



# Freedom Of Information Act 2011 And Open Government In Nigeria: What Is Wrong With The Law?

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## ABSTRACT

Governments all over the world currently recognize the need to run an open and inclusive government, where the rule of law thrives and the society is free of corruption. Access to information is the hallmark of good governance as it promotes accountability, transparency and all that is good about democracy. Without the Right to know, all indices of good governance will amount to nothing. Democracy depends on open government and the opportunity for citizens to participate actively through unhindered access to public information. This paper examines the Freedom of Information Act 2011 and its contribution to open government in Nigeria. The paper argues that nine (9) years after the enactment of the Act, government business in Nigeria is still shrouded in secrecy. The paper highlights the numerous pitfalls of the Act and makes useful recommendation on how to remedy the identified pitfalls.

**Keywords:** Freedom of Information Act, Open Government, Right to know, Rule of Law, transparency and Accountability.

## 1. INTRODUCTION

In a democratic society like Nigeria, it can never be over emphasized that access to public records is fundamental to her development, hence the need for government to proactively, and at all times make public records freely available to enable citizens effectively participate in government activities in the spirit of transparency and accountability.<sup>1</sup>

Apparently, information is vital and indispensable ingredient of participatory democracy.<sup>2</sup> Democratic deepening or consolidation cannot take place if the populace are not legally empowered with information concerning the management of the state.<sup>3</sup> Given the centrality of the welfare of the people to the notion of government, it is indisputable that government cannot be divorced from the people and that their participation in the process of governance through provision of access to relevant information to ensure transparency and participation is the key to the success of any government.<sup>4</sup> Arguably, no government can lay claim to transparency in governance without granting its citizens access to information concerning the process of government. The conduct of the affairs of government both in terms of policy formulation and implementation in utmost secrecy, particularly in area that concern the citizens directly not only constrains transparency but also deprives the people of governance.<sup>5</sup> Nigeria has been faced with the challenge of effective use of resources to support equitable economic growth, effective service delivery and social cohesion. The major driving force for the development blockade is lack of openness, transparency and accountability in governance. Transparency is one of the basic features of good governance. Transparency in governance means that information relevant to the process of governance is accessible to all persons who will be affected by policies and decisions of government and its agencies. Thus, transparent governance means 'Openness of the Government system

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<sup>1</sup> S. Offia 'Freedom of Information Act: A tool for effective citizens' participation in Government available at <http://www.medium.com>. accessed 10 March, 2020.

<sup>2</sup> P. K. Inokoba, 'Freedom of Information Act and Democratic Consolidation in Nigeria: Prospects and challenges' International Journal of Development and Sustainability, volume 3 Number 12 (2014), pgs 2266-2267.

<sup>3</sup> Ibid.

<sup>4</sup> Z. Adangor and CT. Emejuru, 'Freedom of Information Act, 2011 and the Quest for Good Governance in Nigeria: Challenges and prospects' Rivers State University Journal of Public Law, March, 2019, p. 490.

<sup>5</sup> Ibid.

through clear processes and procedures and easy access to public information for citizens.<sup>6</sup> A transparent government is one that accepts citizens of the state as critical stakeholders in the process of governance and readily grants access to information and public records to the citizens not only to empower them to participate actively in policy formulation and implementation but also equip them to evaluate the performance of public officials entrusted with public trust and dictate dysfunctionality, administrative inefficiency and corruption in the process of governance. Thus, transparency not only ensures accountability but also equips the people with relevant information and public records to contribute to public discourse.<sup>7</sup> It is arguable that besides engendering accountability and facilitating the detection of corruption, transparency gives the people a sense of inclusiveness by equipping them with relevant information to participate in the process of governance.<sup>8</sup>

The right to relevant public information by the citizenry and the role the full implementation of this right plays on governance and participatory democracy cannot be over join emphasized.<sup>9</sup>To drive home this point, Stephen Harpen, the Canadian opposition leader in 2005 said:

