



AKUNGBA LAW JOURNAL

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Appraising Freedom of Information Right in Nigeria in the Light of International Standard

ARAROMI, MARCUSAYODEJI*

Abstract

Freedom of information is now considered a fundamental right of individuals at the international level as it acts as a fulcrum upon which many other rights recline. It is realized that right to freedom of information encourages transparency in government and promotes good democratic culture. This right is now gaining international recognition - though the precise scope of this freedom is not generally ascertainable. The level of making information available to the public by the government or private sector carrying out public responsibilities varied from country to country. Nigeria also acceded to the clamour for the enactment of freedom of information law by the passage of the Freedom of Information Act, 2011 in order to allow the citizens have access to certain government information. This very step has relaxed the age long practice of making government information a top secret and removed from the public glare especially through some enacted legislation like the Evidence Act and the Official Secrets Act, among others. This notwithstanding, it has been observed that the standard of making information available to the public in Nigeria is still at very low ebb. The Freedom of Information Act 2011, though a good step in the right direction, does not totally accommodate the required standards or international best practices and principles of freedom of information laws. Certain lop-sidedness is observed in the provisions of the Act and suggestions are made for reforms.

1. Introduction

Information is one of the essential assets in a democratic society, which is a powerful weapon in the hands of the citizenry to have access to certain facts and figures about how the society is administered and how the government manage the resources and affairs of the state. The key paradigm of public information work is embedded in the idea of freedom of access to information.¹ Freedom of information is a recognised right under the law, and considered as one of the important human rights that need the protection of the law. Though the right is generally recognised

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¹ Sturges, P., "Freedom of Access to Information: A Paradigm for the Information Professions." Retrieved on 27 May, 2016 from <http://www.ifla.org/files/assets/faife/publications/sturges/paradigm.pdf>

but its precise scope is not yet generally ascertainable as there are diverse opinions and debates as to the actual range of the right. The issues engendered in the right to freedom of information have become a constant source of debate amongst jurists, political scientists, and civil rights groups; even the United Nations commissions and other international organisations have not come up with a clear position as to the precise scope and nature of this right.² Right to freedom of information has been addressed as a new and distinct but inseparable right from right to freedom of expression.³

Right to freedom of information is recognised and protected at national, regional and international levels. There are multiple treaties, charters and frameworks at the international level recognising and protecting right to freedom of information. For instance, Article 9 of the Universal Declaration of Human Rights provides as follows:

“Everyone shall have the right to freedom of expression: this 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.”⁴

Similarly, Article 9 of the African Charter on Human and Peoples’ Rights states that every individual has the right not only to receive information but shall also have the right to express and disseminate his opinion within the ambit of the law.⁵ The International Convention on Civil and Political Rights (ICCPR) also provides for the right of individuals to hold opinions and right of freedom of expression without interference.⁶

The right to freedom of expression is characterised by six broad features:⁷

1. The right shall be exercised by everyone and there should be no distinctions as to level of education, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth and any other status.
2. The right to seek, receive and impart information is also an obvious aspect of freedom of information. The right can be exercised via any medium which could be in private or in public through reading newspapers, listening to public debates, watching the television, surfing the internet and accessing information in the possession of public authorities.

² Roy P. & Yoram R., “The Constitutional Right to Information” *Columbia Human Rights Law Review*, 42:357, at 358.

³ “Freedom of Expression Key Aspects,” Article 19, available at <http://www.article19.org/pages/en/key-aspects.html>

⁴ Article 19 of the Universal Declaration of Human Rights 1948.

⁵ Article 9 of the African Charter on Human and Peoples’ Rights 1986.

⁶ Article 19(1) and (2) of the ICCPR, 16 December 1966.

⁷ “Freedom of Expression Key Aspects,” Article 19. Retrieved on 24 May, 2016 from <http://www.article19.org/pages/en/key-aspects.html>

3. The right is not limited to specific type of information regardless of whether it is important or not, or whether it is correct or not. The fact that an idea is thought to be incorrect or disliked does not justify its censorship.
4. The right is not limited by geographical scope, therefore countries should allow their citizens to seek, receive and impart information not only within their countries but also from other countries.
5. The right can also be exercised using any form of communication platform, be it modern or traditional.
6. The right must be exercised without undue interference from the states, and states should ensure that obstacles to the exercise of this freedom are removed.

