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- October 2011 -

By

Right to Information Initiative (R2K)

Madam Chairperson, Honourable Commissioners, Distinguished Ladies and Gentlemen,

Right to information Initiative, also known as Right to Know (R2K) Nigeria, thanks the Chairperson and Honourable Members of the African Commission on Human and Peoples Rights for granting the Right to Information Initiative with observer status at the 49th Ordinary session of the Commission in Banjul, The Gambia in April/May 2011.

Right to Information Initiative wishes to respond to the Nigeria Country report for the period between 2008 -2010 with particular focus on the component of the report dealing with Article 9 of the African Charter on Human and Peoples Rights, which encapsulates the Right to Information.

The Nigeria Report makes very little reference in relation to Article 9 of the Charter, for the period of years immediately preceding the eventual enactment of the Nigerian Freedom of Information Act in May, 2011. Although the right to information is enshrined under Section 39 of the Constitution of the Federal Republic of Nigeria, as well as Article 9 of the African Charter on Human and Peoples Rights – which is part of Nigerian Law under Cap A09, Laws of the Federation of Nigeria, 2004 – for over 12 years, the Freedom of Information Bill was pending before the National Assembly, forming part of 18 years of civil society-driven advocacy for the enactment of this all important piece of legislation that safeguards the public's right to information in Nigeria. During the stated period of 2008 -2010, there was continued advocacy for the passage of the Freedom of Information Bill. This period was also marked by certain events that highlighted just why Nigeria needed to establish the public's right to information by adopting a holistic Freedom of Information legislation. Some of these include the following:

- Recurrence of crises in Jos, Plateau State since 1994, and more recently in January and March 2010, which claimed the lives of several thousands and displaced several thousands more. Judicial Commissions of Enquiry were set up to investigate and report on each wave of the Jos crises and the white papers were produced by government at the both the Federal and State levels on such reports. The recurrence of the incidents was exacerbated by a seeming lack of will on the part of the government to implement the said reports and white papers. Meanwhile, Nigerian citizens did not have access to the reports' findings and recommendations and those of the white papers produced from them.
- The vacuum and impasse in governance of Nigeria for 3 months in late 2010 created when several actors in the administration refused to either disclose information about Late President Umaru Musa Yar'adua's health status and his absence from official duty and his apparent lack of ability to function in his official capacity as the President of Nigeria, thereby thwarting and undermining the constitutionally guaranteed process of dealing with such situations as stipulated by Sections 144 and 145 of the 1999 Nigerian constitution.
- On a positive side, mainstreaming the promotion and protection of the public's right to know in the electoral process helped to include the public's right to information and participation as part of an institutional framework that delivered the most credible democratic elections in Nigeria's 2011 elections.

NIGERIA'S FREEDOM OF INFORMATION ACT (FOIA) 2011

After 18 years of advocacy for FOI legislation in Nigeria, the new Freedom of Information Act (FOIA) 2011 was passed by both Chambers of the 6th National Assembly on 24th May 2011 and assented to by President Goodluck Ebele Jonathan on 28th May, 2011.

Right to information Initiative commends the Nigerian Government on the passage of FOIA. The enactment of the FOIA establishes the right of members of the public to access information held by public institutions in Nigeria, which by definition under the Act, includes

all Government Ministries, Departments and Agencies (MDAs) and other government institutions and public bodies in the three arms and tiers of government; and private institutions that utilize public funds, perform public functions, or provide public services.

Among other qualities the FOIA possesses, the Act grants all persons the legally enforceable right to access information under the Act. Any refusal to disclose information is subject to appeal to either the High Court or the Federal High Court as the case maybe. The FOIA requires that public bodies proactively publish 16 categories of information pertaining to the administration, functions and activities of such public bodies. The FOIA gives whistleblower protection to any public officer or anyone who gives or receives in good faith information on wrongdoing, or information which would disclose a serious threat to health or safety. The FOIA also invalidates existing legislation that otherwise hinder public access to information held by public institutions and relevant private bodies.

The establishment of the right to information by the FOIA is in consonance with Article 9 of the African Charter on Human and Peoples Rights – which is part of Nigerian Law under Cap A09, Laws of the Federation of Nigeria, 2004 and also encapsulated in S 39 of the 1999 Constitution of the Federal Republic of Nigeria. It is a milestone in the quest for transparent and accountable governance for Nigeria.

The FOIA has the potential for momentous impact on governance in Nigeria, by modifying the dynamics of the interactions between government and the public. The FOIA supersedes the Official Secrets Act (OSA), 1911 and other laws that bar access to information; and marks a shift from a legal culture of secrecy established by the OSA and similar legislation, under which provisions the unauthorized transmission, obtainment, reproduction, or retention of any classified matter was prohibited and criminalised.

Within a regional context, Nigeria is now positioned among nine countries in Africa to have passed all embracing FOI legislation, thus joining the league of Angola, Ethiopia, Guinea, Liberia, Niger, South Africa, Uganda, and Zimbabwe. However, having FOI legislation is not an end in itself. Implementation of such legislation is vital, and yet among these African countries, only South Africa can be said to have its FOI law, the Promotion of Access to

Information Act (PAIA), being implemented in some form. However, the strength of the FOI regime in South Africa may be potentially diminished by the proposed South African Protection of Information Bill (PIB), of 2008, currently pending before parliament.

IMPLEMENTING THE FOIA IN NIGERIA

In Nigeria, as in most parts of Africa, FOIA implementation has no precedent. For the effectiveness of the FOIA, steps to establish the groundwork necessary to ensure its progressive and effective implementation must be taken. Nigeria's FOIA presents a window of opportunity to lead the region in implementing FOI and establishing transparency and openness in governance and decision making. Indeed, the rest of Africa, and the world are keenly watching to see how much of a success Nigerians make of the implementation and utility of the FOIA.