Information is the life blood of a democracy, without adequate access to information about government policies, programmes, citizens and parliamentarians cannot make informed decisions and incompetent or corrupt government can be hidden under a cloak of secrecy.<sup>10</sup>

The enactment of the Freedom of Information Act (hereinafter referred to as FOI Act 2011) by the National Assembly comprising the senate and the House of Representatives of the Federal Republic of Nigeria and the signing into law of same on 29<sup>th</sup> May, 2011 by President Goodluck Ebele Jonathan is no doubt a landmark achievement in the history of access to Information in Nigeria.<sup>11</sup> This paper intends to critically examine the provisions of this Act and to show its relevance to open government in Nigeria. This paper will also identify the pitfalls of the Act and proffer recommendations to remedy the identified pitfalls.

## 1.2 Conceptual Clarifications

### a) Freedom of Information

Freedom of Information refers to the Right which the Public in any society has to access information held by government officials and institutions.<sup>12</sup> All citizens of any country and indeed all members of the public are entitled to enjoy this right.<sup>13</sup> It draws from the right to freedom of expression which is recognized internationally in the Universal Declaration of Human Rights (1948), and the International covenant on civil and political rights (1966).

#### Article 19 of the UDHR States thus:

Everyone has the right to freedom of expression and opinion.  
This right includes freedom to hold opinion without interference  
and to seek to receive and impart information and ideas through  
any medium and regardless of any frontiers.<sup>14</sup>

<sup>6</sup> World Bank, Governance: the world Bank's Experience (World Bank Washington DC, May 1994) xiv; Available at <http://documents.worldbank.org/curated/en/711471468765285964/pdf/multiplepage.pdf/>accessed> March 4, 2020

<sup>7</sup> Z. Adangor and C.T Emejuru, (n4), P.496

<sup>8</sup> Ibid.

<sup>9</sup> P. K. Inokoba, (n2), P.2259.

<sup>10</sup> Rzk Publication (2011), 'Implementing Nigeria' Freedom of Information Act 2011- The Journey so far' Available at: [Rzknigeria.org/index.php/download/foi-assessments-a-report ---](http://Rzknigeria.org/index.php/download/foi-assessments-a-report---), accessed 4 March 2020

<sup>11</sup> E.J. Osimiri, 'Freedom of Information Act 2011: Appraisal' Rivers State University Journal of Public Law, (Vol.3, 2012, P. 240

<sup>12</sup> C.W. Duru, 'The Relevance of Nigeria's Freedom of Information Act (2011) to the Country's Anti-corruption war' Journalism and Mass Communication, December 2016, Vol.6, No 12, P. 758.

<sup>13</sup> O. Ojo, Combating corruption through the FOI Act, 2015, Proceedings at Media/Civil Society Round table on Nigeria's anti-corruption situation, Lagos.

<sup>14</sup> Article 19 of the UDHR (1948).

<sup>15</sup> Article 19 (2) of the ICCPR.

<sup>16</sup> See Article 9 of the African Charter on Human and Peoples' Right

**Article 19 (2) of the ICCPR States:**

Everyone shall have the right to freedom of expression; this right 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.<sup>15</sup>

Similarly, the African Charter on Human and Peoples' Right with regard to the question of freedom of expression provides that:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.<sup>16</sup>

The same right has received constitutional backing in Nigeria. The 1999 Constitution of the Federal Republic of Nigeria state thus:

Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.<sup>17</sup>

The right to freedom of expression extends to all types of expression, which impart or convey ideals or information irrespective of the content or channel of communication. This right as held by the European Court in *Handyside* case<sup>18</sup> constitutes one of the essential foundations of a democratic society and the basic condition for its progress and development.

