COMMENTARY ON NIGERIA'S FREEDOM OF INFORMATION ACT, 2011

BY

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DEDICATION

This booklet is dedicated to God and Humanity

ACKNOWLEDGEMENTS

I thank God, the Almighty, for giving me the opportunity to write this booklet. I also appreciate the contributions of Dr. Ayobami Ojebode of the Department of Communication and Language Arts, Faculty of Arts, University of Ibadan, Ibadan especially for the promptness with which he wrote the foreword. I equally appreciate Barrister Remi Alli for taking time, out of his pressing schedule, to read the manuscript and offer useful suggestions. I appreciate Mr. Daniel Egbetunde who did most of the typing.

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FOREWORD

It took well over ten years to pass the Freedom of Information bill into law in Nigeria. It also took the bill three journeys to the National Assembly. This was because the bill empowers Nigerians to ask critical questions and demand critical documents or information. The government of the time considered such a bill dangerous for a number of reasons. A freedom of information bill represents the age-long struggle between the press, citizens and civil society on the one hand and the government on the other, with the former trying to widen the circumference of government activities that should be made public and the latter trying to shrink the same.

After reviews and amendments, the bill was signed into law on 28 May, 2011 by the then president, Dr Goodluck Jonathan. Within one month of its being signed, Nigerians began to put the Act to use. It is instructive to note that the first set of people to apply the bill was not journalists.

The first use was by an organization known as the Social and Economic Rights Accountability Project (SERAP), which, citing the relevant sections of the Act, approached the governors of Enugu, Kaduna, Rivers and Oyo States demanding details of budget allocation and expenditure of their Universal Basic Education Commissions (UBEC), since 2005. When, two months after, the information was not supplied, the organization approached the courts citing the appropriate sections of the FOI law.

Other organisations followed. For instance, the Legal Defence and Assistance Project (LEDAP), citing the FOI Act, dragged to court the accountants-general of the 36 states of the federation, as well as the Auditor-General of Kwara State, for refusing to make available to it details of security votes allocated and released to the states from 2007 to 2011 (Maduabuchi, 2011). This was after the organization had allowed the waiting time to lapse. In August, 2011, another organization, the Nigeria Association for the Care and Resettlement of Offenders (NACRO), citing the FOI Act, approached the Ogun State government for information on the concessioning of government-owned Gateway Hotels.

In 2015, an organisation known as BudgIT approached the Office of the Secretary General to the Federation for details of expenditure on Independence Day

anniversaries under the Goodluck Jonathan administration. The Office of the SGF provided the details with figures falling far below those earlier flagged by some of the ex-president's critics.

The important question, however, is this: why are organisations, rather than individuals and journalists, at the forefront of the use of the FOI Act? There must be many reasons, the most influential of which must be that Nigerians are not even familiar with the provisions of the Act. In December 2011, the Department of Communication and Language Arts, University of Ibadan, working with the Institute for Media and Society and the African Languages Technology Initiative organized a public lecture on the FOI Act with the view to exposing journalists and the general public to its contents and use. The lecture was delivered by Mr Edet Ojo, Executive Director of Media Rights Agenda, the organization at the forefront of the FOI advocacy in Nigeria. Years after the lecture, there is still little use of the FOI Act by the ordinary Nigerians and journalists.

This is what calls for a book like this. This book, by Barrister Kehinde Adegbite, should fill this vacuum. It gives an overview of the Act and its 32 sections and then adds comments and explanations of the sections. The most important thing about this book is that it is free from legalese, the language of lawyers by lawyers for lawyers to lawyers and judges who themselves had been lawyers. After reading the book, one comes away with the conclusion that the FOI Act is a powerful tool which has been underutilized. It is not a perfect piece of legislation – and Barrister Adegbite makes this clear citing examples of the shortcomings of the law – yet it is such a potent tool for the growth of transparency in governance and our democracy in general.

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PREFACE

Corruption, abuse of power and bad leadership thrive where activities of government are shrouded in secrecy. One of the ways to eradicate all these ills in public life is through the institutionalization and enthronement of transparency and promotion of open governance. Prior to the passage of the Freedom of Information Act in Nigeria in 2011, releasing and accessing official information and public records were crimes. Almost every official information was classified as confidential and secret. People knew next to nothing about the affairs of government; rumours thrived and information disseminated by the news media was hardly believable. The FOI Act came to revolutionise this.

This booklet therefore focuses on Nigeria's Freedom of Information Act. As said earlier, transparency and accountability constitute one of the strongest antidotes against misgovernace, corruption, nepotism, and abuse of office. Without mincing words, this law is an extremely important legislation in the political and economic life of this nation. But one thing is to enact a good law; it is another thing to make the good law translate into tangible positive developments in the lives of the people. Awareness of any law also drives its implementation and this is the central purpose of this booklet. By throwing light on each section of the law, more and more people will become much more aware of their rights under this particular legislation and with time, the ills that the law aims to eradicate in our society will be overcome.

