 of 1891 and Official Secrets Acts 1911; Chidi Anselm Odinkalu, "On Freedom of Information, Corruption and Mediocrity", Premium Times 15 July, 2013. Available at <<http://www.premiumtimesng.com/tag/official-secrets-act>> last accessed 15 November, 2014.

¹⁹ See Media Rights Agenda, "Unlocking Nigeria's Closet of Secrecy: A Report on the Campaign for a Freedom of Information Act in Nigeria", (Lagos: Media Rights Agenda, 2000) p. 4.

²⁰ See Diso, L.I., *op. cit.* p. 2.

²¹ *Ibid.*

²² See Media Rights Agenda, *op. cit.* p. 1.

²³ See Diso, L.I., *op. cit.* p. 13.

²⁴ See Media Rights Agenda, *op. cit.* p. 16.

²⁵ See Diso, L.I., *op. cit.* p. 12; Oyeboode, Akin., *op. cit.* pp. 176, 177, 179, 181, 182, 184 and 191; Ayoade, M.A., *op. cit.* pp. 40, 44 and 54; Igbenedion, S.A., *op. cit.* p. 175; Akinseye-George, Yemi, Constitutional Framework for Accountability in Nigeria, *Unib Law Journal*, 1(1) (2011) pp. 70, 71, 73 and 74.

²⁶ In 2012, Nigeria occupied the 14th position on the 2012 Failed States Index, while in 2013 she ranked number 16th and in 2014 moved marginally to the 17th position out of 178 countries and topping the alert category. See the Fund For Peace, available at: <http://www.foreignpolicy.com/failed_states_index_2012_interactive>;

The above situation formed the basis of agitation for freedom of information right in order to engender participatory and good governance in Nigeria.

Background to the Freedom of Information Act

Struggles for the enactment of legislation on freedom of information dates back to 1993 when the Media Rights Agenda, the Civil Liberties Organisation and the Nigerian Union of Journalists spearheaded the campaign.²⁷ The desire to “have the right to be informed about administrative documents as a necessary corollary to the guarantee of freedom of expression and to prescribe rules for the exercise of this right”, informed the campaign for the freedom of information right, coupled with the culture of secrecy in governance, and the fact that legislations which permit access to official information are few.²⁸ In addition, it was also realized that advocacy and mobilization activities for the actualization of human rights and entronement of democracy in the country by non-governmental organizations (NGOs) and civil societies were seriously hampered by lack of information.²⁹ It was also thought that democracy could not be said to function effectively without the people having access to information in the custody of government.³⁰

Other reasons for the agitation for the freedom of information law include the need to complement the provision of section 36 of the Constitution of the Federal Republic of Nigeria, 1979 which guarantees the freedom of expression (now section 39 of the Constitution of the Federal Republic of Nigeria, 1999 (1999 Constitution))³¹ as well as the need to, through a regime of freedom of information, build an open, transparent and accountable government, that will surmount the challenge of corruption and underdevelopment.³² The first draft Access to Official Information Act,³³ was ready in 1994 and some workshops were held in 1995 which reviewed the first draft and another in 1999, among others, which produced a second draft.³⁴

Following the inauguration of the civilian regime under President Olusegun Obasanjo in 1999, agitation for the enactment of the legislation continued and the Bill was finally passed by the National Assembly,³⁵ but Obasanjo declined to sign the bill into law before the expiration of his second term in office in 2007.³⁶ The Bill was again presented to the National Assembly which passed it for the second time after which President Goodluck Jonathan signed the same into law in May 2011. It therefore took 18 years from the first draft of the legislation in 1994 to the eventual enactment of the law in 2011.³⁷ All parties involved in the draft Bill, passage and signing of the same into law deserve accolade for the time and resources committed into the process.

The first legislation on freedom of information could be traced to Sweden with a legislation which is over 200 years old.³⁸ Since then, many countries around the world have enacted one legislation or the other on freedom of information, which is either constitutionally protected or contained in a separate legislation, guaranteeing access to information.³⁹ Major international and regional instruments relating to freedom of information include the Universal Declaration of Human Rights, 1948,⁴⁰ International Covenant on Civil and Political Rights, 1966,⁴¹ African Charter

<<http://ffp.statesindex.org/rankings-2013-sortable>>; <<http://ffp.statesindex.org/rankings-2014>> last accessed 16 November, 2014.

²⁷ See Media Rights Agenda, *op. cit.* p. 6.

²⁸ *Ibid.*

²⁹ See Diso, L.I., *op. cit.* p. 2.

³⁰ *Ibid.*

³¹ Available at: <<http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>> last accessed 16 November, 2014.

³² See Diso, L.I., *op. cit.* p. 2.

³³ See Media Rights Agenda, *op. cit.* pp. 6 and 7.