**b) Open Government**

Open Government is an old concept that started to attract more research recently after Obama's administration called for more efforts towards an open government.<sup>19</sup> The idea that Government should be open to public scrutiny and susceptible to public opinion dates back to the time of Enlightenment when many philosophers made an attack on absolutist doctrines of state secrecy.<sup>20</sup>

For almost a decade, countries around the world have been implementing open government initiatives as a way to increase transparency, improved accountability, fight corruption, or foster economic development.<sup>21</sup> In recent years, the term Open Government (OG) has attracted the attention of multiple actors from academia and professional practice. Many of them have contributed valuable perspectives and evidence that continue to form the concept itself.<sup>22</sup> An important milestone in the revitalization of Open Government concept is highlighted in the Memorandum for Transparency and

Open Government first antecedent adopted under the Obama administration in 2009.<sup>23</sup> The Obama administration defined Open Government around three dimensions: transparency, participation and collaboration.<sup>24</sup> Open Government is defined as publishing public sector information in an interoperable and standard formats to enhance people's access to data.<sup>25</sup> Open Government concept revolves around freeing information to gain more efficient public work and better and cheaper service for the public.<sup>26</sup> Open Government is the governing doctrine which holds that citizens have the right to access the documents and proceedings of the government to allow for affective public oversight.<sup>27</sup>

In general term, Open Government is one with high levels of transparency and mechanism for public scrutiny and oversight in place, with an emphasis on government accountability. Transparency is considered the traditional hallmark of an Open Government, meaning that the public should have access to government-held information and be informed of government proceedings.

<sup>17</sup> See Section 39(1) of the 1999 Constitution.

<sup>18</sup> The Judgment of the European Court of Human Rights decided on 7/12/1976 in serves A No. 2v of EHRC 737 at R49.

<sup>19</sup> E. A. Abu-shanab, 'Reengineering the Open Government Concept: An empirical support for a proposed model' Government Information Quarterly 32 (2015) P. 454.

<sup>20</sup> J. Hebermas, *The structural Transformation of the Public Sphere*, 1962 (1962, Trans, Cambridge Massschinseh, 1989)

<sup>21</sup> E. A. Ruvalcaba-Gomez et al, 'Discussing open Government as a concept: A comparison between the Perceptions of Public Managers and current Academic Debate' In dg.o' 18:dg.o2018: Proceedings of the 19<sup>th</sup> Annual International Conference on Digital Government Research, May 30-June 1, 2018, Delft, Netherlands Anneke Zuiderwigk and Charles C. Itinnants' (eds) Acm, New York NY, USA, Article 4, Available at <http://do.org/10.1154/3209281.209320>.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> E.A. Abu-shanab, (n19) p.454

<sup>25</sup> Ibid

<sup>26</sup> A. updegrove, 'How Open must an Open Government Platform be? A Memorandum for the Heads of Executive Department and Agencies, subject. Transparency and Open Government' Available at <http://www.whitehouse.gov/the-press-office/Transparency and Open Government>, accessed 4 March, 2019.

<sup>27</sup> L. Daniel and R. Laurel (eds), *Open Government: Transparency, Collaboration and Participation in Practice*, O' Reilly Media, 2010, P. 14.

Open Government is linked to democracy based on the intrinsic good for modern states.<sup>28</sup> It is important to realize that public information is useful for citizens and this needs to be published and accessed freely.<sup>29</sup>