It is the hope of this writer that by this booklet more people will be empowered to make use of this law as it should. It is interesting to note that no educational requirement is demanded of anyone to request for information under the FOI Act. It is a law that may be used by journalists, the educated, the uneducated and general members of the public. A user does not need to disclose reason (s) for requesting for any information and a public official who wrongly refuses to release such information being requested for incurs the wrath of the law. For whatever reason, anyone may be interested to know how much it cost the government to construct a road or build a community clinic. All the person needs to do is to simply apply for such information, period! However, it will be noted that this law was passed by the National Assembly at the national level and the question is- is it binding on States? This question and many others are addressed in the comment that follows each

section of the Act. Notable national, local, and even international examples of cases of situations where applications have either been refused or granted are given where necessary.

If any defect or mistake is found in the booklet, the fault is entirely mine. As for the accolades and commendations that may come, I must concede that such must be shared by everybody who has played one role or the other to ensure that the booklet achieves what it sets out to accomplish from the beginning.

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COMMENTARY ON NIGERIA'S FREEDOM OF INFORMATION ACT, 2011

An Act to make public records and information more freely available, provide for public access to public records and information, protect public records and information to the extent consistent with the public interest and the protection of personal privacy, protect serving public officers from adverse consequences of disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and; for related matters.

Comment on the Long Title

The primary purpose of this law is to give the people of Nigeria and non-Nigerians residing in the country greater access to information and records officially held by their government so that the people will become involved in the process of governance. The right of the people to official information is one of the tenets of democracy and a veritable weapon to deter corrupt practices and arbitrary use of governmental powers[1]. The law, i.e. Freedom of Information Act (FOI Act), does not however fail to recognize the limits to people's right to know. Personal privacy is still protected to the point that public interest is not jeopardized.

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[1]. Stephen Harper stressed this point further in these words- *"Information 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*." The quote was extracted from M. Kadiri, "Implementing Nigeria's Freedom of Information Act 2011- The Journey So Far", available online at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0ahUKEwibg_69k_fJAhXEmQ4KHXGlD5cQFgguMAM&url=http%3A%2F%2Fr2knigeria.org%2Findex.php%2Fpublications%2Ffoi-assessments-reports%3Fdownload%3D82%3Aimplementing-nigeria-s-foi-act-2011-the-journey-so-far&usg=AFQjCNFM7ZYJ-rrWADRyBiyPdPjeu9G86g&cad=rja (visited last on 23rd November, 2015). The Supreme Court of India also in the case of **State of UP Vs. Raj Narain and Others** [(1975) 4 SCC 428 made this far-reaching pronouncement on the importance of public access to information held by the government: *"In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing."*

The FOI Act has a chequered history in Nigeria[2]. The push for the passage of this law started in Nigeria in 1999 but was not passed until 2011 when the former President, Dr. Goodluck Jonathan, assented to its bill in May, 2011. The idea behind this law is premised on the fact that the power exercised by any government actually belongs to the people and flowing from this, the people are entitled to be informed about the affairs of their government. This right of the people to know is exercisable through their ability to request for information and certain pieces of information to be freely made available to them.

Nigeria is not the first country to recognize the significance of this law through its enactment. As far back as 1766, Sweden, being the first country in the world to do that, passed her Freedom of Information Law and thereafter, many countries have followed suit. Now, about 90 countries have this law, while only ten of these countries are in Africa[3].

Nigeria is one country coming from the background of utmost secrecy in official information. A lot of laws is still in existence that forbid the release of publicly-held information. Prior to the passage of FOI Act, it was a serious challenge for media practitioners to access information, while researchers, civil society organisations and other people were no less encumbered by laws that prohibited access to official information and public records. Government business in Nigeria was shrouded in secrecy. For example, Nigerians wanted to know how much Governors collect as security votes as well as salaries of their national lawmakers, among others. But the question is- with the passage of the FOI Act in Nigeria, has the situation changed? As the common saying goes, *"old habits die hard"*. The situation has not radically changed. Legislation like Official Secrecy Act, Criminal Code, Penal Code, Evidence Act and Public Service Rules still exists. However, in the event of conflict between these laws and the FOI Act, the latter prevails. In spite of this, four years of the FOI Act in Nigeria have not been impressive; many

[2]. For a brief account of the history of the FOI Act in Nigeria, see A. Ojebode, "Nigeria's freedom of information act: Provisions, strengths, challenges ", published in African Communication Research, Vol. 4, No. 2, 2011, pp. 267-284.

[3]. Some of the African countries that have passed this law are South Africa, 2000; Liberia, 2010; Uganda, 2005; Ethiopia, 2008; and Zimbabwe, 2007.

public institutions and officials are yet to come to terms with the obligations imposed on them by the new law. Official information is still not largely available, even on request, while basic information that should be provided publicly without request is still held secret. One of the ways out of this debacle is for corporate bodies, civil society groups and individuals to continue to sensitise the public[4] concerning their right under this law and with time, implementation of the FOI Act will take roots in Nigeria, enhancing accountability and transparency in public life.

The debate on whether or not the law is binding on all States in Nigeria still remains unsettled as at now. The Nigerian Supreme Court is yet to lay the controversy to rest. There are conflicting decisions of High Courts on it. Some High Courts have ruled that the FOI Act is binding on States, while some others have ruled otherwise[5]. So far, only Ekiti State has replicated the law at State level and in many other States, the freedom to request for or to have access to official information is totally non-existent.

