

Proactive Disclosure Requirements under the FOI Act

By Edetaen Ojo

(edet@mediarightsagenda.net)



Introduction

- Proactive disclosure is addressed in Para. 1.5 of the current Guidelines on the Implementation of the Freedom of Information Act
- The issues is addressed in about 4 short paragraphs
- In summary, the view of the Panel is that more emphasis and details are required on the issue given the importance of proactive disclosures



Introduction (Contd.)

- It is also being proposed that the revised Guidelines should contain advice and guidance for public institutions on how they can progressively increase the range, types and number of information, documents and records to be published proactively.
- This will help them improve their compliance with the provisions of the FOI Act while also benefitting them in other ways.



What is Proactive Disclosure?

- Proactive disclosure is one of the 2 major ways by which the public can access public information under an FOI Law.
- This is when information is made available to the public on the initiative of the public institutions themselves, without anyone having to first submit a request for the information.



FOI Laws & Proactive Disclosure

- Many Freedom of Information laws around the world place an obligation on public authorities & institutions to publish, on an automatic or proactive basis, a range of information that are of public importance.
- Many modern FOI laws now contain very extensive provisions imposing proactive publication obligations on public institutions with guidelines for their implementation



Best Practice in Proactive Disclosure

- Some of the international best practice features of the regime of proactive disclosure are:
 - ⇒ Ensuring that information that is of great public interest is routinely published to the public.
 - ⇒ Updating the published information regularly to ensure that it is always accurate & reliable at any point in time.



Best Practice in Proactive Disclosure

- ⇒ Ensuring that the information reaches those who may need it. For example, if a project affects people in a local community, it might not be enough to simply publish the information proactively on the Internet. Such information may also be posted on notice boards in such a community or published through other similar means to ensure that it reaches those for whom it is most relevant.



Best Practice in Proactive Disclosure

- ⇒ Ensuring that the information is understandable for people in a local community. For example, financial, scientific or other technical information should not be presented in excessively technical terms.
- ⇒ Progressively increasing the scope of information that are subject to proactive disclosure over time.



Best Practice in Proactive Disclosure

- Proactive disclosure also helps to facilitate the exercise of the right of access to information for the public because it enables members of the public seeking information to know what information each public institution holds & perhaps, how to access the information.
- People then know which institution they should approach for any specific information they seek.



FOI Act & Proactive Disclosure

- The FOI Act 2011 requires public institutions to proactively publish certain types of information even without anyone requesting them. – S. 2(3).
- These should be widely disseminated & made available to the public through various means, including electronic, print & online channels as well as at the organization's offices. – S. 2(4).



Proactive Publication

- Every public institution is also required to review & update this information periodically & whenever any changes occur - S. 2(5).
- Every member of the public has a right under the Act to institute proceedings before a court to compel any public institution to comply with these requirements, if it is in default. – S. 2(6)



Proactive Publication (Contd.)

Every public institution covered by the Act, is required to publish the following information proactively:

- a description of the organization & its responsibilities, including details of the programmes & functions of each division, branch & department;
- a list of all classes of records under its control in sufficient detail to facilitate the exercise of the right to information.



Proactive Publication (Contd.)

- a list of all manuals used by its employees in administering or carrying out any of its programmes or activities;
- a description of documents containing orders made & final opinions, including concurring & dissenting opinions, rendered in the adjudication of cases;
- documents containing its substantive rules;



Proactive Publication (Contd.)

- documents containing statements & interpretations of policy which it has adopted.
- documents containing final planning policies, recommendations & decisions;
- documents containing factual reports, inspection reports & studies, whether prepared by or for the institution;



Proactive Publication (Contd.)

- documents containing information relating to the receipt or expenditure of public or other funds of the institution;
- documents containing the names, salaries, titles & dates of employment of all employees & officers of the institution;
- documents containing the rights of the state, public institutions, or of any private person(s);



Proactive Publication (Contd.)

- documents containing the name of every official & the final records of voting in all proceedings of the institution;
- a list of files containing applications for any contract, permit, grants, licenses or agreement;
- a list of reports, documents, studies, or publications prepared by independent contractors for the institution;



Proactive Publication (Contd.)

- a list of materials containing information relating to any grant or contract made by or between the institution & another public institution or private organization; and
- the title & address of the appropriate officer of the institution to whom an application for information under the Act should be sent.



Benefits of Proactive Disclosure

- There are many benefits of proactive disclosure, both for public institutions which take the initiative to publish the information they hold & for the public.
- From a public policy perspective, which aims at ensuring better governance, the benefits of proactive disclosure for governments & public institutions include the following:



Benefits of Proactive Disclosure

- ⇒ Proactive disclosure ensures that members of the public are appropriately informed about laws, policies & decisions that affect them.
- ⇒ The proactive disclosure of data, policy documents & other types of information ensures that members of the public have the information they need to participate in policy & decision-making.



Benefits of Proactive Disclosure

- ⇒ The proactive dissemination by public institutions of information about how they operate and what they do helps the public to access government services.
- ⇒ Proactive disclosure encourages better information management within public institutions as it improves the institution's internal information flows, & thereby contributes to increased efficiency.



Benefits of Proactive Disclosure

- ⇒ Proactive disclosure ensures more accountable use of public funds & helps to promote integrity in government.
- ⇒ Proactive disclosure also reduces the burden on public institutions of having to process numerous individual requests for information filed under the FOI law.



Benefits of Proactive Disclosure

- From the public's point of view, the benefits of proactive disclosure include the following:
 - ⇒ The automatic availability of information ensures that the public has timely access to information
 - ⇒ Proactive disclosure also helps to ensure that there is equal access to the information for all members of the public without the need for anyone to file requests to be informed.



Benefits of Proactive Disclosure

- ⇒ Proactive disclosure helps to ensure that all citizens can access at least a minimum amount of information about public institutions, including the vast majority of citizens who may never submit an FOI request.
- ⇒ Where a proactive disclosure regime is functioning properly & relevant information are automatically disclosed in real-time, it becomes difficult to later deny the existence of any particular information or to manipulate information.



Benefits of Proactive Disclosure

- ⇒ Proactive disclosure enhances security for members of the public seeking information relating to specific issues, institutions or groups, as it makes it possible for people to access sensitive information anonymously.
- ⇒ It will therefore be almost impossible for powerful interests in society to identify or track members of the public who are requesting specific information.



Ensuring Compliance

- Section 2(6) of the FOI Act gives every person entitled to the right of access under the Act the right to institute proceedings in the court to compel any public institution to comply with its proactive publication obligations.
- The Act is therefore encouraging the public to monitor compliance with the proactive publications obligations of public institutions & to use the courts to enforce compliance.



Proposed Modifications

- The current Foreword in the Guidelines is being amended to briefly highlight the Proactive Disclosure requirements in the Act
- Chapter 1 of the Guidelines dealing with “Fundamental Principles” is being amended to incorporate relevant principles for Proactive Disclosures
- Para. 1.5 of the Guidelines is being elaborated & possibly turned into a new chapter with details on proactive disclosure



Proposed Modifications (Contd.)

- The new chapter will emphasize the right of the public to proactively disclosed information and the corresponding duty on public institutions to comply with their proactive disclosure obligations under the FOI Act
- The new chapter will include the categories of information that are required to be proactively published under Section 2 of the Act



Proposed Modifications (Contd.)

- The new chapter will include guidance on how to maximize proactive disclosure
- This could conceivably include a recommendation that once any information has been requested and disclosed, such information should be published in a publicly available platform such that it forms part of the institution's proactive disclosures for the benefit of those who may seek the same information in future.

