

# FREEDOM OF INFORMATION

## HANDBOOK FOR LAW CLINICS



Information  
is a Human Right

Ernest Ojukwu et.al.

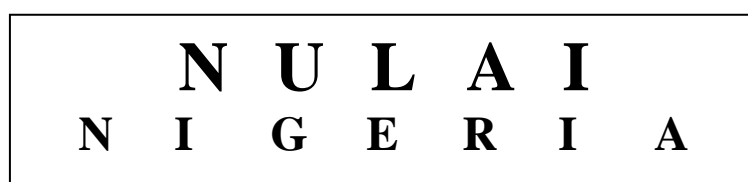
**FREEDOM OF INFORMATION  
HANDBOOK**  
*for*  
LAW CLINICS

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**Freedom of Information Handbook**  
*for Law Clinics*

**Ernest Ojukwu**  
**Sam Erugo, Charles Adekoya**  
**Gbenga Oke-Samuel, Nasiru Muhktar**  
**Olugbenga Olatunji, Victor Ayeni**  
**Ibrahim Sule**



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P.M.B. 274 Area 10 Garki Abuja  
Tel, +234-9-290 0609; 803-7877095  
[www.nulai.org](http://www.nulai.org)

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## ABOUT THE AUTHORS

**Ernest Ojukwu**

Professor of Law; Senior Advocate of Nigeria; President Network of University Legal Aid Institutions (NULAI) Nigeria.

**Sam Erugo, Ph.D**

Associate Professor of Law; Head of Department of Jurisprudence International and Public Law and Coordinator Abia State University Law Clinic, Abia State University Nigeria.

**Charles Adekoya, Ph.D**

Associate Professor of Law; Coordinator Olabisi Onabanjo University Law Clinic and Sub-Dean Post Graduate Department, Olabisi Onabanjo University Nigeria.

**Gbenga Oke-Samuel, PhD**

Coordinator Akungba Law Clinic; Senior Lecturer and Head of Private Law Department Adekunle Ajasin University Nigeria.

**Nasiru Muhktar**

Coordinator University of Abuja Law Clinic, and Lecturer Faculty of Law University of Abuja Nigeria.

**Olugbenga Olatunji**

Senior Lecturer and formerly Coordinator University of Ilorin Legal Aid Clinic, Faculty of Law University of Ilorin, Nigeria.

**Ibrahim Sule**

Coordinator Bagauda Law Clinic and Lecturer Nigerian Law School, Kano Campus.

**Victor Ayeni**

Assistant Coordinator Akungba Law Clinic and Lecturer Faculty of Law, Adekunle Ajasin University Ondo State Nigeria.

## **PREFACE**

*Freedom of Information Handbook for Law Clinics* has been written to provide a guide to law teachers, law students and other persons working in the Law Clinics, human rights, access to justice and governance projects and programmes in Nigeria.

The Handbook provides a basic text for the training of law teachers, students, supervisors and other actors on the use of the Freedom of Information Act. It includes a detailed curriculum and lessons on Freedom of Information.

Since this is an emerging subject with limited judicial intervention, few judicial decisions published on the website of the Right to Know- R2K have been included (with R2K's permission) in this volume.

The Handbook is written by experienced law clinicians in Nigeria. Teachers, students and other governance trainers and users will find this handbook very useful.

We thank the *Open Society Foundation* for supporting the publication of this book.

**Ernest Ojukwu**  
May 2015



# CHAPTER 1

## Background to Access to Information

### Introduction

Governments at all times exist for public and common good. According to Jurgen Habermas<sup>1</sup>, the attribute of the State as a public authority connotes an obligation to promote the public and common welfare of its rightful members. Since sovereignty in popular democracy lies with the people, it is imperative that the people must not only participate but have say in the affairs and governance of the State.

For this purpose, appropriate measures are expected to be in place to safeguard access to information, freedom of expression by the people, monitoring of government activities, accountability, and promotion of transparency among those in charge of public affairs and government business.

As a human institution, there is a tendency for governments and their officials to operate in secrecy or in the case of the officials to abuse their positions. This has actually been the experience in Nigeria and other countries. Prior to the emergence of Access to Information legislation in different parts of the world, different laws and practices existed (some are still in place) to restrict citizens' access to information or knowledge of certain government activities. These laws come by names like state secrets, public order protection and official information protection.

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<sup>1</sup> The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society (Translated by Thomas Burger) Polity Press, 1962.2

## History

The first form of Freedom of Information law was enacted in Sweden in 1766. This was later followed by other nations like Finland (1951), United States (1966); a new freedom of Information Law was later passed in (1976), Norway (1970). By 2013, about 95 countries in all the continents of the world are estimated to have enacted one form of freedom of Information law or another at the national level.

In Africa, the emergence and growth of Freedom of Information laws may be ascribed to the work of the African Commission on Human and People's Rights. The Commission's model laws on Access to information for Africa and the activities of the civil society have given impetus to the growth of Freedom of Information laws in Africa. At least 9 countries on the continent are known to have enacted access to information laws.

Despite constitutional provisions on the freedom of expression prior to the enactment of the Freedom of Information Act in Nigeria, there was a culture of resistance and repression of free press and demands for transparency in governance in successive regimes. While the military regimes were generally unaccountable and authoritarian in nature, many elected regimes in Nigeria refused to open up to journalists, the civil society, communities and individuals in terms of demands for information from government departments. On many occasions, individuals and even social critics were treated as the opposition or enemies of the State. Under one of the infamous military regimes in Nigeria, Decree No 4 of 1984 was promulgated to repress press freedom; two journalists were jailed in one of the cases.

The Nigeria's version of the access to information laws – Freedom of Information Act was enacted in 2011. The Act is a product of intense and deliberate consultation between the Civil Society and the Government of Nigeria.

### **Meaning, Nature and Scope of Access to Information**

Access to information in general entails the right of the people to seek, access and receive information<sup>2</sup> from concerned authorities<sup>3</sup>. According to the United Nations Development Programme (UNDP) –freedom to information encompasses the core principles of democratic governance: participation, transparency and accountability<sup>4</sup>.

In Nigeria, the Freedom of Information Act secures the right of any person to access or request information in any format that is in the custody, possession of any public official, agency or institutions. Just like the Model Freedom of Information law for Africa<sup>5</sup>, the Nigerian Freedom of Information (FoI) Act gives recognition to public officials, agencies and institutions and private Companies utilizing public funds, providing public services or performing public functions<sup>6</sup> for the purposes of access to information by the people.

Under the FoI Act in Nigeria, information that may be obtained include – records, documents and information stored in whatever

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<sup>2</sup> Mohan Karen, FACTSHEET: Freedom of information in Africa. Available online at: <http://africacheck.org/factsheets/factsheet-freedom-of-information-laws-on-the-african-continent/#sthash.xPfA7bJd.dpuf> (accessed 07-10-2014)

<sup>3</sup> In certain countries apart from Nigeria, concern authorities include private corporations that deliver social services.

<sup>4</sup> United Nations Development Programme, Access to Information: Practice Note (2013) iii

<sup>5</sup> See Section 1 of the Model Law.

<sup>6</sup> See Sections 2(7) and 31 of the Freedom of Information Act.

form. This may be in different format like õwritten, electronic, visual image, sound and audio recording<sup>7</sup>ö.

The need for freedom of information stems from the fact that it is an important tool for the people to enjoy some other rights. With Freedom of Information people may seek and obtain information on service delivery, impact of environmental or developmental activities in their neighbourhood and governance issues. In addition, access to information equips the people with appropriate knowledge to monitor or hold government accountable towards safeguarding their rights.

### **Sources of Freedom of Information laws**

Freedom of Information as a recognized right in most democratic States across the world can be traced to several sources, important among which are the following:

1. International Law

As a safeguard, different agreements, measures and frameworks exist at the International and regional levels that promote transparency in governance and access to information at national level.

The major instruments at the international level include:

- a. The Universal Declaration of Human Rights of 1948<sup>8</sup>.
- b. The International Covenant on Economic, Social and Cultural Rights<sup>9</sup>.

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<sup>7</sup> Section 30 (1) Freedom of Information Act, 2007

<sup>8</sup> This emphasizes the right of everyone to participate in the governance of their home countries, either directly or through their freely chosen representatives. See Article 19.

<sup>9</sup> This Recognize the right of every citizen to participate in public affairs, see Article 12 and Article 13. Article 13 underscores the importance of education in promoting effective participation by all persons in governance activities.

- c. The African Charter on Human and Peoples' Rights<sup>10</sup>.
- d. The African Declaration of Principles on Freedom of Expression<sup>11</sup>.
- e. Model Law on Access to Information for Africa<sup>12</sup>

## 2. Constitution

Most democratic countries have clear provisions in their constitution that guarantee access or the Right to Freedom of Information. As the basic law, the Constitution of the Federal Republic of Nigeria recognizes a Right to Freedom of Expression. This however falls short of guaranteeing a Right to Freedom of Information.

## 3. Statutes

In Nigeria, different legislation promote freedom and access to information. These include, the African Charter on Human and Peoples' Rights Act<sup>13</sup> the National Waterways Authority Act<sup>14</sup> the Environmental Impact Assessment Act<sup>15</sup>, Fiscal Responsibility Act<sup>16</sup> the Nigerian Extractive Industry Transparency Initiative Act<sup>17</sup>, Public

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<sup>10</sup> The Charter in Article 1 creates obligation to state parties to enact legislations that will promote the realisation of the rights, freedoms and duties contained in the Charter. Article 9 (1) and (2) of the Charter provides for the right of every person on the continent to receive information, the right to express and disseminate opinions within the ambit of the law.

<sup>11</sup> Adopted by the African Commission on Human and Peoples' Rights at its 32nd Ordinary Session, Banjul, the Gambia from 17th to 23rd October 2002. Article 4 of the Declaration outlines certain principles that should guide the guarantee of the Right to Freedom of Expression through law by state parties.

<sup>12</sup> Drafted by the African Commission on Human and Peoples' rights, the model law was adopted in 2013. It

<sup>13</sup> Cap A9 LFN, 2004

<sup>14</sup> 1996

<sup>15</sup> Cap E12 LFN, 2004

<sup>16</sup> Act 21 of 2007

<sup>17</sup> 2007

Procurement Act<sup>18</sup>, National Archives Decree<sup>19</sup> the Consumer Protection Act<sup>20</sup>, the Freedom of information Act (FoI Act)<sup>21</sup>.

The Freedom of Information Act (FoI Act) 2011 is a development and expansion of the fundamental human rights to freedom of expression, thought and conscience under chapter 4 of the Constitution of the Federal Republic of Nigeria, 1999. The Act is a variety of the different legislation across the world that is meant to secure the rights of the people to information and to promote accountability and transparency in government.

While other statutes listed above regulate access to information in specific sectors, the Freedom of information Act is the flagship legislation on access to information in Nigeria. The passage of the FoI Act in 2011 provides a comprehensive legislation on freedom of information for participation of the people and entronement of transparency in governance in the country.

### **Importance of Access to Information**

Access to information is an important tool for governance, development and social transformation. As a governance tool, social problems like corruption, totalitarianism and poor delivery of social services may be addressed through access to vital information that is backed up by effective legislation.

In terms of development and the global fight against poverty, the United Nations Development Programme has identified access to information as an important tool for empowerment and eradication of poverty. According to the global body, access to information on issues like basic rights and entitlements, public services, health,

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<sup>18</sup> 2007

<sup>19</sup> 1992

<sup>20</sup> Cap C 25 LFN, 2004

<sup>21</sup> 2011, Cap A2 LFN, 2004

education, work opportunities, public expenditure budgets, etc. by the poor and vulnerable is vital to their survival.

As a governance tool, access to information promotes free flow of information between the people, civil society, governments and other public institutions. This promotes mutual understanding, conflict resolution and crisis management<sup>22</sup>. Without question a key importance of the FoI Act is the role it can play in promoting citizen participation in governance.

### **Promoting Citizens' Participation**

Knowledge is power. Information is power. The secreting or hoarding of knowledge or information may be an act of tyranny camouflaged as humility. – Robin Morgan<sup>23</sup>

Generally speaking and in the realm of social science, the word "participation" is being used to refer to variety of mechanisms through which the general public can express their opinion. And not only express their opinion, but even exert some level of influence in relation to political, social, economic and management decisions affecting them.

Sherry Arnstein in her famous "A Ladder of Citizen Participation" globally known as "Arnstein's ladder"<sup>24</sup> defines citizen participation as the redistribution of power that enables the have-not citizens, presently excluded from the political and economic processes, to be deliberately included in the future.

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<sup>22</sup> UNDP Access to Information: Practice Note 1

<sup>23</sup> See "Robin Morgan Quotes", available at Brainy Quotes, <http://www.brainyquote.com/quotes/quotes/r/robinmorga271953.html>, accessed on 2<sup>nd</sup> May, 2015

<sup>24</sup> Arnstein, S.R., "A Ladder of Citizen Participation", *Journal of the American Planning Association* **35** (4): 216-224, doi available at <http://www.tandfonline.com/doi/abs/10.1080/01944366908977225#.VVpZ3PIViko> accessed on 12<sup>th</sup> May, 2015

Citizen participation could also mean a process which provides private individuals and other members of the society with an opportunity to influence public decisions directly or indirectly. Its roots can be traced to ancient Greece and Colonial New England. Citizen participation and public involvement are being used interchangeably although the latter refers to means to ensure that citizens have a direct voice in public decisions affecting them.

Cogan and Sharpe<sup>25</sup> in a study entitled "The Theory of Citizen Involvement" identify five benefits of citizen participation to the planning process or decision making:

1. Information and ideas on public issues;
2. Public support for planning decisions;
3. Avoidance of protracted conflicts and costly delays;
4. Reservoir of good will which can carry over to future decisions; and
5. Spirit of cooperation and trust between the agency and the public.

### **Promoting Citizen Participation under the Freedom of Information Act**

The underlying philosophy of Freedom of Information Act which is properly captured by Article IV(i) of the Declaration of Principles on Freedom of Expression in Africa is that public bodies and institutions are holding information as trustees, not for

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<sup>25</sup> Cited in Wendell C. W, "Introduction of a Community Involvement Component in Policing in Trinidad and Tobago: Reality or Rhetoric?" In International Police Executive Symposium (Geneva Center for the Democratic Control of Armed Forces, Working Paper No. 37, September, 2011) available on [http://www.dcaf.ch/content/download/55531/838404/file/WPS\\_37.pdf](http://www.dcaf.ch/content/download/55531/838404/file/WPS_37.pdf) accessed on 19th May, 2015

themselves but for the public good and everyone in the society has a right to access this information, subject only to clearly defined rules established by law. The whole essence of FoI Act is to empower Nigerian citizens with information on government activities by making public records and information more freely available and accessible. This is to ensure public participation in governance so that government activities and businesses are conducted openly and transparently.

Stephen Harper<sup>26</sup>, a onetime controversial Canadian opposition leader and later the Prime Minister wrote in Montreal Gazette that '[i]nformation is the lifeblood of a democracy. Without adequate access to key information about government policies and programs, citizens and parliamentarians cannot make informed decisions and incompetent or corrupt governments can be hidden under a cloak of secrecy.'<sup>27</sup>

In any society where government's activities are closed for the people and access to information is restricted or completely denied citizens participation in their governance is alienated; because without information on government's activities citizens couldn't make any meaningful contribution. This will result in suspicion and distrust between the citizens and the government or its officials. Other consequences of alienating citizens' participation include:

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<sup>26</sup> Cited in 'Submission to Access to Information Act Review' available on [http://www.oic-ci.gc.ca/eng/DownloadHandler.ashx?pg=be9c1298-43aa-4ba8-9869-a67fb3fc1e77&section=596721a2-8a78-4147-af09-4144e4556163&file=OD\\_DO\\_Stanley\\_Tromp\\_Dec\\_15.PDF](http://www.oic-ci.gc.ca/eng/DownloadHandler.ashx?pg=be9c1298-43aa-4ba8-9869-a67fb3fc1e77&section=596721a2-8a78-4147-af09-4144e4556163&file=OD_DO_Stanley_Tromp_Dec_15.PDF) accessed on 13<sup>th</sup> May, 2015

<sup>27</sup> Cited in 'Submission to Access to Information Act Review' available on [http://www.oic-ci.gc.ca/eng/DownloadHandler.ashx?pg=be9c1298-43aa-4ba8-9869-a67fb3fc1e77&section=596721a2-8a78-4147-af09-4144e4556163&file=OD\\_DO\\_Stanley\\_Tromp\\_Dec\\_15.PDF](http://www.oic-ci.gc.ca/eng/DownloadHandler.ashx?pg=be9c1298-43aa-4ba8-9869-a67fb3fc1e77&section=596721a2-8a78-4147-af09-4144e4556163&file=OD_DO_Stanley_Tromp_Dec_15.PDF) accessed on 13<sup>th</sup> May, 2015

1. Fertile environment created for corruption and maladministration to thrive;
2. Stunted development;
3. impoverishment of citizens;
4. Discontent, disillusionment, anger crystallizing into various forms of violence;
5. Age-long communal ties broken;
6. Promotion of political instability, disillusionment amongst the populace and cynicism.<sup>28</sup>

Therefore since information is power without which no decision can be made, how can the Nigerian citizens participate in their governance if they are not fully informed about the government activities? How can there be trust between the government and the citizens if government activities affecting the citizenry are secretly conducted? For these reasons among others, various provisions of FoI Act require, expressly that public institutions must proactively publish some types of information, by print, electronic, online and other means.

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<sup>28</sup> "Global, Continental and National Context of FoI Development and Essential Elements of the FoI Act, 2011", By Maxwell Kadiri, Associate Legal Officer, Africa Programme, Open Society Justice Initiative, Abuja, Nigeria. "A Paper Presented At The South-West Cso Training Workshop On The Freedom Of Information Act, 2011", Akure, Ondo State March 12-13, 2013, available on <http://www.urfoundation.org/Pdffiles/Globalfoi.pdf> accessed on 19th May, 2015

### **Citizens' Participation under the Constitution of Federal Republic of Nigeria**

Citizens' participation in Nigeria is a matter of constitution. While on one hand all authorities, institutions and persons exercising judicial, legislative and executive powers have constitutional duty to ensure that Nigerians participate in their government; on the other hand, Nigerians have constitutional duty as well to participate in their government.

The cumulative effect of sections 13 and 14(2) (c) of the 1999 Constitution is that all organs of government and all authorities and persons exercising executive, legislative or judicial powers must ensure that the people of Nigeria participate in their government. Under section 13 of the Constitution, it shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of Chapter II of the constitution. It is therefore declared under section 14(1) and (2)(a) and (c) that since the Federal Republic Nigeria is a state based on the principles of democracy and social justice, and since sovereignty belongs to the people of Nigeria, then the participation by the people in their government shall be ensured in accordance with the provisions of this Constitution.

Section 24 of the Constitution generally places duties on all Nigerians to abide by all the provisions of the Constitution, respect its ideals and its institutions, the National Flag, the National Anthem, the National Pledge, and legitimate authorities. They are also duty bound to help to enhance the power, prestige and good name of Nigeria, defend Nigeria and render such national service as may be required. Section 24 (d) and (e) in particular require all Nigerians to make positive and useful contribution to the advancement, progress and well-being of the community where they reside and to render assistance to appropriate and lawful agencies in the maintenance of law and order.

### **FoI Act Provisions Promoting Citizens Participation**

Generally speaking, one may be right to say without any fear of contradiction that the whole essence of FoI passed in any country is to promote and stimulate citizens' participation in governance. Citizens are empowered by the various provisions of the FoI Act to acquire information on government's activities for them to use such information to participate in their governance and to make meaningful contributions to decisions affecting them.

Just a few provisions of the FoI Act will be considered here:

#### *Section 2*

To ensure the promotion of citizens' participation section 2 places a duty on all institutions to widely disseminate information about their activities and to ensure they make such information widely available to all members of the public in print, electronic and online sources.

In this age of IT and especially with the use of internet, the best way to disseminate information is by the use of websites, Facebook, Tweeter, Chatrooms, government blogs, Mobile-Apps etc.

In essence, the FoI recognizes the use of ICT and the internet to promote e-participation, e-information and e-consultation, in reaching out to the public in order to get their opinion on issues affecting them.

There are further ample opportunities under section 2 for Nigerians to make use of the information acquired to participate in their government.

Under section 2(6) every Nigerian is entitled to the right of access conferred by the FoI Act and shall have the right to institute proceedings in the Court to compel any public institution to allow him have access to the information he requested. Under subsection 7 of the same section 2 all Nigerians can request information on activities of all Public institutions and all authorities whether executive, legislative or judicial agencies, ministries, and extra ministerial departments of the government, together with all corporations established by law and all companies in which government has a controlling interest, and private companies utilizing public funds, providing public services or performing public functions.

*Section 7* promotes citizens participation as it mandates institutions that deny or refuse to give access to information to give statutory reasons for their denial. The applicant too does have right to challenge in court any reasons for the refusal given by the institution.

And where a case of wrongful denial of access is established against the institution or the officer in charge, the defaulting officer or institution commits an offence and is liable on conviction to a fine of N500, 000. Thus, literally put, failure to cooperate with a Nigerian seeking information and willing to use such information to participate in his government is indirectly treated as a crime under FoI Act.

In order to sanction non-cooperation with willing participating Nigerian and to promote participation, destruction of records is also a crime punishable with a minimum of 1 year imprisonment.

Sections 27(1)(2) indirectly enhances citizens participation by encouraging and protecting officers who disclose in good faith and who disclose mismanagement, fraud etc. without authorization. Section 27(3) expressly protects information receivers who further discloses the information to other persons.

Without doubt, the main reason for passing any FoI law is not only to allow citizens have access to information but also encourage them to make use of such information acquired to participate in their government. As we have seen above ample provisions are made under the Nigeria's FoI Act to promote citizens' participation in government through the use of the various provisions of FoI Act 2011.

## CHAPTER 2

### Legal Framework of Access to Information in Nigeria

#### Introduction

There is an appreciable legal framework of access to information in Nigeria. This framework derives especially from the domestic legal regime supported by international and regional legal instruments. The multiplicity of legal instruments on access to information demands expertise and caution in the analysis, practice, interpretation and enforcement of access to information and access rights generally in Nigeria. Odinkalu<sup>1</sup> observes the plural legislative environment for access to information in Nigeria as the Freedom of Information (FoI) Act is not the only legislation that mandates access to information in Nigeria. The gamut of these statutes on access to information applicable to Nigeria constitutes the domestic framework of right to information. Essentially, this framework offers a guide to the essential practicality of access to information in Nigeria; and not necessarily the practice in deed. However, the legal regime is the critical base of access to information practice from the perspectives of both the realists' expression of what Nigerian courts will do in fact<sup>2</sup> and the positivists' enactment from a supreme authority with power to make laws.

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<sup>1</sup> Odinkalu, Chidi Anselm, "Two Years of the Freedom of Information Act: Challenges and Prospects", A Keynote Address to the National Conference on Two Years of the Freedom of Information Act, Organised by the Right To Know (R2K) Initiative and the Open Society Initiative for West Africa (OSIWA), Abuja, July 30-31, 2014, 2

<sup>2</sup> Wendell Holmes, Oliver (1897) "The Path of the Law" 10 Harvard Law Review 457: Available online: [www.constitution.org/lrev/10/path\\_law.htm](http://www.constitution.org/lrev/10/path_law.htm), Accessed 2 September 2014

This chapter reviews the legal context of access to information from the international framework which forms the fulcrum of right of access to information, to the domestic regime espousing the FoI Act 2011 as the basic charter, among other instruments.

### **International Legal Instruments**

Like other human right norms, the historical source and inspiration of access to information are traceable to certain international legal instruments. Some of these instruments may not be legally binding or enforceable in domestic courts or tribunal, but have influenced substantive legislation. The most important international legal instruments that influenced the FoI Act in most countries of the world, including Nigeria are the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights 1966, the United Nations Convention on Rights of the Child and the African Charter on Human and Peoples Rights.

### **Universal Declaration of Human Rights, 1948(UDHR)**

The UDHR is the foremost universal declaration of human rights norms with global validity and acceptability. Though not legally enforceable, the declaration is of universal value<sup>3</sup> and continues to exert an enormous impact on people's lives all over the world<sup>4</sup>. It has been very influential and found expression in many domestic and international legally enforceable human rights instruments. Despite the varying socio-political and economic orientations of the world at the time, the declaration represented a common statement of shared goals and aspirations<sup>5</sup> of all peoples. This is one of the earliest international legal instruments positively declaring as a human right the freedom to seek, receive and impart information<sup>6</sup> for all citizens of the world.

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<sup>3</sup> ABC: Teaching Human Rights, Human Rights: United Nations Decade for Human Rights Education(1995-2004), New York and Geneva, 2003, 3

<sup>4</sup> ABC: Teaching Human Rights,*Ibid*

<sup>5</sup> *Ibid*

<sup>6</sup> Article 19

Article 19 of the Universal Declaration of Human Rights provides that: "Everyone has a right to freedom of opinion and expression; this includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers".

The language of the Declaration is virtually the same adopted in most subsequent national legislation and instruments enshrining right to freedom of information.

### **International Covenant on Civil and Political Rights, 1966 (ICCPR)**

The ICCPR is another international legal instrument promoting the right to freedom of information. It has universal application and legally binding on States that are parties to it, including Nigeria. This covenant has also influenced domestic legally enforceable instruments. Article 19(2) of the International Covenant on Civil and Political Rights 1966 provides as follows:

Everyone has a right to freedom of opinion and expression; this includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas of any kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

### **United Nations Convention on Rights of the Child, 1989(CRC)**

The CRC is another international legal instrument espousing the right of access to information. This is with specific reference to children of the world.

Article 13 of the Convention on Rights of the Child provides that:

the child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in

print, in the form of art, or through any other media of the child's choice.

### **African Charter on Human and Peoples' Rights, 1981**

On a regional basis, the African Charter on Human and Peoples' Rights also enshrines the right to access to information for all citizens of Africa.<sup>7</sup> Article 9(1) of the African Charter on Human and Peoples' Rights states that: "Every individual shall have the right to receive information..."

It is noteworthy that while the other international legal instruments may have only persuasive impact in Nigeria, the African Charter is domesticated and enforceable in the domestic courts.<sup>8</sup>

### **Nigerian domestic Legal Instruments**

The Nigerian domestic legal regime of access to information includes the following:

1. Constitution of the Federal Republic of Nigeria, 1999
2. Freedom of Information Act, 2011
3. Child Rights Act, 2003
4. Environmental Impact Assessment Act
5. Nigerian Extractive Industries Transparency (NIEIT) Act
6. Fiscal Responsibility Act
7. Public Procurements Act, and
8. Archives Act

Undoubtedly, the Constitution of the Federal Republic of Nigeria, provides the foundational basis of all human rights in Nigeria, including the right to freedom of information. The FoI Act is the latest and more specific freedom of information legislation in Nigeria. It is applicable in all cases of access to information, both

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<sup>7</sup> See also other regional instruments; see also Model Law on Access to Information for Africa, adopted by the African Union in 2013; Declaration on the Freedom of Expression and Information, Committee of Ministers, 70<sup>th</sup> Session-29 April 1982

<sup>8</sup> See *Cap A9* Laws of the Federation of Nigeria 2004.

proactive and reactive. Before the Act in 2011, other legislation had provided for access to information to one level or the other relative to the intendment of those enactments. These include: the Environmental Impact Assessment Act<sup>9</sup>, the Nigerian Extractive Industries Transparency Initiative (NIEITI) Act<sup>10</sup>, the Fiscal Responsibility Act<sup>11</sup>, the Public Procurements Act<sup>12</sup>, and the Archives Act.

For our purposes, we intend to restrict discussion to the Constitution providing a basis for the framework and the FoI Act which is a specific legislation on access to information. Probably relevant in the framework is the Official Secrets Act<sup>13</sup> a colonial piece of legislation that appears to contradict the philosophy of freedom of information.

### **Constitution of the Federal Republic of Nigeria, 1999**

The 1999 Constitution influenced by the spirit and tenets of the international human rights norms enshrined the basic human rights and the right of access to information now expanded by the FoI Act.

Section 39(1) of the Constitution provides 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” (italics supplied for emphasis).

The provision in section 39(1) is probably not as strong in language as those of the UDHR or the ICCPR which emphasized the right “to seek, receive and impart information”, but recognized as laying foundation for access rights in Nigeria.

Furthermore, section 14(2)(a) states that “sovereignty belongs to the people of Nigeria”. This sovereignty supposedly belonging to

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<sup>9</sup> Cap E 12 Laws of the Federation of Nigeria, 2004 Edition

<sup>10</sup> 2007

<sup>11</sup> 2010

<sup>12</sup> 2007

<sup>13</sup> Cap O3 Laws of the Federation of Nigeria, 2004

the people could only be implicated by openness and transparency that access to information enables. It has been argued<sup>14</sup> that the right to equality envisaged by the section is guaranteed by access to information.

Although section 14 falls within the fundamental objectives and directive principles of state policy, this provision captures the essence of all citizens' participation, at least by having unhindered access to information. Furthermore section 14(2)(c) on the "Government and the people" provides that "the participation by the people in their government shall be ensured in accordance with the provisions of this Constitution"

### **Freedom of Information Act, 2011**

The Freedom of Information Act, 2011 (FoI Act) provides specific legislative framework for access to information and records held by public institutions in Nigeria.<sup>15</sup> It tries to achieve this through an elaborate provision on the right of access to information and records with justifiable exemptions, duties and obligation of public institutions and custodians of public information and records, procedure for request and judicial review or redress procedure, monitoring, processing requests, whistle-blower protection, penalties and guidelines to ensure implementation of the Act.

### **Right of access to records**

The right of access to information/records is established by the FoI Act<sup>16</sup>. The right is guaranteed notwithstanding anything contained in any other Act, law or regulation; and extends to all information in the custody or possession of any public official, agency or institution howsoever described. The primary purpose of the Act is to concretize the right to information enshrined in the Constitution and recognized by international legal instruments. The right guaranteed under the Act is available to all citizens of Nigeria.

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<sup>14</sup> Odinkalu, C.O., *op cit*.

<sup>15</sup> And to a limited extent private companies. See Sections 2(7) and 31 FOI Act.

<sup>16</sup> Section 1-see chapter ...

Section 3(1) of the Act provides the process<sup>17</sup> of requesting for information guaranteed under the Act. The Act liberally provides for corresponding duties and obligations of public institutions, as well as those of applicants to enable the enjoyment of the right.

### **Duties and obligations**

A number of duties are imposed by the Act on public institutions. These include duties to keep, maintain, organize, publish, update and review information about all its activities, operations and businesses<sup>18</sup>.

Essentially, every public institution to which an application is made is obliged to provide access to the information or records to the applicant unless excused by any provision of the Act. Timeline is prescribed within which the public institution is obliged to respond. On refusal, the public institution is obliged to give notice of refusal.

On the other hand, the applicant is obliged to pay for duplication of records in certain circumstances under section 8.

### **Procedure for request of information/FOI Application**

The Act provides a simple, less formal procedure for requesting for information or records under section 3 of the Act. In fact no formal procedure is prescribed, and the lacuna is now filled by the Guidelines on the Implementation of the Freedom of Information Act (the Guidelines).

### **Judicial review/ Redress procedure**

The right to judicial review of grounds of refusal or denial of access to information is conferred by sections 2, and 20-25 of the Act prescribing the judicial process. The hearing is summary and timeline is provided.

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<sup>17</sup> See chapter 8

<sup>18</sup> Section 2; see also section 9

**Penalties and sanctions**

Civil remedies and criminal sanctions have been prescribed by the Act to ensure efficacy of the right established.

Elaborate provisions are made for monitoring, processing of requests and protection of whistle-blowers to ensure access to information is protected.

## CHAPTER 3

### Right to Access Information

#### Introduction

Availability of and easy access to information are very pivotal to the existence of an egalitarian society devoid of secrecy, wanton corruption and official mismanagement of, most times, scarce resources. Countries across the globe have thus enacted laws compelling public institutions and governments to make information easily available and accessible within a limit reasonably permissible under the law. Since lack of access will lead to bad government veiled in secrecy, it is of utmost importance that the tendency to withhold information from the people must be strongly checked by all well-meaning citizens especially the legislators whose duty it is to enact such laws.

This chapter examines the right to access information under the Nigerian Freedom of Information (FoI) Act<sup>2</sup> by discussing the relevant sections of the Act; information/records that can be accessed under the Act, persons who can make request, the issue of *locus standi*, primacy of the FoI Act over other similar laws, etc.

#### Right to Access Information/Records under the FoI Act

##### *Background*

As already pointed out, the right to access information or records is an internationally recognised and protected right. For instance,

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<sup>1</sup> Abid Hussain (1995), Report to the UN Commission on Human Rights, (Geneva: United Nations)

<sup>2</sup> 2011

Article 19 of the Universal Declaration of Human Rights provides that:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, *receive*<sup>3</sup> and impart information and ideas through any media regardless of frontiers.<sup>4</sup>

The Nigerian Constitution<sup>5</sup> provides the foundation for the right to access information in its sections 14(2) (a), 22 and 39. While the provisions of sections 14(2) (a) and 22 of the Constitution are non-justiciable because they are merely fundamental objectives<sup>6</sup>; the provisions of section 39 are justiciable.<sup>7</sup> Questions however exist on whether these provisions actually grant access right to information or record held by government or public institutions.<sup>8</sup> The African Charter on Human and Peoples Rights (Ratification

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<sup>3</sup> Emphasis supplied

<sup>4</sup> Universal Declaration of Human Rights 1948 available online at <http://www.un.org/en/documents/udhr/> accessed [21/07/2014]

<sup>5</sup> Cap C 23, Laws of the Federation of Nigeria (LFN) 2004

<sup>6</sup> See section 6(6)(c) of the Constitution of the Federal Republic of Nigeria

<sup>7</sup> See Mohammed Bello Adoke, Keynote Address at a National Summit on the Freedom of Information Act organised by Media Rights Agenda in Partnership with the United States Agency for International Aid (USAID) held at NICON Luxury Hotel, 18<sup>th</sup> & 19<sup>th</sup> June, 2012 at p 2 paragraph 3 available online at [http://www.foia.justice.gov.ng/pages/resources/download/HAGF\\_FOI\\_keynote\\_address.pdf](http://www.foia.justice.gov.ng/pages/resources/download/HAGF_FOI_keynote_address.pdf) accessed [24/07/2014].

<sup>8</sup> For instance, it is the contention of Olatunji & Egbewole that these provisions cannot be relied upon to seek information or records from public or government institutions. To the duo, sections 14(2)(a) and 22 are non-justiciable in the light of the provisions of section 6(6)(c) of the same Constitution, while section 39 only provides for the right to freedom of expression and the press. The right to impart or receive information, they submitted, is different from the right to access information or records in public or government custodies. See Egbewole, W.O. & Olatunji, O.A. (2013), *Mass Media, Democracy and the Rule of Law under the Nigerian Fourth Republic*. Unpublished (copy on file with author)

and Enforcement) Act also provides for access right in the same language as section 39(1) of the Constitution.<sup>9</sup>

Despite the provisions of these laws and instruments the issue of access to information and records in public or government custody as directly as the FoI Act has done. It is in recognition of the deficiency inherent in the generally worded access to information laws that Countries have deemed it fit to enact a whole law on freedom of information. Such freedom-of-information specific laws have the advantage of dealing with the issue holistically by providing for what can be obtained by way of a freedom of information request; what cannot be obtained; the procedure for obtaining it; action to be taken on refusal; and other allied issues.

In the case of Nigeria for instance, a cursory look at the explanatory memorandum to the FoI Act reveals the holistic approach of the Act. At a glance, it shows that the Act provides for the following:

- Making information and public document available (proactively);
- Providing access to these information/documents;
- Recognizing exemptions justifying non-disclosures;
- Protecting whistle-blowers; and
- Providing for enforcement procedures to sustain the workability of the Act.<sup>10</sup>

Thus, while most countries have freedom of expression or information provisions in their constitutions, they still deem it fit to enact specific FoI laws to bring openness to governance; engender good governance; and take away the confidentiality associated with official secrets laws.

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<sup>9</sup> Article 9 states that (a) every individual shall have the right to receive information (b) every individual shall have the right to express and disseminate his opinion within the law

<sup>10</sup> See the Explanatory Memorandum to the Freedom of Information Act 2011

***Right to access information/Records***

The FoI Act provides for the right of any person to access or request information or records under the Act<sup>11</sup> whether such information is in writing or not. Where the information is not in writing as at the time of making the request, it is mandatory for the public institution involved to reduce the requested information into writing. It is however important that the information or record being requested is such that it can be produced from a machine, normally used by the government or public institution.<sup>12</sup>

***Primacy of the FoI Act***

It has been observed that a bad government needs secrecy to survive. It allows inefficiency, wastefulness and corruption to thrive.<sup>13</sup> This gives impetus to a clamour for a FoI Act in most countries of the world. In most of the countries with FoI laws, the path to achieving an enactment is not always a smooth one and it behooves of citizens, right activists and other freedom of information crusaders to see to it that a strong FoI law is enacted.<sup>14</sup> This is necessary because it is always the intention of the governing constituency to enact a weak FoI law which can easily be circumvented by them.

In recognition of the need to provide access to information and records, section 1(1) of the FoI Act protects the right of every person to access official information and document notwithstanding anything contained in any other Act, law or regulation.<sup>15</sup> However, it should be argued that this provision

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<sup>11</sup> Section 1(1) FoIA

<sup>12</sup> See section 3(2) FoIA

<sup>13</sup> Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation" at p 1, available online at <http://www.article19.org/data/files/pdfs/standards/righttoknow.pdf> accessed [28/07/2014]

<sup>14</sup> Nigeria is a perfect example here. For a detailed account of the journey to enacting an FoI law and the effort of the Nigerian government to enact a watery FoIA, see Ayobami Ojebode (2011), "Nigeria's FoIA: Provisions, Strengths, Challenges" *African Communication Research*, Vol. 4, No. 2, p 267 at 270

Notwithstanding<sup>15</sup> speaks to other laws such as the Official Secrets Act,<sup>15</sup> the Criminal Code Act,<sup>16</sup> the Penal Code Act,<sup>17</sup> the Evidence Act,<sup>18</sup> the Public Complaints Commission Act,<sup>19</sup> and the National Security Act<sup>20</sup> which prohibit the disclosure of certain categories of information and records without prior authorization. This seems to amount to an impediment on the enjoyment of the right guaranteed under section 1(1) of the FoI Act. The Official Secrets Act (OSA) may be particularly singled out because of its notoriety during colonial and military eras. It was a legislation used to deny access to information and/or records in an era when official information and records were haphazardly classified and labelled as 'secret' in the name of protecting national security and defence. It thus remains a concern whether the OSA will not impinge on the status of the FoI Act.

The issue of primacy between the FoI Act on the one hand, and the OSA and other similar anti-disclosure statutes on the other hand has since become rife. The wordings of section 1(1) of the FoI Act connotes that the FoI Act should enjoy supremacy over other related enactments. The existence of these anti-disclosure laws does not in any way water down the worth of the FoI Act. The FoI Act has also not repealed the OSA or other related enactments.<sup>21</sup> It only requires that non-disclosures under other laws must find justification under any of the recognized exemptions copiously provided for under the FoI Act.