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

[4]. There is need to create greater awareness of the FoI Act among the people. *Ayodele Afolayan, in his paper, "A Critical Analysis of Freedom of Information Act in Nigeria", made this point clearly, "The success of implementation of the FIA is the co-responsibility of both the government ("supply side") and the governed ("demand-side"). The demand-side which includes the citizens, civil society and community organizations, media and the private sector must take responsibility for using the law as well as monitoring government efforts. The attitude of public administrators is critical to the successful implementation of the Act because public administrators, who are the face of government, will determine the quality of, and access to, information.", available online at https://odinakadotnet.wordpress.com/2012/08/01/a-critical-analysis-of-freedom-of-information-act-in-nigeria-2/ (visited last on 23rd November, 2015).*

[5]. For example, a Federal High Court sitting in Enugu had ruled that the FoI Act is binding on all States of the Federation, while another Federal High Court in Lagos ruled otherwise. See, Mohammed S., "Much ado about Freedom of Information Act", available online at http://www.dailytrust.com.ng/news/law/much-ado-about-freedom-of-information-act/76894.html (visited last on 23rd November, 2015). A State High Court in Ibadan had earlier ruled in 2013 that FoI Act was binding on all the States of the Federation just like ICPC Act. See, Sylvester U., "Court rules FoI Act as not binding on States", available online at http://dailypost.ng/2014/11/01/court-rules-foi-act-binding-states/ (24th November, 2015).

contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established.

(2) An applicant under this Act needs not demonstrate any specific interest in the information being applied for.

(3) Any person entitled to the right to information under this Act, shall have the right to institute proceedings in the Court to compel any public institution to comply with the provisions of this Act.

Comment on Section 1

This provision establishes the right of every person irrespective of the nationality, sex, age or social status of such individual to have access to official information or to request for official information i.e information held by a public institution in Nigeria or private body performing any public function. An application for official information may be made in writing or orally and if made orally, a public official to whom the application is made has a duty to reduce the oral application into a written application[6]. This right cannot be impeded by any law which restricts free flow of information. Even though the FOI Act does not repeal such official-information-impeding laws as Official Secret Act and Public Complaints Act, the provisions of the former prevail over them[7].

This means that at the point of requesting for any official information, any person making the request does not need to disclose the motive behind the request or the purpose for making the request. Therefore, any person can make request for information for any reason best known to him or her. This provision therefore means that the exercise of the right created under section 1(2) above is not predicated on any condition. In other words, it is an absolute right.

[6]. See, section 3 (4) of this law.

[7]. Ibid, section 1 (1)

This provision creates another right as a follow up to the right established in section 1(1) above. Simply put, this is a right to institute a court action in case a public institution does not supply the information being requested for. Since the enactment of the Act, many NGOs and civil liberty groups have made requests for information and where their requests are turned down, they have also approached courts for remedies. One of such instances was the action[8] instituted by the Legal Defence and Assistance Project (LEDAP) against the National Assembly consequent upon the request of LEDAP in which the former was asked to disclose money spent on and works done as constituency projects between 2011 and 2013. Curiously enough, the National Assembly did not disclose the requested information and LEDAP had to approach the court.

However, the fact that this law does not provide for administrative remedies may constitute some obstacles, especially in the case of an applicant whose main motive for applying for information is for personal consumption. If such person's application is refused, approaching a court of law for remedies may not appear inviting. It is therefore hoped that a future amendment will introduce an administrative remedy instead of instant resort to litigation.

Section 2

(1) A public institution shall ensure that it records and keeps information about all its activities, operations and businesses.

(2) A public institution shall ensure the proper organization and maintenance of all information in its custody in a manner that facilitates public access to such information.

(3) A public institution shall cause to be published in accordance with subsection (4) of this section, the following information –

[8]. Yinka A., "Freedom of Information Act: Successes and Setbacks", available at http://baralpha.com/2015/09/17/freedom-of-information-act-successes-setbacks/ (visited last on 22nd November, 2015).

(a) a description of the organization and responsibilities of the institution including details of the programmes and functions of each division, branch and department of the institution;

(b) a list of all -

(i) Classes of records under the control of the institution in sufficient detail to facilitate the exercise of the right to information under this Act, and

(ii) Manuals used by employees of the institution in administering or carrying out any of the programmes or activities of the institution;

(c) a description of documents containing final opinions including concurring and dissenting opinions as well as orders made in the adjudication of cases;

(d) documents containing -

(i) substantive rules of the institution

(ii) statements and interpretations of policy which have been adopted by the institution,

(iii) final planning policies, recommendations, and decisions;

(iv) factual reports, inspection reports, and studies whether prepared by or for the institution;

(v) information relating to the receipt or expenditure of public or other funds of the institution;

(vi) the names, salaries, titles and dates of employment of all employees and officers of the institution;

(vii) the right of the state, public institutions, or of any private person(s)

(viii) the name of every official and the final records of voting in all proceedings of the institution;

(e) a list of –

(i) files containing applications for any contract, permit, grants, licenses or agreements,

(ii) reports, documents, studies, or publications prepared by independent contractors for the institution, and

(iii) materials containing information relating to any grant or contract made by or between the institution and another public institution or private organization;

(f) the title and address of the appropriate officer of the institution to whom an application for information under this Act shall be sent, provided that the failure of any public institution to publish any information under this subsection shall not prejudicially affect the public's right of access to information in the custody of such public institution.

