

IMPLEMENTING NIGERIA'S FREEDOM OF INFORMATION ACT 2011- The Journey So Far

A report on the level of awareness, compliance and implementation of the Freedom of Information Act, 2011, 18 months after its enactment

Stephen Harper as Canadian opposition leader wrote in 2005: "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 weight of this truth is felt even more acutely in underdeveloped nations where corruption and secrecy is the rule rather than the exception. Nigeria is such a nation. The crucial need to ensure that public institutions in the country adopt a governance process that is accountable, transparent and responsive to the Nigeria people is one reason why, after going through three Parliamentary Sessions over a period of more than 11 years, civil society organisations and the media were thrilled at the signing into law of the Freedom of Information Act, in May 2011 by President Goodluck Jonathan.

More than simply reduce the risk of obtaining and releasing information held by government and public institutions, the Act gives citizens the opportunity to participate in governance, hold government accountable and enable them obtain information as a fundamental human right which in turn actuates the exercise of other rights like the right to healthcare, a safe environment and basic education among others.

Specifically, the Freedom of Information Act, 2011, (FOIA), amends sections of the Official Secrets Act, 1911 which impedes "the right of any person to access information which is in the custody or possession of any public official, agency or institution." It effectively ensures that access to public information is granted to anyone irrespective of age, race, status or gender, without having to give a reason for wanting such information. It sets a limit of 7 days for response to access requests, criminalises the destruction of records, mandates public institutions to proactively disclose information within its custody and protects whistle blowers in public service who release in good faith any information pursuant to the FOIA, especially when there is a failure of public duty, abuse of power, mismanagement of public resources or corruption.

Signing a freedom of information legislation however is not enough to guarantee an open and accountable governance process. What are the gains of this landmark piece of legislation eighteen (18) months after?

This report seeks to evaluate a few sample cases to demonstrate the level of utilization of the FOIA by citizens, compliance of public institutions with the FOIA as well as the general attitude of public institutions to requests for access to information since the passage of the FOIA. The report evaluates key areas of demand for access to information pursuant to the FOIA, proactive disclosure and record keeping by public institutions as well as observance by public institutions of the statutory reporting obligations under the FOIA. The report also

critically examines the annual FOIA compliance reports submitted to the Attorney General in 2012 by public institutions.

To begin, it is worthy of note that a little under a year after the FOIA came into operation on March 15, 2012, the Attorney General of the Federation, Mohammed Bello Adoke SAN CFR, whose statutory mandate it is to coordinate FOIA compliance by public institutions, issued and circulated the “Guidelines On The Implementation of the Freedom of Information Act, 2011”, for ‘clearer implementation of the Freedom of Information Act 2011 and to aid the understanding and application of the FOIA by public institutions. The foreword to the guidelines also stated that ‘the FOIA is not solely concerned with responding to requests for information. It also requires that all public institutions shall organize their records in a manner that makes them accessible to the public as well as publishing information using multimedia formats (i.e. print, electronic and online)’.

Worthy of note is that, with this legislation in force the era of official secrecy backed by law is effectively over. However the value of a law can only be seen when it is tested. Again, a law can only be tested by citizens who are aware of their rights under the law.

Over the last 18 months since the law was passed Right to Know (R2K), Nigeria has engaged with public institutions, civil society groups, the relevant Committees in Parliament and the media in intensive sensitization trainings, workshops, and the development of educational materials that expound the provisions of the FOIA. R2K has also translated the FOIA into the three major Nigerian languages.

One major issue that stood out in all of these trainings and engagements is that a lot still needs to be done with regards to creating more awareness about the Act. For instance most public institutions have not established the mandatory FOI units as stated by the law to deal with requests, neither were budgetary provisions made in the 2012 budget by public institutions for effective implementation. Perhaps the most basic, yet baffling, irregularity is that at the time of this publication, the Ministry of Information, saddled with the responsibility of making laws available in print has not produced an official gazetted copy of the FOI Act. This clearly presents a problem, as unsuspecting persons have fallen prey to profiteers and street vendors who print wrong versions of the FOIA for sale.