The reasons for having the right to freedom of information enacted into law are multiple, and they include, among other things, the need to make the government accountable to the people; encourage public participation through constant engagement of government and its officials; to expose corrupt practices in high places; to give voice to the voiceless and the marginalised or maligned groups in the society; to create an avenue for the ascertainment and enforcement of basic rights of the citizen; to make the government more responsible and responsive to the people. Also in private sector, freedom of information can be employed to demand transparency and accountability from companies or firms and other sectors of the economy. Freedom of information enables the citizens of a country to demand or access official information from the government and puts the government under obligation to facilitate access to such information and thereby encouraging good governance. This precipitates an open system, trust and accountability in the nation and places a duty on government "to publish important information proactively and regularly for the general public."⁸

Article 10 of the United Nations Convention against Corruption approved in October 2003 by the General Assembly encourages countries to adopt such measures as may be necessary to ensure transparency in their dealings.⁹ Such measures as enumerated under this Article include, among others:

- (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;

⁸ Nyokabi P., "Freedom of Information in Kenya," Pambazuka News, 18 May 2007. Accessed on 24 May, 2016 from http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/kenya/foi_in_kenya.pdf

⁹ UN Convention Against Corruption. http://www.unodc.org/unodc/en/crime_convention_corruption.html The Convention was adopted in December 2005 after being ratified by 30 countries.

- (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and
- (c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.

Article 13 of the United Nations Convention Against Corruption also encouraged the Member States to adopt appropriate measures through their domestic laws that will promote public participation in fight against corruption and to raise public awareness regarding the existence, causes and gravity of threat posed by corruption. This participation can be strengthened by such measures as:

- a. Enhancing the transparency of the government activities and promoting the participation of the public in decision making;
- b. Ensuring that the public has adequate access to information.

To promote freedom of information generally in Africa, the African Commission on Human and Peoples' Rights made a model law on access to information which has been endorsed by the African Union and serves as template for African countries to adopt. To some extent this model law has precipitated quick enactment of freedom of information laws in countries like Tanzania, Cote D'Ivoire, Namibia, Sierra Leone, Kenya, Ghana, Malawi, Rwanda and Mozambique.¹⁰

The aim of this work is to appraise some provisions of the Freedom of Information Act 2011 of Nigeria to determine whether the standard is line with the international best practices.

2. Right to Freedom of Information under the Nigerian law

Right to freedom of information is the bedrock of all other rights and needs to be adequately protected. It is ideal for sustenance of democracy and economic development. The legal foundation of the right to freedom of information in Nigeria is the Constitution of the federal republic which is the supreme law of the nation. Although there is no direct allusion to freedom of information under the Constitution, reference is, however, made to the right of freedom of expression and of the press.¹¹ The Constitution provides that "every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference."¹² The United Nations Special Rapporteur in its Annual Report in 1998 stated that the right to access information held by the government of a State is included in the right to freedom of expression. It states: "The right to seek, receive and impart information imposes a positive

¹⁰ Mohan, K. "Factsheet – Freedom of Information in Africa," *Factsheets and Guides*. Retrieved on 24 May, 2016 from <http://africacheck.org/factsheets/factsheet-freedom-of-information-laws-on-the-african-continent/>

¹¹ Section 39 of the 1999 Constitution of the Federal Republic of Nigeria (FRN).

¹² Section 39(1) of the 1999 Nigerian Constitution.

obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems...¹³ Right to freedom of information is also guaranteed by many international instruments to which Nigeria is a signatory, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights.¹⁴ Article 9(1) of the African Charter on Human and Peoples' Rights dealing with freedom of expression was given an expansive meaning by the leadership of the African Union by adopting a set of principles which *inter alia* declared that the African Charter entitles everyone to access information held by public bodies and to access information held by private bodies which is necessary for the exercise or protection of any right.¹⁵

Despite the legal provisions guaranteeing freedom of expression in Nigeria there was no active domestic law which guaranteed access to public records and information in custody of the government or its officers prior to the enactment of the *Freedom of Information Act*.¹⁶ Public documents and information assumed esoteric nature and were not ordinarily made available to the public by the government. For instance, section 190 of the *Evidence Act* states that no one shall be permitted to give out any unpublished official records relating to affairs of State, or to give evidence emanating from such record without the permission of the officer at the head of the Ministry, Department or Agency concerned who shall give or withhold such permission as he thinks fit.¹⁷ This discretion is further subject to the direction as may be given by the President of the Federal Republic of Nigeria if the records are related to national affairs, or the Governor of a State where the records are in the custody of a State. Evidence of the records where relevant shall be given in private in court proceedings by the head of the Ministry, Department or Agency concerned as ordered by the court.¹⁸ This shrouds official records in secrecy and keeps them out of hearing, view or sight of the public.