³⁴ See Diso, L.I., *op. cit.* pp. 3 and 6; Media Rights Agenda, *op. cit.* pp. 9-10.

³⁵ See Diso, L.I., *op. cit.* p. 7.

³⁶ X, “Foi Bill: Vital Tool on the Legislative Shelf”, Thisday, 18 August, 2010. Available at:

<<http://www.thisdaylive.com/articles/foi-bill-vital-tool-on-the-legislative-shelf/80769/>> last 16 November, 2014.

³⁷ See Diso, L.I. *op. cit.* p. 11.

³⁸ Sweden’s legislation on freedom of information is over 200 years. See Media Rights Agenda, *op. cit.* p. v.

³⁹ See Media Rights Agenda, *op. cit.* p. v.

⁴⁰ See article 19 on right to freedom of opinion and expression. Available at:

<<http://www.un.org/en/documents/udhr/>> last accessed 16 November, 2014.

⁴¹ See article 19 on right to hold opinions and to freedom of expression. Available at:

<<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> last accessed 16 November, 2014.

on Human and Peoples' Rights, 1986,⁴² the Public's Right to Know: Principles on Freedom of Information Legislation,⁴³ the Declaration of Principles on Freedom of Expression in Africa, 2002,⁴⁴ and the Model Law on Access to Information for Africa, 2013.⁴⁵

The Freedom of Information Act, 2011

The Freedom of Information Act, (FoIA) 2011 is one of the sources of normative standards for public administration,⁴⁶ which inform peoples' expectations of public administration. This law is a corollary to section 39 (1) of the 1999 Constitution, which provides to the effect that, every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

Some of the provisions of the FoIA will be examined. Some of the striking provisions of the Act are that, apart from the significance of the FoIA in providing for the right of any person, irrespective of nationality, to access information, a legally enforceable one,⁴⁷ some other provisions of the Act are also of importance in dismantling the culture of secrecy in Nigeria.

Under section 1(2) of the FoIA, for instance, an applicant is not required to show any interest for the information being applied for. This provision has removed the burden of *locus standi* that would otherwise be discharged by the applicant.⁴⁸ An applicant also has the right to judicial remedy to compel any public institution to disclose the required information.⁴⁹ Section 2 places obligation on public institutions to publish information about their activities and to keep, ensure proper organization and maintenance of such information. In particular, subsection 3 specifies the list of information to be published.⁵⁰ Section 3(3) makes provision for illiterate or disabled applicants who are unable to make application for access to information. This they can do through third parties. Also, oral application

⁴² See article 9 on right to receive information, and right to express and disseminate opinions. Available at: <<http://www.achpr.org/instruments/achpr/>> last accessed 16 November, 2014.

⁴³ June, 1999. Annex II to Report E/CN.4/2000/63 of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain submitted in accordance with Commission resolution 1999/36. The Principles are based on international and regional law and standards, evolving State practice, and the general principles of law recognized by the community of nations. The set of principles that have been developed by the non-governmental organization Article 19 - the International Centre against Censorship.

⁴⁴ See Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia. This provision serves as a supplement to article 8 of the African Charter, which provides that 'every individual shall have the right to receive information'.

⁴⁵ Prepared by the African Commission on Human and Peoples' Rights, which sets the template for freedom of information legislation in Africa.

⁴⁶ Other sources are Fiscal Responsibility Act 2007, Public Procurement Act 2007, Nigerian Extractive Industries Transparency Initiative Act, 2007, etc.

⁴⁷ See section 1 of the FoIA.

⁴⁸ *Locus standi* deals with the right or competence of a person to institute proceedings in a court of law for redress or assertion of a right enforceable in law. This concept is predicated on the assumption that no court is obliged to provide for a claim in which the applicant has a remote, hypothetical or no interest. In fundamental enforcement cases, it is the person whose right has been, is being or is likely to be breached who can bring such an action to court in Nigeria. See *Adesanya v. President of Nigeria* [1981] 2 NCLR 358; *University of Ilorin v. Oluwadare*, [2003] 3 N.W.L.R. (Pt.806) p.557, see further, Ibidapo-Obe, Akin., "Enforcement of Rights and the Problem of Locus Standi in Nigeria", (2003) 2 *UNAD L.J.*, p. 120. The constitutional basis for the *locus standi* in Nigeria can be found in Section 6(6)(b) of the 1999 Constitution, in respect of which someone can only approach the court 'for the determination of any question as to the civil rights and obligations of that person', such that only the person whose right is threatened or infringed can apply to court for redress.

⁴⁹ See sections 1(3) and 2(6) of the FoIA.