(4) A public institution shall ensure that information referred to in this section is widely disseminated and made readily available to members of the public through various means, including print, electronic and online sources, and at the offices of such public institutions.

(5) A public institution shall update and review information required to be published under this section periodically, and immediately whenever changes occur.

(6) A person entitled to the right of access conferred by this Act shall have the right to institute proceedings in the Court to compel any public institution to comply with the provisions of this section.

(7) Public institutions are 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.

Comment on Section 2

This section addresses four major issues:

1. It requires public institutions to keep their records and maintain such records in a way that will be easy for interested members of the public to have free access to them. It is a mandatory obligation.

2. It requires public institutions to publish basic information about their activities and organizational set-up e.g. the organogram of an institution, their functions, staff manuals, budget, names and other information concerning staff, and any reports. This is also a mandatory obligation.

3. It requires every public institution to designate an individual as a desk officer to whom an application for information may be directed. However, this measure may not be effective enough. The Act should have provided for a sanction against every institution that fails to carry out its obligations under this section.

4. Any member of the public may institute a legal action to compel a public institution that does not comply with the above obligations to do so.

Section 3

(1) *An application for access to a record or information under this Act shall be made in accordance with section 1 of this Act,*

(2) For the purpose of this Act, any information or record applied for under this Act that does not exist in print but can by regulation be produced from a machine, normally used by the government or public institution shall be deemed to be record under the control of the government or public institution.

(3) Illiterate or disabled applicants who by virtue of their illiteracy or disability are unable to make an application for access to information or record in accordance with the provisions of subsection (1) of this section, may make that application through a third party.

(4) An authorized official of a government or public institution to whom an applicant makes an oral application for information or record, shall reduce the application into writing in the manner prescribed under subsection (1) of

this section and shall provide a copy of the written application to the applicant.

Comment on Section 3

This section allows a third party to make an application for information on behalf of an illiterate or a disabled applicant. It also gives validity to oral application in the case of illiterate applicants. This provision reinforces the widespread opinion about this law as being user-friendly and a good piece of citizens' legislation.

However, a large percentage of Nigerians may not be able to take due advantage of this law as a result of illiteracy. For this section of the Nigerian people to be able to use it, the law must be translated into different Nigerian languages, while the government is also taking practical steps to increase access to quality education among the people.

Section 4

Where information is applied for under this Act, the public institution to which the application is made shall, subject to sections 6, 7, and 8 of this Act, within 7 days after the application is received-

(a) Make the information available to the applicant;
(b) Where the public institution considers that the application should be denied, the institution shall give written notice to the applicant that access to all or part of the information will not be granted, stating reasons for the denial, and the section of this Act under which the denial is made.

Comment on Section 4

This provision states that once application is made for information, a public officer to whom the application is directed must make the requested information available within (7) days of receiving the application and if the application is denied, he has to state reason(s) for the denial in writing within 7 days. This section[9] also recognizes two instances when the 7 days' time limit may not be met and these are (i) where documents needed are bulky in which case the time limit for response may be extended by another 7 days, and (ii) where consultations are necessary before complying with the request. In this case too, time may be extended by another 7 days. It should also be pointed out that an applicant has to bear the cost[10] of photocopying or transcripting requested information or records, if necessary.

An applicant is not expected to bear any other cost apart from this. It is however observed that 7 days' time limit for response appears to be a bit short. It is hoped that a future amendment of the Act will extend the response time-frame from 7 days to 14 days in the first place, while an additional extension of time by another 7 days will do. Ekiti State has taken care of this inadequacy in her own version of the Freedom of Information Law by making the time-frame to be 14 days[11], instead of 7 days.

Section 5

(1) Where a public institution receives an application for access to information, and the institution is of the view that another public institution has greater interest in the information, the institution to which the application is made may within 3 days but not later than 7 days after the application is received, transfer the application, and if necessary, the information, to the other public institution, in which case, the institution transferring the

[9]. This section should be read in conjunction with sections 6 and 8 of this law.

[10]. See, section 8.

[11]. See, section 5 (1) of the Freedom of Information Law, 2011.

application shall give written notice of the transfer to the applicant, which notice shall contain a statement informing the applicant that such decision to transfer the application can be reviewed by the Court.

(2) Where an application is transferred under subsection (1), the application shall be deemed to have been made to the public institution to which it was transferred on the day the public institution received it.

(3) For the purpose of subsection (1), a public institution has "a greater interest" in information if –

(a) the information was originally produced in or for the institution; or

(b) in the case of information not originally produced in or for the public institution, the institution was the first public institution to receive the information.

Comment on Section 5

This section will come into effect where, for instance, an application for information is made to Institution A and Institution A knows that Institution B is more closely connected to the information requested for than it, Institution A must transfer the request within 3 (three) days or at most 7 days of receiving the request to Institution B and duly inform the applicant in writing. Institution B will have 7 days to respond to the request.

An applicant who is dissatisfied with the transfer may approach a court of law for the review of the transfer. This is one of the instances where a provision for administrative remedy would have served a better purpose, instead of instantaneous resort to court.