The Constitution also limits the right to freedom of expression guaranteed under section 39 of the Constitution in the interest of defence, public safety, public order, public morality or public health. Such a guarantee of right of freedom can also be derogated from for the purpose of protecting the rights and freedom of other persons.¹⁹ This provision of the Constitution confers power on government to

¹³ Report of Special Rapporteur, "Promotion and protection of the right to freedom of opinion and expression," UN Doc. E/CN.4/1998/40, 28 January, 1998, para. 14.

¹⁴ Note that the African Charter on Human and Peoples' Rights is now part of Nigeria's domestic law enacted as the African Charter (Ratification and Enforcement) Act Cap A9, Laws of the Federation of Nigeria, 2004.

¹⁵ Article IV(2) Declaration of Principles of Freedom of Expression in Africa (2003).

¹⁶ The Freedom of Information Act was signed into law by the, Goodluck Jonathan, former president of Nigeria, on the 28 May, 2011.

¹⁷ Section 190(1) of the Evidence Act, 2011.

¹⁸ See the proviso to section 190 of the Evidence Act 2011. This provision complements by section 36(4)(b) of the 1999 Constitution of the Federal Republic of Nigeria which also provides that evidence relating to official records shall be heard in court in private where public interest demands .

¹⁹ Section 45(1) of the 1999 Constitution of the Federal Republic of Nigeria.

come up with a law at any time it feels necessary that can muzzle the right of freedom of expression based on the excuse that exercise of such a right may affect national defence, public safety, public order, public morality or public health. The constitutional restraints on the freedom of expression seem to promote public interests over and above personal interests. The *Official Secrets Act* also creates some limitations on the exercise of right of expression by creating special protection for official information noted to be classified matters. This legal position gives the government arbitrary power to classify any information as official secret and deny the public access to it.²⁰

It is a known fact that there is always a tendency on the part of the government to keep the prying eyes of the public away from the affairs of the country in order to shield corrupt practices which have been institutionalised in the day to day running of the government. The effect of this discreet management of the affairs of the state poses danger to the exercise of the right to freedom of information, and inadvertently other rights guaranteed under domestic and international law. This also implies that the citizens are tactically unable to participate in governance and subtly prevented from demanding accountability from the government who is a trustee of the commonwealth of the nation, and the legality of the exercise of vested powers through the principle of social contract. The United Nations Special Rapporteur on freedom of expression and opinion in his report to the United Nations Commission on Human rights in 2000 expressed his concern about the tendency of governments and their institutions to withhold information that rightly belong to the people from them. He therefore posited that:

“[T]he right to seek, receive and impart information is ... one of the rights upon which free and democratic societies depend. It is also a right that gives meaning to the right to participate, which has been acknowledged as fundamental to, for example, the realization of the right to development.”²¹

The Special Rapporteur therefore recommended that governments should review their existing laws or adopt new ones to promote access to information.

The principles guiding freedom of information were first drawn up in Article 19, the International Centre Against Censorship in London, which were subsequently endorsed by UN Special Rapporteur on the protection and promotion of the right of freedom of opinion and expression and the UN Commission on Human Rights.²²

“The principles are based on international and regional law and standards, evolving state practice (as reflected ... in national laws and judgments of national courts) and the general principles of law recognised by the community of nations.”²³

²⁰ See section 1 of the Official Secrets Act Cap. O3, Laws of the Federation of Nigeria, 2004.

²¹ Report of the Special Rapporteur, Document No. E/CN.4/2000/63.

²² “Memorandum on the Freedom of Information Bill,” submitted to the House of Representatives Joint Committee by The Freedom of Information Coalition, Nigeria.

²³ *Ibid.*

Based on these principles, Nigerian government was encouraged to enact the *Freedom of Information Act 2011* which remains the basic domestic law for protecting freedom of information right in Nigeria.