⁵⁰ These includes, a description of the organization and responsibilities, classes of records under the control of the institution, manuals used by the employees in carrying out the organization's activities, documents relating to final opinions in adjudication of cases, documents containing substantive rules of the institution, list of files containing applications for contracts, permits, grants, licenses or agreements, reports, the title and address of the appropriate officer of the institution to whom an application for information under the Act shall be sent if such institution fails to publish the information required to be published.

can be made to any public institution and it is the duty of the authorized officer to reduce such application into writing.⁵¹

Section 4 provides for a period of seven days within which a public institution shall make information available to an applicant, and under section 5, an application can be transferred from one public institution to another which has greater interest in the information, while section 6 makes provision for extension of time for granting or refusing application in certain situations.

In cases of refusal for access, the public institution which refuses application for information is mandated to provide the grounds for the refusal and to also furnish the applicant with the same, and the applicant has a right to a judicial remedy.⁵² Where, however, a public institution fails to give access to information within the seven days specified by law, it shall be deemed that access has been refused,⁵³ and in cases where it is established that access was wrongfully denied, this amounts to an offence and the defaulting officer or institution shall be liable on conviction to a fine of N500,000.00 (approximately US\$ 1,250).⁵⁴

Section 8 provides for fees to be charged for duplication and transcription of information where applicable. The cost is to cover reproduction, transcription or translation, etc.⁵⁵ Fees are usually not payable for time spent in searching for information, for reproduction of information which is in the public interest, and where information was not furnished within the time specified by law.⁵⁶ Charges where applicable, should be reasonable and not such that will deter access to information.

Every government and public institution is obliged to keep and maintain records of its operations, personnel and activities, in a way that will facilitate proactive disclosure and easy retrieval.⁵⁷

An issue that the FoIA takes very serious, is with respect to willful destruction or/and falsification of records by an officer who is in possession of such records. These acts amount to crime and are punishable by a minimum of 1 year imprisonment without an option of fine.⁵⁸

The FoIA, as it is customary, provides for recognized heads of exemptions where access to information will be denied. It means that in such cases, the court will not compel disclosure of information.⁵⁹ It is to be noted that although an information may fall under the exemptions, an application for information/records shall not be denied where the public interest in disclosing the information outweighs the injury the disclosure would cause. The public interest test will be applied in appropriate cases to determine whether denial to access information is justified or not.⁶⁰

⁵¹ See section 3(4) of the FoIA.

⁵² See section 7(1)-(3) of the FoIA.

⁵³ See section 7(4) of the FoIA.

⁵⁴ See section 7(5) of the FoIA.

⁵⁵ See Diso, L.I., *op. cit.* p. 11.

⁵⁶ See Article 23, Model Law on Access to Information for Africa, 2013.

⁵⁷ See section 9 of the FoIA. This provision has been earlier provided in section 2(1) and (2) of the FoIA.

⁵⁸ See section 10 of the FoIA.

⁵⁹ The exemptions recognized by the Act are: information relating to international affairs and defence – s. 11; information relating to records of law enforcement and investigation – s. 12; section 12(2)) - public interest test; information relating to personal information – s. 14(1)(a)-(e), except the individual whom it relates consents to the disclosure or that the information is publicly available -14(2) (a) and (b); third party information relating to trade secret, etc, except the third party consent - s. 15(1); information relating to professional or privileges conferred by law - s. 16 (a)-(d); information containing course or research material – s. 17; where the information is exempted but any part of the information that does not contain exemption information is severable, it shall be disclosed – s. 18 and information relating to test questions, scoring keys and other examination data used to administer and academic examination or determine the qualifications of application for license or employment; architects and engineers' plans for public and private buildings where disclosure would compromise security; library circulation and other record identifying library users with specific materials – s. 19. Also exempted are published material or material available for purchase by the public; library or museum material made or acquired and preserved solely for public reference or exhibition purposes; material placed in the National Library, National Museum or non-public section of the National Archives on behalf of any person or organization other than a government or public institution - s. 26.

⁶⁰ See Chapters 3 and 4 of AGF Guidelines on the Implementation of the Freedom of Information Act, 2011 Revised Edition 2013 published under the Authority of the Honourable Attorney General of the Federation and Minister of Justice.

Under the exemptions, there is ambiguity in the provision of section 11 with respect to what constitutes conduct of international affairs and defence. This has now been remedied by AGF Guidelines on the Implementation of the Freedom of Information Act, 2011, Revised Edition 2013 (AGF Guidelines),⁶¹ by defining the terms “conduct of international affairs” and “defence of the country”. Where an information falls under international affairs and defence, and the interest to disclose is balanced with the injury to be caused, no disclosure will be made but where no harm can be established (and the disclosure is not engaged) the application must be granted.⁶² However, there are still some grey areas to be ironed out on this issue.⁶³

Going by the provisions of sections 1, 27 and 28 of the FoIA, the Act supersedes the provisions of the Official Secrets Act, section 97 of the Criminal Code and other laws incompatible with the provisions of the FoIA, save the Constitution. This means that such incompatible laws cannot clog the application of the provisions of the FoIA.

