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## **The Question of National Security and Freedom of Information Act in Nigeria: Balancing the Competing Interests and Rights**

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### **Abstract**

National security and the right of access to public information are rights pulling in opposite directions. On the one hand, there is the need for government to secure public information on grounds of national security; on the other hand, there is the right of persons to access information held by public bodies. There are challenges linked with identifying the balance between the citizens' access to information and protection of national security. In recent times, trends suggest that legitimate national security interests are in practice best protected when the public is well informed. The right to access information under the Freedom of Information Act (FOIA) 2011 and the right to protection of national security are competing rights, and balancing the two is

complicated and has been a topical issue over the years. The paper adopts the doctrinal methodology and focuses on national security under the FOIA and attempts to map out the balance between accessing public information and yet protecting legitimate national security issues. It recommends that one way to achieve a balance between the two competing rights is by clearly delineating ‘national security’ under the FOIA.

**Keywords:** National security; Freedom of information Act; National security threats, democracy; Human rights, Official Secrets Act.

### 1.1 Introduction

International law describes national security as a justifiable limitation on access to information and some national laws define further how it should be enforced.<sup>636</sup> Until now, it remains one of the most problematic exemptions to access public information because it is commonly abused and exploited for selfish reasons. In recent years, the focal point has shifted to how to determine the suitable implementation of national security exemption without thwarting the right of access to information.

One of the greatest challenges confronting human rights activists is that national security is still relatively loosely defined and open to interpretation, specifically under the FOIA. It is evident that most nations, including Nigeria provide nebulous definitions of national security threats; consequently, imposing effective legal challenges to the denial of public information.<sup>637</sup> It is reiterated that government secrecy disguises incompetence and shrouds wrongdoing.<sup>638</sup> An analysis of the historical record shows that many of the most contentious secrecy cases in the United States and Europe were in actuality more concerned with masking government malfeasance than protecting against genuine national security threats.<sup>639</sup> It is contended that openness could prove to be one of the most potent tools in combating terrorism: as an enlightened public can be alert to risks and can often identify shortcomings in security structures better than those within the security system.

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<sup>636</sup> Alasdair Roberts, ‘National Security and Open Government: Striking the Right Balance’ Preface Campbell Public Affairs Institute (ed) x and ix.

<sup>637</sup> *Ibid.*

<sup>638</sup> Steven Aftergood, ‘Reducing Government Secrecy: Finding What Works’ *Yale Law and Policy Review* (2009) (27) 402.

<sup>639</sup> *Ibid.*

National security is not a right but a limitation to access information which should be interpreted narrowly to guarantee its essence. It is described as an obese beast which should be placed on urgent diet, if human rights are to be safeguarded from its crushing weight. The aim is not to shoot the beast but rather to slim it down.<sup>640</sup>

The right of access to information/freedom of information is the hallmark of democracy. This right is however not an absolute one, as there are several grounds for restricting its exercise. One of such is the protection of national security interests. It remains one of the most contentious restrictions to access public information because it is usually susceptible to manipulations and exploitations.

The aim of this paper is to attempt to strike a balance between access to information and national security; by identifying the gaps in the FOIA which allows for unwarranted denial of access to public information under the excuse of national security. The paper discusses the concept of national security under the FOIA; as well as the legal framework on national security in Nigeria. Also, national security is examined against recognised international principles with the aim of safeguarding a legitimate national security exemption. Furthermore, it identifies the need to provide a definitive scope of national security under the FOIA and the OSA; otherwise the exemption of national security would be exploited for selfish interests; thus creating an imbalance between the competing rights of national security and freedom of information.

## 1.2 The Legal Framework of National Security in Nigeria

The concept of national security has been viewed narrowly from the perspective of accumulating arms and ammunitions by a nation's military for the purpose of safeguarding national security.<sup>641</sup> For instance, national security was restricted to the defence and protection of a country or its interests.<sup>642</sup> The traditional conceptualization of national security excluded emerging non-military sources of threat to security which are essential pre-requisites for peaceful co-existence of nations.<sup>643</sup> It measured a nation's security by its readiness to combat, the quality of military strength and the sophistication of weapons in its armoury. With recent global trends, national security has assumed a wider scope to include human security, food security, environmental security, political security; such as, protection from terrorism, banditry, natural

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<sup>640</sup> Roberts, (n1) x.

