

THE ROLE OF THE JUDICIARY IN THE IMPLEMENTATION OF THE FREEDOM OF INFORMATION ACT: PROSPECTS AND CHALLENGES

By

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ABSTRACT

Freedom of information (FOI), access to information and open access policies are the toasts of the moment in the international arena. Countries with freedom of information laws and practice are considered 'free' while those without FOI mechanisms are treated almost like pariahs in the comity of democratic nations. This is because FOI is believed to be critical to democracy, human rights and good governance. Nigeria joined the prestigious league of countries with FOI legislations on May 28th 2011 when the Freedom of information Act came into force. Since its adoption, the Act has been hailed as a landmark piece of legislation especially in view of its elaborate judicial review provisions. This paper examined the role of the judiciary in the implementation of FOI Act in Nigeria. So far, judicial attitude to the FOI Act has evoked public confidence in the capacity of the court as the bastion of justice. This is especially so with reference to the overwhelming evidence of quick dispensation of justice, and effective prescription of time-limit for compliance with court decisions in judicial review cases under the FOI Act. The paper however argued that due to some 'missing links' and institutional bottlenecks in the judicial system, courts may be out of the reach of some applicants who have been wrongfully denied their right of access to information under the FOI Act.

1.1 Introduction

Freedom of information is the cornerstone of democratic governance. It is to democracy what food is to the body.¹ Just like a malnourished body cannot function optimally, democracy cannot flourish in a closed society.² When citizens are not informed or inadequately informed, they are not able to influence public policies or access public resources.³ Without access to information, citizens may not be able to make informed decisions or voice informed opinions about allocation and distribution of public

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¹ Mwananyada, M. "Fumbling under the Veil; Access to Information and Democracy: The Zambian Case" *LLM Thesis*, University of Pretoria, 2006, p.1, <<http://repository.up.ac.za/handle/2263/927>> visited 7/27/2013 at 1 am.

² Boix, C. "The roots of democracy" *Policy Review*, 2006, p. 5.

³ Shado, F.D. 'The torn Veil: Access to Information as a Tool for Combating Corruption with Reference to Uganda' *LLM Thesis*, University of Pretoria, 2004, p. 2, <<http://repository.up.ac.za/handle/2263/927>> visited 7/27/2013 at 1am.

resources. Freedom of information therefore is the oxygen of democracy and the backbone of open and democratic government.⁴ The right to freedom of information is of antiquated origin but the earliest elaboration of such right in a legal document is the Swedish Freedom of Information Law of 1766.⁵ From that time up till around 1990, there were only about thirteen countries with FOI legislations.⁶ However, in recent years, the number of countries with freedom of information legislation has increased significantly, almost reaching over a hundred.⁷ The factors which have led to the upsurge in recent years in the number of countries with FOI legislations globally include pressure by international bodies, corruption and graft related scandals, modernization and the expansion of the internet into everyday usage.⁸

Freedom of information is critical to governance because it makes government more transparent and accountable. It engages public participation in decision making and enhances understanding of the decision making processes by the public thereby improving the quality of decision made and also endearing trust in those decisions and the general working of government. In addition, FOI which encompasses access to official information provides a sure guard against abuses, mismanagement, corruption and especially conspiracy theories and rumor mongering about government activities. Malfeasance thrives in secrecy and obscurity. The more that government transactions and operations are transparent, visible and open to scrutiny, the more feasible it is to expose, deter, and contain corruption. Openness allows citizens to scrutinize the actions and inactions of government, facilitate proper and informed debate which in turn promotes healthy competition. Access to information is key to the realization, promotion and protection of basic human rights especially socio-economic rights. Freedom will be bereft of all effectiveness if citizens have no access to information. Access to information is basic to a democratic way of life. For this reason, citizens must have the legal right to request and receive information on all functions and decisions of government that do not undermine national security or that do not infringe the individual right to privacy.⁹

⁴ Lindstorm, C.A. "A Citizen's Perspective: Introduction to Open Government and the Freedom of Information Act", *The Community Planner* Spring 2011, Volume 1, Number 3, p. 20.

⁵ Keim, W. "List of Countries with Access to Information", www.home.broadpark.no/~wkeim/foi-list.htm visited 7/27/2013. In a letter to W.T. Barry as far back as 4 August 1822, former United State President, James Madison wrote: "A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both." Letter reprinted in Saul K. "The Complete Madison: His basic writings" quoted by Note boom, C. "Addressing the External Effects of Internal Environmental Decisions: Public Access to Environmental Information in the International Law Commissioner's draft Article on Prevention of Trans-boundary Harm" *New York University Environmental Law Journal*, 2003, Volume 12, pp 245-246.

⁶ UNESCO, "Freedom of Information" www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information visited 7/27/2013 at 3am.

⁷ Freedominfo.org, "93 Countries have FOI Regimes, Most Tallies Agree", www.freedominfo.org/2012/10/93-countries-have-foi-regimes-most-tallies-agree visited 7/27/2013 at 3am.

⁸ Banisar, D. "Freedom of Information and Access to Government Records around the World" pp. 3-4, www.ndi.org/files/freeinfo_010504.pdf visited 7/27/2013 at 3am.

⁹ Diamond, L. "Building a System of Comprehensive Accountability to Control Corruption" Paper presented to the Seminar on Democratic Consolidation: The International Context and the Mexican Experience, Mexico City, 18-20 February 18-20 2003.

Freedom of information has been recognized at the international level as early as 1946 when the United Nations General Assembly at its very first sessions adopted Resolution 59(1), on 'Calling of an International Conference on Freedom of Information'. The Resolution states as follows: "Freedom of Information is a fundamental human right and... the touchstone to all freedoms to which the United Nations is consecrated."¹⁰ Article 19 of the Universal Declaration of Human Rights (1948) further states that the fundamental right to freedom of expression encompasses the freedom to "seek, receive and impart information and ideas through any media and regardless of frontiers". Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) prescribes that the right to freedom of expression shall include 'freedom to seek receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'. Adumbrating on the meaning and scope of article 19(2) of the ICCPR, the United Nations Special Rapporteur on Freedom of Opinion and Expression explained that: 'The right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by government in all types of storage and retrieval systems.'¹¹

The right to freedom of information has also been enshrined in regional human rights treaties such as the African Charter on Human and Peoples' Rights (African Charter), the European Convention on Human Rights and the Inter-American Convention on Human Rights. For instance, article 9 of the African Charter of which Nigeria is a party provides that 'every individual shall have the right to receive information.' In line with this provision, the African Commission on Human and Peoples' Right adopted a Declaration of the Principles on Freedom of Expression in African which further elaborated on the freedom of information obligations imposed on member states by article 9 of the African Charter. The Commission has stated that public bodies hold public information not for themselves but as custodians of the public good and everyone has the right to access this information.