In an attempt to evaluate the progress or otherwise since the passage of the FOI Act, this report limits its evaluation to the following areas:

- **The demand for access to information**
- **The response of public institutions to requests for access to information**
- **Proactive disclosure of information by public institutions**
- **Record Keeping by public institutions**
- **Statutory reporting obligations by public institutions**

THE DEMAND FOR ACCESS TO INFORMATION

While there is still considerably widespread ignorance about the FOIA among many in Nigeria, there has been an encouraging increase in the number of individuals and organisations demanding for information pursuant to the provisions of the Act. On its website alone, R2K has through media reports have been able to monitor over 15 FOI requests made by individuals, media organisations and civil society organisations, with majority of these request ending in lawsuits. The very first reported lawsuit being the case instituted by the Committee for the Defence of Human Rights (CDHR) against the Economic and Financial Crimes Commission (EFCC) in August 2011 in Abuja, seeking an order to compel EFCC to provide information substantiating an allegation made against it.

In at least one of those law suits, instituted by the Legal Defence and Assistance Project (LEDAP), the court issued an order to grant access to the information requested by the plaintiffs. At the instance of LEDAP, Justice B. B. Aliyu of the Federal High Court, in Abuja, ordered the Clerk of the National Assembly to release details of the salaries, emoluments and allowances that were collected by national legislators between 2007 and 2011. There are perhaps much more that have not been reported or publicised.

R2K itself has made several requests to public institutions for information pursuant to the Act. In June 2012, R2K made a request for a copy of air crash investigation reports not currently available on the Accident Investigation Bureau Official Website. Also, in seeking to test and evaluate the implementation of the Act, R2K made requests to Ministries, Departments and Agencies of government for copies of their statutory FOI reports as mandated by the FOIA in section 29 (1) which provides that on or before February 1 each year, every public institution must submit to the Attorney-General of the Federation a report on the Institutions implementation of and compliance with the FOIA covering the preceding fiscal year. There were also requests made to the Attorney General for copies of all the annual FOI compliance reports that have been submitted to that office and a copy of the annual report submitted by the Attorney General to the National Assembly pursuant to the sections 29 (7) and (8) of the FOIA. An analysis of the Attorney General's report is captured in this report 'Statutory Reporting Obligations of Public Institutions'.

As public awareness of the FOIA grows so will requests for information pursuant to the Act. This growing demand is healthy for open and democratic government as it helps to ensure first, that the information sort for is required to ensure a meaningful participation of citizens in the democratic process, and that bureaucrats and politicians remain accountable to the citizenry.

THE RESPONSE OF PUBLIC INSTITUTIONS TO REQUESTS FOR ACCESS TO INFORMATIONS

There have been varied reactions by public institutions to requests for access to information that range from outright and unsubstantiated refusal to delays in granting requests.

In one such extreme situation, Daily Trust Newspapers on July 31, 2012 reported that Nigerian National Petroleum Corporation (NNPC), denied a request made by Daily Trust Newspapers through its Secretary and Legal Adviser, Anthony Madichie, who wrote back to Daily Trust, stating that the corporation was not bound by the FOI Act, as it was not a statutory corporation. However after media scrutiny and pressure the NNPC eventually pledged its commitment to abide by the provisions of the Freedom of Information Act.

Other refusals have led to the institution of legal proceedings to compel public institutions to grant requests for access to information. In January 2012, two civil society groups, Socio-Economic Rights and Accountability Project (SERAP) and Women Advocates Research and Documentation Center (WARDC) sued the governor of the Central Bank of Nigeria (CBN), Mr Sanusi Lamido over a failure to release information and documents on the authorization by the CBN of over N1.26 trillion as subsidy for 2011 after the statutory period for granting requests.

Perhaps the most successful so far, as mentioned previously, is the case of LEDAP v Clerk of the National Assembly (2012) where on June 25, 2012, Hon Justice B.B. Aliyu ordered the Clerk of the National Assembly to release to the Legal Defence and Assistance Project (LEDAP), details of the salaries, emoluments and allowances that were collected by national legislators between 2007 and 2011. The National Assembly has since brought a notice of appeal before the court, seeking a stay of execution of the court's order.

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

While ignoring requests for access to information seems pervasive, it is also fair to note that some public institutions respond to requests, albeit many times beyond the statutory 7-day limit for responding to requests. R2K's request to the Attorney-General of the Federation referred to earlier was responded to and granted. Although it took over a month (on July 12, 2012) to receive the response to R2K's letter dated June 7, 2012 the date of the Attorney-General's response- June 13, 2012- at least showed an attempt to comply with the statutory time limit of seven (7) days for responding to requests.