<sup>641</sup> Abraham Orhero, 'Human Security: The Key to Enduring National Security in Nigeria' *Journal of Public Administration, Finance and Law* (2020) (17) 477.

<sup>642</sup> Obiamaka Araka, 'Freedom of Information and National Security' in Epiphanny Azinge and Fatima Waziri (eds) *Freedom of Information Law and Regulation in Nigeria* (Nigerian Institute of Advanced Legal Studies, 2012) 139.

<sup>643</sup> Arnold Okoro, 'Banditry and National Security in Nigeria: A Conceptual Discourse' *Benue Journal of Peace and Conflict Studies* (2022) 70.

disasters and diseases.<sup>644</sup> For instance national security is now defined along the line of a nation's capacity to protect its citizens from economic, social, political, military and environmental threats.<sup>645</sup> Also it is defined as the liberty from real or potential threats to national life arising from human actions or inactions, such as natural disasters like flood, famine, earthquake and drought.<sup>646</sup> National security includes the capacity of a nation to provide its citizens with a favourable social, economic, and political environment.<sup>647</sup> The encompassing definition of national security demonstrates that the concept has metamorphosed over the years from strictly national defence to other issues affecting national well-being.

In Nigeria, going by the broad perspective on national security, challenges bordering on security include kidnapping, banditry, armed robbery, poverty, electoral and religious violence. Others are illegal importation of arms, oil bunkering and corruption. This results mainly from systemic failure and corruption.<sup>648</sup> The conventional notion has defied military remedies; hence, its transcendence to not just protection from physical violence but also to the general well-being of individuals.<sup>649</sup> This point buttresses the fact that national security is dynamic and not a static concept. It evolves as the social, economic and political posture of a nation changes. However the scope of this paper is restricted to national security under the FOIA.

Some of the international/regional Conventions on national security include Article 23 of the African Charter on Human and Peoples Rights which guarantees the right to national and international peace and security.<sup>650</sup> Nigeria has also signed and ratified the Treaty on the Prohibition of Nuclear Weapons<sup>651</sup> On the National level Nigeria has a number of regulations on national security. These include the National Security Agencies Act,<sup>652</sup> and the Official Secrets Act (OSA)<sup>653</sup>

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<sup>644</sup> Ibid, 68.

<sup>645</sup> F Onuoha, 'Oil Pipeline Shortage in Nigeria: Dimensions, Actors and Implications for National Security' *African Security Review* (2008) 17 (3) 105.

<sup>646</sup> Z Peterside, 'The Impacts of Proliferation of Small Arms and Light Weapons on the Quest for National Security in Nigeria' *Saudi Journal of Humanities and Social Sciences* (2018) 3 (7) 854.

<sup>647</sup> Okoro, (n8) 71.

<sup>648</sup> Isaac Albert, 'Nigeria's Security Challenges in Historical Perspective' in Ayodeji Olukoju, Olutayo Adesina, Abimbola Adesoji and Saheed Amusa (eds) *Security Challenges and Management in Modern Nigeria*, (Cambridge Scholars Publishing, 2018) 2.

<sup>649</sup> Arinze Ngwube, 'Threats to Security in Nigeria' *Review of Public Administration and Management* (2013) 1 (3) 75.

<sup>650</sup> <https://au.int/files-treatiespdf> accessed 5 April 2024.

<sup>651</sup> Nigeria ratified the TPNW which came into force on 22 January 2021. The treaty regulates the ownership, possession and control of nuclear weapons.

<sup>652</sup> Cap N74 LFN 2004. The Act replaces the National Security Organisation and establishes three bodies for the effective conduct of National security. They are the Defence Intelligence Agency, National Intelligence Agency and the State Security Service.