Till date, only nineteen out of the 54 African Union member states have passed national FOI laws.¹² Nigeria joined this prestigious league of countries with freedom of information legislation on May 28th 2011, when it enacted the Freedom of Information (FOI) Act, 2011. The Act amends provisions of the Official Secrets Act (1911). It ensures that access to public information is granted to anyone applying for it irrespective of age, gender, race, ethnic or political affiliations. It sets a limit of 7 days for public institutions to respond to requests and criminalizes destruction of public information or records. It protects whistleblowers and mandates public institutions to proactively disclose

¹⁰ United Nations General Assembly Resolution 59(1), 1946. See also Mendel, T. "Freedom of Information as an Internationally Protected Right", 2004, <www.article19.org> visited 7/27/2013 at 3am.

¹¹ UN Document E/CN.4/1998/40 "Promotion and Protection of the Right to Freedom of Opinion and Expression" Report of the Special Rapporteur, 28 January 1998, para 14.

¹² MISA 'Access to Information in Africa - AFEX urges Governments to do more' <http://misa.org/issues/access-to-information/access-to-information-in-africa-afex-urges-governments-to-do-more/> (accessed 8 November 2016).

information in their custody. The Act has been hailed as a landmark piece of legislation especially in view of its elaborate judicial review provisions. The aim of this paper is to discuss the role of the judiciary in the implementation of the FOI Act especially the judicial review provisions of the Act. The paper concludes with an assessment of the challenges which may prevent FOI applicants from reaping the full benefits of judicial review under the FOI Act.

1.2 Overview of the FOI Act

The FOI Act comprises 32 sections which conveniently can be categorized into the following sub-parts, namely: right of access to information and proactive disclosure,¹³ processing of requests,¹⁴ maintenance of public records,¹⁵ exemptions,¹⁶ judicial review,¹⁷ monitoring,¹⁸ and miscellaneous provisions.¹⁹ The objective of the Act is 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 public interest and the protection of personal privacy, protect serving public officers from adverse consequences for disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and for related matters.²⁰

1.2.1 Right of Access to Information

The act provides for the right of 'any person' to access or request any public record or information which is in custody of any public agency or institution.²¹ For the purpose of the Act, public agency or institution includes legislative, executive, judicial, administrative or advisory body of government and private bodies providing public services, performing public functions or utilizing public funds.²² Public records include not merely government records but also record of private bodies relating to matter of public interest.²³

The Act guarantees the right of access to information in two ways. First, the Act obliges public institutions to ensure that they keep records of their activities and ensure proper organization and maintenance of all information in their custody in a manner that facilitates easy public access.²⁴ In this wise, public institutions shall regularly publish and make available to the public without prior request the following information: (a) a list of all classes of records in the institution's custody, a list of manuals used by employees of

¹³ FOI Act, sections 1-2.

¹⁴ Sections 3-8. Ibid

¹⁵ Sections 9-10, Ibid

¹⁶ Sections 11-19, Ibid

¹⁷ Sections 20-25, Ibid

¹⁸ Section 29, Ibid

¹⁹ Sections 26-28 & 30-32, Ibid

²⁰ Explanatory Memorandum to the Freedom of Information Act, 2011.

²¹ FOI Act, section 1.

²² Section 2(7) & 31, Ibid

²³ Ibid.

²⁴ Sections 2(2), 8 & 9, Ibid

the institution in carrying out the institution's programmes, a list of files containing applications for contract and permits, a list of reports or documents prepared by independent contractors for the institution, and a list of materials containing information relating to any grant or contract made or between the institution and other organizations; (b) a description of the organization and responsibilities of the institution and a description of documents containing final opinion and orders made in the adjudication of cases in respect of the institution; and (c) documents containing substantive rules of the institution, policies, recommendations, decisions, reports studies, receipts, expenditure, bio-data and salaries of all employees, record of all its proceedings as well as details of officials of the institution. These publications are required to be widely disseminated, updated and reviewed periodically and whenever changes occur. Any person is entitled under the Act to approach a court with the aim of compelling a public institution to comply with its obligation with respect to proactive disclosure.

Secondly, the Act also guarantees the right of access to information by empowering any person who is interested in any public record or information to apply for it from the public institution which has custody of it.²⁵ An FOI applicant under the Act needs not demonstrate any specific interest or locus *standi* in the subject matter of the information sought.²⁶ The Act also vests an FOI applicant with right to institute judicial review proceedings with a view to ensuring that public institutions comply with the provisions of the Act with respect to processing of requests. Application for information under the Act is to be made in writing except in the case of an illiterate applicant who may make oral application, which shall immediately be reduced into writing by the officer receiving the oral application.²⁷

1.2.2 Processing of requests

As a general rule, all FOI requests shall be processed, granted or refused within seven days. Where the request is refused, the institution refusing the request shall give Written Notice of Refusal to the Applicant, stating the reasons for the denial and the section of the Act under which the right of denial is exercised.²⁸ However, where a public institution which receives an FOI request is of the view that another public institution is more suitable to disclose the information, the institution to which the application is made shall within 7 days the application is received transfer same to the other public institution.²⁹ The receiving institution has seven days within which to make the information available to the applicant. However, where large number of records is requested and producing such volume of records would unreasonably interfere with the operations of the

²⁵ Section 1, *Ibid*

²⁶ Section 1(2), *Ibid*

²⁷ A copy of the written application shall be given to the applicant.

²⁸ Sections 4(b) & 7. The Notice of Denial/Refusal shall state the names, designation and signature of each person responsible for the denial of the application. However, the refusing officer shall indicate whether or not the information requested exists. Where a public institution fails to give access to information requested within the time limit set in the Act, such institution is deemed to have denied access.