Section 6

The public institution may extend the time limit set out in section 5 or section 6 in respect of an application for a time not exceeding 7 days if –

(a) The application is for a large number of records and meeting the original time limit would unreasonably interfere with the operations of the public institution; or

(b) Consultations are necessary to comply with the application that cannot reasonably be completed within the original time limit, by giving notice of the extension stating whether the extension falls under the circumstances set out in this section, which notice shall contain a statement that the applicant has a right to have the decision to extend the limit reviewed by the Court.

Comment on Section 6

This section addresses two circumstances when the time limit within which a public institution has a duty to supply the requested information may be extended by another 7 days.

i. If the record or information is voluminous;
ii. If a public institution needs to consult any authority before releasing the requested information.

However, a public institution must inform an applicant the basis for the extension.

Section 7

(1) *Where the government or public institution refuses to give access to a record or information applied for under this Act, or a part thereof, the institution shall state in the notice given to the applicant the grounds for the refusal, the specific provision of this 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.*

(2) A notification of denial of any application for information or records shall state the names, designation and signature, of each person responsible for the denial of such application.

(3) The government or public institution shall be required to indicate under subsection (1) of this section whether the information or record exists.

(4) Where the government or public institution fails to give access to information or record applied for under this Act or part thereof within the time limit set out in this Act, the institution shall, for the purposes of this Act, be deemed to have refused to give access.

(5) Where a case of wrongful denial of access is established, the defaulting officer or institution commits an offence and is liable on conviction to a fine of N500, 000

Comment on Section 7

Whenever a request for information is refused, an officer attending to such application must do the following:

i. he must, in a letter notifying the applicant of such denial, state the reasons justifiable by any section(s) of the Act for the denial.
ii. he must state his name, designation and sign a notice of such denial, including any other person who has any role to play in the denial.

If it is shown that an officer denying the application for information has wrongfully refused the application, he may be tried and prosecuted for an offence which carries a fine of ₦500,000, if found guilty.

This punishment appears to be too stringent, especially for an officer who may be carrying out instruction from a superior officer. Again, a fine of N500, 000 is too much in a country where an average civil servant hardly earns N500, 000 per annum.

Section 8

Fees shall be limited to standard charges for document duplication and Fees transcription where necessary.

Comment on Section 8

Every person requesting for information or records from a public body may be asked to pay a fee for the purpose of duplicating or transcripting the requested information. Unless the volume of documents is exceptionally large, cost of photocopying or transcripting is relatively affordable in Nigeria.

Section 9

(1) Every government or public institution shall ensure that it keeps every information or record about the institution's operations, personnel, activities and other relevant or related information or records.

(2) Every government or public institution shall ensure the proper organization and maintenance of all information or record in its custody, in a manner that facilitates public access to such information or record under this Act.

Comment on Section 9

This section is a repetition of section 2(1) & (2) already discussed in this booklet.

Section 10

It is a criminal offence punishable on conviction by the Court with a minimum of 1 year imprisonment for any officer or head of any government or public institution to which this Act applies to willfully destroy any records kept in his custody or attempt to doctor or otherwise alter same before they are released to any person, entity or community applying for it.

Comment on Section 10

This is the second offence created under this Act. The offence is committed in a situation where a public officer doctors/falsifies any information or records before releasing the same to the applicant. This offence carries a minimum punishment of 1 year imprisonment. There is no option of fine where such public officer is found guilty.

Section 11

(1) A public institution may deny an application for any information the disclosure of which may be injurious to the conduct of international Affairs and the defence of the Federal Republic of Nigeria.

(2) Notwithstanding subsection (1), an application for information shall not be denied where the public interest in disclosing the information outweighs whatever injury that disclosure would cause.

See, Comment on Section 19 Below

Section 12

(1) A public institution may deny an application for any information which contains-

(a) Records compiled by any public institution for administrative enforcement proceedings and by any law enforcement or correctional agency for law enforcement purposes or for internal matters of a public institution, but only to the extent that disclosure would-

(i) interfere with pending or actual and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency,

(ii) interfere with pending administrative enforcement proceedings conducted by any public institution,

(iii) deprive a person of a fair trial or an impartial hearing,

(iv) unavoidably disclose the identity of a confidential source,

(v) constitute an invasion of personal privacy under Section 15 of this Act, except, where the interest of the public would be better served by having such record being made available, this exemption to disclosure shall not apply, and

(vi) obstruct an ongoing criminal investigation

(b) information the disclosure of which could reasonably be expected to be injurious to the security of penal institutions.

(2) Notwithstanding anything contained in this section, an application for information shall not be denied where the public interest in disclosing the information outweighs whatever injury that disclosure would cause.

(3) A public institution may deny an application for information that could reasonably be expected to facilitate the commission of an offence.

(4) For the purposes of section (1) (a), "enforcement proceeding" means an investigation that –

(a) pertains to the administration or enforcement of any Act, law or regulation;

(b) is authorized by or pursuant to any Act, law or regulation.

See, Comment on Section 19 Below

Section 13

Every government or public institution must ensure the provision of appropriate training for its officials on the public's right to access information or records held by government or public institutions, as provided for in this Act and for the effective implementation of this Act.

Comment on Section 13

This section mandates government and public institution to train their officials in order to enhance the effective implementation of this Act. This envisages that such training will equally increase public awareness of every person's right to have access to publicly held information and records.