Matters arising from the Freedom of Information Act

A lot of matters have arisen since came into force in 2011, some of which would be examined below:

- *Compliance with provisions on freedom of information*

Since the coming into effect of the FoIA, efforts have been made on the part of government to get Ministries, Departments and Agencies (MDAs) of government to comply with its provisions.⁶⁴ A website has been created and managed by the Federal Ministry of Justice on the FoIA.⁶⁵ The Attorney-General of the Federation (AGF)’s Office, has also issued the Guidelines on the Implementation of the Freedom of Information Act (AGF Guidelines), including reporting requirements. The first was made in 2012 while the revised edition was issued in 2013.⁶⁶ Workshops have been organized by civil societies, some in collaboration with government, towards sensitization and creating awareness on the FoIA.⁶⁷

However, despite the fact that the provisions of the FoIA supersede that of any other law (as discussed above), public officers have been using the provisions of the Official Secrets Act to circumvent the implementation of the FoIA by refusing application on that basis.⁶⁸ It may be necessary to invoke provisions of the FoIA on wrongful refusal of information in order to send the right signals to such mischievous government officials.

In spite of the numerous duties imposed by the FoIA on public institutions on reporting, there is neither provision for sanctions on the part of public institutions that defaults nor any mechanism put in place to ensure compliance with the provisions of section 29 on reporting obligations. This may result in situations whereby public institutions take their reporting obligations that are geared towards proactive disclosure among others, with levity.

⁶¹ See Chapter 5 of the AGF Guidelines and note 58.

⁶² See sub-paragraph 5.1.3 of the AGF Guidelines.

⁶³ For instance, is a contract for and supply of weaponry for the military which has been the subject of inflated contract or leasing or purchase of presidential jet which has been subject of controversy over the actual amount of its purchase price qualify for defence or security exemption, despite not having anything to do with intelligence information or threat to security of the president? Is a blanket exemption then sufficient for any subject simply because defence of the country or the President or the presidency is involved? It is hoped that as issues on these areas get to court, their interpretation will form a pool of jurisprudence in this area.

⁶⁴ See Abdallah, N.M., “FG orders Ministries, Agencies to Implement FOI Law”, *Daily Trust*, 9 February, 2012 p. 4.

⁶⁵ Available at:

<<http://www.foia.justice.gov.ng/index.php?page=reports&content=highlights¶meter=applications>> last accessed 24/10/2014.

⁶⁶ See note 56.

⁶⁷ See Okachie, L., “Official Secret Act Hampers FOIA Implementation – CSOs”, *National Mirror*, 25 October, 2014. Available at: <<http://nationalmirroronline.net/new/official-secret-act-hampers-foia-implementation-csos/>> last accessed 16 November, 2014; X, “Labaran Maku, Others Seek Immediate Repeal of Official Secrets Act”, *Newsdiaryonline*, 13 December, 2012. Available at: <<http://newsdiaryonline.com/labaran-maku-others-seek-immediate-repeal-of-official-secrets-act/>> last accessed 16 November, 2014.

⁶⁸ See Okachie, L., “Official Secret Act Hampers FOIA Implementation – CSOs”, *National Mirror*, 25 October, 2014. Available at: <<http://nationalmirroronline.net/new/official-secret-act-hampers-foia-implementation-csos/>> last accessed 16 November, 2014; X, “Labaran Maku, Others Seek Immediate Repeal of Official Secrets Act”, *Newsdiaryonline*, 13 December, 2012. Available at: <<http://newsdiaryonline.com/labaran-maku-others-seek-immediate-repeal-of-official-secrets-act/>> last accessed 16 November, 2014.

Public institutions are required by FoIA to proactively disclose information by making report available to the public by various means, which include, but not limited to, computer, telecommunications, and electronic.⁶⁹ The use of online resources will be quite useful in this regard, as they will enable easy access to and retrieval of such information by the people in any part of the country. Public institutions would therefore have to build capacity in terms of both human and material resources in order to publish information by creating for instance websites, and posting such reports on them. Records have shown that many MDAs are still defaulting in complying with this requirement.⁷⁰

Another issue arising from the implementation of the FoIA, is the controversy on whether the Act is applicable to the States of the federation or that it is not applicable, and that the States need to enact their own legislation because matters relating to archives and public records are on the Concurrent Legislative List of the 1999 Constitution,⁷¹ which both the Federal and State Governments have competence to legislate on.⁷² Some States, like Lagos State have declared that the FoIA is not applicable to them,⁷³ and some have enacted their own legislation on the subject, starting with Ekiti State in 2011.⁷⁴

The controversy on the above issue is further compounded by two conflicting decisions of the High Courts on the issue.⁷⁵

The view that any Federal Law should be re-enacted by the States before it can be applicable to them seems not to have sure footing because Nigeria operates one Constitution and the States have no constitutions of their own. In addition, the National Assembly that passed the FoIA has representatives from all States of the Federation.