²⁹ Notice of the Transfer must be given to the Applicant.

institution, or consultations are necessary before the document can be produced, the original time limit of seven (7) days may be extended by another seven (7) days. Altogether, a public institution may have up to 21 days within which to grant or refuse FOI request, if transfer and consultations are involved. Otherwise, all requests must be granted or refused within seven (7) days.³⁰ It is a criminal offence under the Act for any government official to willfully destroy any records kept in his or her custody. It is also an offence to doctor or attempt to doctor or alter any public document before releasing it to an applicant.³¹ Once a case of wrongful denial is established, every defaulting officer or institution commits an offence and is liable on conviction to a fine of Five Hundred Thousand Naira only.³²

1.2.3 Exemptions

Not every official information is liable to disclosure under the FOI Act. The Act provides for two general exemptions: absolute and qualified exemptions. Qualified exemptions are those exemptions that may be circumvented on the basis of overriding public interest. For instance, where the public interest in the disclosure outweighs the importance of the qualified exemption, a public institution is duty bound to direct that the information should be disclosed.³³ Absolute exemptions on the other hand are those exemptions which must be applied in all circumstances, regardless of whether the public interest in the disclosure outweighs the importance of the exemption. Even in cases where the public interest in the information is very strong and supports disclosure, an absolute exemption will still apply.

(a) Qualified exemptions

A public institution may legitimately deny an application for information if the disclosure of such information will be injurious to Nigeria's defense and conduct of her international affairs.³⁴ Request for information may also be denied if the information requested pertains to records of any public institution in respect of administrative enforcement proceedings and the disclosure of such information would: (a) interfere with pending law or administrative enforcement proceedings, (b) deprive a person of fair trial, (c) breach confidentiality between parties, (d) violate personal privacy, (e) obstruct ongoing criminal investigations, or (f) facilitate the commission of a crime.³⁵ Every public institution is also under an obligation to deny an application for information that contains personal information of a third party except where the third party consents or the information is already publicly available.³⁶ Section 15 of the Act obliges public institutions to deny application for information which contains trade secrets (except the

³⁰ First 7 days is the original time limit; another 7 days in case of transfer; yet another 7 days in case the records requested are large and consultation necessary before the records can be generated.

³¹ FOI Act, section 10.

³² Section 7(5), *Ibid*

³³ *Okazie v Attorney General of the Federation & Anor Suit No FHC/L/CS/514/2012*.

³⁴ FOI Act, Section 11.

³⁵ Section 12(1) & (3). *Ibid*

³⁶ Section 14(1), *Ibid*

person or business to which such trade secret relates consents); information the disclosure of which could reasonably be expected to interfere with the contractual or other obligations of a third party; proposals and bid for a contract or grant; and information containing product of environmental testing carried out by or on behalf of a public institution except the public institution provides the applicant for environmental testing with written explanation of the method used in conducting the test. Finally, requests for information may also be denied under this genre if the information pertains to test question, scoring keys, examination data, architects and engineers' plan for private buildings and library circulation and other records identifying library users with specific material.³⁷

All the exemptions cited above are qualified exemptions. The uniqueness of qualified exemptions is that they are not sacrosanct. In appropriate cases, if it is shown that the public interest in the disclosure of such exempted information outweighs the injury their disclosure may cause, the court may place the public institution concerned under a duty to disclose the information.³⁸

(b) Absolute exemptions

Public institutions under the Act are under absolute obligation to deny application for any information that is subject to legal practitioner-client privilege, health worker-client privilege, journalism confidentiality privileges and any other professional privilege recognized by an Act.³⁹ Similarly, information which contains course or research materials prepared by faculty members is also exempted from disclosure.⁴⁰ The FOI Act does not apply to the following set of information: published materials or material available for purchase by the public; library or museum material made or acquired and preserved solely for public reference or exhibition purposes; and materials placed in the National Library, National Museum and non-public section of the National Archive on behalf of any person or private organization.⁴¹ The Act prohibits the disclosure of any of the set of information cited above. No justification can be advanced under the Act for requesting or disclosing such information.⁴²

1.2.4 Supervisory mechanisms

Section 29 of the FOI Act obliges all public institutions to submit to the Attorney General of the Federation, not later than 1st of February every year, a report to cover the preceding calendar year which shall state: the number of determinations made by the public institution to refuse FOI request and the reasons for the refusal, the number of applications for judicial review, a description of the court's decision with respect to those

³⁷ Section 19, *Ibid*

³⁸ Sections 12(2) & 14(2), *Ibid*

³⁹ Section 16, *Ibid*

⁴⁰ Section 17, *Ibid*

⁴¹ Section 26, *Ibid*

⁴² It should be noted that some of the information which enjoys absolute exemption under the FOI Act may be disclosed by virtue of other laws. For instance, the Legal Practitioners Act and its subsidiary instruments allow privileged or confidential information between counsel and client to be disclosed in certain circumstances.

applications, the number and description of FOI requests pending before the public institution, the number of days taken by the public institution to process different types of FOI requests, the total amount of fees collected on each application, the number of full time staff devoted to processing FOI request, and the total amount of money expended by each public institution in processing FOI request in the preceding year.⁴³ The Attorney General is mandated to make these reports available to the public through print and electronic media. Further, the Attorney General is required to submit to the National Assembly yearly an omnibus report containing “a list of cases arising under the Act, the exemption involved in each case, disposition of such cases and the cost fees and penalties assessed.”⁴⁴ The Attorney General’s report shall also contain a detailed description of the steps taken by the Federal Ministry of Justice to encourage all governments and public institutions to comply with the FOI Act.⁴⁵ Pursuant to these provisions, the Attorney General of the Federation and Minister of Justice issued the Attorneys General’s Memorandum on Reporting Requirements under section 29 of the FOI Act.⁴⁶

1.3 The role of the judiciary under the Act

The real value of a right may be determined only when it is tested in court. This is because courts have the primary and perhaps sacred duty of ensuring justice in the enforcement of law and enjoyment of rights.⁴⁷ The importance of ensuring justice, evenhandedness, fair play and due process in processing FOI requests cannot be overemphasized. It is best illustrated by considering the grimy feelings aroused in FOI applicants and the public at large when these very important values are absent in the administration of the Act. Ultimately, the attitude of the general public to the FOI Act will depend if not mainly but largely on the way the Act is interpreted and applied by the courts. A liberal and purposive interpretation coupled with courageous and dynamic application will import vigor and vitality to the provisions of the Act. Such courageous application would no doubt infuse in public institutions a sense of the peremptoriness of the provisions of the Act. The mandate of the judiciary under the FOI Act may roughly be divided into two: self-implementation and judicial review.