Section 14

(1) Subject to subsection (2), a public institution must deny an application for information that contains personal information and information exempted under this subsection includes-

(a) files and personal information maintained with respect to clients, parties residents, students, or other individuals receiving social, medical, educational, vocational, financial, supervisory or custodial care or services directly or indirectly from public institutions;

(b) personnel files and personal information maintained with respect to employees appointees or elected officials of any public institution or applicants for such positions;

(c) files and personal information maintained with respect to any applicant, registrant or licensee by any government or public institution cooperating with or engaged in professional or occupational registration, licensure or discipline;

(d) information required of any tax payer in connection with the assessment or collection of any tax unless 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.

(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.

(3) 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 request for disclosure is made shall disclose such information subject to section 14(2) of this Act.

See, Comment on Section 19 Below

Section 15

(1) A public institution shall deny an application for information that contains-

(a) trade secret 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 interest 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 be 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.

(2) A public institution shall notwithstanding subsection (1) 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.

(3) Where public institution discloses information, or part of thereof, that contains the result of a product or environmental testing, the institution shall at the same time as the information of part thereof is disclosed provide the applicant with a written explanation of the methods used in conducting test.

(4) A public institution shall disclose any information describe in subsection (1) of this section if that disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in the disclosure clearly outweigh in importance any financial loss or gain to or prejudice to the competitive position of or interference with contractual or other negotiation of a third party.

See, Comment on Section 19 Below

Section 16

A public institution may deny an application for information that is subject to the following privileges-

(a) legal practitioner- client privilege;

(b) health workers- client privilege;

(c) journalism confidentiality privileges; and

(d) any other professional privileges conferred by an Act.

Section 17

A public institution may deny an application for information which contains course or research materials prepared by faculty members.

See, Comment on Section 19 Below

Section 18

Notwithstanding any other provision of this Act, where an application is made to a public institution for information which is exempted from disclosure by virtue of this Act, the institution shall disclose any part of the information that virtue does not contain such exempted information.

Comment on Section 18

This section enjoins any institution to which an application for the disclosure of any information has been made to severe any part of such information from the rest which by this is exempted from being disclosed. So, in essence, instead of a

wholesale denial, an institution may disclose any part of official information or records which is permitted by the law to be so disclosed.

Section 19

(1) A public institution may deny an application for information that contains information pertaining to-

(a) test questions, scoring keys and other examination data used to administer an academic examination or determine the qualification of an application for a license or employment;

(b) architects' and engineers' plans for building not constructed in whole or in part with public funds and for buildings constructed with public funds, to the extent that disclosure would compromise security; and

(c) library circulation and other records identifying library users with specific materials;

(2) Notwithstanding anything contained in this section, an application for information shall not be denied where the public interest in disclosing the information outweighs whatever injury that disclosure would cause.

Comments on Sections 11, 12, 14, 15, 16, 17, 19, and 26

A list of above sections makes a total of eight (8) sections in the law which may be regarded as classified because requests for disclosure in respect of such information may not be granted unless (i) it is in the public interest to disclose such information, (ii) consent is given as in the case of information bordering on an individual and such individual gives his or her consent to the release of the information requested for falls, and (iii) a court of law orders for their disclosure.

A Human Rights organization in Port Harcourt, Rivers State, once applied to the University of Port Harcourt for the disclosure of the details of the former

President of Nigeria, Dr. Goodluck Jonathan's PhD degree in the school[12] but the application was refused. The basis of the refusal was that such information being requested fell under personal information that cannot be publicly disclosed. Even though a request for disclosure of this kind of information may be refused if it is such that relates to an individual's medical records or that discloses privileged communication between a lawyer and a client, it is argued that information concerning a leader's academic records should not be exempted from being disclosed. It should be disclosed as it is in the public interest to do so. The President claimed to have the degree and therefore, the citizens are entitled to verify it through a request for its disclosure because if it is revealed that the President does not have what he claims he possesses, it undermines his integrity and robs him of entitlement to be a nation's leader.

If a leader's academic records cannot be disclosed, can a leader's asset declaration with the Code of Conduct Bureau be made public? This is the issue Nigerians have had to contend with the presidency of Mr. Muhammed Buhari who, during the electioneering campaign before March 28, 2015, promised the people that he would declare his assets publicly, following the example of one of the late former Presidents of the country, Alhaji Musa Yara'dua. However, upon his ascension to the presidency, he only declared his assets to the Bureau; it took him months, after unrelenting demands by civil society organisations and other Nigerians urging him to keep his promise, to make his declared assets publicly.

Another ground on which a request for information may be refused is if the information being requested for falls into the category of such that should ordinarily be disclosed by a public institution in the first place, even without any request[13].

[12]. Ben E., "UNIPORT Hides Jonathan's doctorate details", available online at http://www.premiumtimesng.com/news/headlines/178796-uniport-hides-jonathans-doctorate-details.html (visited last on 23rd November, 2015).

[13]. See, section 26 of the Act.

Section 20

Any applicant who has been denied access to information, or a apart 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.

Comment on Section 20

This establishes the right of any person whose application for information has been denied to approach a court of law for the review of such denial within 30 days when the denial is communicated. This period of 30 days within which an applicant may apply to court can also be extended by a court, if necessary.