The OSA is modelled after the British Secrets Law established in 1911. The OSA is said to be one of the statutes obstructing free access to information in Nigeria on grounds of national security.<sup>654</sup> The aim of the law is to protect state secrets and other official information, mainly relating to national security. Basically, the law restricts the transmission, obtaining and reproduction of any classified information to a person to whom he is not authorized. The law seeks to preserve the integrity and security of a state by restricting the publication of highly confidential information or documents. A public officer is guilty of an offence under the Act, when he fails to safeguard classified information under his control or obtained by virtue of his office.<sup>655</sup> The OSA is an extensive legislation that extends to the prohibition and, prevention of espionage and sabotaging of the nation's strategic installations.<sup>656</sup> The Act vests full control and ownership of public information in the hands of the government. It entrusts public bodies with the sole and unfettered discretion to decide which class of information within the public service should be classified as confidential.<sup>657</sup>

### 1.3 The Legal Framework of Freedom of Information in Nigeria

Freedom of information law permits any person to request information from any public body for any reason. It connotes a citizen's right to access information that is held by the government through the instrumentality of legislation.<sup>658</sup> The concept entails the channel by which information held by the government flows to the public and vice versa. Furthermore, it gives citizens the right to be informed of government decisions and to engage meaningfully in public affairs.<sup>659</sup> It is widely acknowledged as a core feature in a real democracy.<sup>660</sup> Access to public information is an essential tool in ensuring protection for the right of the public to be properly informed. Basically,

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<sup>653</sup> Cap O3 LFN 2004.

<sup>654</sup> Talatu Ocheja, 'Freedom of Information Versus the Issue of the Official Secret' in Epiphanny Azinge and Fatima Waziri (eds) *Freedom of Information Law and Regulation in Nigeria* (Nigerian Institute of Advanced Legal Studies, 2012) 172.

<sup>655</sup> S 1 of the OSA.

<sup>656</sup> Muhammad Nuruddeen, 'An Appraisal of the Right to Information in Nigeria' 2017, 17 <<https://www.researchgate.net/publication/323255289>>.

<sup>657</sup> Position Paper on the Official Secrets Act, Repeal, Review or Stay? Moving from Secrecy to Open Governance <<https://c4center.org>> accessed 11 May 2023.

<sup>658</sup> Stella Ejitaga, 'Challenges of the Implementation of the Freedom of Information Act in Nigeria' *Journal of Information and Knowledge Management* (2019) 10 (1) 124.

<sup>659</sup> Angela Migally, 'Freedom of Information: A Cornerstone of Egypt's Democratic Transition' 5 <<https://www.right2info.org/publications>> accessed 28 March 2023.

<sup>660</sup> David Pozen 'Freedom of Information Beyond the Freedom of Information Act' *University of Pennsylvania Law Review* (2017) (165) 1097.

freedom of information is a quintessential piece of participatory policy making that guarantees equal rights to all persons and fosters open disclosure policy.<sup>661</sup>

Conversely, poor access to information could trigger violence and unrest in a society. This is due to the fact that the public are ignorant of government policies and decisions which affects them, thereby fostering rumours and half-truths.<sup>662</sup> Over 130 countries have adopted the law; Sweden being the country with the oldest legislation (1766). This pathway was later toured by the US, (1966), and closely followed by Norway (1970). Subsequently, several western democracies emerged by enacting their own laws (France and Netherlands (1978), Australia, New Zealand and Canada (1982), Denmark (1985), Greece (1986), Austria (1987), Italy (1990), Nigeria (2011).

The International legal framework for freedom of information includes Article 19 of the Universal Declaration of Human Rights which guarantees the right to freedom of expression and information to everyone. The right includes freedom to hold opinion without any impediment, and to request, accept and disseminate information and ideas through any media and regardless of frontiers.<sup>663</sup> Similarly, this right is protected by Article 19 of the International Covenant of the Civil and Political Rights. On the regional sphere, the right to information is enshrined in Article 9 of the African Charter<sup>664</sup>In Nigeria the right to information is an inalienable part of the Freedom of Expression recognized in section 39 of the Constitution.<sup>665</sup>

#### **1.4 National Security under the Freedom of Information Act**

Generally, the definition of National security like other multifaceted concepts does not lend itself to any precise and acceptable definition.<sup>666</sup> This is due to the fact that it is multi-dimensional and subjective. Basically, it is concerned with the protection and safety of a nation and is restricted to the use of military, political and economic powers in the state.<sup>667</sup>

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<sup>661</sup> Ibid, 1112.

<sup>662</sup> Edwin Abuya, 'Realizing the Right of Access to Information in Kenya: What Should Stakeholders be on the Lookout for?' eds. Fatima Diallo and Richard Calland *Access to Information in Africa: Law, Culture and Practice* (Brill Boston 2013) 216.