1.3.1 Self-implementation

One obvious feature of modern bureaucracy (whether administrative, legislative or judicial) is the production of large quantity of records in the course of their daily

⁴³ FOI Act, section 29(1)(a)-(h). Between 2011 and 2012, only 23 MDAs submitted their Annual Compliance Report to the Attorney General. Out of these MDAs, only 11 have staff specially designated to handle FOI request. In all, eight request were reported, most of which took as much as 20days for the public institution to respond to.

⁴⁴ FOI Act, section 29(7).

⁴⁵ FOI Act, section 29(8).

⁴⁶ Federal Ministry of Justice Document: HAGF/MDAS/FOIA/2012/1.

On 29th march 2013, the Attorney General also issued the Revised Guidelines on the Implementation of the Freedom of Information Act, revised edition of 2013. The Revised Guidelines covered quite a wide range of subject matter. It elaborates on the normative framework of the Act and adds flesh to the otherwise dry provisions of the Act. The Revised Guidelines also provides practical guides to public institutions on implementation of the Act.

⁴⁷ See Nwabueze, B.O. *The Second Justice Kayode Eso Lecture: The Judiciary as the Third Estate of the Realm*, Gold Press Limited, Ibadan, 2007.

transactions.⁴⁸ Thus, one of the greatest challenges confronting court personnel nowadays is how to effectively and economically control and utilize their ever-increasing information base.⁴⁹ The Nigerian judiciary no doubt is notorious for its poor record management. In a survey of courts in five states of Western Nigeria, carried out by S.T. Odeyemi, A.O. Issa and H.T. Saka in 2011, it was revealed that most courts in the study areas lacked standard practices for the creation and use of case files.⁵⁰ About 74% of court records personnel surveyed did not know of any regulatory authority charged with the management of records in Nigeria. Another 58.6% are unaware of the existence of any in-house manuals, handbook or guidelines for records management within the judiciary. The bottom-line is that judicial records in Nigeria are poorly managed.⁵¹

Judicial records include case files, case books, registers, judgment books, case lists and diaries, probate files, and account books. In some cases, these records and files are stored in damp, rodent and insect-infested places.⁵² Some current records are mixed up with semi-current, valueless or antiquated records. Because of this general lack of organization, chances of tracing or retrieving an old case file are usually slim. Many a time, the court clerk finds it easier to say that the file is missing rather than wallow in disorganized and very dusty non-current files.⁵³ In some cases, these files actually go missing because of wrong filing or non-filing of records; absence, refusal to use or outright misuse of filing registers; theft or deliberate hiding of records to attract tips or financial gains from litigants; lack of filing materials and space; use of untrained staff in records management; use of unofficial channels to retrieve records; and wrong coding of files among others.⁵⁴ The above underscores the need for the judiciary not to confine itself to the watchdog role for other public institutions. Beyond judicial review, the judiciary needs to assume responsibility for its own information management. It needs to put its own cluttered house in order and conform to the FOI Act in terms of record keeping, proactive disclosure and efficient retrieval of information for use by members of the public.

The FOI Act is applicable to all public institutions. By virtue of section 31 of the Act, public institution comprises 'any legislative, executive, judicial, administrative or advisory body of the government...which are supported in whole or in part by public

⁴⁸ Popoola, S. O. 'Records management programme in Nigeria: A Survey of Osun State Civil Service, Osogbo' *Nigerian Libraries*, 2000, volume 34 Number 1, p. 21.

⁴⁹ Odeyemi, S.T., Issa, A.O. & Saka, H.T. 'Management of Records in the Judiciary of South-Western States of Nigeria' *The Information Manager*, 2011, Volume 11, Number 1&2, p 47.

⁵⁰ Odeyemiet al, *op cit.*, p 45.

⁵¹ Causes of this poor management of judicial records include inadequate funding, poor storage facilities, lack of trained information personnel, inadequate accommodation, lack of automation and ICT facilities and absence of information management procedures and manuals. See Odeyemiet al, *op cit.*, p 46.

⁵² Daramola, J. B. 'Intervention on records management' in National Archives of Nigeria's *The Nation and its records: Proceedings at the 1st National Seminar on Archives and Records Management*, Ibadan, National Archives of Nigeria, 1980, pp. 73-84 referred to in Odeyemiet al, *op cit.*, p 48.

⁵³ Odeyemiet al, *op cit.*, p 46.

⁵⁴ Odeyemiet al, *op cit.*, p 53.

fund...⁵⁵ It is however hazy whether the FOI Act has prompted any major institutional overhaul of the information management system within the judiciary since the Act came into force. The first Annual National Compliance Report prepared by the Office of the Attorney General of the Federation (AGF) showed that only 25 Ministries, Departments and Agencies (MDAs) submitted Compliance Report to the AGF in the year 2011.⁵⁶ In 2012, the number increased to only 28. At the time of writing, no compliance reports have been received from the Supreme Court, Court of Appeal, High Courts or other judicial bodies.⁵⁷ It is only hoped that the judiciary like other public institutions will step up its game in terms of management of records and internal compliance with the provisions of the FOI Act. Apart from giving hope to applicants whose requests have been unjustly turned down by other public institutions, the judiciary must ensure its personnel do not rebuff legitimate FOI requests. In the spirit of the FOI Act, conscious effort must be put in place to ensure efficient information management, processing and retrieval.