Challenges

There are several challenges against the effective implementation of the FOI Act. These include the following;

- i) Unclear classification standards and protocol of information and documents that form the source and content for FOI applications may lead to arbitrary refusals of information on the grounds that such information is restricted.
- ii) Inadequate record creation, record keeping, organization and maintenance of documents integral to an FOI regime
- iii) The extant culture of secrecy that exists in the public service which is premised on the Official Secrets Act and the Civil service Rules and related regulations
- iv) Deficiencies in the capacity of public service officials on the foundational principles, objectives, goals and benefits of the open government
- v) The investment and budgetary provision that need to be made in both human and material resources that is required for the effective implementation of the FOI Act.
- vi) Lack of effective coordination and information sharing between various MDAs that could hinder the timely identification and tracking of requested information.

Since the passage of the FOIA, the Federal Government of Nigeria has taken several strides towards creating a conducive environment for implementation of the Act. This includes establishing and empowering the necessary Parliamentary Committees in both chambers of the National Assembly, as prescribed the Act, with oversight responsibility for the effective implementation of the FOIA, as well as the responsibility of reviewing existing legislations

and pending Bills to ensure that their provisions do not conflict with the provisions of the FOIA.

However, such steps are only preliminary towards establishing the prescribed framework for the implementation of the Act. There are several other governmental stakeholders whose commitment is crucial to the successful implementation of the FOIA. These include the following:

1. Government Ministries, Departments and Agencies (MDAs)
2. The Attorney General of the Federation and Honourable Minister for Justice
3. The National Assembly
3. The Executive Arm of Government of the Federal Republic of Nigeria

1. Government Ministries, Departments and Agencies (MDAs)

The provisions of the FOIA place several obligations and expectations on the various government Ministries, Departments and Agencies (MDA's) as Public Institutions. Under the Act, MDAs have the following obligations:

- 1) To create, organize and maintain their records and information in such manner that facilitates the public access under the FOIA.
- 2) To proactively disclose 16 categories of information/records by means that ensure wide dissemination, including electronically.
- 3) To designate information officers to handle FOI requests from members of the public.
- 4) To comply with the timelines and processes of dealing with request for information as prescribed under the Act.
- 5) To ensure its staff are fully trained and equipped to meet all its obligations under the FOIA. Such training is necessary in such areas as record keeping and maintenance, IT and software management, FOI request management, to mention but a few.
- 6) To promptly submit an annual report on the status of FOIA compliance to the office of the Hon Attorney General of the Federation (HAGF) by the February 1 of the

subsequent fiscal year. All such reports referred are also made available to members of the public.

2. The Attorney General of the Federation (HAGF)

The Honourable Minister for Justice and Attorney General of the Federation (HAGF) has the mandate of ensuring compliance with the provisions of the Act by public institutions. The HAGF has the specific responsibility of developing guidelines on reporting and performance appraisal for all MDAs.

The HAGF must also ensure that a consolidated report from all MDAs is made available to the relevant committees of both Chambers of the National Assembly not later than 1st April of the succeeding fiscal year, and to members of the public. He is to report on his discharge of this duty and other responsibilities conferred on him in keeping with the provisions of Section 29 of the Act.

3. The National Assembly

The FOIA vests the National Assembly, specifically the House of Representatives Committee on Reform of Government Institutions and the Senate Committees on Government Affairs and the Judiciary with the crucial oversight functions of receiving and reviewing all statutory compliance reports submitted by all institutions. Ancillary to this role is the National Assembly's responsibility of reviewing appropriation proposals from all MDAs aimed at enabling them meet their statutory obligations under the FoI Act.

Furthermore, the recently created House of Representatives Committee's mandate includes the review of the provisions of all Bills before the House of Representatives to ensure that they are not in conflict with the provisions of the FOIA, and make recommendations to the House of Representatives on existing laws that need to either be amended to align them with the FOIA or repealed out-rightly.

The Committees are to oversee all substantive and ancillary processes in the National Assembly geared towards ensuring effective compliance with the provisions of the FOIA by all public institutions and relevant private institutions.

4. The Executive Arm of Government of the Federal Republic of Nigeria

It is imperative that the Nigerian government must give priority to building the capacity of public institutions, especially Government MDAs, to meet their obligations under the FOIA. This would require consistent commitment regarding budgetary allocations, policy changes and legal reform.

Political buy-in and formulation of favourable government policy is absolutely vital to support effective and sustained implementation of the FOIA. The various offices in the executive Branch such as the office of the Head of Service, the Secretary to the Government of the Federation and the National Security adviser are such stakeholders that are crucial to policy reform within the bureaucracy, including breaking the pervasive culture of secrecy within the Civil Service. Other critical actors in the Executive Branch that have a crucial role to play in this process include the National Human Rights Commission, the Public Complaints Commission, the Ministers of Finance, Information, Information and Communication Technology, amongst others.

Some necessary reforms of policy and regulation include a review of the civil service and other rules and regulations that define administrative processes and doctrines in the public service in line with the FOIA; and a review and clarification of the system of security classification of public records, under the authority of the NSA.

Madam Chairperson, members of the Commission, in conclusion, we call on the Commission, through the Special Rapporteur on the Right of Access to Information in Africa to collaborate with the government of the Federal Republic of Nigeria to demonstrate a long-term commitment to taking concrete steps to ensure the full implementation of the Freedom of Information Act, thereby ensuring the promotion and protection of the right to information in Nigeria.