<sup>663</sup> <<http://www.un.org/en/universal-declaration-human-rights>> accessed 23 November 2018. The Declaration is not a binding document. However, today it has inspired over 60 human rights instruments relevant as a common standard of human rights. For instance, Chapter IV of the 1999 CFRN provides for the right to life, dignity, personal liberty, movement, freedom of expression.

<sup>664</sup> Article 9 of the African Charter <[www.achpr.org/instruments/achpr/rartification](http://www.achpr.org/instruments/achpr/rartification),> accessed  
<sup>665</sup> Cap C23 LFN 2004.

<sup>666</sup> Okoro, (n8) 69.

<sup>667</sup> Ibid.

Under the FOIA national security is described as Information injurious to the defence of the nation and conduct of international Affairs.<sup>668</sup> This definition is arguably vague and subjective. Ambiguous definitions of ‘national security’ create the problem of excessive secrecy which presents a dilemma to the nations, including established democracies.<sup>669</sup> Unfortunately, due to the fact that the term ‘national security’ and its parameters are not clearly defined under the FOIA; far-reaching powers are conferred on government agencies that are fraught with the power of classifying information on the basis of national security. This has occasioned its abuse.<sup>670</sup> This is dissimilar to the (South Africa) Promotion of Access to Information Act, (PAIA) wherein section 41 which provides for national defence and security specifies further categories of information under the broad head. These are contained in subsections (2)(a) –(h) and they include, information relating to military tactics, quantity, characteristics, capabilities of weapons used for the curtailment of hostile activities etc.<sup>671</sup> Despite the fact that Nigeria has allotted substantial public funds into protecting national security; the daily emerging threats to the nation is a call for concern.<sup>672</sup> These threats include kidnapping, banditry, the nefarious activities of herdsmen and the Boko Haram sect. The idea of a clear-cut definition of national security which also entails defining the class of information would guard against over-classifying information under national security exemption. Unfortunately, most countries fail to comply with this recommendation.<sup>673</sup> The usual practice is that most FOI laws simply identify national security as one of the grounds for denying public information,

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<sup>668</sup> S 11 It should be noted that national security is one of the numerous exemptions to the disclosure of public information, contained in the FOIA, CAP F43 LFN 2013.

<sup>669</sup> Tony Mendel, *Freedom of Information: A Comparative Legal Study* (2<sup>nd</sup> edn, UNESCO 2008) viii and 5.

<sup>670</sup> Aaron Salau, ‘Positive Obligation to Protect African Charter Access to Information Norm Versus National Security Restrictions in Nigerian Law: Striking a Balance’ *African Journal of International and Comparative Law* (2019) 27 (2) 5.

<sup>671</sup> PAIA 2002 <<https://www.gov.za/documents>> accessed 1 May 2023. This provision conforms to Principles 3 of the Global Principles on National Security and the Right to Information (Tshwane Principles)(Open Society Foundation, 12 June 2013)<<https://www.justiceinitiatives.org>> accessed 10 June 2023. These principles were developed in June 2013 after wide consultations over a two-year period, which culminated in a meeting in Tshwane, South Africa. These Principles were laid down as guide to nations where the government seeks to deny public information on grounds that the release would cause harm to national security. This is necessary, as it is noted that national security is one of the weightiest public grounds for restricting access to information. Principle 3 stipulates that all information relating to national security need not be denied, except it can be shown that the information falls within the narrow and specific categories of information prescribed by law, to protect a legitimate national security interests.

<sup>672</sup> Eugene Nweke, ‘Rethinking National Security in Nigeria: Analysis of Predisposing Conditions and Prospects for Stable Polity’ *Security Strategies* (2011) 7 (14) 101, 111.

<sup>673</sup> Migally, (n24).

without specifying the list of categories of exemptions.<sup>674</sup> A properly functioning FOI law should clearly delineate the types of information that may be exempted so that the system cannot be used to restrict information arbitrarily under the guise of national security. In order to attain an equitable balance between national security and freedom of information, the paper examines national security vis-à-vis regulatory international principles.