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<sup>15</sup> Cap O3 Laws of the Federation of Nigeria, 2004

<sup>16</sup> Cap C38 Laws of the Federation of Nigeria, 2004

<sup>17</sup> Cap 89, Laws of Northern Nigeria, 1963

<sup>18</sup> Cap E14 Laws of the Federation of Nigeria, 2004

<sup>19</sup> Cap P37, Laws of the Federation of Nigeria, 2004

<sup>20</sup> Cap N74, Laws of the Federation of Nigeria, 2004

<sup>21</sup> See Mohammed Bello Adoke, Keynote Address at a National Summit on the Freedom of Information Act, *op cit.* at paragraph 12 where the Honourable Attorney General observed as follows: 'it must however be emphasised that the FoIA did not 'repeal' the OSA. This could not have been so in view of the fact that OSA relates primarily to the preservation of public safety and not just the disclosure of information'

To further clarify this, the FoI Act redefines what it meant for a document to be classified. Section 28(1) of the Act now requires that for a document to be deemed correctly classified, it must fall under any of the recognized exemptions in sections 11, 12, 14, 15, 16, 17, and 19. As a further safeguard against abuse of the exemption provisions, public institutions must demonstrate that non-disclosure by their offices is justified by the public interest which will be served by such refusal to disclose.<sup>22</sup> A document is thus deemed correctly classified and non-disclosable under the OSA or related enactments if it meets the new definition of 'classified' under the FoI Act and if refusal is done for public interest.<sup>23</sup>

Commenting on the superiority of the FoI Act, Ojebode submitted that while 'the OSA, the Criminal Code and the Penal Code prescribe heavy penalty for officials who disclose official secrets. The FoI Act spreads a thick protection over such officials who disclose in 'good faith' official information even 'without authorization.'<sup>24</sup> Thus, while the FoI Act does not repeal the OSA and other similar laws, it enjoys supremacy over them.<sup>25</sup>

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<sup>22</sup> See sections 11, 12, 14, 15, 16, 17, and 19

<sup>23</sup> See Mohammed Bello Adoke, Keynote Address at a One-Day Sensitisation Workshop on the Official Secrets Act 1962 and the Freedom of Information Act 2011 organised by the Public Service Institute of Nigeria on Tuesday 22<sup>nd</sup> of November 2011, available online at [http://www.foia.justice.gov.ng/pages/resources/download/HAGF\\_keynote\\_on\\_workshop\\_on\\_FoIA.pdf](http://www.foia.justice.gov.ng/pages/resources/download/HAGF_keynote_on_workshop_on_FoIA.pdf) accessed [01/08/2014]. The Honourable Minister observed in paragraph 8 thus: 'what section 27 has done is in fact to re-define 'classified matters' for the purpose of disclosure of information in terms of the exemptions referred to under the FoIA.'

<sup>24</sup> Ayobami Ojebode (2011), 'Nigeria's FoIA: Provisions, Strengths, Challenges' *op cit.* at p 277

<sup>25</sup> Mohammed Bello Adoke, Keynote Address at a One-Day Sensitisation Workshop on the Official Secrets Act 1962 and the Freedom of Information Act 2011, *op cit.* at paragraph 4 where the Attorney General submitted that 'any inconsistency between the FoIA and the OSA should ordinarily be resolved in favour of the FoIA in accordance with the well-known canon of statutory interpretation that a latter statute prevails where there is inconsistency between two statutes.'

***What can be requested for?***

The FoI Act provides a right to access information or records in the custody of public institutions or government. However, not all information or records in the custody of public institutions or government can be accessed by way of FoI requests. The Act in its various sections<sup>26</sup> exempts some information from disclosure to strike a balance between the need for access on the one hand, and the need to protect public security, national defence, personal information, etc. on the other.<sup>27</sup> But emphasizing the importance of the right of access granted under section 1(1) of the Act, the Act requires that any refusal of requests by public institution or government must be viewed through the crucible of public interest. Where the public interest to be served by disclosure far outweighs that which will be served by non-disclosure, then applicant's right of access will prevail.<sup>28</sup> The determination of this one way or the other by public institutions is subject to judicial review.<sup>29</sup> All these mechanisms are put in place to ensure that the right of an applicant to access information or public records is not unjustifiably tampered with.

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There however seems to be a challenge to the primacy of the FoIA in the case of *Public & Private Development Centre Ltd/Gte (PPDC) v. NNPC & the Managing Director, NNPC* (unreported suit no: FHC/ABJ/CS/278/2013 delivered on 23 December 2013) where the court held that filing a pre-action notice with the NNPC is a compulsory requirement before a refusal of an application for information within the NNPC can be taken to court. Even though this seems to be a dent on the primacy of the FoIA, one can argue that filing such pre-action notice will not prejudice the right of the applicant in any way. Even though an application in respect of refusal is expected to be filed within 30 days under section 20 of the FoIA; that same section confers on the court the power to grant extension where such is justified. Filing a pre-action notice before commencement, no doubt, will amount to such justification.

<sup>26</sup> See sections 11, 12, 14, 15, 16, 17, 19 and 26 of the FoIA

<sup>27</sup> Full discussion on each of these exemptions follows in subsequent chapters of the Handbook

<sup>28</sup> The public interest test is inbuilt into most of the exceptions.

<sup>29</sup> See section 20 of the FoIA

***Applicants under the Act***

The FoI Act is designed in such a way that anyone can bring a request for information under the Act. Accordingly, an applicant under this Act needs not demonstrate any specific interest in the information being applied for.<sup>30</sup> This is to ensure that information is readily available to all and sundry since everybody is a stakeholder in the task of nation building and ensuring good governance. Furthermore, illiteracy or disability shall not be a ground for denying an applicant access to information or document. It is to this end that the Act provides that illiterate or disabled applicants may make application through a third party.<sup>31</sup> Since applications are expected to be in writing, where an applicant is an illiterate and cannot make his request in writing, such applicant shall make the request orally to the authorized official of a government or public institution who is expected to reduce the application into writing.<sup>32</sup> A copy of the written application is to be provided to the applicant.<sup>33</sup> And more importantly, the FoI Act preserves the right of applicants to approach the court should their right to information under the Act be denied.<sup>34</sup>

These are provisions aimed at ensuring that applicants have easy and assisted access to information and/or documents in public or government custody.

***Destination of FoI requests***

A request for information or access to records can only be made in respect of information or records which are in the custody or possession of any public official, agency or institution howsoever described. Both the FoI Act and the Attorney General's

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<sup>30</sup> Section 1(2) FoIA

<sup>31</sup> See section 3(3) FoIA

<sup>32</sup> See section 3(4) FoIA

<sup>33</sup> Ibid.

<sup>34</sup> Section 1(3) FoIA

Guidelines<sup>35</sup> contain provisions on this. According to the interpretation section of the FoI Act, public institution means:

í any legislative, executive, judicial, administrative or advisory body of the government, including boards, bureau, committees or commissions of the State, and any subsidiary body of those bodies including but not limited to committees and sub-committees which are supported in whole or in part by public fund or which expends public fund and private bodies providing public services, performing public functions or utilizing public funds.<sup>36</sup>

Thus, public institutions or governmental ministries, departments and agencies (MDA) are the destinations of FoI requests. However, private institutions too are expected to comply with the Act if they perform public functions or utilise public funds. Federal and state universities, Consumer Protection Council, Public Complaint Commission, the National Human Rights Commission, the Police Service Commission, Federal and State Hospitals, etc. are some of the examples of public institutions to which FoI requests may be addressed. On the other hands, private universities, private hospital and other private bodies receiving public funding or performing public services are also destinations for FoI requests. A contractor who collects toll on a public highway on behalf of the Government performs a public function and a request can be made to it for information relating to that act of toll collection and management.

### **Conclusion**

The functionality of government, civil and military, prior to the enactment of the FoI Act in 2011 was no doubt shrouded in

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<sup>35</sup> Guidelines on the Implementation of the Freedom of Information Act 2011, Revised Edition 2013

<sup>36</sup> See sections 31 & 2(7) FoIA. Paragraph 1.1 of the AG Guidelines also reiterates this definition.

secrecy. This had been the status quo until recently and it cannot therefore be reasonably expected that the era of secrecy, classification of virtually every document as official, and aggressiveness towards demand for disclosure will immediately disappear into thin air. Nevertheless, the FoI Act is a veritable piece of legislation which can be employed to gradually overcome secrecy in the running of public affairs. It can be relied upon to make the government accountable and responsible as it contains numerous provisions tailored towards achieving this: there is no need to show *locus standi*; illiterate and disabled applicants are not prejudiced; public institution is permissively defined; and public interest test is to be applied to most of the exemption cases.

## **CHAPTER 4**

### **Obligations of Public Institutions**

#### **Introduction**

The main purpose for the enactment of a freedom of information law is to entrench discipline within public institutions and to hold government accountable to the people, thereby promoting a culture of good governance, openness and associated democratic ethos. Public institutions are responsible for enforcing governmental policies. They are comprised of government Parastatals, Ministries, Departments and Agencies both at the federal and state levels. They also include committees, subcommittees, corporations, boards, etc. within States and at the center. Some private institutions are also treated as public either because they access public funds or because they perform public duties. Pre-FoI Act, many of these institutions were operated like personal empires- no information with regard to staffing, the emoluments of public servants; policies; and information or documents were treated like private properties and labelled as confidential whenever it served the purpose of the institutions.

The FoI Act is thus enacted to remedy this malaise within the public institutions. To achieve this, it imposes several obligations and duties on public institutions and provides parameters with which their actions can now be judged. It further provides access to court to ordinary citizens whenever any public institution lags behind in the performance of any of these obligations.

This chapter will examine the nature of public institutions' obligations under three subheads, namely the obligation to proactively disclose certain categories of information/records; the obligation to disclose in response to request for information/record; and other general obligations of public institutions.

### **Nature of Obligations on Public Institutions**

The primary aim of a FoI law is to provide access to information/records in the custody of public institutions or government. The nature of public institutions' obligations therefore mainly consists in making disclosure in accordance with the provisions of the FoI Act. These may be by way of proactive disclosure or disclosure associated with FoI requests or it may be in relation to the training of officers to be responsible for the institution's FoI desk. Each of these obligations is considered below.

#### ***Proactive Disclosure***

Proactive disclosure takes place when information is made available to the public on the initiative of the public institutions themselves, without anyone having to first submit a request for the information. This obligation is not request-dependent.

Public institutions are expected to proactively disclose certain categories of information under the Act.<sup>2</sup> This is advantageous in that it reduces the need for individualised requests thereby

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<sup>1</sup> Edetan Ojo, "Proactive Disclosure Requirements under the FoI Act" Media Right Agenda (Power Point presentation) p 4 available online at [http://foia.justice.gov.ng/pages/resources/download/AGF\\_Proactive\\_Disclosures\\_under\\_the\\_FOI\\_Act.pdf](http://foia.justice.gov.ng/pages/resources/download/AGF_Proactive_Disclosures_under_the_FOI_Act.pdf) accessed [14/08/2014]

<sup>2</sup> See section 2(3) for a list of these disclosures

<sup>3</sup> Mohammed Bello Adoke, Keynote Address at a National Summit on the Freedom of Information Act, organised by Media Rights Agenda in Partnership with the United States Agency for International Aid (USAID) held at NICON Luxury Hotel, 18<sup>th</sup> to 19<sup>th</sup> June, 2012 at p 5 paragraph 5 available online at

limiting the burden on public institutions while also ensuring that they perform their statutory obligation of open administration.

Section 2(3) of the FoI Act contains an enumeration of information that must be proactively disclosed by public institutions. In its Guidelines,<sup>4</sup> the Attorney General's office has simplified this by categorising it into three, namely: descriptive information, list or enumeration of records; and actual records/data. Each categorisation is given further attention below:

- a) Descriptive information: every public institution is required to proactively disclose a description of the organisation and responsibilities of the institution including details of the programmes and functions of each division, branch and department of the institution.<sup>5</sup> Thus, a university for instance is expected to provide in advance information about its programmes, organisations, departments as well as the functions of all the units within the university. This information may be provided on the university website or through any other means that can be easily accessed by its immediate community. Such a description will save the institution's time and human resources which would have been employed in attending to requests about them.

Section 2(3)(c) also requires a public institution to describe document containing final opinions, including concurring and dissenting opinions as well as orders made in the adjudication of cases. Again, a university as an example of public institution is required to proactively publish concurring and dissenting opinions

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[http://www.foia.justice.gov.ng/pages/resources/download/HAGF\\_FOI\\_keynote\\_address.pdf](http://www.foia.justice.gov.ng/pages/resources/download/HAGF_FOI_keynote_address.pdf) accessed [24/07/2014]

<sup>4</sup> See paragraph 1.4 of the AG Guidelines

<sup>5</sup> Section 2(3)(a)

in the adjudication of cases involving students' or staff's disciplinary actions.

- b) List or enumeration of records: this seems the easiest of the information required to be proactively disclosed. All that the public institution has to do here is provide a list of those information and not their contents. Included here is a list containing classes of records under the control of the institution in sufficient detail as well as manuals used by employees of the institution to administer any of the programmes of the institution.<sup>6</sup> Files containing applications for any contract, permit, grants, licences or agreements; reports, documents, studies, or publications prepared by independent contractors for the institution, etc. are some of the other information required to be proactively listed.<sup>7</sup>

The advantage of this listing is that it will provide a before-hand guide to a prospective applicant for information thereby obliterating ambivalent applications and saving the time of both the applicants and the public institution involved.

- c) Actual records/data: documents to be proactively disclosed are contained in section 2(3)(d) of the FoI Act and they include: substantive rules of the institution; statements and interpretations of policy which have been adopted by the institution; final planning policies, recommendations, and decisions; factual reports, inspection reports, and studies whether prepared by or for the institution; information relating to the receipt or expenditure of public or other funds of the institution; names, salaries, titles and dates of employment of all employees and officers of the institution; etc. This, like

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<sup>6</sup> Section 2(3)(b)(i) & (ii)

<sup>7</sup> See section 2(3)(e)(i) & (iii)

other proactively disclosed information, is to meet the need of openness, accountability and financial responsibility.

Note however that the requirement of proactive disclosure in respect of any of the information enumerated above will not apply where a public institution does not ordinarily keep that type of information or where the information is exempted under any of the sections of the Act.<sup>8</sup>

The information enumerated above and required to be proactively disclosed must be widely disseminated through various means such as print (in hard copies), electronic (such as on CD/DVD or other memory sticks), online sources (on the internet) and they should be available both in hard and soft copies at the office of the institution.<sup>9</sup> In choosing the mode of dissemination, it is important to put the immediate community who may want to access the information into consideration.

Thus, where the community does not have access to the internet, the institution may make the information available in hard copy or in other formats that may be accessible by the people of the community. Language barriers should also be put into consideration when dealing with illiterate communities. Efforts should therefore be made in such a case to translate the information into the local dialect of the community hosting the public institution.<sup>10</sup>

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<sup>8</sup> See paragraph 1.42 of the AG Guidelines

<sup>9</sup> See section 2(4) FoIA and paragraph 1.42 of the AG Guidelines

<sup>10</sup> See Edetan Ojo, "Proactive Disclosure Requirements under the FoI Act", *op cit.*, at pp 7 & 8

Where information is required to be proactively disclosed, such information must be the current information and not an outdated one. Thus section 2(5) FoI Act requires that public institutions must periodically review and update the information to be proactively disclosed. Any change in information must also be immediately reflected so that people will not be accessing stale information.

Finally, the obligation on public institutions to proactively disclose is an enforceable right of persons affected by or accessing the information such that where an institution fails to proactively disclose (provided it has custody of such information), a person entitled to the right of access shall have the right to institute proceedings in the court to compel<sup>11</sup> such institution to comply with the provisions of the section.

### ***Request-related obligations***

The FoI Act imposes some obligations on public institutions which must be performed while attending to requests for information made to their offices. These obligations are discussed below.

First, public institutions have an obligation to promptly and effectively communicate with an applicant requesting for information under the Act. Thus, where a request is made under the Act, an institution has within 7 days to respond one way or the other to that request.<sup>12</sup> Where the response is a denial, it is mandatory that the public institution notify the applicant of the denial, stating in writing the reason for that denial, and whether part or all of the requested information is being denied. The

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<sup>11</sup> See section 2(6) FoIA

<sup>12</sup> See section 4 FoIA. But note that this time may be extended for another 7 days in accordance with the provisions of section 6 of the Act

sections of the Act relied on for the denial must also be timely communicated to the applicant.<sup>13</sup>

Another obligation associated with request for information is the obligation to transfer application where the recipient institution is of the considered view that the whole of the information requested or a bulk of it is in the custody of another public institution or when it forms the opinion that another institution has greater interest in the information.<sup>14</sup> This transfer may be done by the first public institution within 3 days but not later than 7 days after it received the application.<sup>15</sup>

The second (i.e. the new) public institution has within 7 days to react one way or the other to the application transferred to it but the 7 days will only start counting when the application is actually received from the first institution.<sup>16</sup> Where part of the requested information is with the recipient institution, an obligation to transfer this to the new institution exists, and in any event, notice of the transfer must be given to the applicant. The applicant must also be informed of his right to review the transfer in court.<sup>17</sup>

Finally, there is an obligation to make partial disclosure where it is justified. Thus, section 18 allows public institutions to sever exempted information from non-exempted ones and disclose the part of the request which is not exempted under the Act.

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<sup>13</sup> Ibid.

<sup>14</sup> Section 5(1) FoIA

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

### ***Other General Obligations***

Apart from obligations relating to proactive disclosure and those relating to request for information, there are other general obligations of public institutions which are provided for by the FoI Act. These obligations are discussed below.

It is a general obligation of a public institution to ensure that it records and keeps information about all its activities, operations and businesses.<sup>18</sup> This is one of the rationales of the FoI Act. The assumption is that proper keeping of records will make it easier for the institution to attend to requests for information from applicants. Non-keeping of such records will mean that there is no information to ask for or disclose.

Closely related to the above obligation is the need to ensure proper organisation and maintenance of all information in its custody in a manner that facilitates public access to such information.<sup>19</sup> Haphazard record keeping will lead to time wasting. It will also lead to inability to locate the information being sought. It is for this reason that the Act imposes the obligation on public institutions to keep their records in orderly and tidy manner. For instance, related information must be kept together; standard filing system must be adopted; the use of log books must be employed; and e-arrangement of all the records/information of the institutions should be done. This will ensure that, apart from keeping records and information, information will be easily accessible by the public.

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<sup>18</sup> See sections 2(1) & 9 FoIA

<sup>19</sup> See section 2(2) FoIA

A general obligation to train officials of public institutions on public's right to access information or records held by them is also provided for under section 13 of the FoI Act. Each public institution is expected to have a FoI help-desk to be manned by trained officers where every request for information or documents can be directed. The contact details of such officer(s) must be made known to the public to facilitate easy correspondence and clarifications resulting from ambiguous written requests.<sup>20</sup>

Finally, all public institutions have the general obligation to submit a report covering the preceding fiscal year and containing the information highlighted in section 29(1)(a) ó (h) to the office of the Attorney-General of the Federation on or before February 1 of each year.<sup>21</sup> This obligation extends to making the report available to the members of the public through electronic means.<sup>22</sup> This is to measure the level of public institutions' compliance with the provisions of the Act.

### **Conclusion**

Public institutions are at the center of the enforcement of any access to information law. They therefore determine the success or otherwise of the law. The citizens however also have pivotal obligations to perform, one of which is to put public institutions on their toes by making requests to uncover some of their activities with a view to bringing about accountability and good governance.

The FoI Act has imposed series of obligations on public institutions, ranging from proactive disclosure, to obligations related to requests for information, to general obligations. The mere provisions of law on these obligations will not in itself achieve the desired goal.

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<sup>20</sup> See paragraph 14.2 of the AG Guidelines

<sup>21</sup> Section 29(1) FoIA

<sup>22</sup> Section 29(2) FoIA

There is therefore an important need for everyone to enforce these provisions. It is only then that the country can be said to have benefitted from the enactment of a FoI law.

## CHAPTER 5

### Exemptions Under the FOI Act

#### Introduction

##### Meaning and nature of exemptions

Constitutional rights and freedoms are not absolute.<sup>1</sup> This implies that every right and freedom has some kind of limitation attached to them. These limitations are boundaries set or necessitated by the need to protect the rights of others or the interests of the public as a whole. Absolute freedom therefore is neither attainable nor desirable. A society in which men recognize no check on their freedom sooner or later becomes a society where freedom is the possession of only a few. Limitation ensures a proper balance between protected rights and other equally important public concerns such as public order, security, and democratic values. The mechanism by which this balance is maintained in the Freedom of Information (FoI) Act is called 'Exemptions'.

An exemption is a form of limitation or a preferential treatment approved by law. It is an official permission not to do something which otherwise you would have been legally bound to do. An exemption may relate to persons or things. Where it relates to persons, it means a legal obligation which ordinarily should attach to everyone does not attach to the exempted persons. In the case of things, it means the exempted things may not be treated the way other things or items are treated. Although the FoI Act does not define exemption, an exemption under the FoI Act, is a right of refusal to disclose information or simply a valid reason for refusing to disclose information. Information or records which enjoy the

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<sup>1</sup> I Currie & J de Waal (2005) *The Bill of Rights Handbook* Cape Town, JUTA, p 163.

status of exemption under the FoI Act are contained in sections 11, 12, 14, 15, 16, 17, 19 and 26. These provisions exempt from disclosure certain information relating to international affairs and defence,<sup>2</sup> law enforcement and investigation,<sup>3</sup> personal information,<sup>4</sup> third party information,<sup>5</sup> professional privileges,<sup>6</sup> course or research material,<sup>7</sup> published material or material available for purchase by the public, library or museum material and material placed in the National Library, National Museum or the non-public section of the National Archives of the Federal Republic of Nigeria.<sup>8</sup> It should be noted that unless a piece of information is specifically exempted from disclosure, there is no legitimate reason under the FoI Act to withhold such information from the public. Thus, documents marked as ‘Confidential’, ‘Secret’, ‘Top Secret’ or ‘Classified’ may still be disclosed to the public proactively or on request unless it is shown that such document falls under one exemption or the other under the FoI Act.

### **Effect of exemption**

The FoI Act contains eight issue-based exemptions.<sup>9</sup> These exemptions set boundaries to the right of access to information contained in the FoI Act or any other legislation relating to right of access to information. If a piece of information is exempt, it means two things. For members of the public, it means that they do not have a right of access to that information. For public institutions, it means they do not have an obligation to disclose such information.

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<sup>2</sup> FOIA, section 11.

<sup>3</sup> FOIA, section 12.

<sup>4</sup> FOIA, section 14.

<sup>5</sup> FOIA, section 15.

<sup>6</sup> FOIA, section 16.

<sup>7</sup> FOIA, section 17.

<sup>8</sup> FOIA, section 26.

<sup>9</sup> 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, p 12. The document is referred to subsequently as the Revised Guidelines on the implementation of the FOIA, 2013.

It should be noted that not having a right does not mean a privilege of access cannot be granted, and not having an obligation to disclose does not mean discretion to disclose cannot be exercised. Thus the particular effect of an exemption under the FoI Act depends on whether the exemption is discretionary or non-discretionary exemption. If an exemption is discretionary, a public institution may still disclose the information even after the exemption has been engaged and the public interest in the disclosure has been shown not to outweigh the injury the disclosure may cause. On the other hand, a public institution is under an absolute duty to deny an application for a piece of information which enjoys non-discretionary exemption. Where an application is made to a public institution for information part of which is exempted from disclosure, the institution shall disclose that part of the information that is not subject to the exemption. It must be noted that exemptions do not apply to request for information by a court of law in the course of judicial proceedings. No information in the custody of any public institution in Nigeria can legally be withheld from a court of law on any ground.<sup>10</sup>

**Purpose of exemption**

Exemption is a very important tool in the FoI Act. The introduction of exemptions into the FoI Act is based on the recognition of the fact that it is impracticable for any government, no matter how liberal, to allow access to all kinds of information and records in its custody without some private or State interests being jeopardized. Exemptions therefore strikes a balance between the right of access to information and other protected rights by ensuring that the exercise of the right of access to information does not interfere with State security, privacy rights, business proprietary interests, fair trial and intellectual property rights. Exemption also serves the purpose of ensuring that right of access to information is not exercised to the detriment of the common good in the areas of national security and international relations.

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<sup>10</sup> FOIA, section 22.

### **Types of Exemptions**

The FoI Act does not clearly classify exemptions. It simply provides for information which may or must be exempted from disclosure and information which may be exempted only upon fulfillment of certain conditions. By looking closely at the various provisions relating to exemption under the FoI Act, the following types of exemptions are identifiable: qualified exemption, unqualified exemption, injury-based exemption, discretionary exemption and non-discretionary exemption.

*(a). Qualified Exemption:*

Qualified exemption applies to the class of information which may be denied by a public institution only after considering and satisfying the requirements of the Public Interest Test.<sup>11</sup> In order words, information enjoying qualified exemption may be disclosed by public institutions on the ground of overriding public interest. For instance, a public institution may legitimately deny an application for information if the disclosure of such information will be injurious to Nigeria's defense and conduct of her international affairs.<sup>12</sup> Request for information may also be denied if the information requested pertains to records of any public institution in respect of administrative enforcement proceedings and the disclosure of such information would:<sup>13</sup>

- (a) interfere with pending law or administrative enforcement proceedings,
- (b) deprive a person of fair trial, (c) breach confidentiality between parties, (d) violate personal privacy,
- (e) obstruct ongoing criminal investigations, or
- (f) facilitate the commission of a crime.

Every public institution is also under an obligation to deny an application for information that contains personal information of a

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<sup>11</sup> Revised Guidelines on the implementation of the FOIA, p 12.

<sup>12</sup> FOIA, section 11.

<sup>13</sup> FOIA, section 12.

third party except where the third party consents or the information is already publicly available.<sup>14</sup> Section 15 of the FoI Act obliges public institutions to deny application for information which contains trade secrets (except the person or business to which such trade secret relates consents); information the disclosure of which could reasonably be expected to interfere with the contractual or other obligations of a third party; and proposals and bid for a contract or grant including information which if disclosed would frustrate procurement or give an advantage to any person.<sup>15</sup> Finally, requests for information may also be denied under this genre if the information pertains to test question, scoring keys, examination data, architects and engineers' plan for private buildings and library circulation and other records identifying library users with specific material.<sup>16</sup>

All the exemptions cited above are qualified exemptions.<sup>17</sup> The uniqueness of qualified exemptions is that they are not automatic. Before a public institution can rely on any one of the qualified exemptions above to deny a request for information, the public institution must have carried out the public interest test. In appropriate cases, if it is shown that the public interest in the disclosure of the exempted information outweighs the injury their disclosure may cause, the public institution concerned may disclose the information.

*(b). Unqualified Exemption:*

This is also referred to as absolute exemption. An unqualified exemption under the FoI Act is an exemption which may be applied by a public institution without carrying out the public interest test.<sup>18</sup> This class of exemptions may be relied upon by a public institution to deny FoI requests, regardless of whether the public interest in the disclosure of the information outweighs the

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<sup>14</sup> FOIA, section 14.

<sup>15</sup> FOIA, section 15.

<sup>16</sup> FOIA, section 19.

<sup>17</sup> See FOIA, sections 11(2), 12(2), 14(3), 15(4), & 19(2).

<sup>18</sup> Revised Guidelines on the implementation of the FOIA, p. 12.

injury the disclosure may cause. Even in cases where the public interest in the information is very strong and supports disclosure, a public institution may legally deny disclosure if the information is one that is exempted without qualifications. The class of information exempted from disclosure without qualification is contained in sections 15(2), 16, and 17 of the FoI Act.<sup>19</sup>

For instance, public institutions may deny application for any information that is subject to legal practitioner-client privilege, health worker-client privilege, journalism confidentiality privileges and any other professional privilege recognized by an Act. Similarly, information which contains course or research materials prepared by faculty members is also exempted from disclosure. Information containing product of environmental testing carried out by or on behalf of a public institution may also not be disclosed. The FoI Act does not apply to the following set of information: published materials or material available for purchase by the public; library or museum material made or acquired and preserved solely for public reference or exhibition purposes; and materials placed in the National Library, National Museum and non-public section of the National Archive on behalf of any person or private organisation. A public institution may deny all the set of information listed above. In doing so, the public institution concerned needs not show public interest or the injury disclosure may cause.

*(c). Injury-based Exemption*

This is a special form of qualified exemption. Injury-based exemptions are exemptions in which disclosure of information “may”, “would” or “could reasonably be expected” to cause injury or harm, or an interference, or a deprivation of the specified purpose of the exemption. Unlike other qualified exemptions, it does not specifically exempt any particular information, and where it does, the exemption relates to only such information the disclosure of which would be injurious to the purpose or subject

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<sup>19</sup> *Ibid.*

matter of the exemption. In such cases, it is not enough to state that a particular piece of information relates to the purpose or subject matter of the exemption. It must further be established by the public institution that the information if disclosed is likely to be injurious to the purpose or subject matter of the exemption. It is only after this that the public interest test is then applied. This type of exemption is contained in sections 11 and 12 of the FoI Act.

Before a public institution can rely on an injury based exemption, the institution must satisfy three pre-conditions. Firstly, it must ascertain that the information requested is of the type covered by the exemption. Secondly, the public institution must show that the disclosure of information may, would or could reasonably be expected to cause the harm identified in the exemption. It is only at this point that the exemption is engaged. Only after then will the public institution apply the public interest test.

*(d). Discretionary Exemption*

A discretionary exemption is one that gives a public institution discretion as to whether or not to disclose a piece of information which is the subject matter of an exemption. This type of exemption is introduced with the phrase "A public institution may deny". This type of exemption is contained in sections 11, 12, 16, 17 and 19 of the FoI Act. The provisions of these sections are introduced with the modal auxiliary verb "may". In *Auchi Polytechnic v. Okuoghae*,<sup>20</sup> the court held with regard to the use of the word "may" in a statute as follows: "In the ordinary rule of construction of statutes containing the word "may", the use of the word *prima facie* conveys that the authority which has power to do an act has an option either to do it or not to do it." In all such cases, a public institution has discretion to disclose or deny access to the information sought under those sections. A discretionary exemption provides a public institution with discretion to still disclose the record or information despite the fact that the public interest in disclosure does not outweigh the injury or harm stated in

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<sup>20</sup> (2005) 10 (PT. 933) 279 @ 293.

the exemption.<sup>21</sup> In other words, there is no obligation to refuse the application and withhold the record.

*(e). Non-discretionary Exemption*

This is also referred to as mandatory exemption. Unlike discretionary exemption, a non-discretionary exemption is one that prohibits disclosure and imposes an absolute obligation on a public institution to withhold the information requested once the requirements of the exemption have been satisfied. This type of exemption is introduced with phrases such as a public institution “must deny” or “shall deny”. In *Ogwuche v. Mba*,<sup>22</sup> the court while stating the meaning or the use of the word “must” in a statute held as follows: “... ‘Must’ is a word of absolute obligation...It is not merely directory. It is naturally prima facie imperative and admits of no discretion.

Similarly, in *Achineku v. Ishagba*,<sup>23</sup> the Court of Appeal explained the meaning of the word “shall” as follows:

The word “shall” in its ordinary meaning is a word of command and one which has always or which must be given a compulsory meaning as denoting obligation. It has a peremptory meaning, and it is generally imperative and mandatory. It has the invaluable significance of excluding the idea of discretion and the significance of operating to impose a duty may be enforced. Thus, if a statute provides that a thing “shall” be done, the natural and proper meaning is that the peremptory mandate is enjoined.

This type of exemption is contained in sections 14 and 15 of the FoI Act. The effect of such exemption is that the public institution

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<sup>21</sup> Revised Guidelines on the implementation of the FOIA, p 13.

<sup>22</sup> (1994) 4 NWLR (PT. 336) 75.

<sup>23</sup> *Achineku v. Ishagba* (1988) 4 NWLR (PT.89) 411 @ 420.

is under an absolute obligation to deny access to the information sought under those sections unless the public interest in disclosure clearly outweighs the harm identified. It is a breach of the FoI Act for any public institution to disclose any information duly subject to non-discretionary exemption.<sup>24</sup>

### **Information exempted from disclosure under FoI Act**

There are basically eight (8) classes of information exempted from disclosure under the FOI Act. As earlier noted, each of the exempted information may be identified as qualified exemption, unqualified exemption, injury-based exemption, discretionary exemption or non-discretionary exemption. However, in order to avoid repetition, subsequent analysis will be limited to qualified and non-qualified exemptions. This is so because injury-based exemption, discretionary exemption and non-discretionary exemption are either qualified or non-qualified exemption.

#### **(a) Information Exempted under Qualified Exemptions**

##### **1. Conduct of international affairs and defense**

This exemption is contained in section 11 of the FoI Act. The section actually contains two sub-exemptions: a sub-exemption for information whose disclosure may be injurious to the conduct of international affairs; and another sub-exemption for information whose disclosure may be injurious to the defense of the Federal Republic of Nigeria (FRN).

##### *(i) The Conduct of International Affairs*

Information whose disclosure may injure or harm the conduct of the international affairs is exempted under the FoI Act. International affairs include relations between Nigeria and any other country; relations between Nigeria and any international organisation, and the protection of Nigeria's interests and citizens abroad.<sup>25</sup> The injury contemplated under this exemption must be to the interests of Nigeria as a collective, rather than simply to the

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<sup>24</sup> Revised Guidelines on the implementation of the FOIA, p 13.

<sup>25</sup> *Ibid* at p 26.

public institution which holds the information or that of any federating State constituting Nigeria.<sup>26</sup> It must be noted that the information exempted under this sub-exemption may be in the custody of any public institution.<sup>27</sup> All that needs to be established is that the disclosure of the information may, would or could reasonably be expected to cause harm to the conduct of Nigeria's international affairs. In order for this sub-exemption to apply, the information requested must relate to the conduct of international affairs and the public institution must demonstrate how the disclosure of the information may, could or would reasonably be expected to harm the conduct of the international affairs of Nigeria. Thereafter, the public institution should proceed to apply the public interest test. If the public interest in the disclosure outweighs the injury the disclosure may cause, the public institution has a duty to disclose the information.

*(ii) Defence sub-exemption*

Information may also be exempted if its disclosure could injure or harm the defence of Nigeria. A piece of information may be injurious to the defence of Nigeria if its disclosure could assist an enemy or a potential enemy of Nigeria.<sup>28</sup> This sub-exemption is not only about defence information such as information about weaponry, troop deployments, reliability of a piece of military equipment, state of alert of the Armed Forces but any information whose disclosure could be injurious to Nigeria's defence.<sup>29</sup> This sub-exemption is subject to the public interest test.<sup>30</sup> This means that even where a piece of information might assist an enemy, public institutions are still obligated to consider whether there is a stronger public interest favouring its disclosure.

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<sup>26</sup> *Ibid* at p. 27.

<sup>27</sup> *Ibid*.

<sup>28</sup> *Ibid* at p 28.

<sup>29</sup> *Ibid*.

<sup>30</sup> See FOIA, section 11(2).

## **2. Law Enforcement and Investigation Exemption**

The activities and events covered by this exemption are:<sup>31</sup>

- i. Pending or actual and reasonably contemplated law enforcement proceedings by any law enforcement or correctional agency.
- ii. Pending administrative enforcement proceeding conducted by any public institution.
- iii. Fair and impartial trial of any person
- iv. Maintaining the secret identity of a confidential source
- v. The personal privacy of any person except it is in the greater public interest to do so
- vi. Ongoing criminal investigations
- vii. Security of penal institutions, such as the various prisons and detention centres.

Before a public institution can rely on any of the foregoing activities as grounds for denying information, the information requested must first of all relate to any of the activities and events above. Secondly, the public institution must further show that the disclosure of the information will be detrimental to any of these activities. Only after demonstrating the detrimental effect of the disclosure to the activities above may the public institution proceed to the public interest test. Public institutions may also deny application for information of which the disclosure could reasonably be expected to be injurious to the security of penal institutions or which could facilitate the commission of an offence.<sup>32</sup>

## **3. Personal Information**

Public institutions are required by virtue of section 14 of the FoI Act to deny application for information which contains any personal information. What is personal information? Personal information includes the following:<sup>33</sup>

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<sup>31</sup> FOIA, section 12.

<sup>32</sup> FOIA, section 12(1)(b)&(3).

<sup>33</sup> FOIA, section 14(1)(a)-(e).

- i. Files and personal information maintained with respect to individuals receiving social, medical, educational, vocational, financial, supervisory or custodial care or services directly or indirectly from public institutions.
- ii. Personnel files and personal information maintained in relation to employees, appointees or elected officials of public institutions or applicants for such positions.
- iii. Files and personal information held by any public institution dealing with professional or occupational registration, licensure or discipline.
- iv. Tax information required from an individual unless disclosure is authorised by another statute.
- v. Information revealing the identity of whistleblowers and other persons who file complaints to administrative, investigative, law enforcement or penal agencies on the commission of any crime.

The purpose of this exemption is to address the tension between right of access to information by members of the public and the right to privacy of individuals. In applying this exemption, it is not necessary for the public institution to show that the disclosure of the information may, could or would reasonably be expected to cause harm to the privacy rights of the individuals concerned. The only task before the public institution is to show that the information requested falls under any of the fore-going list of personal information. However, there are three circumstances in which a piece of personal information may be disclosed by a public institution: (a) if the individual to whom the information relates consents to its disclosure; (b) if the information is already publicly available; or (c) 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.<sup>34</sup>

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<sup>34</sup> See FOIA, section 14(2)&(3).

#### 4. Third Party Information

A public institution is under an obligation to deny an application for information that contains:<sup>35</sup>

- i. trade secrets and commercial or financial information obtained from a person or business where such trade secrets or information are proprietary, privileged or confidential, or where disclosure of such trade secrets or information may cause harm to the interests of the third party provided that nothing contained in this subsection shall be construed as preventing a person or business from consenting to disclosure;
- ii. information the disclosure of which could reasonably be expected to interfere with the contractual or other negotiations of a third party; and,
- iv. Proposal and bids for any contract, grants, or agreement, including information which if it were disclosed would frustrate procurement or give an advantage to any person.

A trade secret is a secret formulae or recipes.<sup>36</sup> It may also include the names of customers and the goods they buy as well as a company's pricing structure (if these are not generally known and are the source of a trading advantage). Commercial information on the other hand covers a broad range of information such as bank statements and advertising budgets.<sup>37</sup>

This is typically a non-discretionary exemption and partly an injury based exemption. In order to engage with the first leg of the exemption, the public institution need to show either that the trade test or commercial information is proprietary, privileged or confidential or that the disclosure of such trade secrets or information may cause harm to the interests of the third party. The other legs of the exemption required an Injury Test. The public

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<sup>35</sup> FOIA, section 15(1).

<sup>36</sup> Revised Guidelines on the implementation of the FOIA, p 38

<sup>37</sup> *Ibid.*

institution needs to show that harm will occur to the purposes/activities specified before proceeding to deal with the public interest test.

Once the information requested falls under any of the listed third party information, the harm has been established, and it is determined that the public interest in disclosure does not clearly outweigh the injury that the disclosure will cause, the public institution must deny the application.

### **5. Test questions, plans for building and library circulation**

Requests for information may also be denied under this genre if the information pertains to test questions, scoring keys, examination data, architects and engineers' plan for private buildings and library circulation and other records identifying library users with specific material.<sup>38</sup> However, where the public interest in the disclosure outweighs the disclosure would cause, the information may nonetheless be disclosed.<sup>39</sup>

#### **(b) Information Exempted under Unqualified Exemptions**

##### **1. Result or product of environmental testing**

A public institution have discretion to deny disclosure of a part of a record if that part contains the result or product of environmental testing carried out by or on behalf of a public institution.<sup>40</sup> Where however the public institution chooses to disclose such information, or a part thereof, that contains the results of a product or environmental testing, the institution shall at the same time as the information or part thereof is disclosed provide the applicant with a written explanation of the methods used in conducting the test.<sup>41</sup> As an unqualified exemption, there is no need for the public institution to consider whether there might be a stronger public interest in disclosing the information than in not disclosing it.

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<sup>38</sup> FOIA, section 19(1).

<sup>39</sup> FOIA, section 19(2).