There are two opposing principles driving the access of the citizens to information held by the State, which are the idea that the information in the custody of the government of the State is regarded as official secret and it can make available such information at will. The other principle is based on the freedom of information doctrine in which case government should make available all information to the citizens and may choose to keep away certain information from the public domain, which it must provide adequate justification for.²⁴ It is germane that the two principles must be weighed on a balance to ensure effectiveness of governance and promotion of democratic values law is set to achieve.

3. A Brief Background of the Freedom of Information Act, 2011

Access to information, including the one in possession of public authorities, as a right of the citizens has attracted attention all over the world. Many countries have given due recognition to this right and have by legislation strengthened this right. The freedom of information right is not a new phenomenon as it has been enacted as far back as 1766 in Sweden; 1888 in Colombia and 1919 in Finland.²⁵ Many other countries have also followed suit by enacting freedom of information laws in their respective countries. The values of democracy can only be achieved if the citizens are fully informed on how the government operates and the principles upon which its activities are based.

Most countries are now implementing strategies and policies that promote information management which include "creating information and communication infrastructure that enables information to flow efficiently and cheaply among citizens and organisations, and... supporting the development of ICT and information content products and services sector to meet the growing demand for information."²⁶

It was observed that the legal regime for exercising freedom of information in Nigeria was not sufficient to realise this right. There was therefore a strong advocacy for the actualisation of such freedom in tune with international standard and practice through enactment of specific legislation. This is to ensure that the citizens are bestowed with adequate and accurate information on government activities so as to run an inclusive government where the citizens will not be left

²⁴ Omotayo, F. O. (2015) "The Nigeria Freedom of Information Law: Progress, Implementation Challenges and Prospects" *Library Philosophy and Practice (e-journal)*, Paper 1219. Retrieved on 12 May, 2016 from <http://digitalcommons.unl.edu/libphilprac/1219> at 2.

²⁵ Omotayo, F. O. (2015) "The Nigeria Freedom of Information Law: Progress, Implementation Challenges and Prospects" *Library Philosophy and Practice (e-journal)*, Paper 1219. Retrieved on 12 May, 2016 from <http://digitalcommons.unl.edu/libphilprac/1219>

²⁶ *Ibid.* at 1.

out in the scheme of things but will be part of the strategies and decision making in the country- which is the beauty of a good and viable democratic rule. Hence, there should be effective flow and access to information in the society which necessitates enactment of law as legislative response to this desire.

The yearning for freedom of information law in Nigeria started in 1993 by a coalition of three notable organisations, which are the Media Rights Agenda (MRA), Civil Liberties Organisation (CLO) and the Nigeria Union of Journalists (NUJ). The team, later known as the Freedom of Information Coalition, prepared a Bill to facilitate the process of consideration of and reporting on the Freedom of Access to Information, which was submitted to the lower chamber of the fourth National Assembly of Nigeria in 1999 to be enacted into law. The Bill was later accompanied by a memorandum submitted to the House of Representatives Joint Committee.²⁷ The philosophy behind the motives of the Coalition is to address the “legal bases and rationale of having Freedom of Information regime in Nigeria, entitlement to request information, obligations of public authorities and agencies, exceptions, documents under security classification, protection of “whistle-blowers and resolution of disputes arising out of the operation of the freedom of information regime to be created by the Bill.”²⁸ The Bill spent about 11 years in the National Assembly and was however, passed on 28 May, 2011 when the former Nigerian President, Dr. Goodluck Jonathan, signed it into law and is now known as the Freedom of Information Act 2011. The preamble of the Act reads as follows:

“An Act 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 the public interest and the protection of personal privacy, protect serving public officers from adverse consequences of disclosing certain kinds of official information without authorisation and established procedures for the achievement of those purposes and; for related matters.”

The scope of the matters seemed to be addressed in the *Freedom of Information Act* through its preamble looks rich and laudable in protecting the right of the public to information held by the government or any public institutions. Based on this background, the provisions of the Act will be examined in detail to identify lapses therein, or whether they are in tune with international best practices of protecting the right to freedom of information.

4. The Required Standards of Freedom of Information Law

In appraising the Act, it is imperative to start on this premise quoting Carmen:

“The proliferation of access to information laws is not without pitfalls; ‘states eager to tender their democratic credentials to the international community may adopt sub-standards laws’ (to satisfy international

²⁷ The memorandum is labelled “Memorandum on the Freedom of Information Bill.”