### **1.5 International Principles Regulating National Security**

The Global Principles on National Security and the Right to Information (Tshwane Principles) stipulates the governing principles on national security. It provides that to deny disclosure of public information on grounds of national security, the government/public body has to show first of all, that the restriction is prescribed by law and is necessary to protect a legitimate national security interest; and secondly, that the law is fool-proof against abuse, including prompt, full, accessible, and effective scrutiny of the validity of the restriction by an independent oversight authority and full review by the courts.<sup>675</sup> It is expedient that the law is unambiguous, narrowly drawn and precise to ensure that it is clear what information may be withheld on national security grounds and information that may be disclosed. It must be clear that disclosure would pose a real and identifiable risk of significant harm to a legitimate national security interest; the risk of harm from disclosure must outweigh the overall public interest in disclosure. Also, the restriction must comply with the principle of proportionality and must be the least restrictive means available to protect against the harm and the restriction must not compromise the very quintessence of the right to access information. Fundamentally, the narrow categories of information that may be withheld on national security grounds should be set forth clearly in law.<sup>676</sup>

Certain class of Information may be legitimately withheld by public bodies to safeguard national security.<sup>677</sup> These include information concerning on-going defense plans or operations; information about the production, capabilities, or use of weapons systems and other military systems, including communications systems. It should be noted that Information relating to budget lines concerning weapons and other military systems should be made available to the public. Information on controlled list of weapons as approved by the Arms Trade Treaty as to conventional weapons, equipment and troop numbers can be published. Other information that may be withheld are information about specific measures to safeguard the territory of the state, critical infrastructure, or critical national institutions against threats or use of force or

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<sup>674</sup> Ibid.

<sup>675</sup> Principle 3

<sup>676</sup> Principle 3(a)(b).

<sup>677</sup> Principle 9

sabotage, the effectiveness of which depend upon secrecy; information concerning national security matters that was supplied by a foreign state or inter-governmental body with an express expectation of confidentiality; and other diplomatic communications insofar as they concern national security matters.<sup>678</sup>

To guarantee the efficient discharge of duty, all oversight, ombudsman, and appeal bodies, including courts and tribunals, should have access to all information, including national security information, regardless of classification level, relevant to their ability to discharge their responsibilities.<sup>679</sup> These oversight bodies have the responsibility of maintaining secrecy of all information legitimately classified.

Certain categories of information enjoy a high presumption in favour of disclosure. In other words, this class of information cannot be withheld on national security grounds except under very exceptional circumstances and the non-disclosure should be for a limited period of time.<sup>680</sup> Information revealing violation of human rights; the existence of military bodies and such other bodies, laws and regulations regulating them, information evaluating their expenditure of public resources must be disclosed. Even the possession or acquisition of nuclear weapon or other weapon of mass destruction must be disclosed as it is deemed as information of public interest. This does not necessarily include the operational capabilities or details of the manufacture of these weapons.<sup>681</sup> Financial information including procurement and budget of security bodies should be disclosed; information jeopardizing public health, safety or the environment is inclusive.<sup>682</sup>

The reasons for classification of information should be clearly stated and these reasons should correspond to one of the narrow categories listed in the global principles, to which the information belongs, and describe the harm that could result from disclosure, including its level of seriousness and degree of likelihood.<sup>683</sup> This is to guard against frivolous classification of information.<sup>684</sup> Furthermore information classified on grounds of national security should only be for a limited period of time to protect legitimate national security interests.<sup>685</sup> That is no information should be

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<sup>678</sup> Principle 9(a)(i) –(v)

<sup>679</sup> Principle 6

<sup>680</sup> Principle 10

<sup>681</sup> Principle 10 D (2)

<sup>682</sup> Principle 10 F and H. It should be noted that A – H contain information that should not be withheld on grounds of national security or any other reason. They enjoy a high presumption of disclosure as they are of overwhelming public interest.

<sup>683</sup> Principle 11

<sup>684</sup> Principle 11. Classification refers to the process by which sensitive records/information are reviewed and given a mark to indicate who may have access and how the record is to be handled. Documents are usually classified for a 5-year period and may be extended if necessary; although some countries classify information for shorter period of time.