### 1.3 Nigeria's Freedom of Information Act 2011

The Freedom of Information Act, 2011 came into force on the 31<sup>st</sup> day of May, 2011 following the assent of the president of the Federal Republic of Nigeria.<sup>30</sup> The assent came after a very long legislative debate which lasted for over 12 years. The bill was developed by the Freedom of Information Coalition, a network of over 180 civil rights, grassroots and community-based Non-Governmental Organization Campaigning for the effective utilization of the Freedom of Information (FOI) Act to ensure accountability and transparency in public institutions in Nigeria.<sup>31</sup> The FOI Act aims to make public records and information more freely available and to protect public records and information in accordance with the public interest and protection of privacy. It enables citizens to hold the government accountable in the event of the misappropriation of public funds or failure to deliver public services. It also seeks to protect serving public officers against any adverse consequences from the unauthorized disclosure of certain kinds of information.<sup>32</sup> Arguably the FOIA 2011 guarantees the right of the citizens to know.<sup>33</sup> The right to receive information will remain merely hollow without a specific enactment prescribing the procedure for seeking access to public records and information and the responsibility of public officials and institutions to facilitate the enjoyment of the guaranteed rights.<sup>34</sup> Several countries of the world have enacted freedom of information laws to guarantee access to public records and information to their citizens.<sup>35</sup>

### 1.4 Some Highlights of the FOI Act

The Act has a very long title stated as an Act to make public records and information freely available, provide for public access to public records and information, protect public records and information to the extent consistent with the public interest and the protection of personal privacy, protect serving public officers from adverse consequences for disclosing certain official information and establish procedures for the achievement of these purposes and related purposes thereof. The Act has thirty-two (32) sections. Section 1 (2) of the Act specifically established the right of any person to access to information or records in custody of any public official in any Government agency, institution without regard to what is contained in any other written law, Act or Regulation. Such applicant need not show any specific interest relating to information applied for<sup>36</sup> and any person entitled to the right to information shall have the right to institute proceedings in a court to compel any public institution to comply with the provision of the Act.<sup>37</sup> The Act mandates public institutions to keep and maintain proper records of its activities.<sup>38</sup> The Act in section 3 (3) paragraphs (a)-(p) set out list of documents and classes of records kept in custody of public institution to be published describing the organization and its responsibilities, manuals used by employees, describe documents containing every opinion and orders made in deciding cases, rules of institution, names, salaries, titles and dates of employment

<sup>28</sup> T. Davies and Z. Bawa, 'The promises and perils of Open Government Data' *The Journal of Community informatics*, 2012, vol. 8, P.2 Available at <http://www.CJ-Journal.net/index.php/ciej/article/view/929/955>.

<sup>29</sup> S. Davies, *Stewardship and usefulness: Policy Principles for information-based transparency*, 2012, *Government Information quarterly*, 27 (4), 377.

<sup>30</sup> Z. Adangor and CT. Emejuru, (n4) P.497.

<sup>31</sup> C. W. Duru, (n12) P. 757.

<sup>32</sup> Ibid. P. 758

<sup>33</sup> Ibid.

<sup>34</sup> Z. Adangor and CT. Emejuru, (n4) P.497.

<sup>35</sup> Ibid.

<sup>36</sup> D. Banisar, 'Freedom of Information around the world 2006: A global Survey of Access to Government Information laws 2006' Available at <http://www.humanright.initiative.org/programs/ai/rti/international/laws.papers/int/global-foi-survey-2006pdf> accessed 4 March, 2019.

<sup>37</sup> S. 2 (2) of the FOI Act, 2011.

<sup>38</sup> S. 2 (3) of the Act

of each official. Publish documents containing contracts, projects, grants, permit, licenses and agreement including application for each of the above.<sup>39</sup> The Act further authorized public institution to publish and update all the lists of documents, classes of records and data referred to in section 3 (3) (a)-(p) to the members of the public through print, electronic, online sources, including publishing it at the office of each public institution.<sup>40</sup> An illiterate or disabled applicant who by virtue of his illiteracy is unable to make an application for access to information or record, may make that application through a third party.<sup>41</sup> The application for information can be made orally to any government or public institution and such institution to which the application is made shall reduce the application into writing and provide a copy of the written application to the applicant.<sup>42</sup> Section 5 provides that where an application for access to public records or information is made pursuant to the Act, the public institution to which the application is made, shall subject to sections 6, 7 and 8 of the Act, within 7 days after the application is received-