<sup>40</sup> FOIA, section 15(2)

<sup>41</sup> FOIA, section 15(3)

## 2. Professional Privileges

Public institutions may deny application for any information that is subject to any of the following privileges: legal practitioner-client privilege, health worker-client privilege, journalism confidentiality privileges and any other professional privilege recognized by an Act.<sup>42</sup> Legal practitioner-client privilege covers all communications between lawyers and their clients for the purpose of obtaining legal advice, and other documents created on behalf of such clients.<sup>43</sup> Health Workers ó Client Privilege on the other hand covers all communication between health worker and their patients or clients.<sup>44</sup> Health workers in this case include doctors, nurses, and dentists.<sup>45</sup> Journalism Confidentiality Privilege is the right to refuse to divulge sources of information or disclose the actual or entire content of the information provided by these confidential sources.<sup>46</sup> The purpose of these privileges is to encourage full and frank openness between professionals and their clients. As an unqualified exemption, there is no need to consider whether there would be any injury caused by disclosing the requested information; or whether there might be a stronger public interest in disclosing the information than in not disclosing it. Once a piece of information falls under any of the privileges, such information is exempted from disclosure. However, the public institution may nonetheless disclose the information since this exemption is a discretionary one.

## 3. Course or Research Material

Public institutions may deny application for information which contains course or research materials prepared by faculty members.<sup>47</sup> Course Material includes any academic material prepared in furtherance of a curriculum offered by an institution of

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<sup>42</sup> FOIA, section 16

<sup>43</sup> Revised Guidelines on the implementation of the FOIA, p 41

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> FOIA, section 17.

higher learning.<sup>48</sup> Research material on the other hand connotes records produced from a systematic investigation undertaken by an academic member of a faculty of a tertiary institution to establish facts, solve new or existing problems, prove new ideas or develop new theories.<sup>49</sup> The purpose of this exemption is to protect academic integrity and professional excellence among lecturers. As an unqualified exemption, there is no need to consider whether there would be any injury caused by disclosing the requested information; or, whether there might be a stronger public interest in disclosing the information than in not disclosing it. Once a piece of information is shown to be a course or research material, such information is exempted from disclosure. However, the public institution may nonetheless disclose the information since this exemption is a discretionary one.

#### **4. Excluded Records**

Section 26 of the FoI Act excludes the following records from application of the FoI Act.

- 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; and
- 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 organisation other than a government or public institution.

As an unqualified exemption, there is no need to consider whether there would be any injury caused by disclosing the requested information; or, whether there might be a stronger public interest in disclosing the information than in not disclosing it. Once a piece of information is shown to fall under any of the listed items, such

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<sup>48</sup> Revised Guidelines on the Implementation of the FOIA, p 43

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

information is exempted from disclosure. Public institutions have no discretion to disclose the information.

### **Tests to be carried out before applying exemption**

#### *(a). Test of Engagement*

Before applying an exemption, the exemption must be engaged. An exemption is engaged when the information requested relates to any of the items mentioned in the FoI Act and in the manner mentioned by the Act. In the case of non-injury based exemption such as professional privileges, course or research material, test questions, plans for building and library circulation, excluded records, personal information exemptions; this is very simple and straightforward. Once the information requested relates to any of the listed professional privileges, course or research material, test questions, plans for building and library circulation, excluded records or personal information, the exemption is said to be engaged. However, in the case of injury-based exemption such as conduct of international affairs and defence, law enforcement and investigation, results or products of environmental testing, and third party information exemptions; the test of engagement is a bit more complicated. The exemption is not engaged simply because the information requested relates to the conduct of international affairs and defence, law enforcement and investigation, results or products of environmental testing, or third party information. In addition to that, it must be shown or demonstrated by the public institution that the information requested may, would or could reasonably be expected to harm, injure, interfere with or prejudice the conduct of international affairs and defence, law enforcement and investigation, results or products of environmental testing, or any third party information. Only then is the exemption engaged. This additional test is called the Injury Test.

Once an Unqualified Exemption has been engaged, such exemption can be applied. However, for Qualified Exemptions, it must be noted that the mere fact that an exemption is engaged does not mean that the exemption should be applied. The Public Interest

Test must also be carried out before applying a qualified exemption.

*(b). Injury Test*

As stated above, the Injury test is not a stand-alone test; it is part and parcel of the Test of Engagement for all Injury-based Exemptions such as the exemptions relating to conduct of international affairs and defence, law enforcement and investigation, results or products of environmental testing, and third party information. One interesting thing about the fore-going list of injury-based exemptions is that it comprises both qualified and unqualified exemptions. In all the examples of exemptions cited above, public institution cannot withhold information unless the disclosure, *‘may’*, *‘could’* or *‘would’* reasonably be expected to injure, harm or prejudice any of the purposes mentioned. The injury test is applied only after it has been determined that the information requested falls under any of the subjects listed above. In all the relevant sections of the FoI Act providing for injury-based exemptions such as sections 11, 12, 14, 15(1) and 19, there are three alternative parts to the injury test. These are: (i) whether the disclosure of the information *‘may’* cause harm to the purposes mentioned or listed, (ii) whether the disclosure *‘could’* reasonably be expected to cause harm to any of the purposes mentioned or listed; and (iii) whether the disclosure *‘would’* cause harm to any of the purposes mentioned or listed.

*‘May’* cause harm implies only a simple possibility or fair chance of injury or harm if the information is disclosed. *‘Could’* reasonable expected to cause harm implies a reasonable expectation or likelihood of harm if the information is disclosed. *‘Would’* cause harm implies a significant, actual and real conviction or certainty that harm will occur should the information be disclosed. Public institutions are required under the FoI Act to explain the harm or injury that *‘may’*, *‘would’* or *‘could’* reasonably be expected to be caused by the disclosure. Although the institution is not expected to prove exactly what would happen on disclosure, it must be able to provide some evidence which it can then use in reaching a well-

informed conclusion about the nature of harm resulting from disclosure. It is not sufficient for an institution to put forward unsupported speculation or opinion.

*(c) Public Interest Test (PIT)*

The FoI Act does not define exactly how public institutions should carry out this test. The Act only mandates public institutions in the cases of Qualified Exemptions to disclose the information requested if the public interest in the disclosure of the information outweighs the harm that its disclosure would cause. Perhaps, the best way to appreciate the public interest test is to understand “public interest”. The phrase “public interest” is also not defined in the FoI Act. However, the *Black’s Law Dictionary*<sup>50</sup> defines “Public Interest” as: “Something in which the public, the community at large, has some interest by which their legal rights or liabilities are affected; Interest shared by citizens generally in affairs of local, state or national government.” It is also important to differentiate between “what interests the public” on the one hand, and “what is in the public interest” on the other hand. Information is in the public interest if it serves the interest of the public at large. In applying the Public Interest Test, public institutions are required to make only two decisions: whether it is in the interest of the public to disclose a particular piece of information, and whether the public interest in the disclosure outweighs the harm that the disclosure of the information may cause. Factors that may influence public interest in the disclosure of any information include: the extent to which the information is already in the public domain, the need for furthering the understanding and participation in the public debate of issues of the day, promoting accountability and transparency by public authorities for decisions taken by them, promoting accountability and transparency in the spending of public funds, allowing individuals, companies and other bodies to understand decisions made by public institutions affecting their lives, and bringing to light information affecting public health and safety.

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<sup>50</sup> 6<sup>th</sup> Edition

**Conclusion**

This chapter has examined the meaning, nature, effect, purpose and types of exemptions under the FoI Act. The chapter has also discussed the various classes of information exempted from disclosure to the public under the FoI Act as well as the tests to be carried out before applying the exemptions. It is important to note the eight exemptions contained in the FoI Act are to be construed strictly and narrowly. The presumption should be in favour of disclosure, always. Whenever the public interest in disclosure is equal to the harm the disclosure would cause, the public interest in disclosure ought to prevail. It is noteworthy that some records may contain both non exempt and exempt information. Just because an exemption applies to some information within a record does not mean that the entire document should be withheld. Section 18 of the FoI Act permits the extraction of non exempt information from other information in a record that is either exempt or not relevant. This is known as redaction. Redaction can be made by deleting or blocking words, sentences, paragraphs and whole sections of record. If well used, redaction will reduce the number of occasions public institutions invoke one exemption or the other under the FoI Act.

## CHAPTER 6

### Redress Mechanisms Under the FOI Act

#### Introduction

Section 1(1) of the Freedom of Information (FoI) Act provides for the right of access of any person to information in the custody or possession of any public official, agency or institution, and that the person requesting for the information need not disclose specific interest in such information. However, denial of access to information under the Act can occur in two ways; a) where the public institution expressly deny access, and (b) by implication or where the public institution fails to give access to information applied for within the time limit set by the FoI Act.<sup>1</sup> In the latter case, it shall be deemed that access has been refused.<sup>2</sup>

In accordance with section 7(1) of the FoI Act, where the government or public institution expressly refuses to give access to information or a part of it, the institution shall state in the notice to be given to the applicant, the following particulars:

- i.) The grounds for the refusal;
- ii.) The specific provision of the Act relating to the refusal<sup>3</sup>;
- iii.) That the applicant has a right to challenge the decision refusing access and have it reviewed by a Court.
- iv.) The name, designation and signature of each person responsible for the denial.<sup>4</sup>

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<sup>1</sup> Section 4 of the FoI Act prescribes a period of 7 days within which a public institution shall respond to request for information. Sundays and public holidays are excluded for the purpose of computation of time.

<sup>2</sup> See section 7(4) of the FoI Act.

<sup>3</sup> Where the ground of refusal relates to the exemptions, the particular exemption relating to the refusal and why it applies to it shall be so clearly stated.

v.) Whether the information or record exists.<sup>5</sup>

Whether access to information is refused expressly or impliedly, the FoI Act provides for remedies to the applicant (in order to make right a wrong or make a correction of a wrong); such that the public institution can be compelled to provide access to the information requested.

A public institution may however extend the period of 7 days within which to make the information available to the applicant for another 7 days (making it not more than 14 days) in two instances: if request made is in respect of a large number of records and to make them available within the stipulated period would unreasonably interfere with the operations of the public institution; and where consultations are necessary in order to comply with the application for information and this cannot be done within the stipulated time, notice of this extension shall be given to the applicant, and the notice shall in addition state that the applicant has a right to have the decision to extend the time reviewed by the Court.<sup>6</sup>

In cases where there is a transfer of application for access to information request by a public institution to another on the grounds that another public institution has greater interest in the information, such application shall be made within a period of 3 days but latest by 7 days after the receipt of the application. The 7 days period within which the new public institution to which the application has been transferred will begin to count from the day it received the application. The public institution transferring the application is obliged to give notice of this to the applicant and also inform the applicant in the same notice that he/she has a right

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<sup>4</sup> See section 7(2) of the FoI Act.

<sup>5</sup> See section 7(3) of the FoI Act.

<sup>6</sup> See section 6 of the FoI Act.

to have the decision to transfer the application reviewed by the Court.<sup>7</sup>

It is important for the applicant to ensure that the time to approach the Court is ripe or appropriate, otherwise the case may not be entertained on such grounds; except where the applicant is challenging the decision of the public institution to extend the original time within which to make the information available or the decision to transfer the application as stipulated by the FoI Act.<sup>8</sup>

### **Redress through the Court**

Before considering the redress available to an applicant who has been denied access to information under the FoI Act, it is important to refer to regional instruments which are also relevant to the issue. Article VI (2) of the Declaration of Principles on Freedom of Expression in Africa, 2002 provides that any refusal to disclose information shall be subject to appeal to an independent body and/or the courts.<sup>9</sup> It further provides that States parties to the African Charter on Human and Peoples' Rights, which Nigeria is one,<sup>10</sup> are enjoined to make every effort to give practical effect to these principles.<sup>11</sup> The Model Law on Access to Information for Africa, 2013<sup>12</sup> in section 15 (9)(b) and (c) reserves the right of a requester for information to apply for a review of a refusal decision in addition to the right to apply directly to an oversight mechanism. A requester who is dissatisfied with the decision of the oversight

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<sup>7</sup> See section 5(1) and (2) of the FoI Act.

<sup>8</sup> See sections 5 and 6 of the FoI Act.

<sup>9</sup> 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"

<sup>10</sup> The African Charter on Human and Peoples' Rights, 1981 was ratified by Nigeria on 22 June 1983.

<sup>11</sup> See Article XVI, Declaration of Principles on Freedom of Expression in Africa.

<sup>12</sup> Prepared by the African Commission on Human and Peoples' Rights

mechanism also has the right to access the court for a judicial review.<sup>13</sup>

Coming to the FoI Act position, it provides that anyone who is refused access to information has the right to institute a court action to compel any public institution to comply with the request made in compliance with the provisions of the FoI Act<sup>14</sup> except where the information required falls within the exemptions recognized by the Act.<sup>15</sup>

The above provision is further reinforced by section 20 of the FoI Act which provides for a judicial remedy to the effect that any applicant who has been denied access to information, or a part thereof, may apply to court for review of the matter within 30 days

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<sup>13</sup> See section 83, Part V of the Model Law on Access to Information for Africa.

<sup>14</sup> See section 1(3) of the FoI Act.

<sup>15</sup> The exemptions recognized by the Act are: information relating to international affairs and defence ó s. 11; information relating to records of law enforcement and investigation ó s. 12; However, application for information/records shall not be denied where the public interest in disclosing the information outweighs the injury the disclosure would cause -section 12(2)) - public interest test; information relating to personal information ó 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 ó 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 ó 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 engineersøplans for public and private buildings where disclosure would compromise security; library circulation and other record identifying library users with specific materials ó 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.

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 expiration of the 30 days fix or allow.<sup>16</sup>

Going by the latter provision of section 20 of the FoI Act, it means that a Court, may on good grounds allow an applicant to bring a case of denial of access to information to be heard before or after the expiration of 30 days specified by the Act.

The appropriate court where an applicant can bring a case of denial of access to information for review is at a High Court or Federal High Court.<sup>17</sup> In other words, this could be the High Court of a State, Federal or of the Federal Capital Territory, Abuja.

Section 21 of the FoI Act intends to ensure speedy trial of cases brought in respect of denial of access to information by providing that an application made under the section shall be heard and determined summarily, in other words, speedily, without any form of bureaucracy, delay or attention to formality.<sup>18</sup>

In order for the Court to be able to properly decide the matter, the FoI Act enables the Court to examine any information to which the Act applies and that no such information can be withheld from the court by any public institution on any ground.<sup>19</sup>

The Court is further empowered while handling matters brought in pursuance of the FoI Act to take necessary precaution to ensure that neither the Court or any person disclose the information or

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<sup>16</sup> Cases of extension of time will usually be by motion to the appropriate Court where the matter will be heard.

<sup>17</sup> See section 31 of the FoI Act.

<sup>18</sup> 'Summary' is defined among others as '(of a judicial process) conducted without the customary legal formalities'. See Catherine Soanes and Angus Stevenson (eds), *Concise Oxford English Dictionary* (11<sup>th</sup> Ed. Oxford: Oxford University Press, 2004) p. 1443.

<sup>19</sup> See section 22 of the Freedom of Information Act.

other material, which the public institution will not be authorized to disclose.<sup>20</sup>

At the hearing of the suit for judicial review of the denial of access to information, it is for the public institution to discharge the burden of proof that it is authorized to deny the required information and that the refusal is justified by the FoI Act.<sup>21</sup>

After hearing the issue concerning denial of access to information, the Court shall order the institution to disclose the information or a part of it. If the Court comes to the determination that the institution is not authorized to deny the application, and even where the institution is authorized to deny access, the Court shall order that the information be disclosed where it comes to the decision that the institution does not have reasonable grounds on which to deny the access.<sup>22</sup> Thus, in *Public & Private Development Centre Ltd/Gt (PPDC) v. Power Holding Company of Nigeria (PHCN) Plc & Ano.*,<sup>23</sup> the Applicant sought to compel the 1<sup>st</sup> Respondent (i.e. PHCN) by an order of mandamus to supply certain documents/information,<sup>24</sup> pursuant to the right conferred on it to obtain public records and information from public institutions pursuant to the FoI Act.

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<sup>20</sup> See section 23 of the FoI Act; Note that there seem to be an omission of the word "not" after the word "will" in the section.

<sup>21</sup> See section 24 of the FoI Act.

<sup>22</sup> See section 25(1) (a) and (b) of the FoI Act

<sup>23</sup> Unreported Suit No FHC/ABJ/CS/582/2012 delivered on 1<sup>st</sup> March, 2013 by Hon. Justice A.F.A Ademola of the Federal High Court of Nigeria, Abuja Judicial Division.

<sup>24</sup> Relating to procurement plan, NEEDS assessment document, documentation on design and specification requirement, documentation on the scope of the procurement, bidding documents issued to all bidders in respect of the procurement and list of all contractors that submitted bids in respect of the procurement, minutes of the Tenders Board approving the winning bids, in respect of a public procurement exercise conducted in 2011 through its Project Management Unit, involving the award of contract for supply and installation of 300 No. 1 KV 500A on load sectionalizers High Voltage distribution system (HVDS) 4 Network etc at Karu, LUTH, Ogba, Agege and Challenge- Ibadan.

The 1<sup>st</sup> Respondent opposed the application based on section 15(1)(b) of the Act which entitles a public institution to deny an application for information to a person when the transaction is still at the negotiation stage, a third party is involved and the disclosure of the information could reasonably be expected to interfere with the contractual or other negotiations of a third party. The 1<sup>st</sup> Respondent also contended that the documents relates to a third party, the winner of the bid and that the said section has its origin in the *privity* of contract doctrine in Law of Contract and submitted that the release of information to a third party, the Applicant, would affect the contractual relationship between parties to the contract.

The Court however agreed with the applicant counsel's submissions among others that the negotiations were concluded and the contract already awarded and as such, the disclosure of the information sought by the Applicant cannot reasonably be expected to interfere with any contractual or other negotiations of the contractor, (the third party). The Court therefore held that the 1<sup>st</sup> Respondent has failed to satisfy the conditions of section 15(1) (b) of the FoI Act and therefore not entitled to the exemption stated therein. The Court granted the prayer of the applicant to the effect that the refusal was wrongful, and ordered the 1<sup>st</sup> Respondent to furnish the Applicant with the information and copies of the documents requested.

Furthermore, where the Court, after a consideration of the issue and the circumstances comes to the conclusion that the public interest in disclosing the information outweighs the interest being served if the application is denied, it shall order that the information be disclosed.<sup>25</sup> In *Uzoegwu F.O.C. Esq v. Central Bank of Nigeria & Ano.*,<sup>26</sup> the Applicant applied for information

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<sup>25</sup> See section 25(1)(c) of the FoI Act.

<sup>26</sup> Unreported Suit No. FHC/ABJ/CS/1016/2011 delivered on 5<sup>th</sup> July, 2012 by Hon. Justice Balkisu Bello Aliyu of the Federal High Court of Nigeria, Abuja Judicial Division.

relating to the amount payable to the Governor, Deputy Governor and Directors of the Central Bank of Nigeria as monthly salary. The 1<sup>st</sup> Respondent (the Central Bank of Nigeria) did not reply to the Applicant's letter or furnish him with the information required by virtue of which it is deemed to have denied the information requested (section 8(4)). The Applicant, who is a lawyer, appeared in person seeking for the review of the refusal. The 1<sup>st</sup> Respondent's response was that the reasons for the refusal was based on the premise that the information is personal information which was communicated to the affected officials upon their appointments and contained in their personal files and thus protected by section 15(1) read together with section 13(3) of the FoI Act and section 37 of the Constitution of Nigeria, and as such, the information sought by the Plaintiff is the one exempted from disclosure under the Act

The 2<sup>nd</sup> Respondent, the Attorney-General of the Federation and Minister for Justice, filed a counter affidavit and relied on facts which are the same as those relied upon by the 1<sup>st</sup> Defendant. The Court held that the FoI Act having not specifically exempted the salaries and allowances of public officers in respect of their employment from disclosure, the legislation did not intend that such information is personal information. The Court therefore held that the 1<sup>st</sup> Defendant's denial of the information requested by the Plaintiff is not justified by the FoI Act and ordered the 1<sup>st</sup> Defendant to furnish the information requested.

In hearing a case for denial of access to information, the Court can make the order to disclose subject to such conditions as it might deem appropriate.<sup>27</sup> In *Uzoegwu F.O.C. Esq v. Central Bank of Nigeria & Ano.*, for instance, the court ordered the 1<sup>st</sup> Defendant to furnish the information requested within fourteen days from the date of judgment, subject only to payment of fees for the certification of records of the information if necessary.

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<sup>27</sup> See section 25(2) of the FoI Act.

It is an offence to wrongfully deny access to information and where the Court found that the applicant was wrongfully denied access to the requested information, the officer or institution in default commits an offence and shall be liable on conviction to a fine of N500,000 (Five Hundred Thousand Naira Only).<sup>28</sup>

### **Redress through Administrative Procedure**

In the provision of the FoI Act on judicial review in cases of refusal of access to information, the word *õmayö*<sup>29</sup> as opposed to *õshallö* was used; which may be interpreted as indicating that is it not mandatory that an applicant who has been denied access to information by a public institution must seek a redress in court. By implication, it means that such an applicant may seek alternative redress through administrative complaints procedure of bodies such as, the National Human Rights Commission, Public Complaints Commission, the legislature (which may exercise oversight functions), the Public Service Commission and the utilization of the internal review mechanism of the public institution which refused access to information.

#### *a. Internal Review Mechanism*

The use of internal review mechanism is provided for by the Guidelines on the Implementation of the Freedom of Information Act (the Guidelines).<sup>30</sup> The mechanism is provided to avoid the high costs of accessing the Court. An aggrieved applicant can therefore petition the senior officials of the public institution which refused access to information and thereby provide the applicant with another opportunity to have the decision reviewed by a more senior staff of the public institution.<sup>31</sup> Chapter 2, paragraph 2.4 of

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<sup>28</sup> See section 7(5) of the FoI Act.

<sup>29</sup> See section 20 of the FoI Act, which provides that *õany applicant who has been denied access to information or a part thereof may apply to the Court* *õ*

<sup>30</sup> See the 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.

<sup>31</sup> See Chapter 2, para 2.3 of the Guidelines on the Implementation of the Freedom of Information Act.

the Guidelines suggests that the senior official of the public institutions whom the petition should be directed to shall be the Chief Executive.

The Guidelines states that FoI Act Committees can act as an advisory body in this regard and under paragraph 2.4 (h), the Guidelines provides that in the notice informing the applicant of the right to challenge a refusal decision in Court, it should be suggested to the applicant that an internal review can be sought by writing to the Chief Executive of the institution. It should be emphasized that this internal review does not affect the right to seek a judicial review. The Guidelines further states that all existing FoI Act Committees can advise the Chief Executive during internal review of the FoI application. However, no time is fixed within which the decision by the internal review mechanism must be taken, which may render such procedure ineffective.

Besides, although the provisions of the Guidelines are laudable, the concern is that the Guidelines are merely directional, geared towards guiding public institutions on the implementation of the FoI Act and as such, has no legal effect since the Attorney General of the Federation's powers to make them did not derive from the Act. Hence, the Guidelines contain no penalties for non-compliance with the provisions of the FoI Act and this can make its provisions unappealing.

The recourse to courts without any effective window of administrative review may be counterproductive and negate the intent of the law, since several factors may play out to the disadvantage of the applicant. If the cost of accessing redress mechanisms/courts is excessive and the time element that it will take the court to pronounce judgment in the matter is too long, the applicant and potential ones will be deterred in seeking redress or applying the FoI Act at all. The principles on freedom of information legislation dictate that there should be layers of remedies available to the applicant in the event of a refusal to

access information.<sup>32</sup> In other words, it is important that these layers are effective and efficient in providing applicants who are denied access to information with redress.

The procedural defect in the internal review mechanism introduced by the Guidelines and the difficulty which its enforcement might pose needs to be cured by specifying a time frame for the internal review. A guide can be found in section 42 of the Model Law on Access to Information for Africa, to the effect that in an application for an internal review of a decision refusing access to information, the senior staff of the public institution shall be required to make a fresh decision within 15 days after the internal review request is received.

*b. Administrative Redress through Public Bodies*

Some public bodies which exercise judicial/quasi-judicial functions such as the National Human Rights Commission (the Commission),<sup>33</sup> the Public Complaints Commission (the Ombudsman)<sup>34</sup> and the Civil Service Commissions (at the Federal and State levels) can play important roles in administrative redress mechanism in respect of the FoI Act.

The National Human Rights Commission, for example now has wide powers to receive and investigate complaints concerning violations of human rights and make appropriate determination, and to act as a conciliator between parties to a complaint and to compel the attendance of witnesses to produce evidence before it.<sup>35</sup>

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<sup>32</sup> See Global Campaign for Free Expression, "The Public's Right to Know: Principles on Freedom of Information Legislation", Report E/CN.4/2000/63.

<sup>33</sup> Established by the National Human Rights Commission Act, Cap. N46, Laws of the Federation of Nigeria, 2004 amended by the National Human Rights Commission (Amendment) Act, 2010.

<sup>34</sup> The Commission was established in 1975 by Decree No. 31 of 1975 as amended by Decree No. 21 of 1979. The Decree was entrenched in the 1979 Constitution and is now Cap. P37, Laws of the Federation of Nigeria, 2004.

<sup>35</sup> See section 6 (2) (a-e) of the National Human Rights Commission (Amendment) Act, 2010

The Commission's law also provides that an award or recommendation by it shall be recognized as binding and upon application in writing to the court, shall be enforced by the court.<sup>36</sup> The Commission may therefore take complaints relating to human rights from aggrieved applicants whose applications for access to information have been denied by public institutions.

The Ombudsman has powers under section 5 of the law to inquire into complaints lodged with it by members of the public (including non-Nigerian residents in the country) pertaining to any administrative action taken by the Federal, State or Local Governments, public institutions and companies, whether in the public or private sectors. The Ombudsman has power to initiate matters *suo moto* (on its own) and its services are free of charge.<sup>37</sup> The Ombudsman may therefore be able to take complaints from those whose applications for access to information have been refused.

The Civil Service Commissions has powers of appointment of persons to offices in the civil service either at the Federal or State levels, and to dismiss and exercise disciplinary powers over such persons and dismissal.<sup>38</sup> This Commission can equally play important roles in the administrative redress mechanisms under the FoI Act. For instance, the Civil Service Commissions can entertain refusal decisions from applicants whose access to information have been denied by public institutions which are under their control

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<sup>36</sup> See section 6(b) of the 2010 Act and the new section 22(1) introduced into the Principal Act by section 19 of the 2010 Act.

<sup>37</sup> The Ombudsman has handled many complaints which include cases of wrongful termination of employment, allegations of extortion by court officials, demand for gratifications, suppression of appeal by judicial officers, unlawful arrest by the police, abnormal increase in electricity bills, assault and battery against police officers, harassment by the police, withholding of recovered money by the police, etc. See The Public Complaints Commission Annual Reports for 2004 and 2005.

<sup>38</sup> 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.

and can use their coercive powers of discipline over the responsible civil servant.

However, if multiple institutions are to be involved in the redress process under the FOI Act, the roles and processes of the different institutions should be harmonized and be clearly defined. Otherwise, this may lead to unnecessary rivalry among such bodies, undue delays and elongation of the redress process which may eventually hamper either effective redress or the internal review mechanism process or both.

*c. Redress through Oversight functions of the National Assembly*

The FOI Act in section 29(1) requires public institutions to submit reports to the Office of the Attorney General of the Federation on the 1<sup>st</sup> of February of every year.<sup>39</sup> The Attorney-General is also obliged to notify the Chairman and ranking minority member of the Committee on Government Reform Oversight of the House of Representatives, and the Chairman and ranking minority member of the Committees on Government Affairs and the judiciary of the Senate not later than April of the year in which the reports were made, the existence of the reports and make it available to them both in hard copies and electronic format.<sup>40</sup>

The FOI Act also requires the Attorney-General to submit to the National Assembly an annual report on or before April 1 of each calendar year.<sup>41</sup> The National Assembly could therefore perform

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<sup>39</sup> Which shall cover the preceding financial year and shall contain among others, the number of refusals for applications for information and the reasons for these; the number of appeals made by applicants whose applications were refused, etc. See section 29 (1)(a) & (h) of the FOI Act.

<sup>40</sup> Section 29(4) of the FOI Act.

<sup>41</sup> Which shall contain among others, a listing of the number of cases arising under this Act, the exemption involved in each case, the disposition of such cases, and the cost, fees, and penalties assessed, description of the efforts taken by the Ministry of Justice to encourage all government or public institutions to comply with this Act. See section 29(4) of the FOI Act.

oversight functions in respect of the implementation of the FoI Act, including redress, through the Committee on Government Reform Oversight of the House of Representatives, and the Committees on Government Affairs and the judiciary of the Senate by virtue of the reports submitted to them.

*d. Need for a Separate Oversight Institution*

In order to have a body which will be saddled with responsibility of seeing to the overall implementation of the FoI Act, it may be desirable to have a distinct oversight body for such purposes. A guide on this can be found in the Model Law on Access to Information for Africa, which serves as a model for shaping national legislation on freedom of information.

The establishment of an independent and impartial oversight mechanism (with composition of information commissioners and other stakeholders (representatives of Bar Association, the press (print and electronic media), civil society, etc) which will be charged with the promotion and protection of the right of access to information, among others is very necessary. The Attorney-General and the National Assembly currently performs oversight functions in respect of the FoI Act.<sup>42</sup>

The independent oversight body will be responsible for receiving of annual reports from public institutions as required by the FoI Act;<sup>43</sup> preparation of reports on the state of implementation right of access to information in Nigeria; preparation of annually reports on its activities to the National Assembly; and undertaking of monitoring activities among others. In order to be effective in discharging its duties, the oversight body should be empowered to

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<sup>42</sup> See section 29 of the FoI Act under which the AGF has the responsibility to ensure that the institutions to which the Act applies comply with the provisions of the FoI Act and the AGF is also required to submit reports to the National Assembly each year.

<sup>43</sup> 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.

review any decision of an information holder, affirm, set aside or vary the decision of the information holder, impose a fine, a contempt order, directives, etc that it may deem appropriate to enforce its decisions. In addition, an applicant that is dissatisfied with the decision of the oversight mechanism should have the right to access the court for a judicial review.<sup>44</sup>

Support for the desirability of an oversight mechanism can be found in the Public's Right to Know: Principles on Freedom of Information Legislation,<sup>45</sup> which states in Principle 5 that the process of deciding requests for information should be at three layers; within the public authority, the appeal to an independent administrative body and appeal to the courts.

Specifically, in terms of internal review mechanism, Principle 5 further provides that provision should be made for internal appeal to a designated higher authority with the public authority who can review the original decision. The Principle also prescribes that when a public authority refuses to disclose information, there should be a right of appeal to an independent administrative body, which may be an existing body, in the form of Human Rights Commission, Ombudsman or an oversight body specially established for that purpose.

Although the use of administrative complaints mechanisms may be cheap, flexible and accessible, they may however be lacking in reliability or efficacy. This is because, as noted above, the administrative complaints mechanisms in most cases have no fixed

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<sup>44</sup> See Part V of the Model Law.

<sup>45</sup> 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

time within which to conclude complaints; thus, the turnaround periods for the conclusion of such cases may take a long time and ultimately undermine or defeat their essence. Apart from the National Human Rights Commission and perhaps the Public Complaints Commission, the decisions/orders made by other administrative complaints mechanisms may not be efficacious or lack capacity to vindicate the violation of the right sought to be redressed.

However, an applicant may get a succor from the inefficiency of such administrative review procedure by reason of the fact that, he/she does not by opting for such procedure waive the right to go to Court as final jurisdiction always rests with the courts.<sup>46</sup> Notwithstanding, the right of access to court, it means that what should be important considerations in administrative review mechanisms is that they should be fast and cheap in terms of cost, in such a way that ensures easy access of all members of the public seeking access to information.

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<sup>46</sup> See 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.

## **CHAPTER 7**

### **Reporting and Monitoring Protocols**

#### **Introduction**

Under the Freedom of Information (FoI) Act, public institutions have obligation to submit reports to the public and the Office of the Attorney-General of the Federation (AGF) and Minister of Justice, while both the public institutions and the Office of the Attorney General of the Federation have shared responsibility to make reports available to the public.

#### **Reports to the Attorney-General**

Section 29(1) of the FoI Act requires public institutions to submit to the Office of the Attorney-General of the Federation on the 1<sup>st</sup> of February of every year, a report covering the preceding financial year; which shall contain among others, the number of refusal for applications for information and the reasons for these; the number of appeals made by applicants whose applications were refused.<sup>1</sup>

Other information to be included in the reports are: a short description of whether or not the Court upheld the decision of the public institution for refusal of applications; the number of pending application as at 31<sup>st</sup> October of the preceding year; the number of applications for information received by the public institution and the number processed; the average number of days it took the public institutions to process the various applications; the aggregate number of fees collected by the public institution to process requests; the number of full-time staff devoted by the

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<sup>1</sup> Section 29 (1)(a) and (c) of the FoI Act.

public institution to processing information requests and the total amount spent by the public institution to process applications.<sup>2</sup>

### **Reports to the Public**

Apart from submitting the report to the office of the Attorney-General of the Federation, the FoI Act also require public institutions to make the report available to the public by various means which includes but not limited to computer, telecommunications, electronic means.<sup>3</sup> The use of online resources will be quite useful in this regard and will enable easy access and retrieval to such information by the people in any part of the country. Public institutions therefore have to build capacity in terms of both human and material resources in order to publish information e.g. by creating websites and posting such reports on their web sites.

### **Reports from the Attorney-General**

The AGF is equally obliged to publish to the public the reports submitted to him/her both in hard copies and electronic format.<sup>4</sup>

The AGF also has the duty to notify certain offices<sup>5</sup> not later than April of the year in which the reports were made, the existence of the reports and make it available to them both in hard copies and electronic format.<sup>6</sup>

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<sup>2</sup> Section 29 (1)(c) & (h) of the FoI Act.

<sup>3</sup> Section 29(2) of the FoI Act.

<sup>4</sup> Section 29(3) of the FoI Act.

<sup>5</sup> These are, the Chairman and ranking minority member of the Committee on Government Reform Oversight of the House of Representatives; and the Chairman and ranking minority member of the Committees on Government Affairs and the judiciary of the Senate.

<sup>6</sup> Section 29(4) of the FoI Act.

The AGF is required to develop reporting and performance guidelines in respect of the reports required to be submitted by the public institutions.<sup>7</sup> Although the AGF has issued the Guidelines on the Implementation of the Freedom of Information Act (the Guidelines) including reporting requirements,<sup>8</sup> this does not cover reporting and performance guidelines as required by the FoI Act.

The Act mandates the AGF to submit to the National Assembly an annual report on or before April 1 of each calendar year which shall contain among others, a listing of the number of cases arising under this Act, the exemption involved in each case, the disposition of such cases, and the cost, fees, and penalties assessed, description of the efforts taken by the Ministry of Justice to encourage all government or public institutions to comply with this Act.<sup>9</sup> The provisions in section 29 of the FoI Act presupposes that the AGF has monitoring duties in order to ensure that public institutions comply with the provisions of the Act and the Guidelines issued by the AGF's Office and to ensure that compliance by public institutions are properly done.

### **Suggestions for Reform**

In spite of the numerous duties imposed by the FoI Act on public institutions as regards reporting, there is neither provision for sanctions on the part of public institutions that default nor any mechanism put in place to ensure compliance with the provisions of the section 29 on reporting obligations. The result is that public

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<sup>7</sup> Section 29(5) of the FoI Act.

<sup>8</sup> See Chapter 13 of the Guidelines which provides among others, that A public institution should consider designating a senior official at the level of Assistant Director or its equivalent or the establishing an FOI Unit which will have the responsibility for the determination and compliance with the Act, specified the format in which all reports must be submitted and the office address for the submission; that the obligation by a public institution to submit a report to the Attorney General is additional to the obligation to make such report directly available to the public electronically; e.g. by publishing the report on its website.

<sup>9</sup> Section 29(7) and (8) of the FoI Act.

institutions may not take seriously the reporting obligations that are geared towards proactive disclosure<sup>10</sup> among others.

However, in view of the enormous responsibility of the Office of the AGF, 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 FoI Act. This body can better and effectively carry out oversight functions which are saddled with the already overburdened Office of the AGF. 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.<sup>11</sup>

The body will be responsible for receiving of annual reports from public institutions as required by the FoI Act,<sup>12</sup> preparation of reports on the state of implementation of the right of access to information in Nigeria and preparation of annual reports on its activities to the National Assembly, undertaking of monitoring activities, among others.

The body will also be responsible for the development of reporting and performance guidelines in respect of reports required by section 29 of the FoI Act, 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.<sup>13</sup> In the event of non-compliance with

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<sup>10</sup> The combined effects of sections 2(4) and 29 of the Freedom of Information Act are towards proactive disclosure.

<sup>11</sup> See Model Law on Access to Information for Africa, prepared by the African Commission on Human and Peoples' Rights, 2013.

<sup>12</sup> 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.

<sup>13</sup> See sections 64 and 67 of the Model Law on Access to Information for Africa.

the provisions of the FoI Act for instance, the oversight body may also first issue a notice to the public institution in question and specify the timeline for compliance, failing which a fine may be imposed as appropriate.<sup>14</sup>

As regards reporting, as at 2013 only 65 public institutions<sup>15</sup> have sent reports to the AGFØs Office, with the reports indicating parameters such as the number of applications received, those processed and pending ones; average number of days that the applications were processed; fees charged, number of staff dedicated to processing of requests; number of refusals; number of requests granted; number of appeals and number of unresolved appeals.<sup>16</sup>

However, these reports did not fully capture what is required under section 29(1) of the FoI Act such as the reasons for refused applications; the number of appeals made by persons under the FoI Act, and the reason for the action upon each appeal that results in a denial of information; in cases of appeal to Court, whether the Court affirms denial to access information and a short description of the information withheld; in cases of pending applications with public institutions, the median number of days that such application had been pending. Public institutions should therefore be directed to capture such information in future reports in compliance with the FoI Act.

In view of the laudable provisions of the Guidelines on the use of internal review mechanism, an oversight body when established, in addition to making new guidelines can require public institutions to include in their reports, the number of internal appeals lodged

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<sup>14</sup> See section 70 of the Model Law on Access to Information for Africa.

<sup>15</sup> Classified as Ministries, Departments and Agencies (MDAs), See 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&parameter=applications>> last accessed 24/10/2014

<sup>16</sup> See Freedom of Information Act Website.

with the relevant authorities; the number of cases in which, as a result of an internal appeal access to information was given; the number of appeals referred both to the oversight body and the court and the outcome of those appeals, etc.

The implementation of the FoI Act and compliance with its provisions are key to its success, the establishment of an oversight body is therefore fundamental to the successful and effective implementation of the FoI Act.

# CHAPTER 8

## Processes Under the FOI Act

### Introduction

Certain processes have been provided in the legal framework for the actualization of the right to information guaranteed under the Freedom of Information (FoI) Act. Like any other regime of rights, compliance with due process is necessary to realize or enjoy conferred benefits, and this is essential for stakeholders. In the same manner compliance with the processes is obligatory for those in charge of information. In fact there is penal sanction for any breach. Most important of the processes are discussed below:

1. Request for information/FoI Application
2. Response to request
3. Follow-up application, and
4. Enforcement process.

The importance of these processes could be seen positively from the perspective of transparency and certainty of process. However, essentially failure to adhere to process could mean failure to obtain appropriate response and ultimately remedy. It is critical that persons desirous of obtaining information under the FoI Act are knowledgeable in the processes. The same applies to those working in offices and responsible for information dissemination.