<sup>685</sup> Principle 16 (a) – (d)

classified or kept secret indefinitely. Where information contains both the non-disclosure and disclosure parts, public bodies are tasked with ensuring the severance of such information and disclosure of the part that can be released.<sup>686</sup> Furthermore, only officials specifically authorized or designated, as defined by law, may classify information.<sup>687</sup> Public bodies, including those affiliated with the security sector who believe that information has been improperly classified, may challenge the classification of the information.<sup>688</sup>

## **1,6 Balancing National Security and the Freedom of Information in Nigeria**

Historically, national security exemption has been invoked to rationalize the excessive control of rights, particularly the right to access public information.<sup>689</sup> There is an intense debate as to identifying the thin line between the citizens' access to information (particularly classified information) and protection of national security.<sup>690</sup> Questions have arisen as to whether the tension between freedom of information and national security can ever be resolved. It is acknowledged that there is the need to strike a feasible and appropriate balance between the two legitimate but competing interests; that is, the need of the people to know how their government operates and the sometimes, counteracting necessity of government to observe secrecy, so it can effectively control the security of the nation, absence of which all the rights of the people would be endangered.<sup>691</sup> Admittedly, the fulfillment of freedom of information in any country is convoluted by the realities of increased national security interests. The growing acts of terrorism globally demand that national security is commonly balanced with, the right to freedom of information, which is a fundamental right.<sup>692</sup> Generally, the leakage of sensitive information could have damaging effect on national security, especially in this digital age of modern technological advancement. Consequently, tension is generated between the right to access information and the right to withhold information on national security grounds. Thus, crafting of the

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<sup>686</sup> Principle 22.

<sup>687</sup> Principle 13

<sup>688</sup> Principle 14

<sup>689</sup> Agnes Callamard, 'Freedom of Expression and National Security: Balancing for Protection' (Training Materials for Columbia University, December 2015) <https://globalfreedomofexpression.columbia.edu/> accessed 1 May, 2023.

<sup>690</sup> Ibid.

<sup>691</sup> T Williams, 'To Restore the Balance between Freedom of Information and National Security' Sept 23 1982, Homeland Security <<https://www.heritage.org/report/restor>> accessed 18 April 2023.

<sup>692</sup> Samuel Oguche, 'Freedom of Information and National Security in Nigeria; Practices of the United Kingdom,' in Epiphanny Azinge and Fatima Waziri (eds) *Freedom of Information Law and Regulation in Nigeria* (Nigerian Institute of Advanced Legal Studies, 2012) 112.

national security exemption is a topical issue in most countries including Nigeria.<sup>693</sup> This is particularly essential because it is often abused to deny citizens' right to information. It must be skilfully crafted in a manner that guarantees the protection of the nation while, at the same time guarding against unwarranted government secrecy under the national security exemption. It is doubtless that protecting national security is a vital responsibility of the government.

Aftergood identify three categories of government secrecy.<sup>694</sup> The first is the 'genuine national security interest,' in which information that could constitute a verifiable threat to the security of the nation is protected. An example is holding back sensitive information entailing details of weapons of mass destruction and, other advanced or military technologies which could pose threat to national security. Such protection is not contentious and the public interest is served when this type of information remains secure. The second one is what he referred to as 'bureaucratic secrecy' where some other reasons are concealed as genuine national security secrecy. Here, information is concealed either out of convenience or a dim suspicion that disclosure is essentially riskier than non-disclosure. The third category is described as 'political secrecy' wherein, classification is used as a justification for political benefit.<sup>695</sup>

The FOI law was developed partly in reaction to the upsurge of national security secrecy. It was aimed at piercing the veil of government secrecy and over classification of public information.<sup>696</sup>

It follows that excessive secrecy in government poses an imminent risk to accessing public information necessary for a better understanding of public issues.<sup>697</sup> However, it is recognizable that certain information must be withheld on grounds of national security. The emphasis is on striking the appropriate balance between the releasing and withholding of information which is essential for a nation's security, progress, development, and welfare, and the full enjoyment of human rights and fundamental freedoms.<sup>698</sup> Recent developments demonstrate that if people are to fully participate in a democracy, they should have access to information held by government including information that relates to national security.<sup>699</sup> This is because, in practice, legitimate national security interests are best protected when the public is well informed about the state's activities, including those undertaken to protect national security. To strike the appropriate balance between the two competing rights, recourse should be had to the guiding principles discussed in section 1.5 above.

