

KEYNOTE ADDRESS DELIVERED BY THE HONOURABLE ATTORNEY GENERAL OF THE FEDERATION AND MINISTER OF JUSTICE, MR. MOHAMMED BELLO ADOKE, S.A.N, CFR, AT A ONE-DAY SENSITISATION WORKSHOP ON THE OFFICIAL SECRETS ACT 1962 AND THE FREEDOM OF INFORMATION ACT 2011 ORGANISED BY THE PUBLIC SERVICE INSTITUTE OF NIGERIA ON TUESDAY 22ND NOVEMBER 2011.

Protocols

I am grateful for the opportunity given to me to deliver the keynote address at this workshop which I understand is being organised in response to the incessant enquiries and concerns about the implementation of the Freedom of Information Act 2011. (FoIA)

2. The Official Secrets Act, Cap O3 LFN 2004 (OSA) and the FoIA have different objectives. The former is concerned with securing public safety by restricting the disclosure of classified or security related information while the latter seeks to make public records and information more freely available, in a manner consistent with the public interest and the protection of personal privacy. There will no doubt be challenges arising from the novelty of the provisions and as public officers adjust to this decisive shift from a culture of secrecy to one of transparency. This is why workshops like these are needful to shed more light on these provisions. I therefore congratulate the organizers.

3. Keenly aware of the oversight functions of the office of the Attorney General under the Act I recently conducted a similar exercise for legal advisers of all MDAs and legal officers in the Federal Ministry of Justice. Some of the outputs of that exercise will form part of the guidelines on implementation of the Act as well as our proposals to strengthen the Act.

4. Any inconsistency between the FoIA and the OFA should ordinarily be resolved in favour of the FoIA in accordance with the well known canon of statutory interpretation that a latter statute prevails where there is inconsistency between two statutes. This is put beyond controversy by virtue of sections 1, 27 and 28 of the FoIA. Section 1 in particular establishes the right of any person to access or request information which is in the custody of any public official or institution notwithstanding anything contained in any other Act. It further provides that an applicant under the Act need not demonstrate any specific interest in the information being applied for and that the person has a right to institute proceedings in the Court to compel any public institution to comply with the provisions of the FoIA.

5. Section 27 of the FoIA is a provision designed to protect whistleblowers i.e. serving public officers from adverse consequences in disclosing certain kinds of official information without authorization. It seeks to achieve this by protecting -

- (a) a public officer who discloses in good faith any information pursuant to the FOIA from civil or criminal proceedings for any consequences that flow from a disclosure, or for the failure to give any notice required under the Act, if care is taken to give the required notice;
- (b) receivers and users of such information from any civil or criminal proceedings; and
- (c) a public officer from suffering any adverse consequence under the law (for example under the Official secrets Act) where the officer without authorization discloses information which he reasonable believes to show -
 - i. violation of any law, rule or regulation;
 - ii. mismanagement, gross waste of funds, fraud, and abuse Of authority; or
 - iii. substantial and specific danger to public health or safety.

The provision specifically excludes the operation of the OSA in these circumstances and clearly demonstrates a definite paradigm shift in the management of and access to public records.

6. A related provision is section 28 of the FOIA which like section 27 limits the operation of the OSA, by providing that the fact that information is classified within the meaning of the OSA shall not prevent disclosure under the FOIA subject to the latter Act's provisions on exempted information under sections 11,12, 14 – 17, 19-21. By way of observation the reference in this provision to sections

20 and 21 is an obvious error considering that these provisions provide for access to courts by applicants and have nothing to do with the nature of documents.

7. The import of sections 27 and 28 considered above is to limit the scope of section 1 of the OSA which penalizes:

- (a) any unauthorized person whom transmits any classified matter to a person or who without authorization obtains, reproduces or retains any classified matter; and
- (b) a public officer who fails to comply with any instructions given to him on behalf of the government as to the safeguarding of any classified matter.