The following public institutions have, although not within the statutory period, granted either partial or full access to requests for information made by R2K:

- National Sports Commission
- Federal Ministry of Police Affairs
- Federal Ministry of Power
- Federal Ministry of Water Resources
- Federal Ministry of Agriculture and Rural Development
- Office of the Attorney General of the Federation

It remains to be seen how much court decisions in favour of granting access to information will affect the general attitude of public institutions toward complying with this aspect of the

Act. While the testing of the FOIA in our courts may be good for precedence and interpretation of the Act, it seems to make more sense for public institutions to have the will to comply with the clear provisions of the FOIA. Open and transparent governance is not enhanced when citizens feel that they need to resort to the long and onerous path of litigation before they are able to obtain information from public institutions. Apart from the length of time it would take for litigations and appeals, there is also the considerable expense of the entire legal process- from the High Courts to the Court of Appeal and Supreme Court- the monetary implication which may be far beyond the reach of many ordinary Nigerians. This will discourage citizens from making requests under the FOIA. Surely, the easier and more beneficial option, for government and citizens, would be for public institutions and government to have the will to comply with the provisions of the FOIA without being forced to do so by the courts.

PROACTIVE DISCLOSURE OF INFORMATION BY PUBLIC INSTITUTIONS

Beyond responding to requests for access to information, the FOIA mandates public institutions to publish extensive information about their operations and structure. Section 2 (3) goes into considerable detail to state what information public institutions must proactively disclose as a matter of course. Section 2 (4), states the categories of information that should be disclosed and notes that these information must be made available to the public through various means including print, electronic and online sources and at the offices of such public institutions. There is currently no public institution in Nigeria that has fully complied with this provisions which includes publishing *not* just a description of the organization and responsibilities of the institution but also documents containing planning policies, names, salaries and titles of employees, applications for contracts, permits, grants, licenses and the title and address of the institutions FOI officer. There are about 40 classes of information under Section 2 (3).

Many public institutions have websites that do not have much information beyond two or three classes of information. In fact in the case of LEDAP v Clerk of The National Assembly the National Assembly which passed the FOI law has taken a step further to challenge the Federal High Court decision that mandated them to respond to requests for information about salaries and emoluments which under Section 2 (3) should be proactively disclosed.

Public institutions need to realize the immense benefits of the proactive disclosure provisions as it potentially seeks to reduce the volume of requests they need to deal with. When information regarding the activities of an institution is already proactively disclosed, it boosts the confidence and trust of citizens in government and governance.

It seems safe to assume that any public institution that fully complies with Section 2 (3), (4) and (5) will hardly need to spend any time dealing with requests.

RECORD KEEPING BY PUBLIC INSTITUTIONS

A visit to the record section in a public institution in Nigeria portrays a picture of how difficult it will be to obtain basic information. Information and records in many public institutions are still paper based and tied up in bundles of stacks of files. Few public institutions have computerized all these documents. Consequently it is routinely impossible, given this challenge of record keeping for even the most well-intentioned of institutions to meet up with the 7 day limit for responding to requests.

The proper keeping of records goes to the heart of the FOIA, for it is on this basis that public institutions can provide information requested of them or proactively publish information as statutorily mandated.

Even where a requester is successful in court, a court order cannot produce a record that does not exist. Recently at a workshop with one public institution R2K learnt of a dangerous practice in the public service of destroying certain documents after a period of seven years. If those reports are accurate, it goes contrary to Section 10 of the FOIA which criminalizes willful destruction of any records, making it punishable by at least 1 year imprisonment.

Section 9 mandates government or public institutions to not only keep records but to ensure proper organization and maintenance of all information and records in its custody, in a manner that facilitates access to such records.

Public institutions have a long way to go in complying with this section. Institutions that have not yet computerized all their operations need to do so immediately together with proper archiving and cataloguing for ease of access.

Record keeping is crucial to institutional memory and to continuity in governance as citizens can only evaluate government and its policies when records exist.

STATUTORY REPORTING OBLIGATIONS BY PUBLIC INSTITUTIONS

As a way of appraising the level of compliance and implementation of the FOIA, the Act provides for a reporting mechanism where public institutions are mandated to submit reports on its level of compliance with the provisions of the Act to the Attorney General, thus making the Attorney General central to FOI compliance by public institutions. The role of the Attorney-General stated in detail in Section 29, includes receiving yearly comprehensive reports on the status of how public institutions have implemented the provisions of the law.