### Request for information/FoI Application

The procedure for requesting for information or record, or "FoI Application"<sup>1</sup> under the Act, is provided under section 3 of the FoI

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<sup>1</sup> See Chapter 1.5, Guidelines on the Implementation of the Freedom of Information Act, 2011, Revised Edition

Act. But no precise procedure is spelt-out under that section. While the section suggests that a request could be written; there is further provision that a request for information not in print or one by an illiterate or disabled person should be reduced into writing as a matter of obligation by the authorized official. In other words, the application need not be made in writing in the first place, as a FoI Act official is required to record an oral application. The terse requirement of writing is amplified by the Guidelines for the Implementation of the Act<sup>2</sup>. The Guidelines suggest additional procedures:

- a) Formal Recording: The Guideline prescribes formal recording of an application requesting information under the Act. Distinction is made between FoI request and routine correspondence.
- b) Statement in form of jurat: A statement in the form of a jurat is required where the application is oral and recorded by FoI Act official.
- c) Resort to dialogue: Where the application is not clear the Guideline suggests prompt establishment of dialogue with the applicant.

### **Response to request**

After a FoI application has been made for information or record, the public institution is required to respond to the request. This is mandatory with penal sanction under section 7. The public institution should respond by providing the information or record or giving notice to the applicant of refusal or denial and the grounds for such.

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2013, Published under the Authority of the Honourable Attorney General and Minister of Justice(Guidelines)

<sup>2</sup> Ibid

The response process has been divided into 10 stages<sup>3</sup>:

1. Register and record the application to note the date it was received;
2. Read and decide whether it constitutes a request or not and if you actually hold the information;
3. Record the action,
4. Responsibility;
5. Retrieve;
6. Refer to others;
7. Redact(sic) and separate(see section 18),
8. Review,
9. Reply and
10. Release to publication scheme under Section 2.

**Time to respond:** By section 4 of the Act, the FoI Act official has a period of 7 days to respond to a request for information. This period excludes Sunday and public holidays. Extension of time is allowed for a maximum period of 7 days within which the public institution may grant or refuse application, and that is if the requested information is for a large number of records or the circumstances necessary to comply with the application cannot be reasonably completed within the initial 7-day period<sup>4</sup>. A notice of this extension informing the applicant about his right to have the decision to extend the time limit reviewed by a court should be provided by the applicant within the initial period. Without such extension of time, failure to respond within the specified time is deemed to be refusal of access.<sup>5</sup>

**Transfer of request:** A public institution is permitted to transfer an application to another public institution that has a greater interest in the information<sup>6</sup>.

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<sup>3</sup> Ibid, chapter 1.12

<sup>4</sup> Section 6

<sup>5</sup> Section 7(1)(4)

<sup>6</sup> Section 5

**Refusal to give information:** Where a public institution refuses to provide the requested information, it shall state in the notice to the applicant the grounds for refusal, the specific provisions of the Act that it relates to and that the applicant has a right to challenge the decision refusing access and have it reviewed by a court<sup>7</sup>. It shall also state whether the information or record exists.

**Follow-up application**

Where the application is not clear the public institution is required to establish dialogue with the applicant to clarify the issues.

Where a request for information has been denied or refused, the applicant is entitled to apply to the Court for judicial review.

**Enforcement process**

The FoI Act provides an enforcement process for the rights enshrined in the Act.

**Judicial review:** Section 20 of the Act provides that 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. The time for this application may be extended by the Court may either before or after the expiration of the 30 days. The application for judicial review shall be heard and determined summarily<sup>8</sup>. However, elaborate provisions are made on how the Court may examine any information to which the Act applies<sup>9</sup>, take precaution to avoid disclosure<sup>10</sup> and on burden of proof. Section 24 provides that the burden of establishing that the public institution is authorized to deny an application for information or part thereof shall be on the public institution.

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<sup>7</sup> Section 7(1)

<sup>8</sup> Section 21

<sup>9</sup> Section 22

<sup>10</sup> Section 23

# CHAPTER 9

## Record Keeping and Information Management

### Introduction

The cornerstone to a successful implementation of a freedom of information law like the FOI Act is record keeping and management. Many documents relating to the day to day running of organisations are records and that is why keeping and maintaining these records becomes an obligation especially on institutions that render public service.

### Why is records management necessary?

Information is every organisation's most basic and essential asset, and in common with any other business asset, recorded information requires effective management. Records management ensures information can be accessed easily, can be destroyed routinely when no longer needed, and enables organisations not only to function on a day to day basis, but also to fulfil legal and financial requirements. The preservation of the records of government for example, ensures it can be held accountable for its actions, that society can trace the evolution of policy in historical terms, and allows access to an important resource for future decision making.

The reasons why many government ministries and agencies in Nigeria fail to keep proper records or fail to manage records properly include:

- i. Lack of skilled human Capacity;
- ii. Lack of Infrastructure;
- iii. Weak work ethic and culture;

#### iv. Corruption.

For the Law Clinic, it helps in sustaining the good strategies and best practices that will be quiet helpful to Clinicians in future. This is even more so as faculty-based clinics have a challenge of the transitory nature of students and the uncertainty of the school calendar.

#### **Record keeping obligation under the Act**

Various legislation now increasingly underline the importance of good record management, in addition to being sound business practice. Compliance with Acts such as Freedom of Information Act is underpinned by effective records management: without properly organised and retrievable records, requests for information governed by statutory response timescales will be impossible to service. Indeed, section 9 (1) and (2) of the Freedom of Information Act 2011 requires every public institution to ensure that it keeps every information or record about the institution's operations, personnel, activities etc.<sup>1</sup> Serious penalty follows any public officer who wilfully fails to keep or destroys records.<sup>2</sup>

The growth in electronic communications and data, from emails to databases, presents new challenges, but can be managed by the same records management principles that are applied to paper documents. Sound records management is also an essential basis for the transition to EDRM (Electronic Document and Records Management) that many organisations are embracing now.<sup>3</sup>

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<sup>1</sup> Section 9(1) and (2) of the Act clearly stipulates that every institution is mandated to keep and maintain proper records in a manner that facilitates public access to them.

<sup>2</sup> Section 10 of the Act.

<sup>3</sup> <http://www.nas.gov.uk/recordKeeping/recordsManagement.asp> accessed on the 24th of May, 2014

**Meaning, Types and Classification of Record Management***i. What then is a record?*

All information created, sent and received in the course of work in an organisation or institution is potentially a record. Records provide evidence of the organisation's activities. Whether a thing is a record depends on the information it contains and the context.

*ii. Types and classification of records*

Records can be in paper, digital or other formats. Examples include:

- a) Emails
- b) faxes
- c) spreadsheets
- d) databases
- e) maps and plans
- f) samples and objects
- g) information in flash drives or systems
- h) letters
- i) text messages
- j) minutes
- k) policy and briefing papers
- l) photographs
- m) research data
- n) social media sites.

*iii. Types of records kept by public institutions: Some of these records includes:*

- a) Letters- sent or received
- b) Internal Memos
- c) Staff files
- d) External correspondences
- e) Receipts of purchases or invoices
- f) Contracts documents
- g) Emails

- h) Databases
- i) etc

### **Record keeping and information management**

#### *What is record management?*

Records management is the systematic control of an organisation's records, throughout their life cycle, in order to meet operational needs, statutory or fiscal requirements, and community expectations. Effective management of information allows fast, accurate and reliable access to records, ensuring the timely destruction of redundant information and the identification and protection of vital records.

#### *File Management at the Law Clinic*

Clinic work entails producing, receiving and managing of various documents ranging from completed client information forms, letters and other paper correspondences between the clinic, clients and other stakeholders. Both clients and clinic documents must be well managed if the clinic is to function efficiently, and this requires the storage of documents either in paper form or electronic form. In spite of the advancement in ICT, documents are mainly stored in paper form and entails creation of files.

Documents should be filed according to the subject matter to which they relate and should be properly file in order of date received or created with the latest documents always placed in front; and fasten to the file jacket by a device to prevent them from falling out. When a file on a matter is full, another file should be opened but the files should be marked serially.

Filing of documents is essential for the efficient running of the clinic because in the clinic interaction with clients and other members of the community, records are being created on daily basis and hence the responsibility of file management should be assigned to a particular clinician(s).

### a) Filing Systems

They are basically two types of filing systems: alphabetic and non-alphabetic even though each consist of sub-types. The alphabetic for instance consist of filling by name, filling by subject and filling geographic location. Under the non-alphabetic system, files are labelled by numbers either numerically or chronologically. Where numerical is used, each file is assigned a number and subsequent files are numbered serially. Where a chronological system is used, a date or set of dates are used to label and subsequent files are dated serially.

For the FOI clinic, a hybrid of the two systems can be used where each file is allocated a file reference number that contains both the date and the subject matter of the client request as well a chronological reference number.

#### **For example:**

In creating FoI request unique file number and file, each new request should be given its own request number. E.g:

**0001**

This a serial number that continues progressively. That will help keep tract of entries or files handle by the clinic with a project life-cycle.

**GAC**

In this case it refers to Gwagwalada Area Council, so an abbreviation of the government institution or agency to which the request is made. That can help trace the destination of the request

**01-05-13**

This represents the date the request is made and it also changes progressively as more request are been made. The date is obviously a very important documentation that is very relevant as FOI request is time-sensitive.

**Ref#D0078N**

This represents the reference number of the agency to which a request is made. It's a kind of cross reference that shows the filing destination of the public institutions.

**0001/GAC/4-5-13/Ref#D0078N**

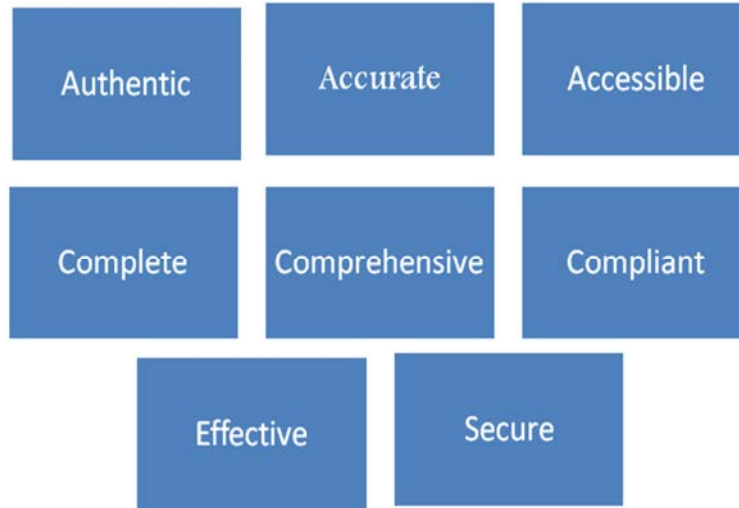
1. **0001:-** represent serial numbering of request submitted, 0001 representing the first request submitted by the clinic
2. **GAC:-** represents the acronym for the public or private body request was submitted to, in this case GAC standing for Gwagwalada Area Council.
3. **4-5-13:-** representing the date request was submitted
4. **Ref#D0078N:-** representing the official reference or file number allocated by the public/private body receiving request.

Filing systems should be supplemented with indexing system to aid accessing and retrieving files especially where the clinic uses a non- alphabetic system as shown above. In this case, matters to which these numbers are assigned on the file label must be stated in the index. There are variety of indexing styles but the one that commonly used are book index which can otherwise be referred to as a **Log book**.

*Principles of good records management*

Good record management should have some characteristics and these can be summarised in the following letters ó

## AAACCES

*Drafting FOI Clinic Templates***FOI Log Book for the Law Clinic<sup>4</sup>**

When you have a unique number request references, you also need to have a book. A log book keeps all the request reference numbers so that you can easily tell what the next number of your next request should be. You should therefore log each FOI requests in your log book. An example of a page from a logbook is shown on the next page.

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<sup>4</sup> Adapted from Promotion of Access to Information Act Workshop Guide brought to you by the South African History Archive (SAHA) Page 41

DATE	REQUEST REFERENCE NUMBER	SUBJECT
11/4/2014	0019/GAC/09-4-14/Ref#D0078N	Records concerning the amount budgeted for maintaining drainages and refuse disposal within the first quarter of the year 2014.
17/5/2014	0020/GAC/2-6-13/Ref#P0081FT	All policies and/or draft policies on community development and plans to roll out projects as part of their commitment to community development.
19/5/2014	0021/FCDA/21-5-14/Ref#D9235A09	Records detailing the total amount of subventions allocated to Gwagwalada Area Council in the first quarter of year 2014

**NOTE: You can now easily see that your next new request will start with 0022.**

You must remember to record every single request that you make in the logbook.

**Client Intake Form for FOI Project**

S / N	Name	Address	Time	Purpose	File no.	Contact	Clinician
	Abdullahi Ibrahim	Unguwar Shanu	9.45 a.m	Making a request	0019/GAC/09-4-14/Ref# D0078 N	08035 12245 6	Godwin Odey

<b>REQUEST OVERVIEW FORM</b>	
Request: 0001/GAC/10-07-14/Ref#D0078N	
Who submitted the request?	Abdullahi Ibrahim (Ungwan Jeshi)
Date of original submission	10- July- 2014
Which information officer was it submitted to?	Alhaji Ndayako Usman
Information officer contact details	08033534221
What is the subject of the request	The details of budget made and contract given for social amenities in Ungwan Jeshi from 2010-2014
Was it a public or private body	Public
When is response due	18-july-2014
Was the request transferred?	No
If yes, to which office/department?	
What was the response?	Refusal
If it was refused, on what grounds?	Unavailability of records
If provided, is it in full or in part?	
Where are the records kept	
Or what action taken after refusal	Matter taken to court
No. of pages of record	
Date file closed	
Etc.	

<b>PHONE LOG BOOK</b>					
0001/GAC/10-7-14/ Ref#D0078N					
<b>Date &amp; Time</b>	<b>Clinician</b>	<b>Caller/ Called</b>	<b>Tel. No.</b>	<b>Result of call</b>	<b>Notes</b>
12/7/14 10:32	Godwin Odey	Abdullahi Ibrahim	0803 3451 221	He answered	He confirmed they are willing to be represented by the Clinic at the GAC

<b>CLIENT UPDATE SHEET</b>	
Subject of Request:	
Date Request was submitted:	
Response Yes/No (If no, Why?)	
Actions taken to a no response	
Summary report of request information	

## CHAPTER 10

### FOI Act through the Courts

#### Introduction

Courts in Nigeria are creations of the Constitution and the different spheres of government. These courts operate in hierarchy. Primarily, the power of the court to interpret law, adjudicate or determine a dispute is guaranteed under the Constitution<sup>1</sup>, the common law and different statutes<sup>2</sup>. By implication, individuals, institutions and other legal personalities may bring action before the court in Nigeria.

While the right of a person to bring an action to court may be restricted by statutes, the common law requires a party to demonstrate sufficient interest for the court to assume jurisdiction in disputes. Courts are however not expected to read enactments in a way or manner that will deny a litigant access to the court of justice<sup>3</sup>.

The right of Individuals or groups to approach the court on denial of access to Information is guaranteed under the Freedom of Information Act. Under Section 20 of the Act, a person may approach the court to compel any public institution to comply with the provisions of the Act<sup>4</sup> where there is denial or deemed denial of access to information or any part thereof<sup>5</sup>.

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<sup>1</sup> See Chapter VIII of the Constitution of the Federal Republic of Nigeria, 1999, see also *Agabai & Ors v Okogbue* (1991)7 NWLR[pt.204] 391, 447-448

<sup>2</sup> See *Agabai & Ors v Okogbue* (1999)

<sup>3</sup> See *Onwuchekwa v NDIC* (2002) FWLR [pt.101] 1615

<sup>4</sup> Paragraph 1.3, Guidelines on the Implementation of the Freedom of Information Act 2011(Revised Edition 2013)

<sup>5</sup> Section 20, Freedom of Information Act, 2011.

To ensure speedy delivery of justice, a court is expected to consider an application for a review of denial by any institution summarily<sup>6</sup>. The Court may after consideration of the case of parties order the affected institution to disclose the information or part thereof<sup>7</sup>.

In exercise of the above power, the courts in Nigeria have handed down different judgments which now follow different trends. A review of the decisions of the courts in some cases gives insight to the emerging jurisprudence on freedom of Information in Nigeria.

The following themes have been subjected to pronouncements in Nigerian courts on Freedom of Information.

### **Denial of Information**

*Failure of Government Agency to furnish information Sought is wrongful and unlawful.*

Where an applicant has met all the conditions under the Act, the failure of a government agency or official to furnish the required information is wrongful and will be reviewed and overturned by the court.

In *Public & Private Development Centre Limited/GT v The Hon Minister of the FCT & 1 or*<sup>8</sup> the Federal High Court at Abuja in granting the prayers of the applicant, held that the failure of the respondent to grant the Applicant access to the information sought amounted to wrongful and unlawful denial of information under the Freedom of Information Act<sup>9</sup>.

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<sup>6</sup> see section 21 Freedom of Information Act, 2011

<sup>7</sup> See Section 25 of the Freedom of Information Act, 2011

<sup>8</sup> Suit No: FCT/HC/CV/M/3057/13 delivered on 30<sup>th</sup> January 2014.

<sup>9</sup> See also *Major Gen Indi Garba v Vandeikya Local Government* unreported, suit no VHC/20/2012

*Onus on denying authority to justify action*

Once an applicant has made a request for information and the right to information is established by the FOI Act, there is an onus on the denying authority to justify the action. This was stated clearly by the FCT Aabuja High Court (per O.A.Adeniyi, J) in *Public & Private Dev. Centre Ltd/GTE v The Hon Minister of the FCT & Anor*<sup>10</sup> that by the provisions of section 24 of the Act, the burden of establishing that a public institution is authorised to deny an application for information or part thereof shall be on the public institution concerned.

In *Legal Defence & Assistance Project (Gte) LTD v Clerk of the National Assembly of Nigeria*<sup>11</sup>, the Federal High Court's position (per Balkisu Bel Aliyu, J.,) was that the obligation of the court under the circumstance will be to review the ground of denial as to whether this is tenable. In *Centre for Social Justice v Minister of Justice*<sup>12</sup>. The Court held that Continuing refusal by an authority to grant access to information without explanation amounts to an infringement of the rights of the applicant under the Fiscal Responsibility Act, 2007.

**Commencement of Action under the FOI Act**

*Action to be commenced by originating summons, in simple manner and promptly.*

In order to expedite action and to avoid undue delay, the position of the court is that application for review of decisions denying request for information are to be determined without the usual bottlenecks and technicalities that surround normal civil actions for reviews.

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<sup>10</sup> Unreported Suit No. FCT/HC/CV/M/3057/13 of 30<sup>th</sup> January 2014

<sup>11</sup> Unreported Suit No. FHC/ABJ/CS/805/2011 of 25<sup>th</sup> June 2012.

<sup>12</sup> Unreported, suit no.FHC/ABJ/CS/301/2013 delivered 26 February, 2014

In *Legal Defence & Assistance Project (Gte) LTD v Clerk of the National Assembly of Nigeria*<sup>13</sup> the court held that there is an intention of the legislature under section 21 of the FOI Act to take applications for the review of denial of request made pursuant to the FOI Act outside the rules of the court. According to the court, summary trial as provided under the Act means "that such matter be heard and determined promptly and in a simple manner." The court further ruled that there was an intention that the rules of procedures of the court regarding the application for judicial review (mandamus, certiorari etc) where there must be leave sought and obtained from the court before an applicant can file such applications seeking judicial review will not apply.

*Failure of applicant to give requisite notices under the law of impending action is fatal*

Two different interpretations have emerged on the issue of pre-action notice.

In *Public & Private Development Centre LTD/GTE (PPDC) v Nigerian National Petroleum Corporation (NNPC) & Or*<sup>14</sup> the respondent did not issue a pre-action notice as required under the NNPC Act before instituting the suit for access to information. According to the Court (as per A.R. Mohammed, J of the Federal High Court) failure to give the requisite notice where this is a requirement of the law will render subsequent application to court for a review of a denial of access to information incompetent and that a pre-action notice was mandatory under the Nigerian National Petroleum Corporation Act.

However another court has reasoned that where the operation of a general law will operate to deny an applicant access to court as provided under section 20 of the FOI Act, the principle of generalitus derogant (special things derogate from general things)

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<sup>13</sup> Unreported Suit No. FHC/ABJ/CS/805/2011 of 25<sup>th</sup> June 2012.

<sup>14</sup> Suit No: FHC/ABJ/CS/278/2013, Delivered n the 23<sup>rd</sup> December, 2013

should apply. In *Public and Private Development Centre v NAFDAC*<sup>15</sup> the Federal High Court found that in the particular case the NAFDAC Act requires a pre Action Notice of 30 days while action for refusal of request is expected to be commenced under section 20 of the FOI Act in 30 days after refusal. The court held the situation to be a special circumstance and an exception to the general rule.

### **Access to Information and Privileged Information**

*Information on salaries and allowances of public and civil servants does not amount to privileged information*

The position of the court is that this group of information is not exempted from disclosure by the legislature because such are of paid from public funds through budget allocations.<sup>16</sup>

In the case of *Legal Defence & Assistance Project (Gte) Ltd v Clerk of the National Assembly of Nigeria*<sup>17</sup>, the Federal High Court at Abuja held that salaries and allowances of public servants are not exempted information and ordered the defendants to disclose to the Applicants detailed information of salary, emoluments and allowances paid to all Honourable Members of the House of Representatives and Distinguished Senators, both of the 6<sup>th</sup> Assembly from June 2007 to May 2011.

### **Exemption of Contracts and Negotiations of third Parties**

In *Public & Private Development Centre Ltd/GTE v Power Holden Company of Nigeria Plc & anor*<sup>18</sup> the Applicant had sought an Order from the Federal High Court Abuja (per A.F.A. Ademola) compelling the Respondents to forthwith furnish the Applicant with

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<sup>15</sup> Suit no FHC/ABJ/CS/760/13 delivered on 14<sup>th</sup> day of December, 2014

<sup>16</sup> Uzoegwu F.O.C v the Central Bank of Nigeria & Ior. Unreported

<sup>17</sup> Unreported Suit No. FHC/ABJ/CS/805/2011 of 25<sup>th</sup> June 2012.

<sup>18</sup> Unreported Suit No. FHC/ABJ/CS/582/2012 of 1<sup>st</sup> March 2013.

the following information and copies of documents: the procurement plan, the NEEDS assessment document; documentation on design and specification requirement which are not contained in the standard bidding documents; documentation on the scope of the procurement; bidding documents issued to all bidders in respect of the procurement; a list of all contractors that submitted bids in respect of the procurement; copy of the bid evaluation report of the technical subcommittee of the Tenders' Board for the procurement; minutes of the Tenders' Board approving the winning bids; copies of the letters of award of contract and final contract award documents for the award of the contract for this procurement; documentation on the current status of the procurement project; document showing the procurement contract sum, conditions of the procurement contract and payment terms and schedule; name and addresses of all Distribution Companies on whose behalf the procurement was undertaken and which will subsequently be responsible for the utilization and management of the goods and works procured.

Section 15(1)(b) of the Freedom of Information Act provides thus: A public institution shall deny an application for information that contains: "information the disclosure of which could reasonably be expected to interfere with the contractual or other negotiations of a third party."

The Court in this case held:

"A scrutiny of Section 15(1)(b) of Freedom of Information Act 2011 states the circumstances a public institution shall deny an application for information to a person:

- a) the Transaction must still be at the negotiation stage
- b) a third party must be involved; and
- c) the disclosure of the information could reasonably be expected to interfere with the contractual or other negotiations of a third party.

This Court agrees with Applicant Counsel's submissions in his reply on points of Law for a public institution to be justified in denying information under the said section of the Law, the above mentioned conditions must exist concurrently. The uncontroverted Evidence before the Court states unequivocally the negotiations were concluded and the contract awarded since 30th November, 2011 with the contract effective from 26/3/2012U. (underlining mine).

... I cannot agree more with Applicant Counsel's arguments in his reply on points of Law that negotiations have been concluded and the contract awarded, the disclosure of the information sought by the Applicant cannot by any stretch of the imagination reasonably be expected to interfere with any contractual or other negotiations of the Contractor, i.e. third party.

As rightly argued by Counsel in his well researched address and brilliant reply on point of Law, the 1<sup>st</sup> Respondent has failed to satisfy conditions (a) and(c) of Section 15(1) (b) of the Freedom of Information Act 2011 and not entitled to the exemption stated herein.

1<sup>st</sup> Respondent's processes and written arguments lack substance, frivolous, time wasting and an abuse of this Court process as they have no justification in denying the Applicant the documents sought...ö

### **The Application of the Freedom of Information Act to States**

A major and recurring issue in the Nigerian court is whether there is need for domestication of the Freedom of Information law at the federating states level in the country.

In *Yomi Ogunlola v Oyo State House of Assembly*<sup>19</sup>, the Oyo State High Court held that the Freedom of Information Act is applicable in the entire Federation of Nigeria. This position according to the court is based on the constitutional provision which mandates the National Assembly to make laws for the peace, order, and good government of Nigeria. According to the court, the provision is applicable to all states of Nigeria without infringing on the autonomy of the states, if such legislation is designed to correct a malaise plaguing the country<sup>20</sup>. The court further held that while information is not within the exclusive or concurrent lists of the 1999 constitution, nevertheless the Act is of general application to both the federal and state governments. The application of the Act throughout the federation is therefore justified because the National Assembly has enacted the FOI Act to be operational throughout the country in the interest of the common good and national interest<sup>21</sup>.

The same position was adopted by the court Benue State High Court (though the applicability of the FOI Act was not directly in issue) in *Major Gen India Garba v Accountant General of Benue State*<sup>22</sup> which emphasized that the National Assembly is vested with the power to make laws for the entire Federation of Nigeria under the Constitution of the Federal Republic of Nigeria 1999 and that this includes power to make the Freedom of information Act<sup>23</sup>.

To clarify the power to make law on freedom of information, it is the decision of the court that legislating on archives and records of the Federation and Governments of the State is quite different from legislating on the freedom of Information. According to the

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<sup>19</sup> Unreported, See *FOI Needs no Domestication, Court Rules* ThisDay Newspaper, Monday, November 18, 2013

<sup>20</sup> above

<sup>21</sup> above

<sup>22</sup> Unreported Motion nos MHC/2564M/12, MHC/811m/14 delivered 26<sup>th</sup> of May, 2014.

<sup>23</sup> Delivered 26<sup>th</sup> day of May 2014

court<sup>24</sup> the Freedom of information Act deals with public records and information on public institutions.

### **Meaning of a Public institution Under the FOI Act**

A private organization executing a contract for government is a public institution within the meaning of the Freedom of Information Act<sup>25</sup>. This was the holding of the Abuja FCT High Court (per U.A. Ogakwu, J.,) in *Okoi Obono Obla v CEEEC*<sup>26</sup> where the court said: "The Defendant was given a contract by the Federal Government to construct or rehabilitate the Calabor- Ugep-Katsina-Ala Road. Doubtless, the road is for the public convenience and benefit."

In *Public & Private Development Centre Ltd/GTE v Julius Berger Nig Plc*<sup>27</sup>, Abuja FCT High Court issued a mandamus against the defendant (not a public institution) compelling the defendant to furnish the applicant with the copies of documents and information relating to the bidding and award of the contract for the re-construction of the Lagos-Ibadan expressway.

In *Public & Private Development Centre Limited/GT v The Hon Minister of the FCT & I or*<sup>28</sup> the court held that:

By my understanding, what the Applicant here requests for is not financial statements of third parties, but such that are kept by the Respondents. In whatever nomenclature or names, that show monies remitted to them by the companies they engaged to collect tolls on their behalves since the

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<sup>24</sup> See Yomi Ogunlola supra

<sup>25</sup> *Okoi Obono Obla v CEEEC* Unreported Suit no FCT/HC/M/34/2014, of 21<sup>st</sup> January 2014.

<sup>26</sup> Unreported Suit no FCT/HC/M/34/2014 of 21<sup>st</sup> January 2014.

<sup>27</sup> Unreported Motion No FCT/HC/M/3879/14 of 9<sup>th</sup> day of June 2014 per M.M. Kolo, J.

<sup>28</sup> Suit No: FCT/HC/CV/M/3057/13 delivered on 30<sup>th</sup> January 2014.

inception of the controlled parking scheme in the Federal Capital Territory.

### **FOI and Human Rights**

The FOI Act is aimed at fulfilling the fundamental Rights to receive information without interference<sup>29</sup>. According to the court the FOI Act was enacted to bring into effect the provision of section 39(1) of the 1999 Constitution. That is to guarantee the fundamental right to receive and impart ideas and information without interference.

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<sup>29</sup> Yomi Ogunlola *supra*.

# CHAPTER 11

## Curriculum and Lessons

### Objectives of the Curriculum

A clinical legal education curriculum has been developed for the clinical course of the university law faculties and law clinics. It was published by NULAI Nigeria as *“Clinical Legal Education: Curriculum, Lessons and Materials”* 2013 and authored by Ernest Ojukwu, Sam Erugo and Charles Adekoya. The book can be accessed at [www.nulai.org](http://www.nulai.org).

Part of the introductory statement at page 11 of the book *Clinical Legal Education: Curriculum, Lessons and Materials* states as follows:

It may be noted that the course provides lessons that generally will enhance the knowledge, skills and values of the law student to be able to deliver services pro bono in the law clinic in competent, ethical and professional manner under the supervision of law teachers and other qualified legal practitioners. It may therefore be necessary to give law students (short) additional or supplementary training where the student is required to undertake specialised clinic work like, prison clinic, child rights, police station duty solicitors scheme, court monitoring, law reform and legislative drafting, freedom of information, consumer protection, tenancy clinic, community outreaches, street law programmes, and so on. Accommodating this

specialised training may also require a modification of the general *Introduction to Legal Practice* curriculum presented here.

The Freedom of Information curriculum fulfils this objective of providing a basis for additional or supplementary training for clinical students who will be required to undertake work on freedom of information projects.

The aim of training law students on freedom of information is to use the FoI Act as a tool by law clinics for attaining effective service delivery; and the education of rural communities and civil society on the provisions, value and utility of the Freedom of Information Act.

The lessons provided under the curriculum are meant as guides. The faculty/law clinic is free to modify the lessons, and activities and determine the appropriate scheduling for the curriculum and lessons to suit its circumstance.

### **Lesson 1**

#### **History, Meaning, Importance, Sources and Legal Framework of Access to Information in Nigeria**

**Outcomes:** At the end of the lesson students would be able to:

- a. Explain and discuss the history, meaning, scope, sources and importance of freedom of information laws and access to information;
- b. List and discuss international, regional and municipal legal instruments on access to information.

#### **Contents**

- a. History, meaning, scope, sources and importance of freedom of information laws and access to information;
- b. International, regional and municipal legal instruments on access to information.

**Activities****Pre class activities**

Students should:

- a) Write short notes on the importance of freedom of information and access to information;
- b) Prepare a list of international, regional and municipal legal instruments on access to information.
- c) Write a legal opinion based on Case Study 1 on the scope and applicability of the National Legislation on Access to Information in Nigeria.
- d) Prepare a debate for or against having specific as against general law for freedom of information in most countries.

**In class activities**

- a) Focuser: Video clip or scripted drama on the importance of the FoI.
- b) Overview and discussion on the history, meaning, scope, sources and importance of freedom of information laws and access to information;
- c) Students Present and discuss their list of international, regional and municipal legal instruments on access to information.
- d) Presentation/discussion of legal opinion based on Case Study 1 on the scope and applicability of the National Legislation on Access to Information in Nigeria;
- e) Debate for or against rationales for specific as against general freedom of information law;
- f) Assessment.

**Case Study 1: Legal Opinion**

The Abuja Law Clinic is involved in a FoI project. EMLA is an international environmental NGO based in Switzerland and invested in projects to assist communities in the Niger Delta region of Nigeria. EMLA is seeking the assistance of a Nigerian organisation to help the Okrika community file an FOI application to obtain information and records from the Federal Ministry of Environment on the UNEP-recommended clean-up of the community. The NGO has approached the Abuja Law Clinic to assist by providing a brief but succinct opinion on the scope and application of specific national legislation on access to information.

**Lesson 2  
Right to Access Information**

**Outcomes:** At the end of this lesson students would be able to:

- a. Explain the scope of the right of access under the FoI Act and the concept of applicants, public institutions and locus standi.
- b. Discuss the primacy of the FoI Act over other related enactments;
- c. Discuss the scope of what can be requested for under the FoI Act.

**Contents**

- a. The scope of the right to access to information under the FoI Act.
- b. The primacy of the FoI Act over other related enactments.
- c. Concepts of 'applicants', 'public institutions', and 'locus standi' under the Act.
- d. What information can be requested?

**Pre-class Activities:**

Students should:

- a) Prepare scripted drama (that could be presented in not more than 5 minutes) depicting the right to access information in a public institution;
- b) Write short notes on the concept of applicants, public institutions and locus standi;
- c) List 10 examples of public institutions to which a request can be made under the Act identifying the types of information that may be requested and the categories of persons who can make requests;
- d) Prepare arguments in favor or against the primacy of the FoI Act over related enactments.

**In-class Activities**

- a) Students present a scripted drama depicting the right of access to information in a public institution.
- b) Students present/discuss examples of public institutions to which a request can be made under the Act identifying the types of information that may be requested and the categories of persons who can make requests;
- c) Using the PRES formula students argue for or against the primacy of the FOI Act over related enactments.
- d) Assessment

**Lesson 3****Obligations of Public Institutions under the Freedom of Information**

**Outcomes:** At the end of this lesson students would be able to:

- a. Explain the nature of obligations imposed on public institutions under the FoI Act;
- b. Discuss public institutions' obligations to proactively disclose; and
- c. Explain request-related and other general obligations of public institutions.

**Contents**

- a. Nature of the obligations of Public Institutions under the Act;
- b. Pro-active disclosure by Public Institutions;
- c. Request-related and other general obligations of Public Institutions.

**Pre-class Activities**

Students should:

- a. Identify 5 public institutions and state their obligation to proactively disclose, in particular, whether selected institution have complied with their obligations under the FoI Act. This should be represented in a tabular form as shown below (and presented in power point slides):

	Name of Public Institution:		
S/N	Information to be proactively disclosed under the Act	Information actually disclosed by PI	Comments/Observations
1	Description about the organisation	PI's website provide for this under the caption about us	FoI Act complied with
2	Salaries of employee	No related information found on PI's website	Non-compliance with FoI Act
3			
4			
5			

- b. Make a list of other general obligations of public institutions not associated with request for information and not related to proactive disclosure.
- c. Write a short note on request related obligations.

**In-class Activities**

- a) Overview/discussion on the nature of obligations of public institutions under the FOI Act and obligations to proactively disclose.
- b) Presentation/Discussion of Identified list of public institutions and their obligation to proactively disclose. See Pre-class activity (a);
- c) Students study Case Study 2 or any similar case study and discuss in groups the obligations of the public institution in the case study;
- d) Presentation of Group reports on case study 2;
- e) Assessment.

**Case Study 2**

Mr Adeeyah of Egbenla Community has written a letter to the ABDA Local Government Area (LGA) requesting for the following information:

1. The total allocation of the local government from January 2013 to December 2014;
2. The total expenditure of the local government for the same period;
3. List of capital projects of the local government within this period;
4. List of locations of capital projects above;
5. Total amount realised from internally-generated revenue (IGR) within the period under request and how same is spent; and
6. List of salaries and other emoluments of the Chairman and councillors in the local government.
7. Identify and discuss the obligations of the ABDA LGA as a result of this request.

**Lesson 4****Exemptions under the Freedom of Information Act**

**Outcomes:** At the end of the lesson, students would be able to:

- a. Explain the meaning exemption and discuss the types, purpose and effects of exemption under the FoI Act;
- b. Enumerate the class of information exempted from disclosure under the FoI Act;
- c. List and discuss the tests for the application of exemption under the FoI Act.

**Contents:**

- a. Meaning of exemption; Effect of an exemption; Purpose of exemption; Types of exemption;
- b. Information exempted from disclosure under the FoI Act;
- c. Tests to be carried out before applying an exemption under the FoI Act.

**Activities:****Pre-class Activities:**

Students should:

- a) Write short notes on the meaning of exemption, types and purpose of exemption under the FoI Act;
- b) Make a list of the class of information or records exempted under each type of exemption.

**In-Class Activities:**

- a) Focuser: Displayed cardboard or flipchart or power point slide with the inscription: -Freedom without limits is just a word or other similar quotes/proverbs which underscore the importance of limitation in relation to freedom;
- b) Presentations/discussions on the meaning of exemption, types, purposes and effects of exemption under the FoI Act.
- c) Discussion on the purposes of exemption under the FoI Act based on Case Studies 3,4 & 5;

- d) Presentation/discussion categories of information exempted under each type of exemption;
- e) Quizzes and discussion on tests to be carried out before applying any exemption under the FoI Act;
- f) Assessment.

### Case Study 3

Dr. Jago is a lecturer in the Department of Pharmacy, University of Lagos. For over 20 years, he worked day and night to find a cure for Ebola Virus Disease (EVD). All his salaries and incomes since he started the search for the Ebola cure have been utilized for this research. He even borrowed N10million to buy some laboratory equipment for the research, hoping to recoup his investments once he finds the cure. Just last year, he made a groundbreaking discovery. He found the cure for EVD! As the practice in most Universities, Dr. Jago submitted a report of his research findings to the Vice Chancellor of the University, although Dr. Jago is yet to present his findings in any local or international conference. Mr. Ole, who is one of the lazy lecturers in the Pharmacy Department, made an FOI request to the Vice Chancellor, requesting to have a copy of Dr. Jago's research material. Mr. Ole obtained the research findings and presented it before several international conferences as his original research. Dr. Jago is now penniless. Banks have taken over his house and all his property but Mr. Ole is making lots of money from several companies who are interested in the research findings.

### Case Study 4

Mr. Goodluck Giwa is a reporter for Gossip Newspapers. Last week, he wrote about the mismanagement of public funds by Chief Olowo, a popular politician in Abuja. Chief Olowo's Personal Assistant immediately made an FoI request to Gossip Newspapers, requesting the source of the report. In the spirit of transparency, Mr. Goodluck Giwa disclosed that his source was Solomon Gandhi, Chief Olowo's driver for 20 years. The following day, Solomon Gandhi was found dead in his house together with his wife and his two lovely daughters. Police are still investigating the matter.

**Case Study 5**

Mr Olofofo is a Nigerian resident in UK. Six months ago, he wrote to the Comptroller General of the Nigerian Prisons Service under the FOI ACT requesting information regarding the current state of security of prisons in the 36 states of the Federation. In the spirit of openness, the Comptroller General provided Mr Olofofo with a detailed report on the state of security of the prisons. Since then, jail break has been reported in almost all major prisons across Nigeria. Criminal activities have also been on the rise as many of the jail breakers now terrorize innocent members of the public for no just cause. The police and other security agencies are finding it difficult to cope with the situation.

**Lesson 5****Redress Mechanisms under the Freedom of Information Act**

**Outcomes:** At the end of the lesson students would be able to:

- a. Discuss the types (including merits and demerits) of redress mechanisms available under the FoI Act.
- b. Discuss the merits and demerits of other redress available under the FoI Act and the administrative mechanisms that are useful to the FoI Act implementation.
- c. Explain the value of having a separate oversight body for the implementation of the FoI Act.

**Contents:**

- a. Types of redress mechanisms under the FoI Act.
- b. The merits and demerits of the redress mechanisms available under the FoI Act.
- c. Need for a separate oversight body for the implementation of the FoI Act.

**Activities:****Pre-class activities:**

Students should write short notes on the following:

- a) The nature of redress available under the FoI Act to an applicant who has been refused access to information.
- b) Merits and demerits of the redress mechanisms.
- c) The desirability or otherwise for the establishment of a separate oversight body for the implementation of the FoI Act.

**In-class activities:**

- a) Focuser ó Using a story, or film clip, or a role play- On an example of the refusal of Mr. Abdulø access to information request by the Fancy Local Government Council concerning the funds allocated for the construction of the abandoned market stalls in his community;
- b) Presentation and discussion of pre-class activities a ó c;
- c) Debate for and against the establishment of an oversight body for the implementation of the FoI Act;
- d) Assessment.