That the FoIA applies to all States is supported by the principle of federalism, under the doctrine of covering the field, to the effect that where the Federal Government has validly legislated on any matter, any legislation of the State on the same, will give way. It is not necessary that the State law conflicts with that of the Federal. The fact that the National Assembly has enacted a law on the subject is enough for such law to prevail over the law passed by any State House of Assembly.⁷⁶ Where there is inconsistency, the State law is void to the extent of its inconsistency.⁷⁷

⁶⁹ See sections 2(4) and 29(2) of the FoIA.

⁷⁰ As at 2013 only 65 public institutions have sent reports to the Attorney-General's Office. Freedom of Information Act Website managed by the Federal Ministry of Justice. Available at: <<http://www.foia.justice.gov.ng/index.php?page=reports&content=highlights¶meter=applications>> last accessed 24/10/2014.

⁷¹ Some are of the view that FoIA applies to Federal Government and its agencies alone why some hold contrary views. See Baiyewu, L., and Aworinde T., *Lawyers Disagree over Freedom of Information Act*, Punch 16 February, 2014. Available at: <<http://www.punchng.com/news/lawyers-disagree-over-freedom-of-information-act/>> last accessed 16 November, 2014.

⁷² See Second Schedule, Part II to the 1999 Constitution on Concurrent Legislative List.

⁷³ See Baiyewu, L., and Aworinde T., *op. cit.*

⁷⁴ See Ekiti State Freedom of Information Law, No. 10 of 2011, signed into law on 4th July, 2011. This is currently being amended.

⁷⁵ While a High Court, sitting in Ibadan decided that FoIA applies to both the Federal Government agencies and the 36 States of the country, a Federal High Court sitting in Lagos has decided to the contrary. See X, "FoI Act Still Steeped in Controversy", Thisday Live, 4 November, 2014. Available at: <<http://www.thisdaylive.com/articles/foi-act-still-steeped-in-controversy/193193/>> last accessed 16 November, 2014; See Ugwuanyi, S., "Court Rules FoI Act as not Binding on States", Daily Post, 1 November, 2014. Available at: <<http://dailypost.ng/2014/11/01/court-rules-foi-act-binding-states/>> last accessed 16 November, 2014.

⁷⁶ See section 4(5) of the 1999 Constitution which provides that "If any Law enacted by the House of Assembly 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."; See Odinkalu, C.A., "10 Myths about the FoI Act, 2011" in R2k, *Understanding the Freedom of Information Act (FOIA)*, 2011, 6, at p. 10 (2011).

⁷⁷ See *A-G. Federation v. A-G. of the States* (2002) 5 M.J.S.C. p. 1; Adekoya, C.O., "Sharia: A Violation of Sections 10 and 38 of the 1999 Constitution?", in Nwanzuoke, A.N. (ed.), *Essays in Human Rights Law*, (Abakaliki: Department of Commercial and Industrial Law, Ebonyi State University, 2004) p. 136.

That the FoIA is applicable to the States is further reinforced by the decision in *Attorney-General of Ondo State v. Attorney-General of the Federation & 35 Ors*⁷⁸ where powers of the National Assembly to make laws for the peace, order and good government of Nigeria was upheld.

It appears that the dust generated by this issue may not fully settle until the Supreme Court makes a final pronouncement on the matter.

- *Oversight functions over implementation of the FoIA*

The Office of the AGF has responsibility for oversight function on the implementation of the FoIA,⁷⁹ but in view of the enormous duties imposed on that office by the Constitution,⁸⁰ it would be desirable to establish an independent and impartial oversight mechanism/body that will be charged with the promotion, protection of the right of access to information, compliance and the implementation of the FoIA.

An oversight body⁸¹ can better and effectively carry out oversight functions which the already overburdened Office of the AGF is saddled with. In that way, the implementation of the FoIA can be given the seriousness it deserves.

- *Redress mechanism*

The redress mechanism provided by the FoIA in cases of denial of access to information is only judicial,⁸² and a public institution has the responsibility to discharge the burden of proof that it is authorized to deny the required information and that such refusal is justified by the FoIA.⁸³ It is gladdening to note that some provisions of the FoIA have been tested successfully in courts. These include:

- i.) *Public & Private Development Centre Ltd/Gt (PPDC) v. Power Holding Company of Nigeria (PHCN) Plc & Ano.*,⁸⁴ where the applicant invoked the provisions of the FoIA to compel the 1st Respondent (i.e. PHCN) by an order of mandamus to supply certain documents/information relating to procurement contracts.
- ii.) *Uzoegwu F.O.C. Esq v. Central Bank of Nigeria & Ano.*,⁸⁵ where the applicant (a lawyer) successfully invoked provisions of the FoIA to compel the 1st Respondent (Central Bank of Nigeria) to disclose the amount payable to the Governor, Deputy Governor and Directors of the Central Bank as monthly salary.
- iii.) *Legal Defence & Assistance Project (Gte) Ltd v. Clerk of the National Assembly*,⁸⁶ where a Federal High Court, sitting in Abuja, decided that salaries of members of parliament are not personal information and should be disclosed.⁸⁷

⁷⁸ (2002) NWLR (Part 772) p. 222.