8. By virtue of section of the OSA a "classified matter" means any information or thing which, under any system of security classification from time to time in use by or by any branch of the government, is not to be disclosed to the public and of which the disclosure to the public would be prejudicial to the security of Nigeria. What section 27 has done is in fact to re-define "classified matter for the purpose of disclosure of information in terms of the exemptions referred to under the FoIA. Public officers should therefore ensure that before designating any record as classified such must fall under one or more of the provisions referred to in section 28, otherwise the classification will in accordance with section 28(2) be ignored.

9. It is noteworthy in this regard to note that sections 11 - 19 of the FOIA provides for qualified exemptions where the information requested for is injurious or prejudicial to -

- (a) International affairs and the defence of Nigeria (s.11)
- (b) ongoing or proposed law enforcement measures, investigations and proceedings (s.12)
- (c) right of privacy save where the person to whom the information relates consents or where the information is in the publicly available. (s. 14)
- (d) commercial interests e.g. trade secrets, third party interests in negotiation environmental surveys or tests or bids for a tender (s. 15)
- (e) professional and other privileges under the law (s.16). the public institution has a discretion to deny or disclose (s. 16)
- (f) Research or course materials prepared by faculty members (s. 17)
- (g) the preservation of certain records e.g. test questions or examination or scoring scheme; building plans of private of designated security installations; library circulation (s. 19)

10. In all these cases the public institution shall disclose the information requested for if (i) disclosure would be in the public interest **and** (ii) if the public interest in the disclosure clearly outweighs the injury to any of the interests outlined in sections 11 – 19 of the Act. Where the public institution determines that disclosure will not be in the public interest or that the public interest in favour of

disclosure does not sufficiently out-weigh the public interest to safeguard the interests outlined in any particular case covered by the above provisions, it may –

- (a) Refuse the request in accordance with section 7 of Act; or
- (b) Consider whether there is some non-exempted part of the information covered by the request which can be severed from the exempted part.

11. There is no doubt that in the absence of a definition in the FOIA of what amounts to “public interest” as to override an exemption, public officers will need to be guided in their application of these provisions. Happily the decision of the public institution is not final as section 20 provides that an applicant may apply to court for judicial review of the decision within 30 days. The onus of proving that information falls within any particular exemption rests on the public institution.

12. It must however be emphasized that the FOIA did not as many Nigerians have assumed repeal the OFA. This could not have been so in view of the fact that the OFA relates primarily to the preservation of public safety and not just the disclosure of information. Therefore a substantial part of the OSA for example the provisions on -

- (a) unauthorized photography or recording;
- (b) unauthorized entry into protected places under section 2; or

(c) the powers of the President during a period of emergency to prohibit any person from photographing, sketching, or recording such things designed or adapted for use for defence purposes.(section 3),

are still very much in operation.

13. Distinguished ladies and gentlemen in closing this address permit me to draw attention to the fact that the FOIA requires that all public institutions shall organize its records in a manner that makes them accessible to the public as well as publishing information using multimedia formats (i.e. print, electronic and online).The Act is not therefore solely concerned with responding to requests.

14. Permit me to also observe that the bases of the right of access to information under the FoIA derives from the guarantees of freedom of expression found in Article 19 of the Universal Declaration on Human Rights, and in the case of Nigeria is to be found in Section 39 of the Constitution of the Federal Republic of Nigeria, 1999. As the UN Special Rapporteur on Freedom of Opinion and Expression Abid Hussain, said in a 1995 Report to the UN Commission on Human rights: *“Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked”*

16 The office of the Attorney General has been tasked with several functions under the FoIA which include the preparation of reporting and performance guidelines, the publication and submission of reports and a general duty to ensure compliance with the Act. Although some institutional and legal challenges have already been identified we will by the Grace of God and with your cooperation of all we will acquit ourselves creditably in the discharge of this statutory mandate.

17. Thank you for listening.

Mr. Mohammed Bello Adoke S.A.N. CFR
Honourable Attorney General of the Federation
and Minister of Justice