**Lesson 6****Reporting and Monitoring Protocols**

**Outcomes:** At the end of the lesson students would be able to:

- a. Explain the reporting obligations of public institutions under the FoI Act;
- b. Discuss the contents of the reports required to be submitted to the Office of the Attorney-General of the Federation by public institutions;
- c. Draft a sample report from an Institution to the Attorney-General;
- d. Discuss the reporting obligations of the Attorney-General of the Federation under the FoI Act;

- e. Explain the monitoring functions of the Attorney-General of the Federation and its sufficiency or otherwise for the implementation of the FoI Act.

**Contents:**

- a. Reporting obligations of public institutions under the FoI Act.
- b. Contents of reports required to be submitted to the Office of the Attorney-General of the Federation by public institutions.
- c. The reporting obligations of the Attorney General of the Federation under the FoI Act.
- d. The monitoring functions of the Attorney-General of the Federation for the implementation of the FoI Act.

**Activities:**

**Pre-class activities:**

Students should:

- a) Write short notes on the reporting obligations of public institutions and the Attorney-General of the Federation under the FoI Act;
- b) List the contents of reports required to be submitted by public institutions to the Office of the Attorney-General of the Federation under the FoI Act;
- c) Draft a sample report from an Institution to the Attorney-General based on Case study 6 or similar case study to be provided;
- d) Outline the reporting obligations, monitoring functions of the Attorney-General of the Federation and its sufficiency for the implementation of the FoI Act;

**In-class activities:**

Students should:

- a) Present and discuss pre-class assignments a, b, c and d;
- b) Group discussion of case study 6;
- c) Presentation of reports on case study 6;
- d) Assessment.

**Case Study 6**

Madam Faith and Daddy Joe made applications to the Kolango Local Government to access certain information. Madam Faith's application centered on the number of applications the local government has received for access to information, the number of refusals in respect of those applications, the total fees collected/spent to process the requests, if any and the number of full-time staff devoted to processing of information requests. The Kalango Local Government declined to give access to the information requested by Madam Faith, stating that the required information is contained in the report it has submitted to the Office of the Attorney-General of the Federation as required by the Freedom of Information (FoI) Act and that such information could be sourced from that report.

Meanwhile, the AGF's Office had sent a mail to the Kalango Local Government, to the effect that its report for 2013 did not comply with the provisions of the Act in terms of the contents stated therein and require that the contents omitted from the said report should be furnished. The Local Government replied by saying that it had complied with its reporting obligation under the FoI Act.

Daddy Joe, who was a former head teacher in a primary school in the community having got wind of the response of Kalango Local Government to Madam Faith's application decided to address his application to the Office of the Attorney-General of the Federation (AGF) requesting for the reports sent to it by Kalango Local Government from 2012 to 2013. Daddy Joe also demanded to know the efforts made so far by the AGF's Office in monitoring compliance of public institutions to the FoI Act. Daddy Joe

received a shocking reply from the AGFø office stating that it is the duty of the Kalango Local Government to furnish the information required as the AGFø Office is only obliged to submit reports from public institutions to the certain offices and the National Assembly. On the second request, the reply states that the AGFø office has done a lot to ensure that public institutions comply with the provisions of the FoI Act and that the most significant of these is the Guidelines on the Implementation of the Freedom of Information Act issued by that office.

Madam Faith and Daddy Joe are confused by the responses they received to their requests and were more confused when they learnt of the mail sent to the Kalango Local Government on non-compliance with its reporting obligations and the Local Government's response to the same. Madam Faith and Daddy Joe want to be properly educated as to the true position of things regarding their requests and the response by the Kalango Local Government to the mail from the AGFø office under the FoI Act.

### **Lesson 7**

#### **Processes under the FoI Act**

**Outcome:** At the end of this lesson students would be able to:

- a. Explain the process of requesting for information and the nature of response under the FOI ACT
- b. Draft an application for request for information
- c. Draft a response to request for information
- d. Explain follow-up processes to a request for information

#### **Content**

- a. Process of requesting for information under the FOI ACT
- b. Application for request for information
- c. Response to request for information
- d. Follow-up processes to a request for information

**Activities:****Pre-class activities:**

Based on case study 7, students should:

- a. Outline the steps in an application and explain the nature of response;
- b. Draft an application requesting for information;
- c. Draft a response to the request for information;
- d. Write short notes on follow-up process for application requesting information.

**In-class activities:**

- a) Presentation/discussion of all pre-class activities.
- b) Assessment

**Case Study 7**

The Bwari community is worried by the activities of Miners and Quarry operators in this rural area. The activities of the Miners and Quarry operators have left the community with perpetual and disturbing sand dust and smoke. Apple and Cherry as representatives of the community visited the XY Ltd, the operator of the biggest Quarry in the community for a negotiation, but XY Ltd insists it has Mining License to operate. But Apple and Cherry are not sure XY Ltd has any License and in fact insist that even if they have License, such License must be scrutinized, revisited and withdrawn by government. This is particularly in view of the increasing number of residential houses in the area, and they are also not sure any Environmental Impact Assessment (EIA) was done before the quarry activities. Both community leaders have an idea of their right under the FOI ACT to obtain information and record from government. They think they can obtain a copy of the Mining License and the EIA from the Ministry of Environment, if any of these exists. Apple and Cherry have now approached you seeking to know the precise processes involved in a FOI Application. They want to know how cumbersome it could be to enable the community decide whether to pursue their right or not.

## **Lesson 8**

### **Record Keeping and Information Management**

**Outcome:** At the end of the lesson, students would be able to:

- a. Explain the meaning, types and classification of records.
- b. Explain the principles and purpose of information management.
- c. Discuss record keeping obligations under the Act.

**Content:**

- a. Meaning, types and classification of records.
- b. Principles and purpose of record management and reasons for failure of institutions to keep proper records or manage records properly.
- c. Record keeping obligations under the Act.

**Activities:**

**Pre-class activities:**

Students should write short notes on:

- a. Meaning, types and classification of records.
- b. Principles and purpose of record management and reasons for failure of institutions to keep proper records or manage records properly.
- c. Record keeping obligations under the FoI Act.

**In-class activities:**

- a. Focuser: Video clip/photograph/scripted drama on record keeping in public Institutions;
- b. Presentations and discussion on pre-class activities;
- c. Group discussion and presentation on case study 8;
- d. Assessment.

**Case study 8**

Following the inauguration of the newly elected Chairman of Dakata Local Government, a meeting of all the Heads of Department was called by the Secretary to receive reports of the

position of each department and take stock of their needs for the smooth running of the local government under the new leadership. During the meeting, the chairman sought to find out the number of contracts executed by the former Chairman and the amount expended in constructing drainages, boreholes and market stalls in the community. The head of Works Department declared that the files are not in his office as the former Chairman keeps such files with him. The new Chairman, Engr. Kabir was shocked because he heard about the FOI Act and the obligation for every government institution to keep and maintain records of all activities and operations. The Chairman made other inquiries and realized that most of the offices have not been keeping proper records.

Engr. Kabir is desirous to educate his entire staff on the need to keep proper records in compliance with the Act and avoid litigation in case members of the community decide to file a request for information. Consequently he heard about the Law Clinic FOI project in the neighbouring Local Government and invites you to educate his senior staff about the LGA's obligation to keep records and maintain same. Prepare a presentation on the duty of public institutions to keep and maintain records and penalties prescribed by the Act for failing to do so.

### **Lesson 9**

#### **Record keeping at the Law Clinic**

**Outcomes:** At the end of the lesson, students would be able to:

- a. Discuss the requirements of record keeping at the Law Clinic.
- b. List 10 tools required for record keeping/file management for FOI project at the Law Clinic.
- c. Discuss the rationale for record keeping and information management at the Law Clinic.

**Contents:**

- a. Record keeping at the Law Clinic
- b. Maintain information at the Clinic

1. FOI Log book
  2. Client intake form
  3. Client update sheet
  4. FOI phone Log book
- c. Rationale for good record keeping at the Clinic

**Activities:****Pre-class activities:**

Students should:

- a. Make:
  1. A list of records at the law clinic;
  2. A list of information management tools at the law clinic/faculty;
- b. Write short notes on current practice on record management at their law clinic;
- c. Develop any freedom of information monitoring tool.

**In-class activities:**

- a. Focuser: Video Clip/photograph on information management;
- b. Presentation and discussion of pre-class assignments/activities;
- c. Complete sample FOI Log book, Client intake form, Client update sheet, and FOI phone Log book;
- d. Assessment.

# ANNEX A

## Cases

The following cases were reported by R2K- Right to know and we have their consent to republish them here. The cases have been reproduced without editing.

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*PPDC V. FMF & HON. MINISTER FMF [SUIT NO: FHC/ABJ/CS/856/13]*

FEDERAL HIGH COURT OF NIGERIA  
IN THE ABUJA JUDICIAL DIVISION  
HOLDEN AT ABUJA  
ON MONDAY THE 15<sup>TH</sup> DAY OF DECEMBER, 2014  
BEFORE HIS LORDSHIP, HON. JUSTICE A.F.A ADEMOLA  
JUDGE

**SUIT NO: FHC/ABJ/CS/856/13**

**BETWEEN:**

PUBLIC & PRIVATE DEVELOPMENT  
CENTRE LTD/GTE(PPDC)}

APPLICANT

**AND**

1. FEDERAL MINISTRY OF FINANCE  
2. THE HON. MINISTER,  
FEDERAL MINISTRY OF FINANCE}

RESPONDENTS

**RULING**

**A. SUMMARY OF FACT**

The application in this suit is brought by **G.N Chigbu** of **A** and **E** law partnership. It is a Motion on Notice dated 11/12/2013 pursuant to Order 34 rules 5 and 6 of the Federal High Court Civil Procedure Rules 2009 and sections 1, 2 (6) and 20 of the Freedom of Information Act and under the inherent jurisdiction of this Honourable Court praying the following reliefs:

- (i) **A DECLARATION** that the failure of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, to furnish Applicant with the information and documents sought vide Applicant's letter of 30<sup>th</sup> October, 2013 amount to a wrongful denial of information under Freedom of Information Act, 2011.
- (ii) **AN ORDER** of the Honourable Court Compelling the Respondents, jointly and severally, within seven days of the judgment herein, to furnish Applicant with information and copies of documents sought vide Applicant's letter of 30<sup>th</sup> October, 2013 and which information and documents are set out in the schedule hereto.
- (iii) **AND FOR** such other order or other orders as the Honourable Court may deem fit to make on the circumstance.

It is supported by a statement pursuant to Order 34 Rule 3 (2) of the Federal High Court Civil Procedure Rules containing the name of Applicant, description of Applicant, Relief sought, grounds upon which relief are sought, facts relied upon, 12 paragraph affidavit deposed to by **Seember Nyager** and also a Written Address with an annexure marked **Exhibit A**.

Upon service on the Respondent, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent filed in response a 3 paragraph affidavit sworn to by Enyiazu David Nwokoma, a civil servant in the employment of the 1<sup>st</sup> Respondent; it is accompanied by a Written Address. Both affidavit and address are dated 3<sup>rd</sup> February, 2014 and filed by Olusegun Omotola of the legal unit of the 1<sup>st</sup> Respondent.

The Applicant replied on points of law. The reply was dated 10<sup>th</sup> and filed 11<sup>th</sup> February, 2014.

On the 3/4/2014 this matter was adjourned to 20<sup>th</sup> May 2014 for hearing. On the said day, **G.N Chigbu** for the Applicant and Udo Archibong for the respondents in Court, adopted all their processes filed as their arguments in this suit.

In the course of arguments, G.Chigbu for the Applicant urged the court to order for and peruse the documents in possession of the Respondent which the Respondents sought to be exempted, to ascertain if the documents should be exempted or not. Further praying the court to grant their reliefs as prayed.

The court having listened to the submissions of Counsel as well as perused the Counter Affidavit of E.D Nwokoma for Respondents particularly paragraph 3 ordered the Respondents to produce a copy of the agreement to the court within a period of 14 days from the 20/5/2014, whilst judgment was reserved in this suit.

On the 27<sup>th</sup> October, 2014 **G.N Chigbu** for Applicant was in court for readoption of his processes. However the Defendant Counsel S. Omotola was

absent but sent a letter giving reason for her absence, and applying for the matter to be adjourned to 30<sup>th</sup> or 31<sup>st</sup> of October for readoption. With no objection from G.N Chigbu, for the Applicant, the Court adjourned the matter to 30<sup>th</sup> October for re-adoption.

On the 30/10/2014, **G.N Chigbu** was in court for the Applicant. The Respondents were not represented.

**G.N Chigbu** urged the court to adopt their papers in line with Order 22 Rule 9 of the Federal High Court Civil Procedure Rules.

**G.N Chigbu** adopted his processes and that of the Respondent were deemed adopted pursuant to Order 22 Rule 9 of the Federal High Court Civil Procedure Rules whilst judgment was fixed for 1/2/2015.

#### **B. STATEMENT OF ISSUES ARISING FROM FACTS**

The Respondent in his Written Address in opposition of the Applicants Motion on Notice dated 11<sup>th</sup> December, 2013, raised the issue for determination which the Court adopts.

Whether on the basis of the Affidavit evidence of the Applicant and Respondents the court should exercise its discretion in favour of the Applicant and grant the orders sought in the circumstance.

It is the Respondent's argument they do not have any document that matches the date stated by the Applicant. However, the document in their possession which is a loan agreement executed between the Federal Government of the Federal Republic of Nigeria and the Chinese Exim Bank on the execution and completion of the Abuja Light Rail Project in the custody of the Respondent contains trade secrets of the Chinese Exim Bank which ought not to be disclosed, this is disposed to in paragraph 3 v, vi, vii and viii of their affidavit.

In the Applicant's reply on points of law, he argued on whether the Respondent successfully denied the existence of the agreement executed between Nigeria and Chinese Exim Bank relating to financing the Abuja light Rail project.

The Respondent did not outrightly deny possession of the document requested by the Applicant however they deposed in paragraph 3 (ii-iv) of their affidavit that the agreement they have in that same description was not entered on or about the 11<sup>th</sup> September but "executed far beyond the said date" (underlinings mine).

The Applicants Counsel in his reply submitted, the law is to effectively deny a fact deposed to in an affidavit it is not enough for an opposing party to make a

sweeping denial of facts in his counter affidavit. To succeed, he must go further to depose to the facts he wants the court to believe. In this case the deponent has failed to controvert the facts deposed to in the Applicants affidavit.

The Respondent merely denied the date stated by the Applicant and not being possession of said agreement. The Court cannot agree more that a mere difference in the dates of the agreement should vitiate the Applicant's access to the agreement.

On exemption from disclosure, the Respondents submitted the document contains trade secrets of the Chinese Exim Bank as earlier stated in paragraph 3 v, vi, vii and viii, ix, x, xi of the respondent's affidavit. The Respondent further submitted that disclosure may cause harm to the interest of the Chinese Exim Bank relying on Section 5(1) a of the FOI Act and paragraph 3 v-ix of their affidavit.

Section 15 (1)(a) is herein reproduced- FOI Act

(a) Trade secrets and commercial or financial information obtained from a person or business where such trade secrets or information are proprietary, privileged or confidential, or where disclosure of such trade secrets or information may cause harm to the interests of the third party provided that nothing contained in this subsection shall be construed as preventing a person or business from consenting to disclosure;

Also stating that section 15(4) gives Court the discretion to disclose information if it is in the interest of the public, and what constitutes public interest is left to the opinion of the court.

The Applicants Counsel in their reply on points of law submitted by section 24 of the FOI Act, the burden is on the Respondent seeking to deny the Applicant access to information to establish the act authorizes it to do so. However, the Respondents failed to depose to such facts in their affidavit.

However, assuming without conceding the Applicant depose to such facts, the court is vested with the power to examine the said agreement pursuant to Section 22 and 25 of the FOI Act to determine which portions if any that contains trade secrets which if exposed by giving out the document would harm the business interest of the Chinese Exim Bank

Sections 22 & 23 are herein reproduced for clarity.

## **Section 22**

Notwithstanding anything contrary contained 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.

### **Section 23**

In any proceeding before the Court arising from an application under 20, the Court shall take precaution, including when appropriate, receiving representations Exparte and conducting hearings in camera to avoid the disclosure by the Court or any person of any information or other material on a basis of which any public institution will be authorized to disclose the information applied for.

Where the court finds information that should be exempted, pursuant to Section 18 of the FOI, the Court can shed the area off and furnish the Applicant with the agreement.

The Court has perused the document in question which was submitted by the Respondent to the Courts, pursuant to Section 22 of the FOI Act, and opines the document is a simple loan agreement made between the Federal Government of Nigeria and the Chinese Exim Bank.

The court does not find any trade secrets, Commercial or financial Information belonging to the Chinese Exim Bank which are privilege proprietary and confidential as submitted by the Respondent.

Consequently, this document does not fall under the exemptions stated in sec 15 (1) (a) of the FOI Act.

(a) Trade secrets and commercial or financial information obtained from a person or business where such trade secrets or information are proprietary, privileged or confidential, or where disclosure of such trade secrets or information may cause harm to the interests of the third party provided that nothing contained in this subsection shall be construed as preventing a person or business from consenting to disclosure;

Therefore disclosure of this document cannot cause any harm to the interest of a third party which in this case is the Chinese Exim Bank.

The Respondents argument lacks substance, are frivolous and a waste of the courts time as they have no justification in denying the Applicant the documents sought.

Accordingly, prayer 1 and 2 of the Applicant's Motion on Notice dated 11/12/2013 are hereby granted in respect of schedule 1-5.

**HON. JUSTICE A.F.A. ADEMOLA**  
**JUDGE**  
**15/12/2014**

PARTIES- Absent  
 APPEARANCES- G.N Chigbu for Applicant, Respondent

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***PPDC V. NAFDAC, & D.G. NAFDAC SUIT NO: FHC/ ABJ/CS/760/13***

FEDERAL HIGH COURT OF NIGERIA  
IN THE ABUJA JUDICIAL DIVISION  
HOLDEN AT ABUJA  
ON MONDAY THE 15TH DAY OF DECEMBER, 2014  
BEFORE HIS LORDSHIP, HON. JUSTICE A.F.A ADEMOLA  
JUDGE

**SUIT NO: FHC/ ABJ/CS/760/13**

**BETWEEN:**  
 PUBLIC & PRIVATE DEVELOPMENT  
 CENTRE LTD/GTE (PPDC) } APPLICANT

**AND**

1. NATIONAL AGENCY FOR FOOD AND DRUG  
 ADMINISTRATION AND CONTROL (NAFDAC)  
 2. THE DIRECTOR GENERAL NAFDAC } RESPONDENTS

**RULING**

**A. SUMMARY OF FACT**

The application in this suit is brought by **G.N. Chigbu** of A and E law partnership. It is a Motion on Notice dated 11/12/2013 pursuant to Order 34 rules 5 and 6 of the Federal High Court Civil Procedure Rules 2009 and sections 1, 2 (6) and 20 of the Freedom of Information Act and under the inherent jurisdiction of this Honourable Court praying the following reliefs

**1. A DECLARATION** that the failure of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, to furnish Applicant with the information and documents sought vide Applicant's letter of

30<sup>th</sup> October, 2013 amount to a wrongful denial of (information under Freedom of Information Act, 2011.

**2. AN ORDER** of the Honourable Court Compelling the Respondents, jointly and severally, within seven days of the judgment herein, to furnish Applicant with information and copies of documents sought vide Applicant's letter of 30<sup>th</sup> October, 2013 and which information and documents are set out in the schedule hereto.

#### **SCHEDULE**

1. Copies of Financial Evaluation Report by the tender's Board approving the winning Bidders.
2. Copies of letters of notification of award of contract and the contract sum
3. Copies of contract document showing effective (start) date of the contract and the end date of the contract, the conditions of the contract, etc.
4. Project status report indicating current level of progress made on the project
5. Schedule of payments for the projects
6. Copies of request by the tender's Board for certificate of no objection.
7. BPP certificate of No objection
8. Copies of summary of details of contracts published by your agency or BPP
9. Copies of bid rejection notices, if any.

It is supported by a statement pursuant to Order 34 Rules 3 (2) of the Federal High Court Civil Procedure Rules containing name of Applicant, description of applicant, Relief sought, grounds upon which reliefs are sought, facts relied upon, a 12 paragraph affidavit deposed to by **Seember Nyager** and a Written Address with **Exhibit A**.

The Respondents, Represented by the law firm of **St Hon, SAN** filed a memorandum of conditional appearance dated 27/1/14 and a Motion on Notice dated 5/2/2014 reading as follows

1. An order extending time within which the Respondents/Applicants will raise objection to this Suit.
2. An order deeming this present Application urging a striking out of this Suit as having been properly filed and served, filing, default and service fees having been paid for same.
3. An order striking out the name of the 2nd Respondent on the non-issuance of pre-action notice.
4. An order striking out the name of the 2nd Respondent on the ground that it is not a party to be sued under the Freedom of Information (FOI) Act, 2011.

5. Consequently an order of this Honourable Court striking out/dismissing this suit against the Respondents for want of jurisdiction.
6. Such other order(s) as this Honourable Court may deem fit to make in the circumstances.

It is supported by an 8 paragraph affidavit deposed to by **Mrs Nneka Offiah Esq.** a senior Legal Officer in the Legal department of NAFDAC and a Written Address, prior to payment of default fees and an affidavit evidencing payment under Order 34 Rule 5 (3) and (4) of the Federal High Court Procedure Rules 2009.

Upon service, Applicant's/Respondents Counsel **G.N Chigbu** filed a reply in opposition to Respondents Preliminary Objections dated 10/4/2014 filed 11/4/2014.

The Defendant/Applicants filed a reply on point Plaintiff's reply on 11/ 2/2014. It is dated 18/2/2014 and filed on same day.

After several adjournments in this suit, on the 3/4/2014 **G.N Chigbu** for the Applicant and **S.T. Hon SAN** for the Respondents proffered oral arguments and adopted their filed processes in this suit.

The Applicants **G.N Chigbu** further applied for leave to make response to Respondent's submission on Section 20 of the FOI Act (Respondent paragraph 1-1.3.)

Leave was granted accordingly, Counsel made his submissions and ruling was reserved in this suit.

#### **B. STATEMENT OF ISSUES ARISING FROM THE FACTS**

After a careful perusal of the processes filed herein by both Counsels to parties, this court adopts the following questions for determination.

1. Whether the Applicant's failure to fulfil the condition precedent set down in section 27 of NAFDAC Act, 2004 robs the court of its jurisdiction to entertain this suit.
2. Whether the 2nd Respondent is a party to this suit under the Freedom of Information Act.
3. Whether by the express provisions of section 20 of the FOI Act 2011, actions can be maintained against the 2<sup>nd</sup> Respondent in this suit.

#### **C. DETERMINATION OF ISSUES BY AN APPLICATION OF LAW TO FACTS**

**ISSUE ONE**

Whether the Applicant's failure to fulfil the condition precedent set down in section 27 of NAFDAC Act, 2004 robs the court of its jurisdiction to entertain this suit.

The Applicants Counsel filed this Motion for mandamus on 11/12/2013 pursuant to leave granted by this court on 5/12/2013 NAFDAC, herein after referred to as the 1<sup>st</sup> Respondent, sometime in the year 2012 conducted a procurement proceeding and awarded the contracts for **PLOT NO. 1 COMPLETION OF NAFDAC EXISTING BUILDING AT NO. 1 ISOLO INDUSTRIAL ESTATE, APAPA EXPRESS WAY LAGOS AND LOT NO. 2 COMPLETION OF EXTERNAL WORKS AT NAFDAC EXISTING BUILDING AT NO 1 ISOLO INDUSTRIAL ESTATE APAPA EXPRESS WAY LAGOS.**

The Applicant, pursuant to the right conferred in it to obtain public records and information from Public institutions pursuant to the Freedom of Information Act applied to the 1<sup>st</sup> Respondent through the 2<sup>nd</sup> Respondent - her Director General by it letter dated 8/10/2013, for copies of the documents and Information set out in the schedule to this application. The 1<sup>st</sup> Respondent refused to furnish the Applicant with the said documents and information.

Therefore Applicant sought the leave of the Honourable Court to bring this application to enforce Applicant's right under FOI Act 2011 and same was granted on 4/12/2013.

Respondent's Counsel replied to the Applicants Motion on Notice, urging the Court to strike out this suit based on two grounds, all on jurisdiction. One of which is the failure of the Applicant to fulfil a condition precedent i.e. Non service of pre-action Notice on the Defendants as required by Section 27 of the NAFDAC Act 2004. He cited

- (1) **NNPC V. EVIDORI {2007} All FWLR (pt 369) 324 @ 1340 D**
- (2) **Niger Care Development Co Ltd V. Adamawa State Water Board (2008) 9 NWLR (pt 1093) 498 @ 526H-5278 SC**
- (3) **Ugwuanyi V. Nikon Insurance Plc (2005) All NWLR (pt 140) 1710 SC**

Finally, the Respondents Counsel **S.T. Hon, SAN** urged the court to strike out this suit for want of jurisdiction.

The Applicant's Counsel **G.N Chigbu** in his reply submitted Section 18 of the Interpretation Act CAP 23 LFN 2004 defines month as "a calendar month reckoned according to Gregorian calendar" Black's Law Dictionary 9<sup>th</sup> Edition defines a calendar month as "any time period approximating 30 days" it went

ahead to differentiate a lunar month which is a period of 28 days and a calendar month which is 30 days.

Furthermore that from the above explanation, sec 27 (1) NAFDAC Act means a period of 30 days which if the Applicant complies with would lose all the days granted it by the FOI Act for redress, therefore lose its right under the Act.

He also cited **Ibrahim v Sheriff** a judgment of the Court of Appeal. He finally referred the Court to Section 1 (1) of the FOI Act which reads as follows:

**Section 1(1)**

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.

Further submitting that based on the highlighted portion of Sec 1 (1) FOI Act, access to information is granted and not subject to section 27 (1) of the NAFDAC Act of any other Act and urged the Court to hold that the legislator of the FOI Act does not contemplate a month's pre-action for the institution of this suit.

The Defendant/Applicant submitted in their reply on points of law that the Defendants argument is an attempt to escape the one month mandatory time stipulated by the NAFDAC Act as there is room for extension of time under the FOI Act and none under the NAFDAC Act.

He further submitted that where the provisions of the law are clear and unambiguous, they should be applied as they are relying on

- (1) **FBN V. Maidawa (2013) 5 NWLR (pt 13487444 @ 483 SC**
- (2) **Knight Frank Ruley (Nig) V. AG Kano 1998 7 NWLR (pt 556)**
- (3) **Kraus Thompson Organisation V. NIPSS (2004) All FWLR (pt 218) 797 @ 809F- GSC**
- (4) **Ndoma Egba V. Chukwuogor 2004 ALL FWLR (pt 217 735 @ 755 G - HSC**
- (5) **Tanko V. State 2004 FWLR (pt 113) 430 SC and many others.**

Also, the Applicants submission are completely out of time with settled principle of interpretation as Section 1 relied on by Applicants contemplates access to records held by agencies not access to Courts.

Jurisdiction is the authority which the Court has to decide matters that they are litigated before it or take cognizance of the matters presented in a formal way for its decision.

**See: (1) Agbogunleri V. Depo & 3 ors (2008) 12 sc (PH) 240**

It is the life line of every trial, for where there is any defect in its competence, it is fatal to the proceeding and makes it a nullity however well conducted or decided.

**See (1) Ademola V. Adetayo (2010) 15 NWLR (pt 1215) 156**  
**(2) IBAKU V. EBENI (2010) 17 NWLR (pt 1222 286 CA**  
**(3) NUEE V. BPE (2010) 7 NWLR (pt 1194 pg 538 SC**  
**(4) SKEN CONSULT V. UKEY & anor (198) ISC p6**

It is the Defendant Counsels argument as stated above that this Court lacks jurisdiction to entertain this suit.

This Court has examined the provisions of the Freedom of Information (FOI) Act and NAFDAC Act particularly Sections 1 and 20 of the FOI Act and 27 of the NAFDAC Act which is reproduced herein for clarity and opines that Section 1 of the FOI Act as rightly argued by the Defendant, contemplates access of records held by agencies and not access to the law courts.

However on the provisions of Section 20 of the FOI Act against section 27 NAFDAC Act the court agrees with the Applicants Counsel especially on the definition of a calendar month and further agrees that a pre-action notice in this case would operate to deny the Applicants of the right of access to court as the time of 30 days duration would have elapsed and the time allowed an Applicant under the FOI Act to seek redress would have elapsed, the same day causing the Applicant to loose his right of action under the FOI Act.

The court further opines that the principle of generalitus derogant (special things derogate from general things) should apply in this circumstance.

This is to say the specific legislation of the Freedom of Information Act overrides any other general law including the NAFDAC Act.

**See (1) Madu mere V. Okwara 2013 LPELR 1 @ 15-17**  
**(2) A.G Ogun v A.G Federation 2003 FWLR (pt 143) 206@ 246**  
**(3) Edet Akpan v State 1986 3 NWLR (pt 27) 25**

Furthermore, on interpretation of statute in the 11<sup>th</sup> Edition of Maxwell at page 164 it is stated that where a general intention is expressed (as in 30 days preaction notice stipulated in the NAFDAC Act) and also a particular intention

which is incompatible with the general intention of the law (as in the Freedom of Information Act requiring an action to be commenced in 30 days) the particular intention is considered an exception to the general rule. **See: Aqua Ltd vs Ondo State Sports Council 1988 4 NWLR (pt 91) 622**

From the foregoing paragraphs, issue 1 is resolved in favour of the Applicant, as the arguments of the Defendant are untenable in law. The court shall proceed to the next issue.

### **ISSUES 2**

Whether the 2<sup>nd</sup> Respondent is a party to this suit under the Freedom of Information Act.

It is the Defendants argument that this suit cannot be maintained against the 2<sup>nd</sup> Defendant who is the DG of NAFDAC Act.

The Defendants Counsel has based his argument on Section 20 and 31 of the FOI Act

The Plaintiff Counsel argue that by section 9 (1 and 2) of the Act, the Director General is the keeper of books and records for the agency so should be a party in this suit.

This Honourable Court agrees with the arguments of the Defendants Counsel on this issue as the 2<sup>nd</sup> Defendant is an officer of the 1<sup>st</sup> Defendant therefore suing the first Defendant suffices.

The Defendants Counsel has rightly relied on the community reading of Section 20 and 31 of the FOI Act 2011 which reads as follows

#### **Section 20**

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.

#### **Section 31**

"public institution" means any Legislative, Executive, Judicial, Administrative or advisory body of the government, including boards bureau, committees or commissions of the State, and any subsidiary body of those bodies including but not limited to committees and sub-committees which are supported in whole or in part by public fund or which expends public fund and private bodies providing public services, performing public functions or utilizing public funds:

The word public institution in section 20 refers to the institution in question and not its officers.

Going by the above paragraphs the 2<sup>nd</sup> Defendant is hereby struck out as not being a correct party in this suit.

**ISSUE 3**

Whether Applicant has met the conditions for the grant of the reliefs sought for in this application.

The defence Counsel did not file a defence to the substantive suit and Averments or facts uncontroverted in law are deemed true see **Ogojeofor v Ogojeofor** (2006) 1 Sc (pt1) 157 (supra). The court has read through the provision of the FOI Act especially section 15 of the Freedom of Information sought by the Plaintiff, and opines in the present circumstance Defendant does not fall under the exception in the FOI Act.

Accordingly, prayer 1 and 2 of the Applicant's motion dated 11/12/2013 are hereby granted in respect of all the items in the schedule

**HON. JUSTICE A.F.A. ADEMOLA, JUDGE, 15/12/2014**

**PARTIES** - Absent  
**APPEARANCES** - **G.N Chigbu** for Applicant,  
 No representative for Respondent

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***PPDC V. JBN [MOTION FCT/HC/M/3879/14; SUIT NO. FCT/HC/CV/]***

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY ABUJA  
 HOLDEN AT HIGH COURT OF JUSTICE WUSE ABUJA ON THE 9<sup>TH</sup>  
 DAY OF JUNE,2014 BEFORE HIS LORDSHIP: HON.JUSTICE M.M.KOLO  
 COURT NO.HIGH COURT TWENTY-SEVEN (27)**

**MOTION FCT/HC/M/3879/14  
 SUIT NO. FCT/HC/CV/**

**BETWEEN:**

**PUBLIC & PRIVATE DEVELOPMENT  
 CENTRE LTD/GTE (PPDC)}**

**PLAINTIFF/APPLICANT**

**AND**

JULIUS BERGER NIGERIA  
PLC}

DEFFENDANT/RESPONDENT

**COURT ORDER**

Upon reading the motion ex parte and the accompanying affidavit of SAMUEL UMEJIAKU, and upon hearing G.N.CHIGBU ESQ. Counsel for the Plaintiff/Applicant praying this Honourable Court for the following reliefs:

1. An order of the honourable Court granting applicant leave to apply for an order of Mandamus to Compel the respondent to furnish applicant with the Copies of Documents and Information relating to the bidding and award of the contract for the Re-construction of the Lagos - Ibadan Express Way to the respondent and on the status of the contract which documents and information are as set out in the schedule hereto.

2. And for such other order(s) as the Honourable Court may deem fit to make in the circumstance.

Hon. Justice M.M. Kolo  
(Presiding Judge)  
9-06-2014

I have carefully examined the motion ex parte filed by the learned counsel for the applicant, and the documents accompanying same and accordingly hereby grant leave to the applicants as prayed.

Case adjourned to 27/6/14 for hearing.

Given under the hand of the Hon. Presiding Judge and seal of this Honourable Court on the 9<sup>th</sup> day of June, 2014.

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***M.G.I.G. V. A.G.B [MOTION NO. MHC/2564m/12; MOTION NO.  
MHC/811m/14]***  
**IN THE HIGH COURT OF JUSTICE OF BENUE STATE OF NIGERIA IN  
THE BENUE STATE JUDICIAL DIVISION  
HOLDEN AT MAKURDI**

MOTION NO. MHC/2564m/12  
MOTION NO. MHC/811m/14

**ON THE MONDAY 26TH DAY OF MAY, 2014**

BEFORE: HIS LORDSHIP HON.JUSTICES O. ITODO

JUDGE

**BETWEEN**

MAJOR GEN.INDIA      GARBA (RTD)}      PLAINTIFF

**AND**ACCOUNTANT GENERAL      OF BENUE  
STATE OF NIGERIA      }      DEFENDANT**RULING**

The plaintiff filed suit No. MHC/2564/12 on the 26:09:12 seeking various reliefs against the defendant, who is the accountant general of Benue state.

Further to that, he went on, on the same date to file two other actions, Viz: suits No. MHC/2565/12 and MHC/2566/12 against the Special Adviser Local Government Affairs and the Commissioner for Finance respectively.

The subject matter in all the action are all the same and impair material. Consequent, upon the above facts, the defendant herein is aggrieved, on the basis that the procedure and processes of the court have been improperly employed, hence the present application charging the plaintiff with abuse of court process, and for an order striking out this action for being incompetent, vexatious and lacking in merit.

The 5 paragraphs affidavit filed in support of the application shows broadly that the application is hinged on the fact that the Freedom of Information Act is not yet domesticated in Benue State and that in addition to the present suit two other actions by the plaintiff on the same subject matter are pending. These other actions are set out in the affidavit.

The plaintiff in reaction filed a counter-affidavit of 9 paragraphs, while each of the parties filed their respective addresses which they adopted in argument.

I am satisfied from an examination of the law and the authority of the decisions of our courts, that the National Assembly is vested with the power to enact Law and legislations, including the Freedom of Information Act under Section 4 of the 1999 Constitution (as altered). I am also satisfied that until set aside pronounced upon to the contrary and /or abrogated such laws apply throughout the country. The question of the Applicability of the law under review is not directly in issue in this application; and even if it is; to the extent that no pronouncement has been made on it and/or same abrogated, it remains in operation and application throughout the country. The decision in **A. G. Abia State Vs A. G. Federation & ors (2006) 28 NSCQR 161** cited by the defendant was upon an issue which was raised and pronounced upon by the court. There is

no similar pronouncement shown to have been made on the Freedom of Information Act and until the contrary be proved, it remains in force.

Also, it matters little or of no consequence, if a man who is entitled to a relief approach the court under the wrong premises or law or under no law at all. The decision in **Falobi Vs Falobi (1976) NMLR 169, 177 cited by the plaintiff and Ulegede V. Milad (2000) FWLR (Pt. 22) 981 at 993**, refers.

The complaint that the action is an abuse of process however merit a closer probe. With the assistance of the various decisions cited by the parties as a guide, it is evident that, for an action to be declared frivolous, vexatious oppressive and an abuse of court process, it must be shown quite clearly that there are two or more actions between the same parties in respect of the same subject matter in one or more courts at the same time. See **Ikine Vs Egberode (2001) 9 LRCN 3288, 3307**, per Ejiwunmi, JSC, cited by the defendant. As correctly pointed out by the defence in its address, it contemplates or at its bedrock is the existence of multiple actions between the same parties, which it further explained through the decision in **Umeh V. Iwu {2008} 34 NSCQR (Pt. 11) 1133, 1152** as the co-existence of (a) a multiplicity of actions (b) between the same parties (c) on the same subject matter and/or (d) issues.

The operative phrase for the purpose of the decision in this ruling is whether the parties and subject matter and/or issues are the same. While the latter is capable of being a long drawn analysis, the same cannot be said of the parties. Whereas, the plaintiff is the same person in all the actions, the defendants are different functionaries of Government. There is no agreement between the parties as to their real functions, until evidence is led, it is presumed that their functions are what the plaintiff present them to be.

I should think that the decisions cited by the defendant on this issue which is in accord with the following decisions of the same court, to wit; **7up Bottling Co. V. Aboila (2001) 88 LRCN 2214, 2239** per Ugundare, JSC that;

“If there were cases pending between the same parties on the same or substantially the same cause of action, it would be abuse of process of court for the plaintiff to institute yet another action in the same court against the same defendant while these other cases were still pending.”

And per Tobi JSC, in **African Reinsurance Corporation V. JDP (2003) 106 LRCN 539 at 559**, that;

“There is said to be an abuse of the process of the court when a party improperly uses the issue of the judicial process to the irritation and annoyance of his

opponent such as instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues-----"

It is clear from these decisions of the court that the underlying fact that must exist to constitute an abuse of the process of the court is that the parties to all the actions, amongst other factors must be the same.

That is not so in the three cases filed by the plaintiff as all the defendants are different. The objection therefore fails and it is dismissed.

Justice S. O. Itodo  
26:05:14

Plaintiff present  
Defendant absent  
Chief O. O. Obono-Obla, Esq. for plaintiff

No appearance for defendant.

Court: Ruling read out in court. Preliminary objection is dismissed.

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***PPDC V. H. M.FCT & SEC. T.S. [SUIT NO: FCT /HC/CV /M/3057/13]***

IN THE HIGH COURT OF FEDERAL CAPITAL TERRITORY  
IN THE ABUJA JUDICIAL DIVISION  
-HOLDEN AT ABUJA  
ON THURSDAY 30TH JANUARY 2014  
BEFORE HIS LORDSHIP: HON JUSTICE O. A. ADENIYI  
SITTING AT COURT NO. 25 APO-ABUJA

**SUIT NO: FCT /HC/CV /M/3057/13**

**BETWEEN:**

PUBLIC & PRIVATE DEVELOPMENT CENTRE  
LIMITED/ GT}

APPLICANT

**AND**

1. THE HON. MINISTER OF THE FCT  
2. THE SECRETARY, FCT TRANSPORT  
SECRETARIAT}

RESPONDENTS

**RULING**

The instant application was filed by the Applicant on 24/04/2013, pursuant to the grant of leave by this Court on 17/04/2013, to bring on application for judicial review by way of mandamus against the Respondents. The application seeks two reliefs, namely:

1. A declaration that the failure of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to furnish the Applicant with the documents/information sought vide Applicant's letter of 13<sup>th</sup> December, 2012, amounts to a wrongful denial of information under the Freedom of Information Act 2011 (the Act).
2. Order of the Honourable Court compelling the Respondents jointly and severally to forthwith furnish the Applicant with the information and copies of documents set out in the schedule to this application.