- a) Make information available to the applicant;
- b) Where the public institution considers that the application should be denied, the institution shall give written notice to the applicant that access to all or part of the information will not be granted, stating reasons for the denial and the section of the Act under which the denial is made.<sup>43</sup>

However, the public institution to which the application is made may extend the time limit for supplying the information requested for a period not exceeding 7 days if:

- a) The application is for large number of records and meeting the original time limit would unreasonably interfere with the operations of the public institution;
- b) Consultations are necessary with the application that cannot reasonably be completed within the original time limit.<sup>44</sup>

Sections 8 and 11 of the Act provides for offences and punishment under the Act. Sub section (5) of Section 8 provides that where a case of wrongful denial of access to public records or information is established, the defaulting officer or institution shall on conviction be liable to a fine of **Five Hundred Thousand Naira (N500,000.00)**.<sup>45</sup> Similarly, it is a criminal offence punishable on conviction by a competent court with a minimum of one(1) year imprisonment for any officer or the head of any government or public institution which this Act applies to willfully destroy any records kept in his/her custody or attempts to doctor or alter same before they are released to any person or entity applying for it.<sup>46</sup>

### 1.5 Exemptions under the Act

There are certain categories of information that are exempted from the general right of access. They are clearly spelt out in sections 12, 13, 15, 16, 17, 18, 19 and 20. This includes:

- a) Defence/Security matters
- b) The conduct of international affairs
- c) Law enforcement investigation
- d) Trade secrets, financial, commercial, technical and scientific information of economic value.
- e) Third party information, solicitor/client privilege;
- f) Test questions and exam, Architects and engineers plan, library circulation and other records.

Section 20 equally empowers any public institution where application for access to information is made to deny such access if they are affected by the exemptions.

### 1.6 Pitfalls of the Act

The Act is bedeviled with several pitfalls that have made the realization of its laudable objectives difficult. There are several inherent deficiencies in the Act. First the Act contains more exemption sections and clauses than sections that grant access to information. It is worrisome that only section 2 and 3 grant access to information whereas as many as Eight(8) sections, that is, sections 12, 13, 15, 16, 17, 18, 19 and 20 are meant to deny the public access to information. This was done deliberately by legislators to water down the effectiveness of the Act and many public servants have exploited this lacuna for mischievous purposes.

<sup>39</sup> Section 3 (1) and (2) of the Act

<sup>40</sup> Section 3(3) (a)-(p) of the Act

<sup>41</sup> Section 3 (4) – (7) of the Act

<sup>42</sup> Section 4 (4) of the Act

<sup>43</sup> Section 4 (4) of the Act

<sup>44</sup> Section 5 of the Act

<sup>45</sup> Section 7 (a) and (b) of the Act

<sup>46</sup> Section 8 (5) of the Act

Secondly, the existence of subsisting laws which conflict with the Act also affects its full implementation. Even though the exemption provisions of the Act supercedes the official secret Act, the application of National Security as a means of denial of access to information or records in public institution in absence of total repeal of the official secret Act reduces the FOIA to merely complementing other existing laws like the official Secret Act etc and gives the public officers wide discretion using national security principle which is rather fluid to deny access to public records.<sup>47</sup> The culture of secrecy in government makes notion of public scrutiny an alien concept. Government officials in Nigeria like most other African countries are obliged upon appointment to be guided by 'various oath of secrecy under which they undertake not to disclose any information which comes to them in the course of the performance of their duties.'<sup>48</sup> After decades of operating official secret laws, there has emerged an iron-cast culture of secret among civil servants and public officials and it has become extremely difficult for many of them to change.<sup>49</sup>

Another major pitfall of the Act is that there is no specific provision in the Act mandating the 36 states of the federation to domesticate the law. This Act operates at the Federal level and domestication by states is needed to make the law fully operational in the states. In Nigeria where we operate tiers of governments, transparency and accountability is desirable at all levels. However, schedules 4, 5 and 6 of the constitution,<sup>50</sup> empowers both the Federal and States of the Federation to make laws relating to law of this nature.<sup>51</sup> In the absence of this interpretation problems, public officers in the state public institutions are likely to hide under this lacuna and deny the general public access to public records in the states. This will also create interpretation problems in the court.<sup>52</sup>