⁷⁹ Section 29(1) of the Freedom of Information Act currently requires that the Office of the Attorney General of Federation is to receive reports from public institutions.

⁸⁰ See section 211 of the 1999 Constitution.

⁸¹ The body must be established by law, and the law establishing it shall specifically deal with issues such as, establishment of the body; independence, structure and operations; powers and duties; promotion; monitoring; applications to the body; procedure; orders, decisions and directives. See Model Law on Access to Information for Africa, prepared by the African Commission on Human and Peoples' Rights, 2013. The body will also be responsible for the development of reporting and performance guidelines in respect of reports required by section 29 of the FoIA, including the power to issue orders compelling public and relevant private institutions to provide further information and to impose penalties for failure to comply with reporting guidelines. See sections 64 and 67 of the Model Law on Access to Information for Africa.

⁸² That is, at the High Court of a State, Federal or of the Federal Capital Territory, Abuja., section 31 of the FoIA.

⁸³ See section 24 of the FoIA.

⁸⁴ Unreported, Suit No. FHC/ABJ/CS/582/2012 delivered on 1st March, 2013 by Hon. Justice A.F.A Ademola of the Federal High Court of Nigeria, Abuja Judicial Division.

⁸⁵ Unreported Suit No. FHC/ABJ/CS/1016/2011 delivered on 5th July, 2012 by Hon. Justice Balkisu Bello Aliyu of the Federal High Court of Nigeria, Abuja Judicial Division.

⁸⁶ Unreported, Suit No. FHC/ABJ/CS/805/2011), the Federal High Court, Abuja, per Balkisu Bello Aliyu, J., 25 June 2012.

⁸⁷ Available at: <<http://www.right2info.org/cases/r2i-legal-defence-assistance-project-gte-ltd.-v.-clerk-of-the-national-assembly-of-nigeria>> last accessed 16 November, 2014.

Although, jurisprudence on the FoIA is still patchy but steadily growing, it is believed that in the years ahead, pattern of decisions would have concretized and to a larger extent, become predictable.

Section 21 of the FoIA provides for speedy trial of cases of denials and most of the cases decided so far, evidenced by the suit number of the case and the date of delivery of judgment, have been fast enough, lasting a few months, which is quite commendable and should be sustained.

However, as noted earlier, the FoIA only provides for judicial review in cases of refusal of access to information but the use of the word “may”⁸⁸ as opposed to “shall”, used in the Act, may be interpreted as indicating that it is not mandatory that an applicant must seek redress in court. By implication, it means that such applicant may seek alternative redress through the administrative complaints procedure of bodies such as, the National Human Rights Commission,⁸⁹ Public Complaints Commission, the legislature (which may exercise oversight functions),⁹⁰ the Public Service Commission,⁹¹ in addition to the utilization of the internal review mechanism of the public institution which refused access to information.

Mindful of the high costs of accessing the Court, which might make approaching the court for a redress difficult for those who may not be able to afford it, the AGF Guidelines has provided for the use of internal review mechanism,⁹² through which an applicant can have the refusal decision reviewed by a more senior staff of the public institution. However, no time is fixed within which the decision by the internal review mechanism must be taken, which may render such procedure ineffective.⁹³ Fixing a time line for this may be helpful.

Despite the laudable provisions of the AGF Guidelines on internal review mechanism, the concern is that the AGF Guidelines are merely directional, geared towards guiding public institutions on the implementation of the FoIA and as such, may have no legal effect. The AGF Guidelines also contains no penal provisions for non-compliance and this can render its provisions unappealing or ineffective.

In terms of redress, the FoIA is deficient by not making provisions for three layers of redress mechanisms - within the public authority, the appeal to an independent administrative body and appeal to the courts.⁹⁴ It is also important that these layers are effective and efficient in providing applicants who are denied access to information with redress. This deficiency may be remedied by an amendment to the FoIA.

- *Information administration and maintenance*

Public institutions have obligations to report obligations under the FoIA⁹⁵ and as well as that of keeping, organizing and maintaining information about their activities.⁹⁶ There is however no provision in the FoIA for a “more structured and better organized system” of records in view of the disordered manner of public records in the country, and in spite of the fact that records are the bedrock of the right of access to information.⁹⁷ The FoIA also failed to provide for the roles of information professionals such as archivists, librarians, information and records managers, etc., in ascertaining state of public records in Nigeria and the processing of information management system, in a way “to evolve more efficient approach to generating, organizing, searching and retrieving, preserving, and disseminating such records.”⁹⁸ This situation calls for urgent attention.