1.3.2 Judicial Review

Within the context of the FOI Act, judicial review implies a proceeding whereby a court assesses or evaluates decisions of public institutions with respect to FOI requests or other matters under the Act with a view to ascertaining whether such decisions or actions have been taken or done as prescribed by the Act.⁵⁸ Nearly every decision taken by a public institution under the FOI Act is subject to judicial review.⁵⁹ Importantly, an applicant who has been denied access to any public information may apply to court within 30 days after the denial or within such further time as the court may allow.⁶⁰ The court has stated in *Incorporated Trustee of the Citizen Assistance Centre v Ikuforiji*⁶¹ that non-compliance with the 30-day time frame is not fatal to the applicant's right to seek judicial review. The court during a judicial review under the FOI Act shall hear the applicant summarily,⁶² and the onus of proof during the trial shall lie not on the applicant but on the public institution.⁶³ The court may compel a public institution to disclose any information sought by the applicant if and only if the court finds: (a) that the public institution is not authorized by the FOI Act to conceal the information, or (b) that the institution is so authorized but the court nonetheless finds that the institution does not have a reasonable

⁵⁵ FOI Act, section 31 [Emphasis mine]

⁵⁶ Communiqué Issued at the End of a Two-Day National Conference on the Freedom Of Information Act 2011 organized by Right To Know Initiative (R2k), Nigeria on the 30th and 31st of July, 2013 at the New Chelsea Hotel, Abuja.

⁵⁷ Ibid.

⁵⁸ See *A.G. Federation v Abule* (2005) 11 NWLR (part 936) 369.

⁵⁹ The right of access, proactive disclosure duty, decision of a public institution to transfer an FOI request to another institution, and the decision by a public institution to unilaterally extend the time for processing FOI request beyond seven days are all enforceable in court. Further, all notices of denial of access, notices of transfer of requests and notices of extension of time for processing FOI request shall contain a clause informing the applicant his right to seek judicial review of such notices. See FOI Act, sections 1(3), 2(6) & 5(1).

⁶⁰ FOI Act, section 20.

⁶¹ *Incorporated Trustees of the Citizens Assistance Centre v Ikuforiji* Suit No ID/211/2009.

⁶² FOI Act, section 21.

⁶³ FOI Act, section 24

ground to deny the application, or (c) that the public interest in the disclosure of the information is greater and more vital than the interest being served if access to the information is refused.⁶⁴

As expected, it is in the court and not in the legislature or decrees of a legislature that the public feels the cutting edge of the law.⁶⁵ If citizens are well acquainted with the work of the courts, this knowledge and respect for the work of the court will 'survive the shortcomings of every other branch of government. But if they lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment of the society.'⁶⁶ It is thus important to know not only the provisions of the FOI Act but more importantly the interpretations which the courts have vested on such provisions in decided cases. A review of some of the landmark cases on the FOI Act is available in the Freedom of Information Law Report.⁶⁷

In *Uzoegwu F.O.C Esq. v. Central Bank of Nigeria & Anor*,⁶⁸ for instance, the court ordered the Central Bank of Nigeria (CBN) to disclose within 14 days the monthly salaries and allowances of the Governor, Deputy Governor and Directors of CBN. Similar verdict was given in *Okazie v Attorney General of the Federation & Anor*.⁶⁹ In this case, the court ordered the Attorney General as well as the Economic and Financial Crimes Commission to provide information to the applicant within 72 hours. In the case of *Legal Defence and Assistance Project (LEDAP) v Clerk of the National Assembly*,⁷⁰ LEDAP petitioned the Clerk of the National Assembly requesting amongst others information on the details of the salaries, emoluments and allowances paid to federal legislators from June 2007 to May 2011. This request was denied by a Notice of Denial written to the applicant by the Clerk of the National Assembly. On application to court for judicial review of the Notice of Denial, the court ordered the Clerk of the National Assembly to disclose to the applicant within 14 days from the date of the order detailed information on the salaries and emoluments of the affected legislators. Similar decisions have been handed down in the judicial review cases of *PPDC v Power Holding*

⁶⁴ FOI Act, section 25

⁶⁵ Vanderbilt, A. *The Challenge of Law Reforms*, Princeton, Princeton University Press, 1955, pp.4-5, referred to in Abraham, H.J. *The Judicial Process*, London, Oxford University Press, 1975, p. 3.

⁶⁶ Ibid.

⁶⁷ See Freedom of Information Law Report available online at:

<http://mediarightsagenda.net/freedom-of-information-law-report>. The cases are not reported in conventional law reports such as the Nigerian Weekly Law Report (NWLR), Federation Weekly Law Report (FWLR) and All Nigeria Law Report (All NLR) among others. These Standard Law Reports usually report only appellate decisions. All the cases reviewed in this paper are High Court decisions. There is yet to be an appellate court's decision on judicial review under the FOI Act as at the time of writing this paper.

⁶⁸ Suit No FHC/ABJ/CS/1016/2011.

⁶⁹ *Boniface Okazie v Attorney General of the Federation & Anor* Suit No FHC/L/CS/514/2012.

⁷⁰ *Legal Defence and Assistance Project (Gte) Ltd v Clerk of the National Assembly* Suit No FHC/ABJ/CS/805/2011.

Company of Nigeria,⁷¹*Okazie v Central Bank of Nigeria*⁷²and *Citizens Assistance Centre v Ikuforiji*.⁷³

1.4 Prospects and challenges of judicial review

The power of the courts to review decisions of public institutions in respect of FOI requests is precious, yet fragile. While the trend in most of the cases reviewed above evokes public confidence in the capacity of the court as the bastion of justice –with reference to the quick dispensation of cases, and especially the prescription of time-limit for compliance with decisions – it is nonetheless necessary to state that due to some factors unconnected with the FOI Act, courts may be out of the reach of some applicants who have been denied wrongfully their right of access to information. It is well known that the problems bedeviling adjudicatory process in Nigeria are multifarious and multi-dimensional.⁷⁴ They range from too many cases in court to trial delays, denial of justice, inadequacy of judicial personnel, archaic system of court adjudication, corruption, lack of modern management technology and the absence of case management techniques.⁷⁵

One major problem with administration of justice generally is undue delay.⁷⁶ This problem is as old as the Magna Carta, if not even older.⁷⁷ This age-long problem has been addressed by the Constitution of the Federal Republic of Nigeria 1999 when it provides: “In the determination of his civil rights and obligations, including any question or determination against or by any government or authority, *a person shall be entitled to a fair hearing within a reasonable time* by a court or other tribunal established by law in such manner as to secure its independence and impartiality”.⁷⁸ Despite the clear constitutional provision in support of expeditious trial, delayed trial and trial beyond what can be regarded as reasonable time is the norm rather than the exception. This is because the judicial process by its very nature is slow.⁷⁹ A study conducted by the Lagos State Ministry of Justice in 2001 showed that it takes an average of five to ten years for a contested case to move from filing to judgment.⁸⁰ A very high officer recently lamented

⁷¹*Public and Private Development Centre (PPDC) Ltd & Nigeria Contract monitoring Coalition v Power Holding Company of Nigeria* Suit No FHC/ABJ/582/2012.