Another noticeable pitfall is the supervisory function of the Attorney-General of the Federation under Section 30 of the Act. The power of the Attorney-General under the Section is not backed by necessary sanctions against public institutions for non-compliance or failure to forward to the Attorney General a report on or before 1<sup>st</sup> February of each year. Such a lacuna is likely to water down the functionality and practicability of the provisions of the section. The public institutions are likely to observe the contents of the section in disobedience.<sup>53</sup> Moreso, there is no similar duty placed on the applicant or general public to forward such reports to the Attorney-General or National Assembly. Therefore serious doubt is cast on the workability of the provisions of section, for lack of sanction against public institution that fails to comply.<sup>54</sup>

Again, section 14 of the Act which relates to the training of public officials in public institution has no time limit within which such trainings can be conducted and there are no sanctions against public institutions for failure to train public officers on the importance of the implementation of the Act.

## 1.7 CONCLUSION

Irrespective of the identified pitfalls, the FOI Act 2011 is a good piece of legislation enacted to enhance the development of participatory democracy and ensure transparency in governance. Information is key to the participation of the people in the development and implementation of policies and in decision making.<sup>55</sup> While it is conceded that not all public records and information can be made available to the people, access to relevant information particularly information relating to appropriation and spending of public fund by agencies of Government can go a long way in reducing corruption in our public service.<sup>56</sup> The FOI Act gives citizens legal guarantee to access public

<sup>47</sup> Section 11 of the Act

<sup>48</sup> 'Getting rid of thorns, yields on pathway to FOI regime' The Guardian Newspaper, Monday June 13, 2011, P. 64

<sup>49</sup> F. Ojo, 'Freedom of Information Current status, challenges and implications for News Media 2010, Available at: [www.unesco.org/new/...MULTT-MEDIA](http://www.unesco.org/new/...MULTT-MEDIA) accessed 4 April 2019.

<sup>50</sup> Ibid.

<sup>51</sup> See constitution of Federal Republic of Nigeria, as amended

<sup>52</sup> E. J. Osimiri, (n 11) P. 252

<sup>53</sup> See the Guardian Newspaper, Wednesday August 31, 2011, P. 7

<sup>54</sup> E. J. Osimiri, (n11) P. 248

<sup>55</sup> Ibid.

<sup>56</sup> Z. Adangor and C.T Emejuru, (n4) P. 513

information; help in strengthening democracy, since Governments would become directly accountable to the governed. Effective implementation of the FOI law is therefore the greatest test of Nigeria's democracy or civilian rule.<sup>57</sup> If well implemented, it will facilitate open government at Federal States and Local Governments, because it makes more government information to be in public domain.<sup>58</sup> No doubt, the intendment of the Act is to create Open Government, promote good governance and eliminate corruption and enthrone transparency in governance. So if the pitfalls identified in the Act are remedied and the Act is well implemented, its laudable objectives will be achieved and democratic governance in Nigeria will be strengthened through enhanced participation. This paper therefore makes the following recommendations:

1. The Act should be amended to limit the number of sections that can deny the citizens access to information.
2. The official secret Act and some other existing laws that restrict access should be repealed.
3. Civil society organizations and the media must take advantage of the FOI Act to entrench transparency and accountability in public institutions.
4. There should be sustained and robust public awareness to build the capacity of the citizens on the FOI Act, with a view to getting the masses to own the law; so as to be able to hold leaders accountable.
5. There is the need for the establishment of an agency or commission saddled with the implementation of the Act.

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<sup>57</sup> Ibid

<sup>58</sup> C.W. Duru, (n12) P. 759