⁸⁸ See section 20 of the FoIA, which provides that “any applicant who has been denied access to information or a part thereof may apply to the Court...”

⁸⁹ See section 6 (2) (a-e) of the National Human Rights Commission (Amendment) Act, 2010; Adekoya, C.O., “National Institutions’ Mandate of Human Rights Protection: How Effective is the National Human Rights Commission in Protecting Rights in Nigeria?”, *Mediterranean Journal of Human Rights*, 17 (2013) p. 70.

⁹⁰ Section 29(4) of the FoIA.

⁹¹ See sections 170 and 207 of the Constitution of the Federal Republic of Nigeria, 1999 and Parts I and II, Third Schedule to the Constitution.

⁹² See Chapter 2, para 2.3 of AGF Guidelines on the Implementation of the Freedom of Information Act.

⁹³ See section 42 of the Model Law on Access to Information for Africa for guidance which specified 15 days within which to make decision on the internal review.

⁹⁴ See principle 5 of the Public’s Right to Know: Principles on Freedom of Information Legislation.

⁹⁵ See section 29(2) of the FoIA.

⁹⁶ See section 2 of the FoIA.

⁹⁷ See Diso, L.I., *op. cit.* p. 11.

⁹⁸ See Diso, L.I., *op. cit.* p. 15.

- *Promoting awareness and education about the FoIA*

If people are going to enforce a set of rights, the fact cannot be overemphasized that they must first be aware of the existence of such rights and also be well informed about them.⁹⁹ This is coupled with the not too high level of adult literacy in Nigeria.¹⁰⁰ There is therefore the need to embark on aggressive promotion and education about the FoIA in Nigeria so that the people can be aware of the rights created by the Act and the mechanism for enforcing them. The vulnerable and the disadvantaged groups of the society must be targeted in this regard.

Information materials on the FoIA must be made available to the people, promotional events such as outreaches, collaboration with the media, etc., must be organized on a regularly basis. There should be education and training programmes for public officials, especially those that are or will be designated as FoI officers, community leaders, professionals that are instrumental to the implementation of the FoIA such as judicial officials, archivists, librarians, records and information managers, in order to build capacity towards effective implementation of the provisions of the Act. People at the grassroots should not be left out.

There has been an international consensus on the essential role that human rights education plays in the promotion and realization of human rights.¹⁰¹ Right to freedom of information should therefore be included in the curricular of primary, secondary and tertiary schools in order to raise a new generation of Nigerians who are FoI conscious.¹⁰²

The Network of University Legal Aid Institutions (NULAI, Nigeria) and Open Society Foundations funded an FoI outreach project, involving 9 pilot University-based Law Clinics which carried out outreaches to educate members of the local communities on the value and utility of the FoIA, and its importance to community development. The project has the objective of promoting and educating on the FoIA towards having an informed citizenry who can in turn influence community development with the effective use of FoIA, and thereby impart transparency and accountability at the local level.¹⁰³

Under the project, students first paid advocacy visits to the target communities, arranged dates and venues of outreaches, prepared for mobilization of community members. Thereafter, the outreaches were carried out. Each law clinic that participated in the project was expected to contact at least 800 participants, take at least 5 FoI requests and process them on behalf of the requesters, under the project. The efforts of the project sponsors are commendable.¹⁰⁴

In a country where the culture of secrecy in governance is more than a century old, the tempo of promotion and education on FoIA is unarguably low and this should be scaled up.

The Freedom of Information Act as Template for Good Governance

It is generally believed that there is public interest in giving people a right of access to information held by the public authorities and in increasing the transparency of governmental decision-making.¹⁰⁵ Exclusion and the conduct

⁹⁹ See Adekoya, C.O., "National Institutions' Task of Promoting Human Rights: An Assessment of the Nigerian Situation", *Unimaid Journal of Public Law*, 3(1)(2014) p. 119.

¹⁰⁰ This was put at 57% in 2010. See National Bureau of Statistic, National Literacy Survey, 2010 p. 14.

¹⁰¹ See Draft plan of action for the second phase (2010-2014) of the World Programme for Human Rights Education, UN GA A/HRC/15/28 of July, 2010, para 1.; Adekoya, C.O., "The World Programme for Human Rights Education and Nigeria's Obligation Towards its Implementation", *The Justice Journal* 5(2013) p. 214.

¹⁰² See Adekoya, C.O., "The World Programme for Human Rights Education and Nigeria's Obligation Towards its Implementation", *op. cit.* pp. 214-220.