It should be noted that any failure on the part of an applicant to approach the court within a period of 3 months after denial may rob such applicant the right to any remedy because the law which shields public officers from legal liability three months after the doing of any official action is still in force.

Section 21

An application made under section 20 shall be heard and determined summarily.

Comment on Section 21

This provision is meant to ensure that court actions arising under this law are resolved expeditiously. In spite of this provision, litigations on this law may still drag for years, especially where there is an appeal.

Section 22

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

Comment on Section 22

This section gives courts uninhibited access to information which may arise where a court would need to decide where information being requested by a party from a public institution is a type that could be disclosed publicly or not.

Section 23

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

Comment on Section 23

A court proceeding may be conducted in camera to prevent careless disclosure of official information.

Section 24

In any proceeding before the Court arising from an application under section 20, 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 concerned.

Comment on Section 24

Even though, in most cases it is likely that an applicant whose application has been denied will approach a court for remedy, it is the respondent (i.e a public officer/institution) who denies the requested information that bears a duty to prove in court whether the denial is justified under any provision or circumstance in line with the Act.

Section 25

(1) Where a public institution denies an application for information, or a part thereof on the basis of a provision of this Act, the Court shall order the institution to disclose the information or part thereof to the applicant-

(a) if the Court determined that the institution is not authorized to deny the application for information;

(b) where the institution is so authorized, but the Court nevertheless determines that the institution does not have reasonable grounds on which to deny the application; or

(c) where the Court makes a finding that the interest of the public in having the record being made available is greater and more vital than the interest being served if the application is denied, in whatever circumstance.

(2) Any order the Court makes in pursuance of this section may be made subject to such conditions as the Court deems appropriate.

Comment on Section 25

This establishes the power of a court of law to order a public institution to disclose any information being requested for in appropriate circumstances.

Section 26

This Act does not apply to-

(a) published material or material available for purchase by the public;
(b) library or museum material made or acquired and preserved solely for public reference or exhibition purposes; or
(c) material placed in the National Library, National Museum or non- public section of the National Archives of the Federal Republic of Nigeria on behalf of any person or organization other than a government or public institution.

Comment on Section 26[14]

The right of access to information which this Act establishes is not applicable to information which is already available in public domain e.g. in newspapers or public libraries.

Section 27

(1) Notwithstanding anything contained in the Criminal Code, Penal Code, the Official Secrets Act, or any other enactment, no civil or criminal proceedings shall lie against an officer of any public institution, or against any person acting on behalf of a public institution, and no proceedings shall lie against

[14]. For more on this, see comment on section 19 above.

such persons thereof, for the disclosure in good faith of any information, or any part thereof pursuant to this Act, for any consequences that flow from that disclosure, or for the failure to give any notice required under this Act, if care is taken to give the required notice.

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

(b) mismanagement, gross waste of funds, fraud, and abuse of authority; or

(c) a substantial and specific danger to public health or safety notwithstanding that such information was not disclosed pursuant to the provision of this Act.

(3) No civil or criminal proceeding shall lie against any person receiving the information or further disclosing it.

Comment on Section 27

This section offers protection to two types of person.

i. It protects public official who disclose official information from any source of criminal prosecution or civil liability as contrary to penal sanctions contained in pre-existing laws such as the criminal code, official secret Act and others. This has been referred to as the Whistleblowers' Protection.

   However, this protection does not appear to be enough because it does not prohibit the imposition of administrative sanctions such as a dismissal or suspension against such a public officer as contained in the Public Service Rules[15].

ii. It protects any member of the public who receives such unauthorized disclose information from any criminal or civil liabilities.

[15]. See, Rules 030401 and 030421 of the Public Service, 2013, Vol 1.

Section 28

(1) The fact that any information in the custody of a public institution is kept by that institution under security classification or is classified document within the meaning of the Official Secrets Act does not preclude it from being disclosed pursuant to an application for disclosure thereof under the provisions of this Act, but in every case the public institution to which the application is made shall decide whether such information is of a type referred to in Sections 11, 12, 14, 15, 16, 17, 19, 20 or 21 of this Act.

(2) If the public institution to which the application in subsection (1) is made decides that such information is not a type mentioned in the sections referred to in subsection (1), access to such information shall be given to the applicant.

(3) If the public institution, to which the application mentioned in subsection (1) is made, decides that such information is of a type mentioned in sections referred to in subsection (1), it shall give notice to the applicant.

Comment on Section 28

Documents already labeled as "classified documents" under the Official Secret Act may still be disclosed as long as they do not fall under the class of information offered protection under this Act.

Section 29

(1) On or before February 1 of each year, each public institution shall submit to the Attorney-General of the Federation a report which shall cover the preceding fiscal year and which shall include-

(a) the numbers of determinations made by the public institution not to comply with application made to such public institutions and the reasons for such determinations;

(b) the numbers of appeals made by persons under this Act, and the reason for the action upon each appeal that results in a denial of information;

(c) a description of whether the Court has upheld the decision of the public institution to withhold information under such circumstances and a concise description of the scope of any information withheld;

(d) the number of applications for information pending before the public institution as of October 31 of the preceding year and the median number of days that such application had been pending before the public institution as of that date;

(e) the number or applications for information received by the public institution and the number of applications which the public institution processed;

(f) the median number of days taken by the public institution to process such applications; and

(g) the total amount of fees collected by the public institution to process such applications; and

(h) the number of full-time staff of the public institution devoted to processing applications for information, and the total amount expended by the public institution for processing such applications.