⁷²*Boniface Okazie v Central Bank of Nigeria* Suit No FHC/L/CS/514/2012.

⁷³*Incorporated Trustees of the Citizens Assistance Centre v Hon. Adeyemi Ikuforiji* Suit No ID/211/2009.

⁷⁴ Anyebe, P.A. “Towards Fast Tracking Justice Delivery in Civil Proceedings in Nigeria”, <www.nials-nigeria.org> visited 7/27/2013 at 3am.

⁷⁵ Peters, D. “Alternatives to Litigation: The Multi-Door Court House Concept in Issue” in, Yusuf, F.A.O (ed): *Justice Administration in Nigeria*, Lagos, VDG International Limited, 2008, p. 435.

⁷⁶ Tobin, N. *The Nigerian Lawyer*, Lagos, Law Research & Development Forum Limited, 2002, p.412.

⁷⁷ Tobin, N. “Delay in Administration of Justice” In Nweze C.C. (ed): *Justice in the Judicial Process: Essays in Honour of Honorable Justice Eugene C. Ubaezonu JCA*, Enugu, Fourth Dimension Publisher, 2002, p. 138. It would be recalled that as far back as 1215, section 40 of the *Magna Carta* provides: ‘To no one will we sell, to no one will we deny nor delay right to justice.’

⁷⁸ Section 36, Nigeria Constitution [Emphasis mine].

⁷⁹ Tobin, (2002), *The Nigerian Lawyer*, op cit, p 413.

⁸⁰ Anyebe, Op cit.; Osinbajo, Y. (2011) *The Retreat of the Legal Process* Nigerian Institute of Advanced Legal Studies, Lagos, p. 3.

that a suit before one of his courts suffered well over (80) eighty adjournments.⁸¹ The appellate courts are not any better. During the 2010-2011 Legal Year, for instance, the Supreme Court disposed of 163 cases, consisting of 78 judgments and 85 motions.⁸² However, 1149 civil appeals, 58 criminal appeals and 177 motions were still pending before the Supreme Court. Commenting on this backlog, Justice Dahiru Musdapher, C.J.N (as he then was) opined that even if there were a full constitutional complement of 21 justices of the Supreme Court, it would certainly take several years before the logjam would be cleared.⁸³

Due to the prevalence of this problem, the Supreme Court in *Ariori v Elemo*⁸⁴ laid down the criteria for determining the reasonableness of the length of a civil trial. The court held:

Reasonable time for the consideration and delivery of court judgment depends only on the time an active, healthy and mentally alert judge takes to read and consider the evidence and write his judgment with full and complete consciousness of all the impressions of witnesses at the trial. A period of time which dims or loses the memory of impressions of the witnesses is certainly too long and is unreasonable. Where a period of time dims or loses the memory of impressions or witnesses, it occasions a miscarriage of justice, contravenes the fair trial provisions of our Constitution and vitiates the whole proceedings”.⁸⁵

The court also noted that what amounts to reasonable or sufficient time in each case depends on the court's discretion. Thus, in the case of *Lawal v Erinle*,⁸⁶ where the trial judge delayed the delivery of a judgment for a period of nine months after final address, the Supreme Court described the delay as inordinate. However, in *Nnaji for v Ukonu*,⁸⁷ the Supreme Court found that a trial which lasted three years did not violate the constitutional right of fair hearing within reasonable time.

The causes of delay in the adjudicatory process are numerous. These may include the fact that judges write down court proceedings in long hand,⁸⁸ inordinate applications for adjournment,⁸⁸ lack of legal representation or absence of counsels in court, poor health of

⁸¹ Yadudu, A.H. "The Nigerian Legal Profession: Towards 2010", NIALS Annual Lecture Series, Lagos, Nigerian Institute of Advanced Legal Studies, 1997, p. 6.

⁸² Musdapher, D. "The Nigerian Judiciary: Toward Reform of the Bastion of Constitutional Democracy" *Fellows Lectures Series*, Lagos, Nigerian Institute of Advanced Legal Studies, 2011.

⁸³ Ibid. See also Anyebe, *op cit*.

⁸⁴ (1983) 1 SCNLR 1.

⁸⁵ As above.

⁸⁶ SC 109/70 decided on 1st September 1972 (unreported) referred to in Tobi, 'Delay in administration of justice' *op cit* p. 143.

⁸⁷ (1985) 2 NWLR (part 9) 686.

⁸⁸ A civil case is hardly completed without adjournments unless the defendant, the public Institution in this case accepts liability.

the parties or the judge, congested Cause List, lengthy court processes,⁸⁹ lengthy advocacy, filing of many motions and raising countless objections. Another frequent cause of delay is the right of appeal even in the slightest interlocutory matters.⁹⁰ Although some measure of delay is indispensable if the judicial process must triumph for the mutual benefits of parties, yet undue delay of FOI cases may constitute a formidable disincentive to judicial review under the FOI Act. While the judiciary must be saluted so far for the accelerated hearing of FOI cases and the prescriptions of time-limit for compliance with their decisions, it is nevertheless noteworthy that semblance of undue delay is beginning to rear its ugly head in the adjudication of FOI cases. One of the cases which has been credited as the most daring and far-reaching, *LEPAD v Clerk of the National Assembly* (where the court ordered the Clerk of the National Assembly to release to LEPAD details of the pay package of legislators between 2007 and 2011) is currently on appeal. In fact, majority of the cases reviewed in this paper are currently on appeal, and the first thing public institutions do is to secure an order of the appellate court staying execution of the laudable judgment of the lower court. It is needless to state that the practice of dragging FOI cases through the odious appeal process from the High Court all the way to the Supreme Court may impact not only the public's desirability to access the court but also on the usefulness of the information obtained at the end of that long-drawn-out process.