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<sup>693</sup> Migally, (n24)

<sup>694</sup> Aftergood, (n3) 402 – 403.

<sup>695</sup> Ibid.

<sup>696</sup> Pozen (n25) 1120.

<sup>697</sup> William, (n56)

<sup>698</sup> Principle 2 (a)(b)

<sup>699</sup> Ibid, 6

In addressing the challenges linked with identifying the balance between the citizens' access to information (particularly classified information) and protection of national security under the FOIA; the opening gambit is to ensure that national security is clearly defined and its parameters delineated distinctly in the FOIA. That is, information considered threats to national security should be stated explicitly to avoid ambiguity. More importantly, national security interests should be subject to overwhelming public interest. This means that national security information should be disclosed when the interest of the public outweighs the risk of disclosure. Before information is denied on grounds of national security, it should be shown that disclosure would pose a real and identifiable risk of significant harm to a legitimate national security interest and that the risk of harm from disclosure outweighs the overall public interest in disclosure.<sup>700</sup> This would guard against unwarranted secrecy in government; while at the same protecting the legitimate security of the nation. The rationale for this is that all information relating to national security need not be denied, except it can be shown that the information falls within the narrow and specific categories of information prescribed by law, to protect a legitimate national security interest and, the interest of the public must be the main consideration concerning the right to access information. There should be an exclusive list of categories of information that are as narrowly drawn as the categories contained in the global principles.<sup>701</sup>

It is suggested that national security threat be defined in the Act as one relating to a nation's existence and integrity against the use or threat of force and its competence to counter the use or threat of force, which could be external or internal. An example of an external source of threat is military threat; while internal threat includes instigation to an impending topple of an incumbent government.<sup>702</sup> National security threats should exclude information that protects the government from embarrassment or reveals public misfeasance or withholding information concerning the functioning of its public institutions.<sup>703</sup> Furthermore, the definition of national security threat should include specific types of information relating to it. The Act should not exempt any national security body from its purview; only certain information should.

The balance between access to information and national security under the FOIA is clearly lopsided. The Act fails to provide a clear-cut definition and a definitive scope of national security; thus leaving its interpretation to subjective analysis and a target

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<sup>700</sup> Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' <[www.article19.org](http://www.article19.org)> accessed 3 August 2023.

<sup>701</sup> Principle 9.

<sup>702</sup> Migally, (n24) It is noted that the Tshwane Principles fails to define national security but recommends a precise definition in the national law which is consistent with the demands of a democratic society.

<sup>703</sup> Principle 3

for easy manipulation for mischievous purposes. It is also evident that there is need for independent oversight bodies to oversee the security sector and other public bodies to ensure that vital information is not denied the public on grounds of security. However, the FOIA makes no provision for oversight bodies except for the courts.<sup>704</sup> This is a regrettable omission and constitutes a serious shortcoming as the snag of resorting to litigation only, in contentious matters especially bordering on national security matters is indisputable. We cannot neglect the issue of undue delay in court proceedings, as a result of backlog and other technicalities issues.<sup>705</sup> It is further argued that the delay associated with the courts may, sabotage the intent of requesting information originally.

The Act does not stipulate any duration for classification of information nor does it provide the categories of information deemed fit for classification. This would imply that the issue of classified information is open-ended and information kept secret on national security grounds remain so indefinitely, even where the circumstances warranting the classification have expired. It is however noted that by virtue of Section 28 of the Act, the supremacy of the FOIA over the Official Secrets Act (OSA) is established. It provides that any information kept under security classification, within the meaning of the OSA does not preclude it from being disclosed under the provisions of the Act; rather the application for information shall be determined based on the exemptions contained in the Act. The implication of section 28 of the FOIA is that the Act overrides the secrecy law. That is, where there is request for information relating to classified information, the provisions of the FOIA will prevail over that of the OSA. Inevitably, this laudable provision is elusive, as the FOIA is as vague and ambiguous as the OSA itself when it comes to the protection of national security.<sup>706</sup> For instance the OSA defines classified information as any information under which any system of security from time to time in use by or by any branch of the government is not to be disclosed to the public and which disclosure would be prejudicial to the security of the nation.<sup>707</sup> This definition is rather vague and wide power is bestowed on public bodies to classify information; which makes it susceptible to abuse and manipulations. Also, the OSA neglects to include the safety check of disclosing certain information in the face of overwhelming public interest. The FOIA should specify the designated body empowered to classify information; to ensure that public bodies do

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<sup>704</sup> Section 7 of the FOIA

<sup>705</sup> World Bank Governance and Public Sector Group, 'Legal Framework for Establishing Freedom of Information' <<https://siteresources.worldbank.org>> accessed 2 May, 2023.