(2) Each public institution shall make such report available to the public, among other means, by computer and telecommunications, or if computer and telecommunications means have not been established by the government or public institution, by other electronic means.

(3) The Attorney-General shall make each report, which has been submitted to him, available to the public in hard copies, online and also at single electronic access point.

(4) The Attorney-General shall 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 each such report is issued, of the existence of such report and make it available to them in hard copies as well as by electronic means.

(5) The Attorney-General shall develop reporting and performance guidelines in connection with reports required by this section and may establish additional requirements for such reports as the Attorney-General determines may be useful.

(6) The Attorney-General shall in his oversight responsibility under this Act ensure that all institutions to which this Act applies comply with the provisions of the Act.

(7) The Attorney-General shall submit to the National Assembly an annual report on or before April 1 each year which shall include for the prior calendar year a listing of the member of cases arising under this Act, the exemption involved in each case, the disposition of such cases, and the cost, fees, and penalties assessed.

(8) Such reports shall include detailed description of the efforts taken by the Ministry of Justice to encourage all government or public institutions to comply with this Act.

(9) For purpose of this section, the term-

(a) "government" includes any executive department, military department, government corporation, government controlled corporation, or other established in the executive branch of the government (including the

Executive Office of the President), or any other arm of government agency or public institution; and

(b) "information" means any term used in this Act in reference to information or record which includes any information that would be held by a government or public institution and information subject to the requirement of this Act, when maintained by any public institution in any format, including electronic format.

Comment on Section 29

The section essentially aims to achieve compliance among public institutions and in order to achieve that purpose, it spells out obligations to be performed by public bodies by ensuring that certain annual reports are made to the Attorney-General of the Federation.

Section 30

(1) This Act is intended to compliment and not replace the existing procedures for access to public records and information and is not intended to limit in any way access to those types of officials information that have been normally available to the general public.

(2) 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 otherwise exempted by this Act.

Comment on Section 30

This section re-emphasises the main objective of this law which is to facilitate greater access to public information and records and to ensure that this law takes precedence over any law that may tend to limit this objective.

Section 31

In this Act –

"applicant" refers to any person who applies for information under this Act;

"application" refers to any request for information made under this Act;

"Courts" means a High Court or Federal High Court respectively.

"Foreign State" means any State other than the Federal Republic of Nigeria;

"Information" includes all records, documents and information stored in whatever form including written, electronic, visual image, sound, audio recording, etc.

"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;

"Public record or document" means a record in any form having been prepared, or having been or being used, received , possessed or under the control of any public or private bodies relating to matters of public interest and includes any-

(a) writing on any material;

(b) information recorded or stored or other devices; and any material subsequently derived from information so recorded or stored;

(c) label marking, or other writing that identifies or describes anything of which it forms part, or to which it is attached by any means;

(d) book, card, form, map, graph, or drawing,

(e) photograph, film, negative, microfilm, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment);

"Minister" means the Minister charged with responsibility of information;

"Personal information" means any official information held about an identifiable person, but not includes information that bears on the public duties of public employees and officials.

Comment on Section 31

This section is technically referred to as "the Interpretation Section". It defines certain key words in the Act and it is whatever meaning given to such words under this section that actually determines their usage and connotation. Words and phrases like "public institutions", "official information", and "Minister" are defined. However, some other important words are left out. For example, "public interest", and "judicial review" are not defined under this section. The two words/phrases need to be clearly defined so that the court will be properly guided in interpreting the law.

Section 32

This Act may be cited as the Freedom of Information Act, 2011.

Comment on Section 32

This is the name of this law, that is, **"The Freedom of Information Act, 2011"**.

GENERAL COMMENTS

As good as this law is, it fails to define the scope of its applicability. It is clear that the law is binding on the Federal Government and all its ministries, departments and agencies (MDAs) but it remains unclear whether it applies to State and Local Governments.

It is however the view of this author that the drafters of this law do not intend that it will be binding on State and Local Governments. For instance, under section 29 of the Act, States' Attorney-Generals are not mentioned at all. This would not have been the case, if the law was intended to apply across the federation. In the light of laudable objective of this law, it is hereby suggested that civil society groups may have to intensify efforts so as to ensure that other levels of government replicate the law accordingly.

Although the business of government was shrouded in secrecy prior to the signing of the FOI Act, it could not be said that there was no a single legislation in Nigeria which encouraged transparency and accountability in government. The major challenge was lack of implementation. With the passage of the FOI Act, it is hoped that other legislation like Public Procurement Act, Fiscal Responsibility Act, National Inland Waterways Authority Act, National Archives Act, Consumer Protection Act, and Environment Impact Assessment Act will be activated by interested members of the public.

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COMMENTARY ON NIGERIA'S FREEDOM OF INFORMATION ACT, 2011

This booklet aims to explain the Nigerian Freedom of Information Act so that every reader can read it with understanding. It is a companion, most especially for non-lawyers who may, without such explanatory notes, find some sections a bit difficult to understand.

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