The Applicant further set out the information/documents sought from the Respondents in a schedule to the Application. They are as follows:

- i. How many companies did the FCTA engage for the purpose of this controlled parking/collection of parking tolls or fees?
- ii. What are the names of the companies and their addresses?
- iii. What are the terms of the engagement of each of these companies?
- iv. How much has each of the companies remitted to the FCTA since inception of their respective engagement?
- v. Copy of the contract of engagement between the FCTA and each of the companies;
- vi. Statement of account showing remittances made by each of the companies from inception of their engagements to date.

To support the Application, the Applicant further filed a Statement, pursuant to the provision of **Order 42 Rule 3 (2)** of the **Rules** of this Court; an affidavit containing 11 paragraphs, to which three (3) documents were attached as exhibits; and a Further Affidavit of 4 paragraphs.

To oppose the application, the Respondents filed a Joint Counter Affidavit of 5 paragraphs.

I have proceeded to examine the totality of the processes filed by the parties on record. I have also given a careful consideration to the written and oral arguments advanced by learned counsel on both sides, to back up their respective contentions.

It is not in dispute between the parties that sometime in 2011, the 1<sup>st</sup> Respondent commenced a controlled parking scheme and collection of parking tolls from motorists within some parts of the Federal Capital Territory; and that to

undertake this assignment, the Respondents engaged the services of some private companies.

It is also not in dispute between the parties that the proceeds of this scheme form part of the internally generated revenue of the FCT Ministry.

It is further undisputed that, pursuant to the provisions of **Sections 1 and 2** of the **Freedom of Information Act, 2011**, the Applicant, as it is entitled, applied to the Respondents to obtain information relating to the activities of the said controlled parking system, as set out in the foregoing, vide letters attached to the application as **Exhibits A and B**.

It has also been resolved that, in filing the instant application, the Applicant complied with the provision of **Section 20** of the **Act** that states 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 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.

Now, the case of the Applicant is that upon writing the letters, **Exhibits A and B** to the Respondents respectively on 13/12/2012, the 1<sup>st</sup> Respondent failed to respond thereto; whilst the 2<sup>nd</sup> Respondent, by letter dated 20/12/2012, copy of which is attached to the application as **Exhibit C**, informed the Applicant that he was liaising with some other bodies to gather the information requested and that the same shall be turned over to the Applicant as soon as the same were delivered to him.

The Applicant further alleged that the Respondents have failed and refused to deliver the information it requested in spite of the undertaking given by the 2<sup>nd</sup> Respondent to deliver the same.

The Applicant's learned Counsel had argued that by the provision of **Section 4** of the **Freedom of Information (F.O.I.) Act**, the Respondents were duty bound to provide the information requested vide **Exhibits A and B**, within seven (7) days of receipt of the said letters; and that having failed to supply the information within the prescribed period, the Respondents are deemed by the provision of **Section 7 (4)** of the **Act** to have refused access to the information required.

**Mr. Chigbu** of counsel of the Applicant, further argued that in view of the failure of the Respondents to provide the requested information, the Applicant is entitled in law to approach this Court as it had done, to compel the Respondents

to provide the information requested, by virtue of the provision of **Section 1 (iii)** of the **F.O.I. Act**.

The position of the Respondents however is that they were willing to provide some of the information the Applicant had requested for but that it failed to fulfil a condition precedent which is payment of the requisite fees before the documents could be handed over to it.

The Respondents further contended, on the other hand, that some of the documents requested for by the Applicant are exempted from disclosure under the provision of **Section 15 (1) (a)** of the **Act**. Specifically, the Respondents contended that the statement of account required under **item (f)** in **Exhibits A** and **B**, form part of such documents the Respondents, by **Section 15 (1) (a)** of the **Act**, are not under obligation to disclose or exempted from disclosing to the Applicant.

Firstly, although it is correct that in certain instances, the Respondents are entitled to charge fees for documents sought from them, as permitted by **Section 8** of the **Act**; however, as correctly submitted by **Mr. Chigbu**, there is no material before the court to show that the Respondents informed the Applicant of such requirement to pay fees for information required under **items (a) - (e)** of **Exhibits A** and **B**. All that the 2<sup>nd</sup> Respondent said in his letter Exhibit C, in response to Exhibit B, was to inform the Applicant that he was sourcing for the information required from other institutions and that as soon as the information are procured, he shall turn the same over to the Applicant.

It is therefore clear, that the excuse as to payment of fees, as contended by the Respondents, is nothing but an afterthought, and I so hold.

Moreover, by the provision of **Section 4** of the **Act**, the Respondents are under obligation to formally communicate to the Applicant, within **seven (7)** days of receiving its request, where they consider that the request of the Applicant, or any part thereof, should be denied. The written communication must also state the reason for denying access to the information required.

In the instant case, no such formal communication was made by the Respondents to the Applicant; neither did they give notice of extension of time to the Applicant, as required by **Section 6** of the **Act**, stating the reasons for unavailability of the Information required within the time prescribed.

Now, with respect to the contention of the Respondents that the information required in **item (vi)** of the Schedule is such that is exempted by virtue of **Section 15 (1)** of the **Act**, the said Section provides as follows:

- “15. (1) A public institution shall deny an application that contain:**
- a. trade secrets and commercial or financial information obtained from a person or business where such trade secrets or information are proprietary, privileged or confidential, or where disclosure of such trade secrets or information may cause harm to the interests of the third party. Provided that nothing contained in this subsection shall be construed as preventing a person or business from consenting to disclosure;**
  - b. information, the disclosure of which could reasonably be expected to Interfere with the contractual or other negotiations of a third party, and**
  - c. proposal and bids for any contract, grants, or agreement including information which if it were disclosed would frustrate procurement or give an advantage to any person.**

Learned Respondents' counsel had argued that, by virtue of the afore stated provision of the Act, the Respondents have been exempted from providing information on the statement of account relating to third parties, as required by the Applicant, when the information required thereby is likely to cause harm to the interest of such third parties. Learned counsel further argued that the provision of **Section 15 (1) (a)** of the **Act** is very clear and unambiguous and as such urged the Court to so hold in favour of the Respondents that the information requested for in **item (vi)** of the Schedule is such that they are exempted by law not to supply to the Applicant.

I have examined the information requested by **item (vi)** of the Schedule to this application. The Applicant thereby, simply requests the Respondents to supply it with statement of account showing remittances made by each of the companies from inception of their engagements to the date of the application.

By my understanding, what the Applicant here requests for is not financial statements of third parties, but such that are kept by the Respondents. In whatever nomenclature or names, that show monies remitted to them by the companies they engaged to collect tolls on their behalves since the inception of the controlled parking scheme in the Federal Capital Territory.

I agree with **Mr. Chigbu**, that the Respondents' learned counsel grossly misconceived the clear provision and intendment of **section 15 (1) (a)** of the **Act**. By no stretch of interpretation could it be said that the provision covers or exempts the kind of information the Applicant had requested in **item (vi)** of the Schedule. I so hold.

As correctly contended by **Mr. Chigbu** in order to establish that the information requested for in **item (vi)**, are such that the Respondents are exempted from supplying to the Applicant. They must show that the information contain trade secrets or commercial and financial information which must be proprietary, privileged or confidential; that the information is in the possession of a third

party and that the disclosure of such information may cause harm to the interest of the third party.

By the provision of **Section 24** of the **Act**, the burden of establishing that a public institution is authorized to deny an application for information or part thereof shall be on the public institution concerned. In the instant case, the Respondents have failed to discharge this burden.

As such, I am satisfied that the application is meritorious and the same is hereby granted as prayed. Accordingly, it is hereby declared that the failure of the Respondents to grant the Applicant access to the information and/or documents sought by letters written to the Respondents respectively on 13/12/2012, amounts to wrongful and unlawful denial of information under the **Freedom of Information Act, 2011**.

Pursuant to the provision of **Section 25** of the **Act**, the Respondents are hereby further ordered and compelled, jointly and or severally, within twenty one (21) days from the date hereof, to grant the Applicant access to all the information and/or documents sought as specified in the schedule to the Application already set out in the foregoing. I make no orders as to costs.

**OLUKAYODE A. ADENIYI**  
(Presiding Judge)  
30/01/2014

**Legal representation:-**

G. N. Chigbu, Esq. - for the Applicant  
R. J. Goyol, Esq. - for the Respondents

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*O.O.O. V. CCEC [MOTION NO. FCT/HC/M/34/2013]*

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY  
HOLDEN AT JABI - ABUJA  
THIS TUESDAY, THE 21<sup>ST</sup> DAY OF JANUARY, 2014  
BEFORE: HON. JUSTICE UGOCHUKWU A. OGAKWU -JUDGE

**MOTION NO. FCT/HC/M/34/2013**

**BETWEEN:**  
OKOI OBONO-OBLA }

PLAINTIFF

**AND**

CCEC NIGERIA LIMITED}

DEFENDANT

**RULING**

The Plaintiff desirous of getting information on the contract for the rehabilitation of the Calabar-Ugep-Katsina-Ala Road wrote to the Defendant pursuant to the Freedom of Information Act to supply it with information on the said road rehabilitation contract. At the expiration of the time to supply the said information and the Defendant having failed to make available the information to the Plaintiff, the Plaintiff applied to Court pursuant to Section 20 of the Freedom of Information Act for a judicial review of the matter.

On 5<sup>th</sup> June 2013 the Court granted the Plaintiff leave to apply for judicial review by originating motion in accordance with the stipulations of the High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules, 2664 (HCR). Pursuant to the said leave of Court the Plaintiff filed a motion on notice on 14<sup>th</sup> June 2013 claiming sundry declarations, orders and damages against the Defendant.

Upon being served with the said motion on notice, the Defendant entered a conditional appearance, filed a counter affidavit and further filed a notice of preliminary objection wherein it sought the order of the Court to set aside the leave granted to the Plaintiff to seek judicial review and dismiss the suit for want of jurisdiction. This Ruling is in respect of the said preliminary objection which is dated and filed on 17<sup>th</sup> September 2013.

The preliminary objection is predicated on four grounds, namely:

1. That the Plaintiff's suit is frivolous, vexatious and an abuse of court process thereby robbing the Honourable Court of the jurisdiction to entertain same.
2. CCECC is a private company and not an administrative body or tribunal that is subject to judicial review.
3. That the instant suit is incompetent for being commenced by a motion on notice and not an originating motion as stipulated by the Rule of the Court.
4. The suit is bad for misjoinder of party.

The preliminary objection is supported by an affidavit of six paragraphs with one exhibit attached thereto. The Defendant also filed a written address in support of the preliminary objection wherein three issues were distilled as arising for determination as follows:

1. Whether CCECC is subject to judicial review

2. If answer in issue one is in the negative, whether the Plaintiff's suit is not incompetent, vexatious, scandalous and an abuse of the process of the court.
3. Whether the Honourable Court has the power to set aside the order granting Leave to the Plaintiff to seek judicial review

On 25<sup>th</sup> September 2013, the Plaintiff filed a Reply to the Defendant's preliminary objection. The Plaintiff did not formulate any issues in his said reply. He however tacitly adopted the issues as distilled by the Defendant by proffering seriatim submissions on the said issues formulated by the Defendant. At the hearing of the preliminary objection on 6<sup>th</sup> November 2013, Mutiu Akinrinmade Esq. of counsel for the Defendant referred to the order sought in the preliminary objection and the grounds on which the said preliminary objection is predicated. He relied on the paragraphs of the supporting affidavit and the exhibit attached thereto. Adopting the submissions in the written address in support of the preliminary objection, he posited that when the Defendant is paid for a job which it does for the government, the Defendant is not thereby utilising public funds. He maintained that Defendant by carrying out a contract awarded to it was not providing public service or performing public function. He urged the Court to uphold the objection.

In opposition to the preliminary objection, Mrs. J. O. Obono-Obla learned counsel for the Plaintiff adopted the submissions in the Plaintiff's Reply dated 24<sup>th</sup> September 2013 but filed on 25<sup>th</sup> September 2013 and which was settled by Mrs V. Igiede, of counsel. She urged the Court to dismiss the preliminary objection.

I have insightfully considered the processes filed in respect of this preliminary objection and the submissions of learned counsel on both sides of the divide. The issues for determination as distilled by the Defendant and tacitly adopted by the Plaintiff clearly bring out the path of the questions to be agitated in a resolution of this preliminary objection. It is therefore on the basis of the said issues that I will now resolve the preliminary objection

#### **ISSUE NUMBER ONE**

##### **WHETHER CCECC IS SUBJECT TO JUDICIAL REVIEW**

The contention of the Defendant is that the Court in exercise of its supervisory function can judicially review the actions and decisions of inferior tribunals and administrative bodies, and that the Defendant not being an inferior tribunal or administrative body but rather a privately owned company was not subject to judicial review within the purview of Order 42 Rule 1 HCR.

In his reply, the Plaintiff concedes that the Defendant is a private company but maintains that the basis of the action was in respect of information requested for

in respect of a contract awarded to the Defendant which information can be sought for under the Freedom of Information Act since the Defendant is a public institution within the meaning of the Freedom of Information Act.

Now, the Long title to the Freedom of Information Act provides that the Act is for purposes of making public records and information more freely available and for providing public access to public records and information. Section 1 of the Freedom of Information Act establishes the right of any person to access or request information which is in the custody or possession of any public Official, agency or institution. Section 4 of the Freedom of Information Act stipulates that any information applied for shall be made available to the applicant within seven days of the application or where the application is to be denied, the applicant is to be informed in writing within seven days. Section 20 of the Freedom of Information Act, then gives an applicant the right to seek judicial redress where access to the information sought is denied. The said Section gives an applicant the right to seek judicial review in respect of such a denial within thirty days after the denial or the application is deemed to have been denied.

At the outset of this Ruling, I stated that it was consequent upon the refusal or failure to give the Plaintiff the information he requested for that this action for judicial review was commenced. There is therefore backing in the Freedom of Information Act for the Plaintiff to commence this action to seek for judicial review in respect of the refusal or failure to give him the information requested for. Accordingly, I am unable to agree with the Defendant that it is not subject to judicial review since Section 26 of the Freedom of Information Act has expressly given an applicant the right to approach the Court for judicial review. We will however still find out in the course of this Ruling if the Defendant is a public institution within the meaning of the Freedom of Information Act. This issue number one is consequently resolved against the Defendant.

#### **ISSUE NUMBER TWO**

**IF ANSWER IN ISSUE ONE IS IN THE NEGATIVE, WHETHER THE PLAINTIFF'S SUIT IS NOT INCOMPETENT, VEXATIOUS, SCANDALOUS AND AN ABUSE OF THE PROCESS OF THE COURT?**

The contention of the Defendant on this issue is that it is not a public institution within the meaning of the Freedom of Information Act since it is a private company in which the government does not have the controlling interest and also it does not utilise public funds, provide public services or perform public functions. The Defendant contends that any moneys paid to it in respect of services it rendered to the government is a mere consideration for services rendered by it and that they are not public funds.

The Plaintiff in his Reply maintains that the Defendant is a public institution within the meaning of the Freedom of Information Act because the Defendant is a private body utilising public funds by way of the contract awarded to it by the Federal Government to construct the Calabar-Ugep-Katsina-Ala Road.

Under the provisions of the Freedom of Information Act an application is for access to or request for information which is in the custody or possession of any public official, agency or public institution. Without a doubt the Defendant is neither a public official nor a public agency, but is it a public institution? Section 31 of the Freedom of Information Act states that a public institution inter alia means private bodies providing public services performing public functions or utilising public funds. Now the Defendant is a private body. Where it provides public services or utilises public funds it will qualify as a public institution within the meaning of the Freedom of Information Act.

The Defendant in contending that it does not provide public service relies on the definition of public service in the Black's Law Dictionary 6<sup>th</sup> Edition to the effect that it arises where a private body is given an appropriate franchise from the State to provide for a necessity or convenience of the general public. It therefore contended that since it does not have any franchise from the government, to provide any service of a public nature, it did not perform any public service or function and did not come within the ambit of the Freedom of Information Act.

The Defendant has relied on the definition of public service in the Black's Law Dictionary 6<sup>th</sup> Edition. The Black's Law Dictionary 7<sup>th</sup> Edition has however defined public service as:

**"Public service.** 1. A service provided or facilitated by the government for the general public's convenience and benefit. 2. Government employment; work performed for or on behalf of the government."

See Black's Law Dictionary, 7<sup>th</sup> Edition page 1246.

The Defendant was given a contract by the Federal Government to construct or rehabilitate the Calabar- Ugep- Katsina-Ala Road. Doubtless, the road is for the public convenience and benefit. The defendant in its written address agrees that consideration will be paid to it for the construction work. So the government is facilitating the construction of the road for the general public's convenience and benefit. The Defendant has not argued that the government did not award it a contract for the road construction work. Clearly therefore the Defendant was doing the work for or on behalf of the government. Therefore it seems to me that it cannot be seriously argued that the Defendant is not performing a public

service in respect of the contract awarded to it by the Federal Government for the Calabar-Ugep-Katsina-Ala Road.

In Words and Phrases Legally Defined, 3<sup>rd</sup> Edition page 472, public service is inter alia defined to include any service which would supply wants felt by the public or which the public might be reasonably desirous of having on its own behalf. It is stating the obvious to say that the generality of the public would want a good highway on the Calabar-Ugep-Katsina-Ala Road. Another angle to the Defendant's contention is that the moneys paid to it by government for the construction work are mere consideration for services rendered and are not public funds. It has to be remembered that the definition of a public institution includes a private body such as the Defendant utilising public funds. While it is correct that moneys paid to the Defendant by the Federal Government is consideration for services rendered, I am unable to agree with the Defendant that such moneys which come from government coffers are not public funds.

Section 80 of the 1999 Constitution (as amended) makes provisions in respect of power and control over public funds, and indeed payments to the Defendant for the road construction work cannot be made unless the moneys have been duly authorised by an Appropriation Act of the National Assembly. Accordingly, it seems to me to be misleading for the Defendant to argue that moneys paid to it from the government coffers in respect of a contract awarded to it does not amount to utilisation of public funds. In all therefore, I must resolve this issue in favour of the plaintiff. The motion is neither incompetent, vexatious, scandalous nor an abuse of the process of court, because the Defendant is a public institution within the meaning of the Freedom of Information Act.

In paragraph 4 of the affidavit in support of the preliminary objection, it is deposed that CCECC is an entirely different legal entity from CCEC and has no relationship whatsoever with CCEC. In paragraph 1 of the said supporting affidavit, the deponent deposed that he is in the employment of CCECC Nigeria Ltd which has been sued as CCEC Nigeria Ltd.

From the processes filed by the Plaintiff, it is clear that the entity which has been sued is CCEC Nigeria Ltd and not CCECC Nigeria Ltd. It seems clear from the submissions in the Plaintiff's Reply that the entity which has a contract with the Federal Government in respect of the road construction work and which he intended to sue is CCECC Nigeria Ltd. The Plaintiff therefore submitted that the error or mix-up in the abbreviation of the company name of the Defendant is a harmless one and has not misled the Defendant as to the party which he intended to sue and did in fact sue.

It seems to me that the contention of the Defendant in this regard as set out in ground 4 of the grounds of objection is that there has been a misjoinder of party

since CCEC which has been sued is a total stranger to the contract in respect of which the Plaintiff requests for information under the Freedom of Information Act. The entire contention of the Defendant seems to me to relate to nothing other than a misnomer.

Now, misnomer simply means a wrong use of a name; or 'a mistake in naming a person place or thing, especially in a Legal instrument'. See Black's Law Dictionary (7<sup>th</sup> Edition) page 1615. Where there is a misnomer or misdescription in the title or caption of any proceedings, what the court will consider in order to nullify such proceedings are: (i) whether the misdescription in title has substantially misled the parties; and (ii) whether a miscarriage of justice was thereby occasioned. See **BAYO Vs. NJIDDA (2004) 8 NWLR (PT 876) 544; AJADI Vs. AJIBOLA (2004) 16 NWLR (PT 898) 91 and BAJOGA Vs THE GOVERNMENT OF FEDERAL REPUBLIC OF NIGERIA (2007) ALL FWLR ( PT 394) 273 at 311 C -E.**

In the context of litigation, a misnomer occurs where the entity suing or intended to be sued exists, but a wrong name is used to describe that entity. See **MAERSK LINE V. ADDIDE INVESTMENT LIMITED (2002) 11 MJSC 157 at 179 & 196-197.** In other words, a misnomer is said to occur in legal proceedings when the correct person comes or is brought to court under a wrong name but not when the wrong person sues or is sued in an action. See **EMESPO J. CONTINENTAL LTD V. CORONA S. MBH & CO. (2006) 11 NWLR (PT 991) 365 at 378 (per Mukhtar, JSC).** The test which has been applied by the Courts to ascertain if the title of a party is shown on the writ of summons is well settled. One factor that operates on the mind of the recipient of a document (writ) is whether there is or is not another entity to which the description on the document (writ) might refer. The test therefore is: How will a reasonable person receiving the document take it? If in all circumstances of the case and looking at the document as a whole, he would say to himself, 'of course it must mean me, but they have gotten my name wrong', then there is a case of mere misnomer. If, on the other hand, he would say, 'I cannot tell from the document whether they mean me or not and I shall have to make inquiries', this has gotten beyond the realm of misnomer. See **DAVIES V. ELSBY BROTHERS LTD (1960) 3 ALL ER 672 at 676, MAILAFIA V. VERITAS INSURANCE (1986) 4 NWLR (PT 38) 802 at 812 and NWABUEZE V. NIPOST (2006) 8 NWLR (PT 983) 480 at 526 -527.**

Applying the above test, I reiterate that in paragraph 1 of the affidavit in support of the preliminary objection, the Defendant deposed that it has been sued as CCEC Nigeria Ltd. So there is no doubt whatsoever that the Defendant was not mistaken that it was the one that had been sued. Furthermore, in the Memorandum of Conditional Appearance dated and filed on 5<sup>th</sup> August 2013 appearance was entered for CCECC Nigeria Ltd sued as the Defendant in the

action. Therefore CCECC Nigeria Ltd is not in any doubt whatsoever that it is the entity which has been sued as CCEC Nigeria Limited.

Howbeit, the law is that where there has been a misnomer, an application to amend the misnomer will readily be granted almost as a matter of course. See **JESSICA TRADING CO. LTD V. BENDEL INSURANCE CO. LIMITED (1993)1 SCNJ 240 and ADEKANYE V. GRAND SERVICES LTD. (2007) ALL FWLR (PT 387) 855 at 866 - 867. Order 46 Rule 1 HCR** confers a discretionary power on the Court to make such orders as it considers necessary for the purpose of doing justice irrespective of whether the order has been expressly sought by the party entitled to the benefit. In **MAERSK LINE vs. ADDIDE INVESTMENT LIMITED** (supra), the Supreme Court held inter alia that the power of a trial court to make amendment suo motu at any stage of the proceedings before judgment could be exercised by the Court without any party applying for it. Therefore in exercise of discretion pursuant to Order 46 Rule 1 HCR and being satisfied that the mistake in the name of the Defendant on record is a mere misnomer, it is hereby ordered that the misnomer be corrected by the addition of the missing alphabet 'C' in the name of the Defendant in the title of the action such that the Defendant on record will read CCECC Nigeria Limited.

It has to be remembered that the object of the Court is to decide the rights of the parties and not to punish them for mistakes which they make in the conduct of their cases by deciding otherwise than in accordance with their rights. This is because the Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy. See **CROPPER vs. SMITH (1884)26 Ch. D 700 at 710 - 711 and NWABUEZE vs. NIPOST (supra)at 528G-H**. This being so, I do not think it will be appropriate to punish the Plaintiff by acceding to the submission of Defendant's counsel as the law is clear that the mistake made by the Plaintiff in the spelling of the name of the Defendant in the title of the action is such that can be cured by an amendment since it is a mere misnomer. See **MAILAFIA vs. VERITAS INSURANCE (supra) at 812H**. Accordingly, the Plaintiff is given seven (7) days from today to effect the necessary amendment in the processes filed.

In ground 4 of the Notice of Preliminary objection, the Defendant raised the issue that the action was commenced by a Motion on Notice as opposed to an Originating Motion as stipulated by the HCR. It was therefore posited that the action having been commenced by an invalid originating process is null and void. The Plaintiff in his Reply submits that the form of an Originating Motion is not specified in the HCR. The court was therefore urged to pay attention to the Substance rather than the form in order to do substantial justice.

In the prolegomenon of this Ruling, I stated that leave was granted to the Plaintiff to apply for judicial review. In the said order granting leave, the

Plaintiff was ordered to make the application for judicial review by Originating Motion in accordance with the stipulations of Order 42 Rule 5 HCR. The process filed by the Plaintiff pursuant to the grant of leave is titled Motion on Notice as opposed to Originating Motion. The contention of the Defendant is that on account of this, the action had not been commenced as stipulated in the Rules of Court. Now, is this a failing on the basis of which the Court should shut out the Plaintiff?

The modern approach to adjudication is to avoid preference of technicality to the principal duty of the Court to do justice. It needs to be emphasised that justice is not a fencing game in which the parties engage themselves in a whirligig of technicalities to the detriment of the substantial issues before them. The need to do substantial justice should always supersede where adherence to technicality will inhibit or hinder justice. To allow the mere fact that the process filed by the Plaintiff after grant of leave is headed Motion on Notice as opposed to Originating Motion or Notice of Motion to forestall proceedings would be to lean on the side of technicalities. The attainment of justice is generally no longer allowed or tolerated to be controlled by strict adherence to technicalities but rather to substance. See **EGOLUM vs. OBASANJO (2004) 1 WRN 87 at 164**, **AFOLABI vs. ADEKUNLE (2004) 2 SCNLR 141 at 150** and **KANO TEXTILE PRINTERS PLC vs. GLOEDE & HOFF NIG. LTD (2002)7 WRN 78 at 114**.

In **NNEJI vs. CHUKWU (1988) 3 NWLR (PT 81) 184**, Oputa, JSC quoted with approval the dictum of Lord Penzance in **COMBE vs. EDWARDS (1878)L. R. 3 P. D. 142** as follows:

"The spirit of justice does not reside in formalities, or words, nor in the triumph of its administration to be found in successfully picking a way between the pitfalls of technicality. After all, the law is, or ought to be, the handmaid of justice, and inflexibility, which is the most becoming robe of Law, often serves to render justice grotesque..

...if the choice is between legal technicality and justice, one ought to cast one's lot with justice. But it is not all that simple for justice in our courts is, or ought to be justice according to law... I will at anytime, anywhere cast my lot for truth and justice rather than for mere formal objections.

... Technicalities deal with Legal forms but not necessarily with substance. The Courts exist to do substantial justice, not formal and technical justice. Rules of court dealing with technical mode of procedure should be subservient to the dictates of justice. If therefore, observance of any rule will produce an obvious injustice, a court of justice will naturally prefer justice to the technicalities the rule imposes ..."

On my part, I will equally cast my lot on the side of justice. A court has a duty to discover the true intents of the law and do substantial justice accordingly, not formal or technical justice. A court in its quest for justice must act within the dictates of reason. The manner in which a court is to be approached in an application for judicial review is by a motion. The fact that originating or notice of is not prefixed before the word "motion" or the fact that "on notice" is suffixed after the word "motion" as in the instant action should not operate to prevent the Court from doing substantial justice especially when the Defendant has not in any way been prejudiced or embarrassed by the way the originating process was titled. See **BAJOGA vs. GOVT., FRN (2008) 1 NWLR (PT 1067) 85 at 115B-C and 123C-H**. In pursuit of substantial justice therefore. I do not agree with the Defendant that the action is incompetent on account of this.

**ISSUE NUMBER THREE**

**WHETHER THE HONOURABLE COURT HAS THE POWER TO SET ASIDE THE ORDER GRANTING LEAVE TO THE PLAINTIFF TO SEEK JUDICIAL REVIEW?**

This issue as distilled restates the obvious since the law is trite that the Court has the competence to set aside its order which is a nullity: **ACB PLC vs. LOSADA (1995) 7 NWLR (PT 405) 26 at 45**. However, in the peculiar circumstances of this preliminary objection, this power of the Court cannot be exercised in favour of the Defendant since from the totality of what I have said thus far, it is evidently manifest that there is no basis for the Court to exercise this power by setting aside the order granted to the Plaintiff to apply for judicial review as the said order is not a nullity.

Therefore, in a summation and from the totality of the foregoing, I find no merit whatsoever. In the Notice of Preliminary Objection. The same fails and it is hereby dismissed. The Plaintiff is given seven (7) days from today to correct the misnomer in the name of the Defendant as it appears in the title of the action.

**UGOCHUKWU ANTHONY OGAKWU  
PRESIDING JUDGE**

**Appearances:**

Mrs. J. O. Obono-Obla (with Mrs. V. I. Igiede) for the Plaintiff .

Mutiu Akinrinmade, Esq. (with Ahmed Oyegbami Esq.) for the Defendant

***PPDC V. NNPC, & G.M.D NNPC [SUIT NO:FHC/ ABJ/CS/ 278/ 2013]***

IN THE FEDERAL HIGH COURT OF NIGERIA  
IN THE ABUJA JUDICIAL DIVISION  
HOLDEN AT ABUJA  
ON MONDAY THE 23<sup>RD</sup> DAY OF DECEMBER.2013  
BEFORE HIS LORDSHIP, HON. JUSTICE A. R. MOHAMMED  
(JUDGE)

**SUIT NO:FHC/ABJ/CS/ 278/ 2013**

**BETWEEN:**

PUBLIC & PRIVATE DEVELOPMENT CENTRE  
 LTD/GTE (PPDC)}

APPLICANT

**AND**

1. NIGERIAN NATIONAL PETROLEUM CORPORATION (NNPC)
2. THE GROUP MANAGING DIRECTOR NNPC .J}

RESPONDENTS

**JUDGMENT**

By a Motion on Notice for order of mandamus dated 30/5/13 but filed on 31/5/13, the Applicant seeks for:-

1. A DECLARATION that the failure of the 1<sup>ST</sup> and 2<sup>ND</sup> Defendants to furnish Applicant with the procurement documents sought vide Applicant's letter of 21<sup>st</sup> March, 2013 amounts to a wrongful denial of information under the Freedom of Information Act, 2011.
2. ORDER of the Court compelling the Respondents jointly and severally, Within seven days of the Judgment herein, to furnish Applicant with information and copies of documents sought vide Applicant's letter of 21<sup>st</sup> March, 2013 which information and documents are set out in the schedule hereto.

In the schedule to the application, the documents sought by the Applicant were listed as follows:-

1. Copies of the procurement plans and information, including needs assessment and evaluation, Identification of goods and works required for the bid.
2. Copies of advertisements of Invitation for bids published in at least two national dailies and the Federal Tenders Journal.
3. Evidence of the advertisement on NNPC website and notice board.
4. Copies of bid submission register and duplicate copies of receipts issued to bidders on submission of bids.
5. Minutes of public bid opening for technical and financial proposals.

6. Copies of standard bidding documents issued to bidders in respect of the procurement.
7. Copies of Bid Evaluation Report by the Technical Sub-Committee of the Tenders Board.
8. Copy of the minutes of the meeting of the Tenders board approving the winning bidder.
9. Copies of rejection letters or notices (if any).
10. Copies of notices of acceptance of bids issued by the procuring entity (NNPC) to the successful bidder immediately a winner was selected (if any).
11. Letter of notification of award of contract (if any).
12. Signed contract document (if any).
13. Copy of formal by bidders (protest letters) and the decision in such complaints/appeals (if any).
14. Copy of summary of details of contract published by NNPC or BPP (if any).

The application is supported by a statement which contained the name and description of the Applicant, the reliefs sought and the grounds upon which the reliefs are sought. The application is also accompanied with affidavit in support and exhibits marked "A", B and B1 respectively. The application is also supported with a 12 paragraphs affidavit deposed to by Ilo Nkemdilim, the Applicant's procurement officer. There is also Applicant's written address dated 30/5/13 but filed on 31/5/13.

The Respondents reacted to the application with a counter affidavit filed on 14/6/13 and deposed to by Victor Omoluabi, a Manager in the legal department of the Respondents. The Respondents' counter affidavit is also accompanied with a written address.

The Applicant then filed a Reply on points of law to the written addresses of the Respondents.

The Respondents in addition brought a notice of preliminary objection dated 5/6/13 but filed on 2/7/13 with an affidavit in support and a written address. The Applicant then filed reply in opposition to the Respondents' preliminary objection. The Respondents then filed Reply on points of law to the Applicant's written address against the preliminary objection.

In the Applicant's written address, this issue was formulated for determination:

“whether the Applicant has met the conditions for the grant of this application?”

In his argument, learned counsel for the Applicant referred to the cases of **FAWEHINMI vs. IGP (2002) 7 NWLR PART 767, 606 at 674, 686, 694 and 697-698 and ATUNGWU V. OCHEKWU (2000) 1 NWLR PART 641 507** on the conditions that must exist for the grant of order of mandamus. Reference was also made to Sections 1, 2(6) and (7) of the Freedom of Information Act, to the effect that any person has the right to access or request for information which is in the custody of any public official, agency or institution howsoever called without showing any specific interest in the information applied for. That any person entitled to the right to information under the Freedom of Information Act shall have the right to institute proceedings in a Court to compel any public institution to comply with the provisions of the Act. It was submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are public institutions and officer respectively by the provisions of Section 2(7) of the Freedom of Information Act. That the Applicant has done all that it is required to do by the Act on the information and documents requested from the Respondents, but the Respondents without any reason have refused to provide the Applicant with the documents in breach of his right under the Freedom of Information Act. That by Section 4 of the Freedom of Information Act, the Respondents have a legal duty to provide the Applicant with the requested document and information within 7 days of the receipt of the request. It was then contended that the Courts have the duty to enforce the mandatory provisions of the law. Reference was made to the case of **INYANG vs. EBONG (2002) 2 NWLR PART 751 284 at 331.** The Court was urged to grant the application.

In the Respondents' written address in support of their counter affidavit, this issue was formulated for determination:

"Whether in the absence of compliance with the condition precedent for the grant of an order of mandamus, the application of the Applicant is not liable to be struck out and dismissed for lack of merit?"

Arguing the issue, learned Respondents' counsel stated that the Court must be satisfied that the Applicant has complied with all the conditions precedent to the grant of order of mandamus and that there is no other remedy available to him. Reference was made to the cases of **FAWEHINMI vs. IGP** supra at pages 697-698 and **LAYANJU vs. ARAOYE (1959) 1 NSCC 143 at 146.** to the effect that as a discretionary order, the Court will decline to grant it if there are other remedies available and effective, and that an Applicant has sufficient interest and the Respondent has a duty of a public nature to perform and he has refused to perform on demand to perform it. It was then submitted that in the instant case, the Applicant has failed to show that he has made a demand of the documents referred to in its motion as there is no evidence of receipt of the letter exhibited by the Applicant by the Respondents. That the person who signed as Kingsley O. is not a person known to or in the employ of the

Respondents as neither does the document bear the stamp of the Respondents as is the practice of the Respondent in respect of documents received by it. That the Applicant has failed to show that there was ever any publication made by the Respondents inviting bids for the procurement of an Insurance broker for the Insurance of the NNPC Oil and Aviation Assets for the year 2013/2014. That the Applicant only succeeded in exhibiting a document showing a publication made via "Tenders in Nigeria" [www.tenders.nigeria/invitation](http://www.tenders.nigeria/invitation) - for qualification, website which the Respondents' counsel said is unknown to the Respondents and does not bear the logo of the Respondents. It was further submitted that failure to fulfil a condition precedent to instituting an action has the effect of robbing the Court of jurisdiction to hear the matter. Reference was made to the case of **ORAKUL RESOURCES LTD VS. N.C.C. (2007) 16 NWLR PART (1060) 270 at 278.** It was finally submitted that as the Applicant has failed to comply with a condition precedent for order of mandamus against the Respondents, the application is incompetent and liable to be struck out.

In the Applicant's written Reply on points of law, it was stated that the Applicant deposed specifically in paragraph 3 of the supporting affidavit that in December, 2012, the Respondents commenced the process for the procurement of an Insurance broker for the 1<sup>st</sup> Respondent's Oil and aviation assets. That in paragraph 5 of the supporting affidavit, Applicant deposed to specific date for the closing of bids in respect of the procurement. That none of these facts were specifically denied. That what the Respondents did was to deny in paragraphs 5 (a-c) of their counter affidavit publishing the invitation for bids on the website of Tenders Nigeria. That having not denied the conduct of procurement for the engagement of an Insurance broker, the Court was urged to hold that the Respondents have admitted those facts. Reference was made to the case of **OGUNSOLA VS. USMAN (2002) 14 NWLR PART 788, 636 at 657.** On the absence of Respondents' official stamp on exhibit "B" to the Applicant's affidavit, it was stated that the Respondent did not cite any law which says that an acknowledgment copy of a letter delivered to the Respondent must bear their official stamp or else it would amount to a non-delivery. The Applicant has also filed a Further Affidavit on 2/7/13 deposed to by one Mr. Ada Obaje, a staff of Neuron Express deliveries Ltd, who stated therein that when he took the Applicant's letter, that is, exhibit B to the office of the Group Managing Director of the NNPC, he was directed to Kingsley O. who said it was his work schedule to receive letters meant for the 2<sup>nd</sup> Respondent. That when the said Kingsley O. was asked to write his position and stamp on the acknowledgement copy of the letter, the said Kingsley O. stated that it was the practice of the Respondents to acknowledge letters in the manner shown on exhibit "B". That the deponent of the Further Affidavit further deposed to having been introduced to Kingsley O., he has no right to insist on any mode of acknowledgement of receipt of mails.

In the Respondents' preliminary objection, the Court was urged to strike out this suit on the ground that a condition precedent to the institution of this suit has not been satisfied, in that the Applicant did not issue or serve the statutory pre-action notice on the 1<sup>st</sup> Respondent. That the action is wholly speculative, vexatious and abuse of the Court process. That this suit is fundamentally defective and incurably incompetent.

In the Respondents' written address in support of preliminary objection, two issues were formulated as follows:-

1. Having regard to the fact that the requisite Pre-Action Notice was not served on the 1<sup>st</sup> Respondent prior to the institution of this suit, whether the suit is not altogether fundamentally defective and incurably incompetent.
2. Whether this Court has the jurisdiction to entertain this suit.

On the first issue formulated above, learned Respondents' counsel referred to paragraph 4(iii) of the affidavit in support of the preliminary objection, where it was deposed that no pre-action has been served on the Respondents. That by Section 12(2) of the NNPC Act cap N123 LFN 2004, it is mandatory on anyone who intends to commence an action against the 1<sup>st</sup> Respondent in a Court of law, to first issue and serve on it a pre-action notice. That the requirement of a pre-action notice is a condition precedent which Respondents' counsel said must be fulfilled before any legal proceedings can be initiated against the 1<sup>st</sup> Respondent. That failure on the part of the Plaintiff to issue and serve a pre-action notice before this suit was commenced renders the suit incompetent. Reference was made to the following cases **MOBIL (NIG) LTD VS. LASEPA (2002) 18 NWLR PART 798 at page 30; GAMBARI VS. GAMBARI (1990) 5 NWLR PART 152; UMUKORO VS. NPA (1997) 4 NWLR PART 502. 656; ATOLAGBE VS. AWUN (1997) 9 NWLR PART 522. Page 536 and AMADI VS. NNPC (2000) 10 NWLR PART 674 76.**

On the second ground of the objection, learned Respondents' counsel referred to paragraph C of the Applicants' Grounds for the application for mandamus and paragraph 3 also of the Applicant's supporting affidavit and contended that the action of the Applicant is based on conjectures, assumptions and imagination. That Courts of law do not act on academic postulations. Reference was made to the case of **A. G. ANAMBRA VS. A.G. FEDERATION (2005) 9 NWLR PART 931. 572 at 610.**

In the Applicant's Reply written address in opposition to the Respondents' preliminary objection, this question was posed:

"Considering the provisions of the Freedom of Information Act, 2011, (the Act), does the Legislature intend the pre-action Notice of one month to be served

on the Respondent herein before an action could be commenced against them under the Freedom of Information Act, 2011?"