<sup>706</sup> The OSA contains broad spectrum definitions. This implies that all classes of official information, not necessarily restricted to national security concerns are protected giving room to abuse.

<sup>707</sup> S 9 OSA

not classify information for ‘no reason and for all reasons.’<sup>708</sup> Also, room should be given for the challenge of classified information believed to be improperly classified.<sup>709</sup>

Undoubtedly, information concerning procurement and budget of security bodies should not be classified or restricted. In Nigeria, it is a fact that monies allotted for security is outside the reach of the public. For instance, issues relating to the proper disbursement of funds distinguished as ‘security votes are not publicly disclosed.’<sup>710</sup> Public officials commonly mask national defence to the disclosure of information relating to funds allocated for security in Nigeria. This therefore, gives rise to misappropriation and malfeasance.<sup>711</sup>

Thus, it would be expedient for the FOIA to specify the categories of information under classification and include the criteria for such classification. Restriction should be placed on the duration for classification of information to forestall indefinite denial of information on grounds of national security; for instance, a period of 5 years at the first instance and may be renewed for a further term where necessary. Reasons must be given for such classification and these reasons should correspond to one of the narrow categories as listed in the FOIA, and the harm that could result from disclosure should be explicitly stated.<sup>712</sup>

Also, the dispute resolution mechanism should comply with international standard. The requirement is that resolution mechanism should entail three levels. The first level is the internal appeal to the public body which denied the information; appeal to an independent oversight body (ombudsman or information commissioner) and finally to the courts.<sup>713</sup> The essence of a multi-tiered resolution system cannot be overemphasized. Therefore, the FOIA should conform to the three-tier level of appeals stipulated for reviewing denial cases. This is an integral feature of the FOI regime, as the challenges linked with litigation would make inanity of the law. It is further argued that the delay associated with the courts may sabotage the intent of requesting information originally. Therefore, it is suggested that an oversight body be created in the FOIA to review issues arising from the Act, such an Information Commissioner.

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<sup>708</sup> Principle 14

<sup>709</sup> Principle 13

<sup>710</sup> Dakuku Peterside, Security Vote and Transition Stories (The Cable News, 10 April 2023) Security vote, often provided in cash is not subject to legislative oversight or any form of accountability. Rather information surrounding the disbursement of security vote is shrouded in secrecy.

<sup>711</sup> Brendan Asogwa and Ifeanyi Ezema, ‘Freedom of Access to Government Information in Africa: Trends, Status and Challenges’ *Records Management Journal* (2017) 29 (3) 335. The failure to disclose financial information relating to security issues is contrary to Principle 10.

<sup>712</sup> Principle 11

<sup>713</sup> Article 19, (n65).

The courts should not hesitate to sever and disclose information considered to genuinely harm national security interests from information remotely considered to be a risk. In this way, only legitimate security interests will be protected and not those considered by public bodies to threaten national security.

### **1.7 Conclusion**

It is now generally accepted that a democracy functions maximally where persons have access to public information within the restricted scope of exemptions, particularly, national security.<sup>714</sup> Essentially, it is imperative that a suitable balance be drawn between the right of the public to access information and the duty of government to safeguard national security without authorizing indiscriminate secrecy. The paper argues that national security under the FOIA is susceptible to abuse by public/government officers because of the vague and nebulous delineation of the concept. To attain an equitable balance between the protection of national security threat and access to public information under the FOIA, the international standard as reflected in the guiding principles of national security should be adhered to. National security should be clearly defined with categorized classes of information to exclude ambiguity. National security interests should be subject to overriding public interests and the harm test. Also, the mechanism for resolving denial of information should be compliant with the three-tiered model to guarantee that only legitimate exemptions are excluded.

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<sup>714</sup> William, (n56).