One clear missing link in the FOI Act which has posed quite a challenge to persons seeking judicial review of actions of state governments with respect to the FOI Act is the lack of clarity and specificity about the application of the Act to the 36 states of the Federation. It is also not very clear which provisions of the Constitution the Act was passed pursuant to. Could it be section 38 of the Constitution,⁹¹ paragraph 3(c) of Part the Third Schedule to the Constitution,⁹² Item 60(a) of the Exclusive Legislative List⁹³ or item 4 of the Concurrent Legislative List?⁹⁴ This ambiguity is seriously affecting the willingness of members of the public to institute judicial review proceedings in states which claim the Act does not apply to them. Another major challenge to judicial review under the FOI Act is the seeming inconsistency in the decisions of the various courts. While the court in *LEPAD v Clerk of the National Assembly* for instance directed that the salaries, emoluments and allowances of Federal legislators from 2007 to 2011 should

⁸⁹ Although the originating motions for judicial review of FOI requests are usually of concise length, the affidavit and written address are not.

⁹⁰ Tobi, "Delay in administration of justice" *op cit.* p 413.

⁹¹ This section provides for Freedom of Expression and the Press. Most commentators believe FOI is an appendage of the freedom of expression.

⁹² This provision establishes the Code of Conduct Bureau and empowers the National Assembly exclusively to make laws prescribing the terms and conditions for access to information about assets declaration by public officers.

⁹³ See Part I of the Second Schedule of the Constitution. This Part contains the Exclusive Legislative power of the National Assembly to make laws for the establishment and regulations of authorities for the federation or any other part thereof for the promotion and enforcement of the fundamental objective and directive principles of state policy (FODPSP). It would be recalled that section 14(2)(c) of the FODPSP (of the Constitution) requires government to ensure participation of all and sundry in affairs of government.

⁹⁴ See Part II of the Second Schedule of the Constitution. This Part contains the Concurrent Legislative power of both the National Assembly and State Assemblies to make law with respect to archives and public record.

be disclosed, the court in *Incorporated Trustees of Citizens Assistance Center v Ikuforiji* refused to allow same information to be disclosed in respect of Lagos State legislators arguing that salaries are personal information exempted from disclosure under the Act.⁹⁵ Such inconsistency can be resolved only by the appellate court but it is certainly not in the interest of the public or FOI applicants that FOI matter should be dragged up to the Supreme Court as most times information requested is only useful if obtained within a specific time-frame.

Yet another challenge often overlooked is the cost implication of pursuing a judicial review under the Act. Although the FOI Act in its wisdom contains provisions which are meant to trim down the cost of requesting and obtaining information from public institutions,⁹⁶ the Act nevertheless failed to mitigate the financial burden of FOI applicants in their effort to seek judicial review. In a paper presented at the 6th international Appellate judges' conference in September 1992, Honourable Justice Niki Tobi, JCA (as he then was) described the impact of the global economic meltdown and inflationary trend on costs of litigation as follows:

The world is in a state of flux. And I really mean the entire world. It is in a state of economic depression. Prices of goods jump every day. So also are costs of services. They jump by leaps and bounds. The economy does not only fluctuate like the tidal waters in Nigeria or like the weathercock in climatology, it is also frail and flabby: One is not sure of the price index the next day...Because of competing economies and the dynamics of changing economic society in particular the economic world order in general, the resultant inflationary trend is inching every day, and for the worse and disadvantage of mankind. This hurrying inflationary trend affects everybody everywhere... since the judicial process being enforced by judges is part of the world legal system and legal order, it must feel the pains and pangs of the global recession.⁹⁷

The picture above is even truer today. Court fees are increasing daily in order to generate more revenue for government and meet the overhead costs of the court. It is a truism that justice in court to a large extent depends on the caliber of lawyers employed by the litigant. Thus apart from statutory court fees litigants have to pay their counsels and the services of good lawyers are no doubt very costly. The applicant also has to transport himself to court and in some cases, he has to foot the bills of some well-wishers who may offer to accompany him to court. This state of affairs usually goes on for a long time. While justice delayed may not in all cases be synonymous with a denial of justice, it

⁹⁵ The grounds for the refusal by the court in *Incorporated Trustees of Citizen Assistance Centre* were that the FOI Act cannot apply retrospectively and that the emolument of legislators is not disclosable under the Act.

⁹⁶ See FOI Act, section 8.

⁹⁷ Tobi, N. "Poverty and the Judicial Process", A paper presented by Honourable Justice Niki Tobi JCA (as he then was) at the *Sixth International Appellate Judges Conference* in September 1992, referred to in Tobi, 'Delay in the administration of justice' *op cit.*, p 146.

nevertheless means added expenses for the applicant. The costs and expenses of litigation again grow bigger and bigger as the public institution climbs the ladder of appeal up to the apex court. Altogether, an FOI applicant who wishes to pursue the option of judicial review to completion may have to cough out huge amount of money. Many a time, the costs and expenses associated with litigation far exceed the value of the subject matter of the case. This is especially so in FOI proceedings where all an applicant requires for instance is a few pages of a public document. Under this type of arrangement, only rich applicant will succeed in pursuing their requests to the point of judicial review or on appeal if need be. Public institutions on the other hand squander tax payers' money to engage the services of the best lawyer and spend even more to drag the case through appeal. If the applicants cannot match up, the case may go in favour of the public institution. While the FOI Act could not have prescribed separate, subsidized filing fees for cases of judicial review under the FOI Act nor preclude lawyers from demanding high professional fees, nevertheless, the Act ought to contain some practical legal aid provisions. The absence of such provisions is a fundamental omission which no doubt will affect the willingness of members of the public to seek judicial review under the Act.