It was stated by the learned Applicant's counsel that the NNPC Act was enacted in 1973, while the Freedom of information Act was enacted in 2011. It was then submitted that the Freedom of Information Act 2011 is the later of the two Acts and that in making the Freedom of Information Act, 2011, the legislature would have taken into consideration the provisions of the NNPC Act, 1973. Learned Applicant's counsel then referred to Section 4 of the Freedom of Information Act, 2011 which is to the effect that a public institution to which a request is made for Information must furnish the Applicant with the said information within seven days of the receipt of the request. That by Section 7 of the Freedom of Information Act, where the institution to which request for Information is made fails to furnish an Applicant with the requested information within seven days; the institution is deemed to have denied the Applicant of the information so requested. That by Section 20 of the Freedom of Information Act, any person who was denied access to information upon request made under the Freedom of Information Act, 2011 may seek redress from the Court within 30 days of such denial or deemed denial. It was then contended that the application of Section 12(2) of the NNPC Act, 1973 operate to deny an Applicant of the right of access to Court because by the time the duration of the pre-action notice prescribed by the NNPC Act would have elapsed, the time allowed an Applicant under the Freedom of Information Act to seek redress would also have elapsed. Learned counsel further submitted that it is a well established principle of Interpretation of statutes that there is a presumption against unreasonable and inconvenient result or a presumption against intending what is inconvenient and unreasonable.

It was also submitted that it is a well established principle of interpretation that the construction most agreeable to justice and reason must be adopted. The Court was referred to the case of **IBRAHIM VS. SHERIFF (2004) 14 NWLR Part 892, 43 at 65-66.** Reference was further made to Section 1 (1) of the Freedom of Information Act, 2011 to the effect that the right of access to Information pursuant to the Act is guaranteed and is not subject to the provisions of any Act or law including the NNPC Act. It was therefore submitted that the Respondents are not entitled to any pre-action notice from the Applicant before the institution of this suit.

On the contention of the Respondents that this suit is speculative and an academic postulation, it was stated that the Respondents have not denied the averment. In the Applicant's affidavit that they procured Insurance broker for the 1<sup>st</sup> Respondent's Oil and Aviation Assets for the year 2013/2014. That exhibit B attached to the Applicant's affidavit is a document which forms part of the affidavit and is therefore relevant for the determination of the issue. That exhibit B is not speculative.

In the Respondents' Written Reply on points of law, it was stated that from the submission of the Applicant's counsel, it was conceded that no pre-action notice was served or issued on the 1<sup>st</sup> Respondent as required by law. On the argument of the Applicant's counsel that the legislature never intended that the requirement of pre-action notice under any circumstance, relying on sections 1(1), 4, 7(4) and 20 of the Freedom of Information Act, 2011, learned Respondent's counsel submitted that Section 12(2) of the NNPC Act contains provision specifying that pre-action notice must be served on the 1<sup>st</sup> Respondent. That Section 12(2) of the NNPC Act is a specific legislation as against the general provisions of Freedom of Information Act, 2011. Reference was made to the case of **A.B.S.U. VS. OTOSI (2011) 1 NWLR PART 1229, 605.** On the case of **IBRAHIM VS. SHERIFF**, Respondents' counsel stated that the case is not on all fours with the case at hand, because **IBRAHIM VS. SHERIFF** was an interpretation of the Electoral Act, 2002 on the requirement of signing a petition. It was also submitted that the requirement of pre-action notice is not a denial of the Applicant's right but a condition precedent which the law considers very essential given the character of the Respondents. That if the Legislature under the Freedom of Information Act, 2011 had intended that no pre-action notice would be applicable, it would have expressly and specifically stated so. The Court was urged not to exclude the provision of statute which has specifically dealt with a subject in contention. That Section 1(1) of the Freedom of Information Act guarantees right of access to information, while Section 12(2) of the NNPC Act regulates access to Court as it pertains the NNPC by creating a condition precedent. That Section 12(2) of the NNPC Act cannot be subjected to or be subservient to the provisions of Section of the Freedom of Information Act, because the two provisions, counsel said, are mutually exclusive.

I have reviewed the argument of learned counsel for the parties on the substantive suit and the Respondents' preliminary objection. The position is that where the Court has taken argument on issue of jurisdiction together with the substantive suit, the Court must first of all express it's views on the issue of jurisdiction. If the issue of jurisdiction succeeds, the Court should terminate the proceedings at that stage. Where, however, the issue of jurisdiction fails, the Court would then proceed to determine the merit of the substantive suit. In the present case, the first ground of the objection is to the effect that the Applicant has not issued or served the 1<sup>st</sup> Respondent (NNPC) in this suit with a pre-action notice as required by Section 12(2) of the NNPC Act. That the provision of Section 12(2) of the NNPC Act is a condition precedent to the institution of any action against the 1<sup>st</sup> Respondent. Learned Applicant's counsel is however of the view that in view of the provisions of Sections 1(1), 4, 7(4) and 20 of the Freedom of Information Act, the Legislature never intended that pre-action notice shall apply to matters brought under the Freedom of Information Act,

2011. In the determination of this issue, recourse must be had to the provision of Section 12(2) of the NNPC Act. Section 12(2) provides thus:

*'No suit shall be commenced against the corporation before the expiration of a period of one month after a written notice of intention to commence the suit shall have been served upon the corporation by the intending Plaintiff or his agent; and the notice shall clearly and explicitly state the cause of action, the particulars of the claim, the name and place of abode of the intending Plaintiff and the relief which he claims. "*

A careful reading of Section 12(2) of the NNPC Act reproduced above would show that it is a specific provision which places a duty on any intending Plaintiff that wishes to institute legal proceedings against the 1<sup>st</sup> Respondent herein (NNPC) to first of all issue and serve pre-action notice on it. The general trend in the wordings and intendment of statutes is for the Legislature to make specific provisions on certain subject matter so that the issue is not left to speculation. A little illustration would help to drive the point home. In the Fundamental Rights Enforcement Procedure Rules, 2009, requirement of pre-action notices and provisions of statute of limitation have been specifically provided not to apply to actions or suits brought under the Fundamental Rights Enforcement Rules 2009. However, the previous Fundamental Rights Enforcement Procedure Rules, 1979 did not have a similar provision ousting the application of pre-action notice and limitation period. On the other hand, I have read the provisions of Sections 1(1), 4, 7(4) and 20 of the Freedom of Information Act, 2011 relied upon by the Applicant's counsel, but I understand the Sections to be on right to information and right to access to Court when such information, requested is denied. In my humble view, Sections 1(1), 4, 7(4) and 20 simple guaranteed the right to request for information and where it is denied, an Applicant may approach the Court to seek for redress. Now, where in the exercise of right to approach the Court for redress, if there is another legislation that places some conditions before one can ignite the Court's jurisdiction, such requirement cannot by any stretch of imagination be regarded as impeding right of access to Court. In the case of **AMADI VS. NNPC (2000) 10 NWLR PART 674, Page 76 at page 113**, the Supreme Court held as follows:-

*"It is instructive therefore that compliance with the provisions of Section 11(2) of NNPC Act 1977 is a condition precedent to instituting a suit against the Respondent. Cases constantly occur in which, although everything has happened which would at common law prima facie entitle a man to a certain sum of money or vest in him a certain right of action, there is yet something more which must happen, in the particular case, before he is entitled to sue, either by reason of the provisions of some statute or because the parties have expressly so agreed. This is something called a condition precedent. It is not of*

*the essence of such a cause of action, but it is essential. It is an additional formality super imposed on the law"*

See also the case of **BAKARE VS. NRC (2007) NWLR PART 1064, 606 at 636, 656.**

From the above pronouncement by the apex Court reproduced above, it is crystal clear that provisions in statutes regarding pre-action notices are held to be proper. As the Applicant has not shown this Court that it has issued and served a pre-action notice on the 1<sup>st</sup> Respondent in this suit in accordance with the mandatory requirement of Section 12(2) of the NNPC Act, a condition precedent to the institution of this action has not been fulfilled. The failure has consequently rendered this suit incompetent and by extension robbed the Court with jurisdiction to entertain this suit.

In consequence of the above finding, this suit is hereby struck out for being Incompetent.

No order as to cost.

**HON.JUSTICE A. R. MOHAMMED  
JUDGE  
23/12/2013**

**COUNSEL;**

G. N. CHIGBU ESQ. for the Applicant.

A. A. MAUK ESQ. with A. A. ODIA (MRS.) ESQ., C. A. MORDI (MISS) ESQ. and C. P. ANINWOYA ESQ. for the Respondents.

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***PPDC V. IPS [MOTION NO: M/3059/13]***

**IN THE HIGH COURT OF JUSTICE**  
**FEDERAL CAPITAL TERRITORY OF NIGERIA**  
**HOLDEN AT ABUJA**  
**ON TUESDAY 9TH JULY 2013**  
**BEFORE HIS LORDSHIP' HON JUSTICE O. A. ADENIYI**  
**SITTING AT COURT NO. 26 APO- ABUJA**

**MOTION NO: M/3059/13**

**BETWEEN:**

PUBLIC & PRIVATE DEVELOPMENT CENTRE  
LTD/GTE (PPDC)}

PLAINTIFF

**AND**

INTEGRATED PARKING SERVICES  
LTD}

RESPONDENT

**RULING**

I have carefully considered this application by which the Applicant has prayed for a declaration and an order to compel the Respondent to furnish her with information and copies of documents as set out in the schedule to the application.

I have also carefully examined the totality of the processes filed to support this application, including learned counsel's written submissions of arguments in support thereof.

It is to be noted that pursuant to the ex-parte application of the Applicant, this Court granted leave on 17/04/2013 to bring the instant application.

It is also to be noted as it is borne by the records of the Court, that the Respondent has not responded one way or the other to the instant application, the implication being that she is not contesting the application and the affidavit deposed to in support of the same.

It is not in dispute that pursuant to the provisions of **Section 1** of the **Freedom of Information Act**, the Applicant is not only competent to bring this application; but is also entitled to have access to the information sought by the application.

I am also satisfied, by virtue of the provision of **Section 2 (7)** and **Section 31** of the **Freedom of Information Act**, that the Respondent is under lawful obligation to disclose to the Applicant the information sought by the instant application.

Upon proper examination of the affidavit filed to support the application and especially the documents attached thereto, being letter of 13<sup>th</sup> December, 2012, by which the Applicant formally requested from the Respondent, the information as set out in the schedule to this application; which letter the Respondent failed to respond as requested.

I am therefore satisfied that it is appropriate in the circumstances to grant this application as prayed.

Accordingly, it is hereby declared that the failure of the Respondent to furnish the Applicant with the information sought, vide her letter of 13<sup>th</sup> December, 2012, amounted to a wrongful denial of information and in violation of the provisions of **Section 1** of the **Freedom of Information Act, 2011**.

Consequently, an order of Mandamus is hereby issued compelling the Respondent to furnish on the Applicant forthwith, information required as set out in the Schedule to this application; namely:

- i. How much has the Respondent realized from inception of engagement of her services by the Federal Capital Territory Administration up to date?
- ii. How much has the Respondent remitted to the Federal Capital Territory Administration till date and by what means was the sum remitted?
- iii. What are the terms of the Respondent's engagement by the Federal Capital Territory Administration and how much accrues to the Respondent from this engagement?
- iv. Certified copy accounts of the Respondent showing all moneys realized in the course of her services to the Federal Capital Territory Administration.
- v. Certified copy of the Respondents contract of engagement with the Federal Capital Territory Administration.

This Order shall be served on the Respondent forthwith.

**OLUKAYODE A. ADENIYI**  
**(Presiding Judge)**  
**09/07/2013**

**Legal representation:**

**G. N. Chigbu, Esq.** - for the Plaintiff/ Applicant.



- i. NATIONAL BIOMETRIC DATABASE OF VOTERS REGISTER BY INEC IN THE COUNTRY FOR THE APRIL, 2011, GENERAL ELECTIONS.
  - ii. A DETAILED, COMPREHENSIVE & FAIR STATEMENT OF ACCOUNTS OF EXPENDITURE INCURRED BY INEC FOR THE CONDUCT OF ELECTION.
  - iii. A LIST OF CONTRACTORS AWARDED CONTRACTS CONCERNING PRINTING OF BALLOT PAPERS; VOTERS CARD AND OTHER DOCUMENTS CONCERNING THE 2011 GENERAL ELECTIONS within seven (7) days of the receipt of same does not amount to an infringement of the provisions of Sections 4 (a) and 7(1) of the Freedom of Information Act (supra)?
3. Whether by a true interpretation and construction of the provisions of Section 7 (5) of the Freedom of Information Act (supra) the Defendant is not entitled to pay a fine of N500,000:00 (Five Hundred Thousand Naira) for the wrongful denial of the Plaintiff the right of access to Information sought?

The Plaintiff claims against the Defendant as follows:

1. **A Declaration** that the refusal, failure and or neglect by the Defendant to release the information requested by the Plaintiff concerning i. NATIONAL BIOMETRIC DATA BASE OF VOTERS REGISTER BY INEC IN THE COUNTRY FOR THE APRIL, 2011 GENERAL ELECTIONS ii. A DETAILED, COMPREHENSIVE & FAIR STATEMENT OF ACCOUNTS OF EXPENDITURE INCURRED BY INEC FOR THE CONDUCT OF ELECTION iii. A LIST OF CONTRACTORS AWARDED CONTRACTS CONCERNING PRINTING OF BALLOT PAPERS; VOTERS CARD AND OTHER DOCUMENTS CONCERNING THE APRIL 2011 GENERAL ELECTIONS same amounts to a violation of Section 7(1) of the Freedom of Information Act (supra) and therefore is wrongful, illegal and unconstitutional.
2. **A Declaration** that the refusal, failure and or neglect by the Defendant to release the information requested by the Plaintiff concerning the i. NATIONAL BIOMETRIC DATABASE OF VOTERS REGISTER BY INEC IN THE COUNTRY FOR THE APRIL, 2011 GENERAL ELECTIONS. ii. A DETAILED, COMPREHENSIVE & FAIR STATEMENT OF ACCOUNTS OF EXPENDITURE INCURRED BY INEC FOR THE CONDUCT OF ELECTION iii. A LIST OF CONTRACTORS AWARDED CONTRACTS CONCERNING PRINTING OF BALLOT PAPERS; VOTERS CARD AND OTHER DOCUMENTS CONCERNING THE 2011 GENERAL ELECTIONS amounts to a violation of the provisions of Section 4 (a) of the Freedom of Information, Act, 2011.
3. **A Declaration** that by the true interpretation and construction of Defendant as Public Institution within the meaning of Section 7 and 31 of the Freedom of Information Act (supra) is obligated to furnish on request by the Plaintiff: i. NATIONAL BIOMETRIC DATABASE OF VOTERS REGISTER

BY INEC IN THE COUNTRY; ii. A DETAILED, COMPREHENSIVE & FAIR STATEMENT OF ACCOUNTS OF EXPENDITURE INCURRED BY INEC FOR THE CONDUCT OF ELECTION; iii. LIST OF CONTRACTORS AWARDED CONTRACTS CONCERNING PRINTING OF BALLOT PAPERS; VOTERS CARD AND OTHER DOCUMENTS CONCERNING THE APRIL, 2011 GENERAL ELECTIONS.

4. **An Order of Mandamus** directing the Defendant including its servants, agents, privies, officials and or cohorts to furnish the Plaintiff with a comprehensive and detailed information concerning i. NATIONAL BIOMETRIC DATABASE OF VOTERS REGISTER BY INEC IN THE COUNTRY FOR THE APRIL, 2011 GENERAL ELECTIONS; ii. A DETAILED, COMPREHENSIVE & FAIR STATEMENT OF ACCOUNTS OF EXPENDITURE INCURRED BY INEC FOR THE CONDUCT OF ELECTION. iii. A LIST OF CONTRACTORS AWARDED CONTRACTS CONCERNING PRINTING OF BALLOT PAPERS; VOTERS CARD AND OTHER DOCUMENTS CONCERNING THE APRIL, 2011 GENERAL ELECTIONS case within seven (7) days of the delivery of Judgment.

5. **An Order** of this Honourable Court directing the Defendant to pay a fine of N500,000:00 (Five Hundred Thousand Naira) for the wrongful denial of the Plaintiff the right of access to the Information sought.

6. The costs of this Action.

7. Any further **order** (s) as the Court may deem fit and proper to make in the circumstances of this case.

The Originating Summons dated 21<sup>st</sup> day of December, 2012 is accompanied by a 17 paragraphs affidavit deposed to by **Efa Otu Oka**, Legal Practitioner in the Law firm of **Obono- Obono & Associates** with **EXHIBIT AA** and a written address.

Upon Service, the Defendant's Counsel, Ahmed Raji SAN, of **AHMED RAJI & CO.**, 3B Lake Kariba close off Mississippi Street, Abuja, filed on 25/01/2013 a Memorandum of Conditional Appearance, notice of preliminary objection dated 23rd January 2013, urging this Honourable Court to strike out this suit on behalf of Plaintiff for lack of jurisdiction supported with a 12 paragraph affidavit, deposed to by **Oziegbe Omo-Egharevba** a Legal Practitioner in the Law firm of **AHMED RAJI & CO.**, on 25/01/2013 and a written address. The grounds of the said objection are hereinafter reproduced:

1. That the Honourable Court cannot grant the Reliefs sought by the Plaintiff.

2. The Reliefs/Information sought by the Plaintiff predate the enactment of the Freedom of Information Act, 2011 and the freedom of Information Act cannot be made to operate retrospectively. **ALEWA V. SSIEC (2007) 15 NWLR (pt.1057) 285 CA; OBIUWEUBI V. CBN (2011) 7 NWLR (pt.1247) 565 SC.**

3. By reason of Paragraphs 1 & 2 above, the Plaintiff has no locus standi to institute this proceeding; hence, the Honourable Court lacks jurisdiction to entertain the Reliefs herein.
4. The instant Suit is an abuse of court process.
5. The appropriate Order to grant is an Order of striking out when the Court has no jurisdiction to entertain a Suit.

The Defendant's Counsel urged the Court to strike out this suit.

On the 28/01/2013 the Plaintiff's Counsel filed a written address opposing the Defendant's preliminary objection, urging the Court to enter Judgment in their favour. The Defendant's Counsel also on 4/02/2013 filed a 21 paragraph counter affidavit with **EXHIBIT NS**, in opposition to the originating summons. It was deposed to by **Zekeri Garuba**, a Legal Practitioner in the Law Firm of Ahmed Raji and Co., and supported with a written address.

On the 6<sup>th</sup> February, 2013, the Plaintiff's Counsel filed a reply address to the Defendant's written address opposing the Plaintiff's originating summons to which the Defendant's Counsel responded with a reply on points of Law dated 11<sup>th</sup> day of February, 2013.

On 26/3/2013, Ahmed Raji SAN and Chief Obon-Obla adopted their Court processes proffering Legal arguments in support of their respective positions.

After a close perusal of the written arguments of Counsel, this Court adopts the following questions for determination.

- i. Whether this Honourable Court can assume jurisdiction over the suit and cause the Freedom of Information (**FOI**) Act 2011 to apply retrospectively, having regard to **EXHIBIT AA** in Plaintiff's originating summons and the reliefs sought here
- ii. If the answer to question one (1) is in the affirmative, is the Plaintiff entitled to its 7 claims upon a determination of the questions set only in its originating summons of 21/12/2012.

**C)** The Defendant Counsel's Notice of Preliminary Objection herein before reproduced with five grounds is supported with a written address, advancing legal arguments on the applicability or otherwise of the Freedom of Information (FOI) Act retrospectively based on the following cases;

- i) **ALEWA V. SSIEC (2007) 15 NWLR (pt.1057) 285 CA**
- ii) **OBIUWUEBI V. CBN (2011) 7 NWLR (pt.1247) 565**

Jurisdiction is the authority which the Court has to decide matters that are litigated before it or take cognizance of the matters presented in a formal way for its decision.

**See- (i) AGBOGUNLERI V. DEPO & 3 ORS (2008) 12 SC. (PHI)240.**

It is the Life line of every trial for where there is any defect in its competence, it is fatal to the proceedings and makes it a nullity however well conducted or decided.

**See:**

- i) ADEMOLA V. ADETAYO (2010) 15 NWLR (pt.1215) 156.**
- ii) IBAKU V. EBENI (2010) 17 NWLR (pt.1222) 286CA**
- iii) N.U.E.E V B.P.E (2010) 7·NWLR (pt.1194) pg.538**
- iv) SKEN CONSULT V UKEY & ANOR. (1981) 1 SC pg.6**

Defendant/Applicants Counsel submitted that statutes are designed to operate from date of commencement. In other words statutes are meant to operate prospectively and not retrospectively.. He cited the cases of;

- i) ANIYI V. AROYEHUN (1991) 5 NWLR (pt.1057) 285**
- ii) OJOKOLOBO V. ALAMU (9187) 3 NWLR (pt.61) 377**

He contended it is a fundamental rule of statutory interpretation that no Law shall be construed to have retrospective effect. However, where the legislature contemplates a retrospective application of a statute, it must be expressly provided for in a clause in the statute thereto. He cited the following cases.

- i) NZE BERNARD CHIGBU V. TONIMAS (2006) LPFELR- 11924 (CA)**
- ii) ALEWA V. SSIEC (2007) 15 NWLR (pt.1057) 285 CA**
- iii) OBIU WUEBI V. CBN (2011) 7 NWLR (pt.1247) 565S.C**
- iv) GOLDMARK (NIG.) LTD. V. IBAFON CO. LTD, (2012) 10 NWLR (pt.1308) 291**

In conclusion, Defendant/Applicant's Counsel submitted the Freedom of Information Act, 2011 signed into Law by the President of the Federal Republic of Nigeria on 31<sup>st</sup> May 2011 does not apply to information created before 31<sup>st</sup> May 2011 when the Act was enacted. The Freedom of Information (**FOI**) Act he argued contains no provision in express terms for the purpose of retrospective application. As Plaintiff's claims in respect of information created before May 31<sup>st</sup> 2011 are not cognizable under the Freedom of Information Act, it lacks the Locus Standi to bring this suit which ought to be struck out by the Court.

**Chief Obono-Obla** in his written address opposed the preliminary objection by Defendant's solicitors in the following grounds:

1. The affidavit in support of the preliminary objection was sworn to by Oziegbe Omo-Egharevba, a Legal Practitioner to Defendant as it is professionally undesirable and procedurally wrong for a Counsel to descend into the Arena of the duel between parties and give evidence on behalf of his Client.
2. It is anathema and indeed procedurally wrong for an objection on points of Law or jurisdiction to be supported with an Affidavit.

He urged the Court to discountenance the affidavit in support of the notice of Preliminary objection and strike out same as it is not relevant to resolution of the Plaintiff's Locus Standi to institute this case.

A Court of Law has to only peruse the Plaintiff originating summons and supporting affidavit in ascertaining whether or not the Plaintiff has the Locus Standi to institute a suit.

On the Plaintiff's 1<sup>st</sup> ground, it is the Court's opinion there is nothing illegal or wrong for a counsel to a party in a suit to swear to an affidavit.

It is only advisable that Counsel to a party in a suit should not in certain circumstances that may warrant him to give evidence as well as conduct his Client's case or likely to be contentious.

See—

- i) **IBE V. ONUORAH (1999) 14 NWLR (PT 638) 340**
- ii) **SODIPO V. HEMMINKAUMEN O, (supra)**
- iii) **IBWA V IMANO NIG, LTD {1988} 3 NWLR (Pt 85)633 .**

Furthermore, on the Plaintiff's Counsel's second ground there is nothing wrong for an objection on points of Law on jurisdiction to be accompanied with an affidavit in support.

See -

- i) **FAWEHINMI V. ABACHA (1996) 9 NWLR (pt.475) 710**
- ii) **Order 29 Rule 4 (b)** of the Federal High court (Civil Procedure) Rules 2009.

The Plaintiff Counsel's two grounds of objection to the Defendant's affidavit deposed to by Oziegbe Omo-Egharevba a Legal Practitioner are misconceived, frivolous and hereby dismissed by the Court.

On this main issue of the Plaintiff/Respondent's Locus Standi to seek the Reliefs contained in its originating summons, Plaintiff's counsel submitted the grounds in the preliminary objection do not raise jurisdictional issues or questions and

therefore are not grounds on which a preliminary objection can be raised. He submitted further whether the Freedom of Information (FOI) Act can operate retrospectively or not is not a jurisdictional issue but at best a point of Law in defence to the suit. The defendant, he contended has not demonstrated what defects or features in the suit divest the Court of jurisdiction to hear the case.

Plaintiff's Counsel submitted it has the Locus Standi to institute this suit in the light of **Sections 1(1) (2) & (3), and 20** of the Freedom of Information Act 2011 and its originating processes having disclosed sufficient interest thereof. He referred to (i) **OWODUNI V REGISTERED TRUSTEES OF C.C.C.** and submitted it is trite that the Law or statute in force when the cause of action arose is the applicable Law i.e. Freedom of Information (FOI) Act 2011 and any change or changes of the Law will not affect the accrued rights and obligations unless made retrospectively. He argued the Plaintiff's cause of action accrued on 22/11/2012 and Freedom of Information (**FOI**) **Act 2011** is applicable in the circumstances. Plaintiff's Counsel further submitted that public information or record in existence before the enactment of the Freedom of Information (FOI) Act is contemplated by virtue of **Section 31 of the Freedom of Information Act.**

Finally, he urged the Court to overrule the objection on the ground of Plaintiff's lack of Locus Standi as it has Locus Standi from its originating summons and affidavit with **EXHIBIT AA** as well as the provisions of **Sections 1 and 20** of the Freedom of Information Act 2011.

This Court has examined the provisions of the Freedom of Information (FOI) Act signed into Law by the President of the Federal Republic of Nigeria, DR. GOODLUCK EBELE JONATHAN on 31<sup>st</sup> May 2011 the commencement date, and finds no express provisions giving retrospective effect to it. Neither will a Court of Law read into a statute what is not there when construing it.

**See- A. G KANO STATE V N. RABIU. (1980) 8-11 SC 130 at149**

The facts of the Plaintiff's case can be gleaned from its originating summons, affidavit and **EXHIBIT AA**. They relate to (i) Natural Biometric Data Base of Voters Register by INEC to the Contrary used for the April, 2011 General Election (ii) A detailed Comprehensive and Fair Statement of Accounts of Expenditure incurred by INEC for the conduct of April, 2011 General Election (ii) List of Contractors awarded contracts concerning Printing of Ballot Papers; Voters Card and other Documents concerning the 2011 General Elections and Expenditure of the Eighty-Seven Billion Naira given to INEC to conduct the April, 2011 General Elections. (Underlinings mine)

The information sought by the Plaintiff through its solicitor predates 31st May, 2011 (Underlinings mine) when the President signed the Freedom of Information (FOI) Act into Law as rightly submitted by Defendant's counsel, Ahmed Raji SAN.

In the circumstances the Plaintiff lacks the Locus Standi or standing to institute this Civil suit, based on the **Freedom of Information (FOI) Act 2011**. The well researched & lucid arguments of the Learned **Silk, A.C. Raji SAN**, are unassailable intellectually and tenable in Law and hereby upheld by this Court.

It appears from the Plaintiff's written address dated 28/01/2013 and Letter of 18/02/2013 as well as oral submissions, Plaintiff's Counsel has misconstrued, or confused about the doctrines of prospectivity and or retrospectivity in the interpretation of statutes. This Court's agrees with the contents of Defendant Counsel's letter of 01/03/2013 on this point and has nothing more to add.

From the foregoing paragraphs of this ruling, the Plaintiff's claims are not cognizable under Freedom of Information (**FOI) Act, 2011** and lacks the Locus Standi to institute this suit. Plaintiff's, questions 1 is answered in the negative. Accordingly originating summons dated and filed on 21/12/2012 with accompanying affidavit in support and **EXHIBIT AA** is hereby struck out with N20,000:00 Cost to the Defendant.

Notwithstanding the negative answer to question 1 assuming the Court has the requisite jurisdiction, I shall now proceed to determine the Plaintiff's seven claims on its originating summons on its merits. The Defendant, filed a Counter-Affidavit of 21 paragraphs in opposition to Plaintiff's processes with **EXHIBIT NS** and a written address. The Plaintiff's written address contain three issues for determination while the Defendant raised two issues for determination in his written address.

Subsequently, Plaintiff's Counsel on 07/02/2013 filed a Reply address which he adopted and submitted on the Defendant's two issues for determination by this Court to wit:

1. Whether the Plaintiff will be entitled to the information sought in **EXHIBIT AA** having regard to the combined provisions of **Section 12 (i), (iv) - (v), 13 (3), 16 of the FOI Act 2011 and EXHIBIT "NS"**.
2. Whether the Plaintiff is entitled to the Relief sought in prayer 5 of the originating summons. Again Plaintiff's Counsel
3. urged the Court to strike out paras. **10-11, 15, 16, 7, 18, 19 & 20** of the Defendants Counter-Affidavit because they are either Legal arguments or Legal conclusions which are at variance with the provisions of **Section 115(1) - 4 of the Evidence Act; 2011**,

This Court has examined the said paragraphs in detail and opine they contain material facts, not at variance with **S. 115 (1) - (4) of the Evidence Act, 2011**, Plaintiff's Counsel objections to paragraphs of Defendant's Counter-Affidavit are overruled in the circumstances being misconceived and lacking in substance.

It is also the Court's opinion on the substantive suit, that Plaintiff's arguments on Defendant's issues 1 & 2 fail to answer the brilliant arguments of Defendant's counsel in their written address. Their arguments on issue 1 is basically repetition of the arguments on interpretation of statutes in itsø Notice of preliminary objection. The Plaintiff has also failed to answer the defences of natural security, privacy, International Affairs Defence, third party information raised by Defendant's Counsel.

Neither are its arguments on **EXHIBIT NS**, the Court of Appeal Judgment in **CA/A/EPC/PRES/1/2011: CPC V. INEC & 4 ORS**. Comprehensible to the Court. **EXHIBIT NS** constitutes issue Estoppel between the Plaintiff and Defendants in the suit See - **A.G. RIVERS V. A.G FEDERATION & ORS. SC 250/2009**.

In accordance with the rule of stare decisis, this Court is bound to follow it, i.e. **EXHIBIT NS** - a Court of Appeal Judgment. To do otherwise, will be tantamount to judicial rascality by this Court. This Court agrees with the submissions of the Learned **Silk, Ahmed Raji** who must be commended for his Industry and Research and erudite submissions in this suit. Without much ado, **Issues 1 & 2** are also answered in the negative whilst the originating summons is dismissed in its entirety being frivolous, vexatious, abuse of Court process and bereft of intellectual research. The Costs of **N20,000:00** is awarded to the Defendant against the Plaintiff.

**HON. JUSTICE A.F.A ADEMOLA**  
**JUDGE**  
**19/06/2013**

**PARTIES** - absent

**APPEARANCES**

- Mrs. J.O. Obono-Obla with B. Abebe Ms.
- for Plaintiff, Adeola Adedipe with N.I.
- Zarmi, Z. Garuba, O. Omo-Egharevba
- (Ms), Peter Nwatu for the Defendant.

***PPDC V. PHCN, & HON. ATG [SUIT NO. FHC/ABJ/CS/766/2012]***

IN THE FEDERAL HIGH COURT OF NIGERIA  
IN THE ABUJA JUDICIAL DIVISION  
HOLDEN AT ABUJA  
ON FRIDAY THE 1<sup>ST</sup> DAY OF MARCH, 2013  
BEFORE HIS LORDSHIP HON.JUSTICE A.F.A ADEMOLA  
JUDGE

**SUIT NO. FHC/ABJ/CS/582/2012**

**BETWEEN:**

PUBLIC & PRIVATE DEVELOPMENT CENTRE LTD/GT (PPDC) (For itself and on behalf of the Nigeria Contract Monitoring Coalition)} - APPLICANT

**AND**

1. POWER HOLDING COMPANY OF NIGERIA (PHCN) PLC
2. HON. ATTORNEY GENERAL OF THE FEDERATION}- RESPONDENTS

**JUDGMENT****A. SUMMARY OF THE FACTS**

The Applicant in this suit brought by Motion on Notice dated 14/12/2012 pursuant to Order 34 Rules 5 & 6 Federal High Court (Civil Procedure) Rules 2009, **Sections 1, 2(6)** 20, of the Freedom of Information Act, 2011 and the inherent powers of this Honourable Court, prays for the following Reliefs:

- i. **A DECLARATION** that the failure of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to furnish Applicant with the documents/information sought vide Applicant's letter of 30<sup>th</sup> August, 2012 amounts to a wrongful denial of information under the Act.
- ii. **ORDER** of the Honourable Court **COMPELLING** the Respondents to forthwith furnish the Applicant with the information and Copies of the documents set out in the Schedule hereto.

**SCHEDULE**

- a) The procurement plan.
- b) The NEEDS assessment document (if separate from the procurement plan).
- c) Documentation on design and specification requirement which are not contained in the standard bidding documents.
- d) Documentation on the scope of the procurement.
- e) Bidding documents issued to all bidders in respect of the procurement.
- f) A list of all contractors that submitted bids in respect of the procurement.

- g) Copy of the bid evaluation report of the technical subcommittee of the Tenders' Board for the procurement.
- h) Minutes of the Tenders' Board approving the winning bids.
- i) Copies of the letters of award of contract and final contract award documents for the award of the contract for this procurement.
- j) Documentation on the current status of the procurement project.
- k) Document showing the procurement contract sum, conditions of the procurement contract and payment terms and schedule.
- l) Name and addresses of all Distribution Companies on whose behalf the procurement was undertaken and which will subsequently be responsible for the utilization and management of the goods and works procured.

It is supported by an amended statement with names of Applicant, Description of Applicant, Reliefs sought, grounds which reliefs are sought; facts relied upon, affidavit with EXHIBITS A- E and a written address.

The Respondent filed a Counter-Affidavit of 5 paragraphs sworn to by Kemi Iyunade, Litigation Clerk in the office of Messrs Joseph Ochuko Tobi & Co, Counsel to the 1<sup>st</sup> Respondent with Exhibits A & B, a written address prior to paying default fees under Order 34, Rule 5(3) & (4) of the Federal High Court (Civil Procedure) Rules, 2009.

Upon service i.e, Applicant Counsel, G.N. Chigbu filed a reply on points of Law to 1st Respondent's address dated 28/01/2013. This suit commenced in this Court on 23/10/2012 but delayed by several interlocutory applications of Counsel till 8th day of February 2013 when G.N. Chigbu, Applicant's Counsel and Edna Ejikeme for 1st Respondent proffered oral argument and adopted their written address in court. The 2<sup>nd</sup> Respondent though served, never entered appearance or file papers. Accordingly this suit was reserved for judgment by the court:

**B) STATEMENT OF ISSUES ARISING FROM THE FACTS**

Applicants counsel in this application for an order of mandamus submits one issue for determination in his written address dated 14/12/2012 to wit:

Whether Applicant has proved its entitlement to the relief sought herein.

1<sup>st</sup> Respondent in his written address dated 15/01/2013 and filed on 8/01/2013 adopted the Applicant's issue as the only issue arising for determination.

This Court hereby formulates the said issue for determination in this Judgment.

**C) DETERMINATION OF ISSUES BY AN APPLICATION OF LAW TO FACTS**

Applicant's Counsel submitted pursuant to leave of this Court granted on 29/10/2012, the substantive motion on notice for mandamus dated 14/12/2012 was filed on the same day.

Power Holding company of Nigeria hereinafter referred to as the 1<sup>st</sup> Respondent, sometime in the year 2011, through its Project Management Unit (PMU) conducted a Public Procurement exercise involving the award of contract for supply and installation of 300 No. 11 KV, SOOA on Load sectionalizers at Karu, LUTH, Ogba, Agege and Challenge - Ibadan High Voltage distribution system (HVDS) 4 Network.

The Applicant pursuant to the right conferred on it to obtain public records and information from public institutions pursuant to the Freedom of Information Act, 2011 applied to the 1<sup>st</sup> Respondent through its PMU for the copies of the documents and information set out in the schedule to this application. The 1<sup>st</sup> Respondent refused to furnish it with the said documents and information.

Therefore Applicant sought the leave of the Honourable Court to bring this application to enforce Applicant's right under the Freedom of information Act, 2011 and same was granted on 29<sup>th</sup> October, 2012.

The 1<sup>st</sup> Respondent in response to the application for procurement information on the installation of 300 No.1/KV SOOA on load sectionalizers at the said locations wrote a letter dated 9/11/2012 annexing this documents/information required to the Applicant except the document in paragraph 'g' of the Schedule hereinbefore attached to the motion on notice dated 14/12/2012 i.e copy of the bid evaluation Report of the Technical Sub-Committee of the Tenders Board for the procurement.

Applicant's Counsel submitted that it has complied with Section 1, (2) subsection 2(6) & (7), 4 and 7(a) of the Freedom of Information Act, 2011 and satisfied the conditions precedent for the issuance of an order of mandamus from this court. He cited the following cases;

- (i) **GANI FAWEHINMI V. IGP (2007) 7 NWLR (pt.767)606**
- (ii) **ATUNGWU V. OCHEKWU (2000)1NWLR (pt.641) 507**
- (iii) **INYANG V. EBONG (2002) 2 NWLR (pt.751) 284** and

Finally Applicant's Counsel urged the Court to grant this application in the interest of justice and observance of the Rule of Law.

1<sup>st</sup> Respondent's Counsel opposed its grant based on 15(1)(b) of the Act submitting the information and documents sought for by the Applicant is a copy of the bid evaluation report of the technical subcommittee of the Tender's Board for the procurement involved a third party the winner of the bid, **CROWN RESOURCES DEVELOPMENT CO. LTD**, hereinafter referred to as the Contractor.

He argued further that the intention of the section has its origins in the privity of contract doctrine in the Law of Contract, submitting the Release of information to a third party, i.e. Applicant, would affect the contractual relationship between parties to the contract.

In the present case the contractor has contractual relationship with 1<sup>st</sup> Respondent and not the Applicant whilst 1<sup>st</sup> Respondent cannot be required to disclose or release information or documents between her and the contractor to the Applicant who is not privy to the contract since it would be contrary to Law.

**Section 15(1)(b)** of the Freedom of Information Act provides thus;

A public institution shall deny an application for information that contains:-

"information the disclosure of which could reasonably be expected to interfere with the contractual or other negotiations of a third party."

He urged the Court to dismiss the relief of the Applicant as it affects paragraphs of the Schedule of the said application as its grant would cause injustice to the Contractor who is not a party to this suit resulting in a breach of the PRIVACY OF CONTRACT DOCTRINE.

A scrutiny of **Section 15(1)(b) of Freedom of Information Act 2011** states the circumstances a public institution shall deny an application for information to a person;

- a) the Transaction must still be at the negotiation stage
- b) a third party must be involved; and
- c) the disclosure of the information could reasonably be expected to interfere with the contractual or other negotiations of a third party.