Furthermore, section 29 (3), mandates the Attorney General to '*make **each report** which has been submitted to him, available to the public in hard copies, online and also at a single electronic access point*' (Emphasis ours). Section 29 (5) allows the Attorney General to develop performance guidelines in connection with the reports and to establish additional requirements for the reports as may be considered useful. Section 29 (3) is the first level of disclosure the Attorney General is mandated to make under section 29.

The FOIA in section 29(7), mandates the Attorney General to make a second level of disclosure of FOI reports of public institutions, namely, the submission *'to the National Assembly an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of cases arising under th[e] Act, the exemption involved in each case, the disposition of such cases and the cost fees and penalties assessed'*. This report according to Section 29 (8) *'shall also include a detailed description of the efforts taken by the Ministry of Justice to encourage all government or public institutions to comply with th[e] Act'*.

R2K between April and June 2012 made requests to the Attorney General for access to these compliance reports. The annual compliance reports provided by the Attorney General of the Federation show that of all the Ministries, Departments and Agencies in Nigeria, only the following 23 submitted annual compliance reports:

1. Ministry of Police Affairs.
2. Ministry of Mines and Steel
3. National Planning Commission
4. Federal Ministry of Justice
5. Federal Ministry of Environment
6. Nigerian Law Reform Commission
7. Federal Ministry of Power
8. Federal Ministry of Communication
9. Federal Ministry of Information
10. Federal Ministry of Works
11. Office of the Secretary to the Government of the Federation
12. Legal Aid Council
13. Nigerian Copyright Commission
14. Federal Ministry of Tourism, Culture and National Orientation
15. Federal Ministry of Transport
16. Federal Ministry of Lands Housing and Urban Development
17. Federal Ministry of Youth Development
18. National Drug Law Enforcement Agency
19. National Agency for Prohibition of Traffic in Persons
20. Federal Ministry of Aviation
21. Federal Ministry of Health
22. Nigeria Football Federation

Of all these public institutions, only 11 have staff designated to handle FOI requests. In all, 8 requests were reported, some reports taking as much as 20 days to respond to.

This report paints a less than acceptable picture of the state of FOIA compliance in public institutions, 18 months after the enactment of the law.

It is important that public institutions need to take more seriously their obligations under the FOIA, understanding that their actions affect open democracy and governance and infringes on the citizens right to know. As an open and accountable government works well for everyone, because government is better able to deliver development to the citizens in an atmosphere of trust and confidence.

Specifically, public institutions need to:

1. Respond to requests for access to information within the 7 days stipulated by section 4 of the FOIA.
2. Comply with Section 2 by proactively disclosing all the classes of information mandated by the FOIA, ensuring that such information is widely disseminated through print electronic and online sources.
3. Create websites that proactively disclose information
4. Update websites, electronic and print materials in line with section 2 (5) reflecting changes in the institution immediately those changes occur.
5. Computerize operations and create a system of properly managing records for ease of access.
6. Ensure that there is no destruction of records however old.
7. Create FOI units and provide FOI training and capacity for staff especially those who will handle FOI requests, if they have not already done so.
8. Submit to the Attorney General annual an FOI compliance reports in line with section 29 (1) of the Act.
9. Publish the annual compliance report submitted to the Attorney General in line with Section 29 (2).

The Attorney-General needs to:

1. Ensure that public institutions are aware of their obligations under the FOIA
2. Proactively publish reports made available to the Office of the Attorney General in line with section 29 (3).
3. Ensure that public institutions comply with the provisions of the FOIA in line with section 29 (6) by setting up a compliance evaluation and enforcement mechanism for public institutions.

Citizens need to:

1. Better acquaint themselves with the contents of the FOIA especially as regard their right to access information, understanding that this is linked to their responsibility to both constitute government and hold it accountable.
2. Be free to make requests to any public institutions for information pursuant to the FOIA.

R2K on its part remains committed to advocating for public access to information, and will keep partnering with government and public institutions in a bid to building capacity of staff

of public institutions to better comply with the FOIA, and sensitize the public about their obligations and rights under the FOIA with the ultimate goal of ensuring citizen participation in governance.