¹⁰³ The project has ended in October, 2014. The author, is the Coordinator of Olabisi Onabanjo Law Clinic, one of the law clinics that participated in the project. See Mahmud Yusuf, Report of NULAI Freedom of Information Teacher Training Workshop for Clinical Law Teachers, held at Best Western Plus-Ajuji Hotel, Gudu District, Abuja on 23- 24 May, 2013, p. 11.

¹⁰⁴ See Lagi, Odi., "Proposal for Mainstreaming the Utilization of the new Freedom of Information Act, 2011 by Nigerian University-based Law Clinics", Network of University Legal Aid Institutions (NULAI, Nigeria) 2014. (Copy on file with author).

¹⁰⁵ See Coppel, P., *Information Rights*, (London: Sweet and Maxwell, 2004) p. v.

of affairs of the government in secrecy¹⁰⁶ breeds corruption. Lack of information creates a divide, distrust and suspicion between government and the general public,¹⁰⁷ and rumour peddling becomes the pastime of the public. Access to information will enable the people, especially the poor to demand accountability from all actors.¹⁰⁸ Lack of accountability on the part of government officials in Nigeria can explain the absence of good governance, rising level of poverty in the face of economic growth, and “increasing deterioration of all infrastructure in the face of increased revenue from crude oil.”¹⁰⁹

In the UN Secretary-General, Kofi Annan’s report to the UN General Assembly in September 2003,¹¹⁰ on the implementation of the United Nations Millennium Declaration, he emphasized good governance and democracy as key for effective realization of human rights and in meeting the millennium goals. It is believed for instance that good governance will keep a check on corruption and abuse of office through accountability.¹¹¹

With the FoIA granting enforceable rights, people can access government information and public documents. This will in turn create a template for good governance in Nigeria. Thus, if good governance¹¹² is firmly enthroned, with the observance of human rights, rule of law, democracy and participation, as well as accountability, it will create inclusion, empower the masses in the country and significantly reduce poverty.

There are lots of things that could be achieved with the FoIA as a tool. For example, budgetary allocations and bids for contracts can be monitored, to see whether allocations were appropriately spent and whether contracts followed due process. Service delivery and policies on the part of government can be measured, equitable distribution of resources across Nigeria, etc, can also be monitored with the FoIA.¹¹³

If access to information on the conduct of government will enhance citizens’ participation in governance, engender accountability, as well as inclusion and empower the people, it follows that the FoIA has potentials to set the agenda for inclusion and good governance in Nigeria. The FoIA will equally promote investigative journalism in Nigeria whereby this legislation can be used as a weapon to dig up facts and fight corruption.¹¹⁴ The efficient use of this legislation should be vigorously pursued by all.

Conclusion and Recommendations

As discussed above, it can safely be concluded that the FoIA, if properly utilized has the potential to foster inclusion and good governance in Nigeria. There is need for government at all levels to deploy massive resources towards the promotion and education about the FoIA, drawing lessons from other jurisdictions, to encourage its effective use and bring about the desired changes in governance and public service in Nigeria.

An independent oversight body is desirable and recommended to be established, if freedom of information is to be taken seriously in Nigeria.

Information professionals should be integrated into the implementation of the FoIA, especially as it relates to the creation, keeping and maintenance of records/information, since access rights will be meaningless if the records are not in place or are not properly maintained/backed up in a way that will ensure their continued access.

¹⁰⁶ Historically, in the United Kingdom too, it has been shown that the central government has been slow to shed the aura of secrecy surrounding its processes, as legislation conferring rights of access to information has been piecemeal, sometimes prompted by the requirements of European Union Law. See Coppel, P., *op. cit.* p. v.

¹⁰⁷ See Mmadu, R.A., “A Critical Assessment of Nigeria’s Freedom of Information Act 2011”, 1(1) (2011) *Sacha Journal of Human Rights*, p. 144.

¹⁰⁸ See UNDP Report 2000, *op. cit.* p. 106.

¹⁰⁹ See Diso, L.I., *op. cit.* p. 12.

¹¹⁰ See A/58/323 of 2 September 2003.

¹¹¹ *Ibid.*

¹¹² For example, good governance will ensure employment policies and jobs programmes for the very poor, with a jobs creation programmes component that takes into account extremely poor persons. ‘In addition, national legislation should promote policies for occupational integration or re-integration which target their measures more specifically on the poorest population groups: women, single mothers, adolescent migrants, members of minorities, indigenous peoples, the disabled, persons displaced within their own country, the elderly, and the homeless.’ See E/CN.4/2000/52, para 99 p. 30.

¹¹³ See Right to Know, “23 Reasons for the Freedom of Information (FoIA), 2011”. Available at:

<www.r2knigeria.org> last accessed 7 November, 2014.

¹¹⁴ See Dunu, I., and Ugbo, G.O., *op. cit.*, p. 2.

Attention should be given to the training of judicial officers on freedom of information rights and implementation of the FoIA in order to build their capacity to efficiently adjudicate on cases that may be brought before them.