This Court agrees with Applicant Counsel's submissions in his reply on points of Law for a public institution to be justified in denying information under the said section of the Law, the above mentioned conditions must exist concurrently. The uncontroverted Evidence before the Court states unequivocally the negotiations were concluded and the contract awarded since 30th November,

2011 with the contract effective from 26/3/2012  
(underlining mine)

See 1<sup>st</sup> Respondent's **EXHIBIT B, paragraph one Annexure VII** in these civil proceedings.

The Applicant's averments of the affidavit in support of the substantive motion was not contradicted by 1<sup>st</sup> & 2<sup>nd</sup> Respondents. They are deemed as true having being admitted by the opposing party i.e. the 1<sup>st</sup> & 2<sup>nd</sup> Respondents. See **OGOEJEFOR V OGOEJEFOR (2006)1 S.C (pt.1) 157.**

This principle of Law also applies to paragraph 7 of the said affidavit requesting inter alia for the documents in issue on 30/8/2012, several months after conclusion of negotiations between the 1<sup>st</sup> Respondent and the Contractor i.e. the third party. I cannot agree more with Applicant Counsel's arguments in his reply on points of Law that negotiations have been concluded and the contract awarded, the disclosure of the information sought by the Applicant cannot by any stretch of the imagination reasonably be expected to interfere with any contractual or other negotiations of the Contractor, i.e. third party.

As rightly argued by Counsel in his well researched address and brilliant reply on point of Law, the 1<sup>st</sup> Respondent has failed to satisfy conditions (a) and(c) of **Section 15(1) (b)** of the Freedom of Information Act 2011 and not entitled to the exemption stated herein.

1<sup>st</sup> Respondent's processes and written arguments lack substance, frivolous, time wasting and an abuse of this Court process as they have no justification in denying the Applicant the documents sought.

Accordingly prayers 1 & 2 of the Applicant's Motion on Notice dated 14/12/2012 are hereby granted particularly in respect of item "g" in the Schedule herein.

Costs of N20,000:00 are awarded jointly and/or severally against 1<sup>st</sup> & 2<sup>nd</sup> Respondents in favour of the Applicant.

A.F.A. ADEMOLA  
JUDGE 01/03/2013

**PARTIES** - absent

**APPEARANCES-** G. N. CHIGBU for Applicant  
No representation for Respondents

***M.G.I.G. V. VANDEIKYA L.G. [SUIT NO:VHC/20/2012]***

**IN THE HIGH COURT OF BENUE STATE OF NIGERIA  
IN THE BENUE STATE JUDICIAL DIVISION  
HOLDEN AT VANDEIKYA**

**SUIT NO:VHC/20/2012**

**ON WEDNESDAY, THE 31<sup>ST</sup> DAY OF OCTOBER, 2012**

**BEFORE HIS LORDSHIP: HON JUSTICE D.M.IGYUSE -JUDGE**

**BETWEEN:**

**MAJOR GEN.INDIA GARBA (RTD)}**

**PLAINTIFF**

**AND**

**VANDEIKYA LOCAL GOVT}**

**DEFENDANT**

An order of mandamus is this day and hereby made against the defendant to furnish the plaintiff with all the detailed records of all the income and expenditure of all the Federation revenue allocations to the defendant from the month of May, 2007 to June, 2012 within fourteen (14) days from the date of the judgment.

The plaintiff has established his claim to the effect that the defendant has wrongfully denied him of the said information. The defendant is found guilty and convicted as well as ordered to pay N500,000.00 fine to the Benue State Government as provided by S. 8(5) of the Freedom of Information Act, 2011

**SIGN: D. M. Igyuse, J**  
**31-10-201**

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***M.G.I.G V. VANDEIKYA L.G. [SUIT NO. VHC/20/2012]***

**IN THE HIGH COURT OF JUSTICE BENUE STATE OF NIGERIA  
IN THE VANDEIKYA JUDICIAL DIVISION  
HOLDEN AT VANDEIKYA**

**SUIT NO. VHC/20/2012**

**BETWEEN**

**MAJOR GENERAL INDIA GARDA (RTD)}**

**PLAINTIFF/APPLICANT**

**AND**

VANDEIKYA LOCAL GOVERNMENT AREA COUNCIL} DEFENDANT

**JUDGMENT:-**

The plaintiff file this originating summons on 27<sup>th</sup> July, 2012 under Order 40 Rule 5 (1) of the 2007 Civil Procedure Rules of the court claiming against the defendant Local Govt. for:

I. A declaration that the refusal, failure and or neglect by the defendant to release the information requested by the plaintiff dated 29-06-2012, concerning the allocation of revenue to the Vandeikya Local Govt Area Council of Benue State of Nigeria from the Federation Accounts from May, 2007 to June, 2012 and expenditure of same amount to a violation of **S. 4(a) and (b) of the Freedom of Information Act, 2011** and is therefore wrongful, illegal, and unconstitutional.

II. A declaration that the refusal, failure and or neglect by the defendant to release the information requested by the plaintiff as in para. (1) above amounts to a violation of **S. 4 (a) and (b) of the Freedom of Information Act, 2011.**

III. A declaration that by the true interpretation and construction of S. 4 (a) of the Freedom of Information Act, 2011 which shall be hereinafter simply referred to as the Act is obligated to furnish on request by the plaintiff a comprehensive, just, fair and detailed accounts of the amount or money allocated to the Local Government Area Council from the period in question and the expenditure of such allocation.

IV. An order of Mandamus directing the defendant including its servants, agents, privies, officials and or cohort to furnish the plaintiff with comprehensive and detailed information concerning the allocation of revenue from the Federation Accounts to the defendant covering the period as in para. I above until judgment is delivered in this case within 14 days of the delivery of judgment.

V. An order of the court directing the defendant to pay a fine of N500,000.00 for wrongful denial of the plaintiff the right of access to information sought pursuant to the plaintiff's application dated the 29<sup>th</sup> June, 2012.

VI. Cost of this action.

VII. Any further order(s) the court may deem fit and proper to make in the circumstance of the case

In support of the originating summons are, a 15 para affidavit, a copy of the application to the defendant requesting for the information in question dated the 29<sup>th</sup> June, 2012, a written address and a copy of the leave of the court granted to the plaintiff to file this suit.

In his written address on behalf of the plaintiff Chief Okoi O. Obono Obla of counsel flamed three issues for determination in this suit as follows:-

1. Whether by a true interpretation and construction of **S. 4 (a)** of the Act the defendant is not obligated to allow the plaintiff unfettered access to information concerning the allocation of revenue to the defendant from the Federation Accounts upon the plaintiff's application within seven days?
2. Whether the refusal or failure of the defendant to grant the application of the plaintiff as in (1) above amount to an infringement of **S. 4(a)** of the Act, and
3. Whether by a true interpretation and construction of the provisions of **S. 7 (5)** of the Act the defendant is not entitled to pay fine of N500,000.00 for wrongful denial of the plaintiff the access to the information sought.

In his written submissions counsel submitted in support of the claim and the issues raised as already reproduced above. By the facts as disclosed in the affidavit in support of originating summons and the written submission of counsel on behalf of the plaintiff the attached copy of a letter requesting for the said information from the defendant is dated the 29<sup>th</sup> of June, 2012 and served on the defendant on the same date. A copy of the letter of 29<sup>th</sup> June, 2012 requesting for the information is **exhibit GAB 1** attached. By paras 7 to 9 of the supporting affidavit **exhibit GAB 1** was served on both the caretaker chairman and the Secretary of the defendant on the same date of 29<sup>th</sup> June, 2012.

Paras 10 to 12 of the affidavit in support of the originating summons have stated that the defendant has refused and or neglected to supply the requested information within seven(7) days as required under the law. para. 13 of the affidavit in support of this suit seeks the assistance or order of the court. Compelling the defendant to comply with exhibit GAB1. Counsel submitted on issues one and two argued together that the defendant has no powers under the law to refuse to supply the information requested and that non compliance with the request is wrongful. Counsel relied on the supporting affidavit and submitted on issue NO. Three for determination that the consequence of the refusal to furnish the requested information is that the defendant be fined and compelled supply the said information under the Act.

I have gone through all the court processes filed in this suit. I have listened to the argument and submissions of Chief Obla for the plaintiff. The defendant was served with the writ of summons as per the return of service on the 08-08-2012 and also served with the hearing date of the suit on 28-09--2012. The defendant was in court, being represented by her legal Officer when the suit came up for hearing on the 12-10-2012. The defendant has not entered defence in this suit up to the time of writing and delivery of this judgment in spite of the fact that when the plaintiff presented his case the court did not deliver judgment there and then but adjourned for judgment for over a period of two weeks till today.

I, therefore, believe that the defendant does not dispute nor intend to dispute the action. The defendant has not filed any counter-affidavit to this suit to dispute the averments in the affidavit in support of the summons. There is also no counter written address to that of the plaintiff from the defendant. The receipt of requesting for the information, exhibit GAB is not denied. There is no issue from the defendant contrary from the case of the plaintiff in this suit.

The unchallenged affidavit evidence of the plaintiff in this suit shall be accepted by me as the truth as stipulated in the case of **FEDERAL AIRPORT SECURITY OF NIG. V. WAMAL (2011) I SCNJ P. 133/143** L. 26-28 Per ..... JSC. It was held thus:-

*"It is trite law that any averment in an affidavit which has not clearly, unequivocally and directly been denied is deemed admitted."*

The suit of the plaintiff is not challenged in which situation the law enjoins the court to accept such an entire suit as the truth and to rely on same. See **CAMEROON AIRLINES V. OTUTUIZU (2011) (2) SCNJ P. 96118** L.17-23. The apex court per R. VIVOUR JSC thus:-

*"The position of the law is well settled that where a party testifies on a material point in this case the loss of \$20,000 the appellant ought to XXd him or show that his testimony is untrue. Where, as in this case neither was done, the court would readily conclude that the adverse party, in this case the appellant does not dispute the fact".*

I believe that the defendant has not complied with the provision of S... of the Act. The plaintiff is entitled to the information sought from the defendant. I believe also that the refusal to furnish the requested information.....Section 4, 5 and 8 (4) and (5) of the Act. The case of the plaintiffí . proceeds on all the three issues identified for determination in this suit.... counsel. The consequence of the above findings is that an orderí is hereby made against the defendant to furnish the plaintiff withí the records of all the income and expenditure of all the Federationí to the defendant from the month of May, 2007 to June, 2012,í 14 days from the date before this judgment.

The plaintiff has established his claim to the effect that the defendant has denied him of the said information. The defendant is found guilty andí .. ordered to pay N500,000.00 fine to the Benue State í .provided by S. 8 (5) of the Freedom of Information Act, 2011.

**Note: Dotted lines are missing words from scanned document.**

**SIGN ; D.M. Igyuse, J 31-10-2012.**

Parties- All present.

The defendant is represented by her Legal Officer, Mrs Roseline Dumawa .  
B. I. ESQ. - For plaintiff

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***LDAP V. CLERK N.A. [SUIT NO: FHC/ABJ/CS/805/2011]***

IN THE FEDERAL HIGH COURT OF NIGERIA  
IN THE ABUJA JUDICIAL DIVISION  
HOLDEN AT ABUJA  
ON MONDAY,THE 25TH DAY OF JUNE, 2012

BEFORE THE HON.JUSTICE BALKISU BEL LO ALIYU (JUDGE)

**SUIT NO: FHC/ABJ/CS/805/2011**

IN THE MATTER OF THE APPLICATION BY LEGAL DEFENCE AND  
ASSISSTANCE PROJECT Gte LTD FOR AN ORDER FOR THE  
ENFORCEMENT OF THE FREEDOM OF INFORMATION ACT, 2011

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT, 2011

**BETWEEN:**

LEGAL DEFENCE & ASSISTANCE PROJECT (Gte) LTD APPLICANT

**AND**

CLERK OF THE NATIONAL ASSEMBLY OF NIGERIA} RESPONDENT

**RULING**

By its motion on notice filed on the 28<sup>th</sup> November, 2011, the Applicant, Legal Defence & Assistance Project (Gte) Ltd sought for extension of time within which it will file an application for the review of denial of information it requested from the Respondent, Clerk of the National Assembly of Nigeria. In this Court's ruling delivered on the 8th of March,2011, time was extended within which the Applicant may file its originating motion; The originating motion already filed on 20<sup>th</sup> September,2011 was deemed duly filed, pursuant to section 20 of the Freedom of Information Act,2011.

In that originating motion, the Applicant seeks for two orders against the Respondent the Clerk of the National Assembly of Nigeria. The orders are declaratory and mandatory orders as follows:

1. "A DECLARATION that the Respondent's deemed denial of the information requested by the Applicant in its letter dated 6<sup>th</sup> July, 2011 to the

Respondent, on details of the salary, emolument and allowances paid to all Honourable Members and Distinguished Senators, both of the 6<sup>th</sup> Assembly, from June 2007 to May 2011 is an infraction of Section 1(1) of the Freedom of Information Act, 2011 and of the Applicant's rights to such information under the said section.

2. AN ORDER of court compelling the Respondent to disclose to the Applicant within 14 days of the order the detailed information as requested by the Applicant in its letter of 6<sup>th</sup> July, 2011 to the Respondent."

The applicant relied on the following grounds for seeking the above reliefs:

1. The Applicant has the right to the information it requested from the Respondent in its letter of 6<sup>th</sup> July 2011 (attached to the affidavit in support of this motion as Exhibits B) by virtue of Section 1(1) of the Freedom of Information Act, 2011.

2. The Respondent is deemed to have denied the application for information, having failed to respond to the Applicant's request after the number of days stipulated under Section 4 of the Act.

3. The information sought by the Applicant from the Respondent does not fall within any of the exemptions provided under the Act.

4. This Honourable Court has the jurisdiction to order the Respondent to disclose the requested information under Section 25 of the Act. The application is supported by affidavit and a written address of counsel to the Applicants.

In support of the motion is a ten paragraphed affidavit sworn to by Chigozie Eburuo, the litigation officer in the law firm of Obiagwu & Obiagwu, the law firm representing the Applicant in this suit. In this affidavit, the deponent said that the Applicant is a registered non- governmental, non-profit organization with over 15000 registered members. The objectives of the Applicant includes protecting and promoting good governance, public accountability and the rule of law in Nigeria. As part of its work, the Applicant made an application to the Respondent dated 6<sup>th</sup> July, 2011 by which it requested information on details of salary, emolument, and allowances paid to the Honourable Members of the House of Representatives and Distinguished Senators, both of the 6<sup>th</sup> Assembly, from June 2007 to May, 2011. The Respondent did not respond to this request even though it was delivered to him by courier on 6<sup>th</sup> July, 2011. Attached to the affidavit are copies of Certificate of Registration of the Applicant as a company limited by guarantee (exhibit 'A') and the letter of request sent by the Applicant to the Respondent dated 6<sup>th</sup> July, 2011(exhibit 'B').

The counsel to the Applicant Mr. Chino Edmond Obiagwu, filed an address which he adopted as his arguments and submissions in support of the application. In that address, he submitted two issues for determination as follows:

1. **"Whether the Respondent's deemed denial of the information requested by the Applicant in its letter of 6<sup>th</sup> July,2011 to the Respondent is authorized under the Freedom of Information Act, 2011;**
2. **If issue (1) above is decided in favour of the Plaintiff, whether, having refused to provide the requested information, then this Honourable Court can order the Respondent to do so.**

Counsel made submissions on the above issues relying on the provisions of Sections 1(1), 4, 7(4) and 25(1)(a) to argue that this court has power to order the Respondent to provide the said information requested to the Applicant.

The Respondents entered a conditional appearance and filed a counter affidavit in opposition to the originating motion. In addition, the Respondent gave notice of his intention to rely on a preliminary objection to the competence of this application at its hearing. The Respondent by that notice said that this suit is "incurably incompetent" on the following four grounds:

1. "The mode of commencement of this suit is alien to the Federal High Court (Civil Procedure) Rules,2009.
2. The suit is statute barred.
3. The Hon. Court lacks the Jurisdiction to hear and entertain this suit.
4. The suit ought to be dismissed or struck out."

In his address in support of the grounds of objection, Mr. J. J. Usman counsel of the Respondent formulated two issues for determination as:

1. Whether this suit as constituted is competent and
2. Whether the suit is statute barred.

In answering issue one above, Mr. Usman said that this originating motion was brought by the Applicant pursuant to Order 3 of this Court's Rules of Civil Procedure, 2009. He submitted that neither Order 3 nor any other order in the Rules of the Civil Procedure of this Court permits the commencement of suit through motion simpliciter. He contended that the mode of commencement of this suit is incurably defective and incompetent. He placed reliance on several cases including the cases of C.C.B. (Nig) Plc Vs. A. G. Anambara State (1992) 10 SCNJ 137 at 163; and Okparanta vs. Elechi (2007) ALL FWLR (pt 358) 1185 at 1193, to support his submissions. He submitted that this Court has no jurisdiction to entertain an incompetent suit which has not been commenced by due process of law.

In arguing issue two which he formulated for determination, Mr. Usman said that this suit is statute barred in view of section 21 of the Freedom of Information Act, 2011. That section provides that where an applicant for information has been denied access to that information by a public institution, he may apply to the Court for the review of that refusal within thirty days after the denial or deemed denial. He submitted that this suit was filed by the applicant outside the

30 days of the denial or deemed denial of the information it requested from the Respondent. This is in contravention of the provisions of section 21 of the Freedom of Information Act aforesaid. Counsel relied on the cases of **N. P. A. Plc vs. Lotus Plastic Ltd (2005) 9 NWLR (pt. 959) 158 and Lamina Vs. Ikeja L.G.C. (1993) 3 NWLR (pt. 314) 759 at 771**, in urging the Court to find that this suit is statute barred and to dismiss same. At the hearing of this suit, while adumbrating on his address, Mr. Usman said that the complaint of the Respondent is that the Applicant has failed to seek for and obtain leave of Court before filing this application for judicial review. This is in contravention of Order 34 of this Court's Rules of Civil Procedure.

The Applicant's reply to the objection raised by the Respondent as stated above was filed on 31<sup>st</sup> January, 2012. In reply to the objection and argument of the Respondent to the mode of commencement of this suit, Mr. Chino Edmond Obiagwu quoted the provisions of Order 3 Rule 1 of the Federal High Court (Civil Procedure) Rules, 2009, and submitted that the mode of commencement of this action is not alien to the Rules of this Court. He also relied on section 20 of the Freedom of Information Act, pursuant to which this suit is brought and argued that section 20 does not specify the mode for commencement of action 7 under the Act. He submitted that action for judicial review are usually commenced by way of originating motion.

In responding to the ground of objection that this suit is statute barred, the Applicant's counsel submitted that actions commenced under the Freedom of Information Act such as this one, are not subject to rules under limitation of action. So the cases cited by the Respondent are not applicable to this suit, because section 20 of the Act has provided for the extension of time to the applicant who failed to apply to the Court within the 30 days mentioned. He argued that the word "or" used in the Section 20 of the Act is disjunctive in order to accommodate an applicant who failed to apply within the 30 days of the denial of the information requested. At the hearing, he also responded to the submissions of Mr. Usman on the issue of leave for judicial review, and he submitted that this suit was not filed pursuant to the Rules of this Court and that Order 34 thereof is not applicable.

My starting point is to determine the objection of the Respondent to the competence of this Suit. In determining whether or not the objection of the Respondent aforementioned has any merit, we have to examine the originating motion filed by the Applicant. It is stated on the face of the originating motion that it is **"Brought Pursuant to Sections 1(1) &(3), 2 (6), 7(4), 20 and 25(1) of the Freedom of Information Act, 2011, Order 3 of the Federal High Court (Civil Procedure) Rules, and Inherent Jurisdiction of this Honourable Court."** The Counsel to the Applicant cannot claim in his address that this Application is not brought under the Rules of Procedure of this Court.

This is particularly so when the counsel in his reply to the preliminary objection stated that "**Apart from the fact that the above Section of the law does not specifically provide for the mode for commencement of action under the Freedom of Information Act, supra, we submit that action for judicial review are usually commence(sic) by way of originating motion, which is a conventional mode of commencement of action in our Courts.**" (underlining provided for emphasis). The application is also brought pursuant to Section 20 of the Freedom of Information Act, 2011. That section provides as follows:

**"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."**

From the wordings of the above section 20, the application envisaged by the legislature is one of judicial review of the denial of the requested information by the public body concerned. I am in agreement with the interpretation of Mr. Obiagwu of this section in his address where he said that this section allows two categories of Applicants. The first one is he who applied within the 30 days of the denial or deemed denial of the information and the second category is the applicant who failed to apply within the 30 days. The latter may still apply to the Court for extension of time to apply for the Court's review of the denial of the information. The last phrase "**or within such further time as the Court may either before or after the expiration of the 30 days fix or allow**" to my mind, is intended by the law makers to exclude the rules of procedure of the Court regarding ordinary procedure for judicial review, which is the general rule. This is in accordance with the principle of interpretation that where a special provision is made to govern a particular subject matter, it is excluded from the operation of any general provision. This is represented in the Latin maxim, "generalia specialibus non derogant". See the case of **A. G. Fed. V. Abubakar (2007) 10 NWLR (pt.1040) 1 at 148 paragraph H.** See also the case of **Ehuwa vs. Ondo State INEC (2007) ALL FWLR (pt.351) 1415 at 1430 to 1431G-B.** a case cited by the counsel to the Respondent in his alternative submissions. Therefore, though the Applicant brought this motion pursuant to Order 3 of the Federal High Court Rules, those Rules are not applicable. This intention of the legislature to take the application for the review of the denial of information made pursuant to the Act outside the provisions of the rules of Court is manifested in Section 21 of the Act which provides that:

**"An application made under Section 20 shall be heard and determined summarily."**

Summary proceedings are defined in the Black's Law Dictionary, Ninth Edition at page 1324 as "**A nonjury proceedings that settles a controversy or disposes of a case in a relatively prompt and simple manner.**" The authors of the Dictionary quoted A. H. Manchester's "Modern Legal History of England and Wales, 1750 -1950" who said "**Summary proceedings are such as directed by Act of Parliament, there was no jury, and the person accused was acquitted or sentenced only by such person as statute had appointed for his judge....**" Hearing of a matter summarily means disposing of that matter as simply as possible without the usual procedure being followed. For example a summary trial in criminal cases entails non calling of evidence by the prosecution to prove the guilt of an accused person, but he is convicted upon his plea of guilty to the information or charge at the point of arraignment. See the case of **Garba V. C.O.P. (2007) 16 NWLR (pt.1060)378.** Thus by providing that the application for the review of the denial of information under the Section 20 of the Freedom of Information Act shall be determined "summarily" the law maker intends that such applications should be heard and determined promptly and in a simple manner. This is intended that the Rules of Procedure of the Court regarding the applications for judicial review (mandamus, certiorari etc) where there must be leave sought and obtained from the Court before an applicant can file such applications seeking judicial review will not apply. Making the applicant for review of the denial of information under the Freedom of Information Act to seek and obtain leave before making the application for review will negate the "summary" hearing of the review meant by section 21 of the Act. The mode adopted by the Applicant in this case by filing an originating motion on notice is the procedure contemplated by the section 21 of the Freedom of Information Act quoted above and I so hold. The application is therefore competent, and this Court has the jurisdiction to determine it. The objection of the Respondent on this ground is thus lacking in merit and it is dismissed.

With regards to the objection to the competence of this application on the ground that it is statute barred, this Court had already extended time within which the applicant may file this motion in its ruling delivered on 8<sup>th</sup> March, 2012. That ruling was on a motion filed by the Applicant seeking extension of time to apply for the review of the denial of information, pursuant to Section 20 of the Act under consideration. This ground of objection is also dismissed.

We will proceed to determine the merit of the application. In his response to the Application, the Respondent filed a counter affidavit dated 2<sup>nd</sup> November, 2011 deposed to by Alih M. Hassan, the Principal Legal Assistant in the Department of legal services of the Respondent. He stated that on receipt of the Applicant's letter of request, he had promptly replied and informed the applicant that the information he requested is now a subject of two suits filed by the Nigeria Bar Association and Mr. Femi Falana. There is a subpoena issued to the Respondent by this Court to produce the details of all salary, emolument and allowances paid

to all members of the Respondent's sixth Assembly from 2007-2010. The Respondent had not complied because his counsel has filed a notice of objection to the jurisdiction of this Court to hear those suits. The second reason for the denial of the requested information by the respondent is that the information sought by the applicant is the type of information that the respondent is not permitted to disclose by the Freedom of Information Act (herein after referred to as "the Act"). The respondent stated that the information requested by the Applicant is the type exempted by the Act.

Attached to the counter affidavit are documents marked as exhibits A, B, C, and D. Exhibit 'A' is the reply of the Respondent to the Applicant's letter of request. This reply is dated 11<sup>th</sup> July, 2011, by which the Respondent denied the information requested by the Applicant on two grounds, namely; **that the requested information is subject to litigation in Court, and that the information is among the information exempted by section 14 of the Act.** Exhibit 'B' are the copies of the originating summons, affidavit in support and address filed in suit, **No: FHC/ABJ/CS/599/10**, between the Incorporated Trustees of the Nigerian Bar Association as the Plaintiffs, and the President of the Senate, the Speaker of the House of Representatives, the National Assembly and the Hon. Attorney General of the Federation as the Defendants. By that suit the Incorporated Trustees of the Nigerian Bar Association as the plaintiff sought for the determination of three legal questions regarding the alteration of the 1999 Constitution of Nigeria by the Defendants under Sections 9 and 58, of the same Constitution. Upon the determination of the three questions, the plaintiff sought for five declarations on the legality of the Constitutional alteration by the 1<sup>st</sup> to 4<sup>th</sup> Defendants without the assent of the President. **Exhibit 'C'** is the subpoena issued to the Clerk of the National Assembly to produce before the Court **"details of quarterly constituency allowances including: bank payments advice, pay slips and other documents in respect of such allowances paid to all the members of the National Assembly since 2007 till date."** Exhibit 'D' attached to the counter affidavit of the Respondent in this case is the notice of objection filed by it and the National Assembly to the suit No **599/10** challenging the locus standi of the Plaintiff to institute that suit. But in a further affidavit dated 24<sup>th</sup> January, 2012, sworn to by Adah Phillips, a lawyer in the law firm representing the Respondent in this case before me, another originating summons filed in this Court is attached as exhibit 'FOI1'. This is to replace exhibit 'B' attached to the counter affidavit of Alih M. Hassan. The attached exhibit 'FOI1' is predicated on the salaries and allowances of the members of the Nigeria's Senate and House of Representatives. It was on this suit that the subpoena (exhibit 'D') above was issued. This Originating summons (exhibit 'FOI1') challenges the legality/constitutionality of the "constituency allowances of N45million to members of the senate and N27.5million for the each member of the House of Representatives."

In his alternative submissions in the event that his preliminary objection fails (and it has failed by our finding above), Mr. Usman submitted a single issue for determination. This is "**Whether from the facts of this case and the relevant law, the applicant is entitled to the reliefs sought in the Originating Motion.**" While conceding that the applicant has the right under Sections 1 and 2 of the Act to request for information from the Respondent, but he contended that the right is not a blanket one. According to the counsel of the Respondent, this right of information is limited by Sections 12 and 14 of the same Act.

The Counsel quoted the Sections he relied upon and submitted that those Sections and exhibits 'B', 'C' and 'D' attached to the counter affidavit of the Respondent have shown the restraint placed on him not to grant the request of the Applicant. Particularly, Mr. Usman submitted that the Section 14 of the FOI Act prohibits disclosure of information on personnel files and personal information maintained with respect to employees, appointees or elected officials of any public institution. His contention is that the information requested by the Applicant is the type exempted by the Act. He said that by Sections 11, 12, 14, 16, 17 and 19 of the Act, the law makers intended to exclude the information contained therein from being disclosed to the public. He relied on the case of **Ehuwa V. Ondo State INEC (supra)**, to the effect that the expressed mention of one thing in a statutory provision, automatically excludes any other which otherwise would have applied by implication with regard to the same issue. Counsel urged the Court to dismiss this application.

The Applicant filed a reply to the counter affidavit of the Respondent aforementioned. The reply affidavit is dated 31<sup>st</sup> January, 2012, sworn to by Okorie Godswill, a legal practitioner in the law firm of the counsel to the Applicant. He said that the Respondent did not receive the notification of refusal to its request i.e. Exhibit 'A' which the Respondent attached to his counter affidavit. The deponent said the information the Applicant requested is not the same with the subject matter of the suit in exhibits 'B' and 'C' attached to the Respondent's counter affidavit. Finally that the information sought by the Applicant is not exempted by the Act and its disclosure is in line with the public interest.

In his final reply on points of law, filed on 31<sup>st</sup> January, 2012, counsel to the Applicant, Mr. Obiagwu submitted rightly in my view that the Respondent having stated the reasons for the denial of information to the Applicant in their exhibit 'A', cannot validly rely on other grounds outside that stated in his reply. This is contrary to section 8(1) of the Act which are mandatory according to the Applicant. It is the further submissions of Mr. Obiagwu that the provisions of Sections 12 and 14 of the Act relied upon by the Respondent as justification for denying the Applicant the information requested are not applicable to this suit. He said Section 12 of the Act deals with the exemption of cases coming under

the International Affairs and Defence which is not this case. Section 14 on the other hand deals with training of officials on the right to information and on the effective implementation of the provisions of the Act, and therefore not a ground for exemption. On the claim of the Respondent that the requested information is a subject of litigation as shown on exhibit 'B', Mr. Obiagwu said that exhibit 'B' deals with constituency allowance which is not the same request made by the Applicant and even if this allowances are included in the Applicant's request, the Respondent will be bound to release the other information requested. Relying on Sections 13(2) and 15(3) of the Act, counsel to the Applicant submitted that the information sought by the plaintiff relates to public fund and not personal information. The disclosure of such information will encourage accountability, transparency, good governance and rule of law; ease probity and check tendency to misuse of public fund. He said it help to check against official corruption. He urged this Court to hold that from the evidence presented by the Respondent, he has not justified the grounds of exemption upon which he relied in denying the information the Applicant requested. The learned counsel urged the Court to grant the reliefs the Applicant seeks by his originating motion.

I have reviewed the affidavit evidence and the counsel addresses for and against the application for the review of the denial of information requested by the Applicant from the Respondent. It is to be noted that the Freedom of Information Act, 2011 is a new law enacted by the National Assembly and it came into force barely a year ago, i.e. on 28<sup>th</sup> May, 2011. But cases under the Act appear simple, in the sense that a request is made to the public institution and when denied then the Courts will examine the grounds of the denial to find if they are justified. Once the applicant has shown that he made a request for information under the Act, and his right to access of such information is established by Section 1(1) of the Act, then the onus in this circumstance is on the denying authority to show that it is justified by the Act to deny the information requested, My position for this holding is strengthened by Section 30 (2) of the Act provides as follows:

**"Where the question whether any public record or information is to be made available, where that question arises under this Act, the question shall be determined in accordance with the provision stated herein, unless the otherwise exempted by this Act."**

So what is to be examined by the Court in its review of the denial is the grounds of the denial and for it to make a finding on whether the grounds are tenable within the Act itself. Therefore the issue for me to determine is whether the grounds relied upon for the denial of the Applicant's request for the details of the salary, emolument and allowances paid to all Honourable Members of the House of Representatives and Distinguished Senators, both of the 6<sup>th</sup> Assembly, from June,2007 to May, 2011 are justified under the Act.

The Respondent in Exhibit 'A', which is his reply to the plaintiff's requested information stated as follows:

**"..... We acknowledge the receipt of your letter dated 6<sup>th</sup> July, 2011. We regret to inform you that your request could not be granted because two cases are pending on the subject matter of the salary and emolument of the members of the 6<sup>th</sup> National Assembly in which the Court ordered subpoena deduces tecum and we are contesting the jurisdiction of the Court to entertain these cases. These cases are: Suit No: FHC/ABJ/CS/599/10 & Suit No: FHC/ABJ/CS/574/10 for Incorporated Trustees of Nigeria Bar Association V. National Assembly and Suit No: FHC/ABJ/CS/603 for Femi Falana V. National Assembly respectively. In view of the above, it will be pre-judicial to these cases to grant your application. Secondly the request cannot be granted in view of the exemption by Section 14 of the Act."**

By the above letter, Respondent relied on two grounds for denying the Applicant the information requested. The first ground is that two cases are pending in respect of these records in the Court and it will be **"pre-judicial"** to these cases if the applicant's request is granted. In his paragraph 9 of his counter affidavit, the Respondent stated **"That it will be prejudicial to grant the Applicant's request in view of the pending suits."** In this paragraph, the word used is "prejudicial", the adjective of "prejudice." What interest of the Respondent will be prejudiced by the release of the information and how is that relevant to these proceedings. The answers to these two questions must be found from the affidavit of the Respondent in support of his grounds for denial of information the Applicant requested. In answer to the first question, the Respondent said in paragraph 7 of his counter affidavit that his counsel has filed "a notice of preliminary objection challenging the jurisdiction of the Court." How is that relevant to these proceedings, especially as the applicant herein is not a party to the suits mentioned. The Respondent did not state the relevance. We cannot speculate. What is relevant to this application is that the objection of the Respondent to this suit on the ground of jurisdiction has been heard and dismissed earlier in this ruling. It is important to note that information from public institution on records is to be issued by way of certification by the officer who has custody of them. Public Records are for the public and cannot be issued in their original form. This is to compliment the provisions of the Evidence Act regarding issuance of public documents upon application. See section 30(1) of the Act where it is stated that the freedom of Information Act is intended to compliment procedure for issuance of public record and information. So it is not the original records but copies of same that is required to be issued on request. I have not seen the relevance of the two cases quoted by the Respondent as the ground for denying the Applicant the certified copies of the information requested. That ground is not justified by the Act and it is hereby so declared.

**(d) information required of any tax payer in connection with the assessment or collection of any tax disclosure is otherwise requested by the statute; and**  
**(e) information revealing the identity of persons who file complaints with or provide information to administrative, investigative, law enforcement or penal agencies on the commission of any crime.**

Let us examine the wordings of these Sections as it relates to the personal information of the persons stated therein. Starting with the first group under subsection(a), "clients" of a public institution, such as subscribers to the services of public institutions like for example electricity providers. "Patients" will include, for example those admitted in public hospitals; occupiers of public institution's facilities. Students of course will mean those in the public schools or other public institutions at all levels. Personal information of employees, or appointees or elected officials will include as example, personal data of such employees or appointees which they filled in before or after their employment or appointment as the case may be. Personal information of elected officials will include for example, the personal data required to be filled in by any person seeking election. Information of the tax payer in connection with the assessment of any tax and protection of a complainant or informant to law enforcement needs no further interpretation. In all these cases, it is from the type of the information requested that it is determined whether it falls under any of these categories. Each case will be determined upon its peculiar circumstances.

The information requested by the Applicant in this matter relates to salaries, allowances and emolument paid to elected members of the 6<sup>th</sup> National Assembly. The Applicant did not request any of the personal information relating to the Honourable Members, but simply what was paid to them while they were in service from the public fund. It is my view that this information is not among those exempted by the above quoted Section 14 (1) of the Act. It must be noted that even personal information protected by this subsection can still be disclosed in the circumstances stated in sub-section 2 of Section 14 as follows:

- (2) "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.

Still sub- section (3) provides as follows:

**"Where disclosure of any information referred to in this section 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, the public institution to whom the**

**request for disclosure is made shall disclose such information subject to section 14(2) of the Act"**

The above provisions are as clear as the colour purple and hardly needs any interpretation. The Act clearly places the public interest above all else including the personal interest of the individuals. Where the interest of the public is in clash with the individual interest, in deserving cases, the collective interest must be held paramount. Upon all I stated above the information requested by the Applicant in this suit is not exempted under this Section as held earlier. The Respondent is not justified by the Act to deny it to the Applicant. The reliefs sought by the Applicant in this motion are both granted. The Respondent is hereby ordered to disclose to the Applicant within 14 days from today give detailed information of salary, emolument and allowances paid to all Honourable Members of House of Representatives and Distinguished Senators, both of the 6<sup>th</sup> Assembly, from June, 2007 to May, 2011.

**BALKISU BELLO ALIYU**

**JUDGE**

**25TH JUNE,2012**

**APPEARANCES:**

C.OBIAGWU ESQ. WITH C. N.OBANIESQ.FOR THE APPLICANT.

J. J. USMAN ESQ. WITH HIM A. O. PHILLIPS ESQ. FOR THE RESPONDENT.

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***ITCAC VS LSHA [SUITNO:ID/769M/ 2011]***

**IN THE HIGH COURT OF LAGOS STATE  
HOLDEN AT IKEJA JUDICIAL DIVISION**

**SUITNO:ID/769M/ 2011**

**BETWEEN:**

INCORPORATED TRUSTEES OF THE CITIZENS ASSISTANCE CENTRE }  
APPLICANT

**AND**

1. HON. S. ADEYEMI IKUFORJI (SPEAKER, LAGOS STATE HOUSE OF ASSEMBLY)
2. LAGOS STATE HOUSE OF ASSEMBLY } RESPONDENTS

**ENROLMENT OF ORDER MOTION EX- PARTE**

BROUGHT PURSUANT TO

1. ORDER 40 RULE 3 OF THE HIGH COURT OF LAGOS STATE (CIVIL PROCEDURE) RULES, 2004
2. SECTION 2, 3, 5, 21 & 22 OF THE FREEDOM OF INFORMATION ACT, 2011
3. SECTIONS 22, 23, 24, & 39, FEDERAL REPUBLIC OF NIGERIA'S CONSTITUTION 1999 (AS AMENDED)
4. ARTICLE 13 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (RATIFICATION AND ENFORCEMENT)ACT, CAP A9, LAWS OF THE FEDERATION OF NIGERIA (LFN) 2004
5. INHERENT JURISDICTION OF THIS HONOURABLE COURT.

UPON THIS MOTION EX-PARTE dated 25/10/11 coming up before this Honourable Court.

**AFTER** reading through the Motion paper, Affidavit in support, Statement, written address and Exhibits attached. The Affidavit was deposed to by Prince Adekunle Adebajo, Male, Nigerian Citizen, Legal Practitioner and human rights activist of No 4, Owolowo Street, Ikorodu, Lagos State. Sworn to and filed at the High Court Registry, Ikeja on 25<sup>th</sup> October, 2011.

**HAVING LISTENED** to N. Ogbara (Esq.) of Counsel for application to move in terms of the Motion Ex-parte dated 25<sup>th</sup> October, 2011.

**IT IS HEREBY ORDRED**  
**Y.O IDOWU (MRS) JUDGE**

Having gone through and considered the 5 paragraph affidavit of urgency as well as the Ex-parte application with the affidavit in support and Exhibits annexed.

Having listened to submission of learned Counsel for applicant, relief 1 for extension of time within which to apply for the Order of Mandamus is hereby granted.

Leave is granted to the applicant to apply to this Court for an Order of Mandamus as stipulated in the Motion paper. The processes are to be served on the Respondents.

Matter fixed for hearing on Tuesday, 6<sup>th</sup> December, 2011 upon evidence of service of the processes.

**DATED AT HIGH COURT NO.10,  
GENERAL CIVIL DIVISION, IKEJA.  
THIS 22<sup>ND</sup> NOVEMBER, 2011.**

S. O. SANUSI  
REGISTRAR

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**Freedom of Information Handbook for Law Clinics** has been written to provide a guide to law teachers, law students and other persons working in the Law Clinics, human rights, access to justice and governance projects and programmes in Nigeria.

The Handbook provides a basic text for the training of law teachers, students, supervisors and other actors on the use of the Freedom of Information Act. It includes a detailed curriculum and lessons on Freedom of Information.

Since this is an emerging subject with limited judicial intervention, few judicial decisions published on the website of the Right to Know- R2K have been included (with R2K's permission) in this volume.

The Handbook is written by experienced law clinicians in Nigeria. Teachers, students and other governance trainers and users will find this handbook very useful.

We thank the Open Society Foundation for supporting the publication of this book.