1.5 Conclusion

Judicial review is not a free-standing component of the FOI Act. The phase of judicial review can be reached only after some preliminary stages have been exhausted. Thus, the number of judicial reviews under the FOI Act will depend first on the number of FOI requests made generally. If there are fewer requests, it follows there will be few judicial review cases. Similarly, judicial review depends on whether every piece of information requested is disclosed by the relevant authority. If that is the case, there will certainly be no need for judicial review. Further, even if there are cases of refusal, judicial review will still depend on whether the reasons given for the refusal are satisfactory to the FOI applicants. If they are, no judicial review will be made. Even if the reasons given are not satisfactory to the applicant, judicial review also depends on whether the applicant is not incapacitated or discouraged from seeking review by other reasons or factors such as excruciating poverty, protracted delay often associated with judicial proceedings, and the costs of seeking judicial review, among others. The implication of the analysis above is that case reports on FOI cannot be used as sole determinant of citizens' engagement with the FOI Act.

One point that came out clearly from the FOI cases reviewed is the fact that most public institutions refuse FOI requests on any ground, lawful or otherwise thereby leaning in favour of the option of being dragged to court, where they would further advance ridiculous defences.⁹⁸ These defences are usually slammed by the courts and the public institutions are usually compelled to disclose the information which they had no legitimate reason to conceal in the first place. Such an attitude is costly for citizens and

⁹⁸ Media Rights Agenda, 'Press Release: Media Rights Agenda commends judiciary for upholding right to information for citizens' Lagos, Tuesday, 28 May 2013, <<http://mediarightsagenda.net/press-release-media-rights-agenda-commends-judiciary-for-upholding-right-to-information-for-citizen/>> visited 7/27/2013 at 3am.

for the public institutions themselves. It amounts to an unconscionable waste of public funds. In fact, majority of the cases which have so far come before the court on the FOI Act should ordinarily not have come near the court's doorstep in the first place. In the spirit of proactive disclosure, such matters as salaries and allowances of staff of public institutions ought to be published and made available to the public by the public institutions in hard copy or on the institution's web page. Proactive disclosure is the cornerstone of the freedom of information regime. Without efficient record keeping and a culture of self-disclosure, public institutions may act in sabotage of the Act. If public institutions are not obligated to keep records, the public's right to request such records cannot be said to be guaranteed.

Another vital observation is the fact that, with the exception of section 6 of the Act which allows for additional 7 days in case the information requested is voluminous or consultation is required in order to produce the information, the Act is not sufficiently flexible in terms of time-frame for response by public institutions. For instance, in the cases of *Okazie v Attorney General of the Federation & Anor*⁹⁹ and *PPDC v Power Holding Company of Nigeria*,¹⁰⁰ there is no way a government institution working at its normal pace would produce all the documents requested within the first seven (7) days or even within the additional seven (7) days. In such exceptional cases, the FOI applicant ought to have been empowered by the Act to demand that the request be processed within a longer time-frame.¹⁰¹ The advantage of this arrangement is that it is the FOI applicant who is recognizing the need for more time, not the government agency making excuses for additional time outside the statutory maximum. Another reason for this flexibility is because those records might not have been kept. Even where they are kept, the figures or information requested may not have been disaggregated in the way and manner the applicant wants them.

It is also useful if lawyers representing clients in FOI matters state in their originating processes the specific time-frame within which they want the public institution concerned to comply with the order of the court. A review of the cases earlier highlighted shows that in all cases where the time-frame for compliance is specifically stated in the applicant's pleadings, the court usually enforce same. In the case of *Okazie v Central Bank of Nigeria*,¹⁰² for instance, where no time-frame for compliance was ordered by the court, the Applicant too in that case negligently omitted to ask for one.

It is often said that the role of the judge in any society is the attainment of justice.¹⁰³ Put conversely, it implies the removal of every sense of injustice. In the context

⁹⁹ *Boniface Okazie v Attorney General of the Federation & Anor Suit No. FHC/L/CS/514/2012.*

¹⁰⁰ *Public and Private development Centre (PPDC) Ltd & Nigerian Contract Monitoring Coalition v Power Holding Company of Nigeria Suit No FHC/ABJ/582/2012..*

¹⁰¹ The applicant could for instance state in his/her application: 'Although I know organization is bound by law to process my request within 7 days or at most 14 days, I am willing to give your organization one month to respond because of the volume of information I am requesting.'

¹⁰² *Boniface Okazie v Central Bank of Nigeria Suit No. FHC/L/CS/494/2012.*

¹⁰³ Aderemi, P.O. "The Role of a Judge in the Administration of Justice in Nigeria" in Yakubu, J.A. (ed): *Administration of Justice in Nigeria: Essays in Honour of Hon Justice Mohammed Lawal Uwais* Lagos, Malthouse Press, 2000, p 79.

of the FOI Act, the task of ensuring justice through the process of judicial review is a very odious one. This is because judges like other human beings are mere mortals who are prone to sympathy, fears, prejudices and all manners of frailties.¹⁰⁴ Infallibility is certainly not their virtue. Yet, whether the FOI Act will achieve its objectives as set out in its Explanatory Memorandum depends largely on the attitude of judges to the Act. Already, majority of FOI requests under the Act are resulting in lawsuits. Even simple matters such as salaries of staff which ought to be disclosed proactively by the relevant public institutions had to end up in court as in *Uzoegwu v Central Bank of Nigeria & Anor.*¹⁰⁵ It however remains to be seen how these court cases will impact on the attitude of public institutions to comply with the Act.

The FOI Act mandates public institutions while denying a request for information to state whether or not the information exists.¹⁰⁶ What if a document exists but the institution lies that it doesn't. Of course, the public institution is still in violation of its obligations, having failed to comply with section 2 of the Act which compels keeping of record of all activities, operations and businesses. But what good will it do the applicant if the court finds a public institution in violation of its record keeping obligation? While court cases are good for proper understanding of the import of the Act and for the purpose of setting precedents, public institutions should be encouraged and sensitized to comply voluntarily with Act especially with reference to record keeping. It is elementary to state that even when an FOI applicant is successful in court, a court order cannot produce a record that does not exist.

¹⁰⁴ Ibid.

¹⁰⁵ *Uzoegwu FOC Esq. v Central Bank of Nigeria & attorney General of the Federation* Suit No. FHC/ABJ/CS/1016/2011.

¹⁰⁶ FOI Act, section 7(3).