²⁸ “Memorandum on the Freedom of Information Bill” submitted to The House of Representatives Joint Committee by The Freedom of Information Coalition.

regulations or superficially respond to local pressures). Where laws are excellent on paper, they may not be well implemented in practice. The challenge is to effectively implement laws that regulate the relation between citizens and their state based on a two-way information relation.²⁹

From the foregoing submission, it is apt to say that some countries may tend to reflect legal requirements at the international scene in their laws to politically silent detractors or to put their names in the good book of the international league. It is not unlikely that such seemingly positive steps taken by the governments of those countries may be tainted with insincerity and mere ploy to cover their misgiving with unpleasant laws cloaked with little practical reality. It is important at this juncture to reflect on the principles guiding the exercise of freedom of information that a good law must possess to be in harmony with the international requirements.

There are certain features of freedom of information (FOI) law which can be regarded as the minimum standards for the contents of Freedom of Information law. The United Nations Special Rapporteur on Freedom of Opinion and Expression outlined standards that FOI legislation must satisfy.³⁰ It must be pointed out that there are no generally accepted standards governing right to information held by public bodies but general framework for the right of freedom of information are found in International Treaty Laws and the Universal Declaration of Human Rights.³¹ However, the common trends that run through the FOI Laws of most countries are that public bodies are required to publish information even in the absence of request; and this include information on how they operate, their policies, how to request for information and also create opportunities for the public to participate in their work.³² Moreover, the Council of Ministers of the Council of Europe in its 2002 Recommendation provides for possible limitations to access to official documents.³³ More importantly, the Recommendation prescribes for the Member States to guarantee the right of everyone without discrimination and regardless of nationality to access official documents held by public authorities.³⁴

Access to information is a veritable tool to participate in the public sphere and effective democratic involvement both offline and online and as such requires

²⁹ Carmen S. G., (2008), "Freedom of Information: Bridging the Gap Between Citizen and State," p. 22. Retrieved on 20 May, 2016 from <http://www.right2info.org/resources/publications/publications/CARMEN%20THESIS.pdf>

³⁰ Report of the Special Rapporteur, Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.

³¹ Carmen Said Geha, *op. cit.* at 24.

³² *Ibid.*

³³ Recommendation Rec (2002) 2 on access to official documents, adopted by the Committee of Ministers of the Council of Europe on 21 February 2002 and explanatory memorandum.

³⁴ *Ibid.* note also that Article 19 also requires that everybody within the territory of a country should benefit from right to freedom of information.

developments at all levels, including education, democratic, economic, pricing scheme and social development.³⁵ It behoves the government to therefore ensure easy access to information by the public.

ARTICLE 19³⁶ has published a set of principles based on international and regional standards and evolving State practices therefore establishing a framework through which freedom of information legislation can be assessed, which principles were developed by extensive study, analysis and consultation.³⁷ The United Nations Special Rapporteur on Freedom of Information and Expression endorsed the principles developed by ARTICLE 19 in the year 2000. These principles are now going to be examined here vis-à-vis the provisions of the Freedom of Information Act in Nigeria.

5. Principles of freedom of information law

5.1. Maximum disclosure

The first principle requires maximum disclosure which is predicated on a presumption that all information within the custody of the government or public bodies should be subject to disclosure to the people. Both the Aarhus Convention and the COE Recommendation define public bodies widely to include government at the national, regional and other levels, and “natural or legal persons insofar as they perform public functions or exercise administrative authority and as provided for by national law.”³⁸

In South Africa, even private bodies are required to disclose information which is necessary for actualizing this right. Likewise, Principle IV(2) of the African Declaration also have similar provision, thus: “[E]veryone has the right to access information held by private bodies which is necessary for the exercise or protection of any right.”³⁹ This approach is pertinent given the fact that many public functions are now being handled by private bodies due to the trendy privatisation of public establishments.

According to the Inter-American Court of Human Rights “a society that is not well informed is not a society that is truly free.”⁴⁰ This right should be a Constitutional

³⁵ Rikkie Frank Jørgensen, “The Right to Express Oneself and to Seek Information” at 57. Accessed on 21 June, 2016 from http://phase1.nccr-trade.org/images/stories/mira/ict_freedom%20of%20expression.pdf

³⁶ Article 19 is an organisation based in London named after Article 19 of the Universal Declaration of Human Rights 1948 and is set up to defend the right to freedom of expression and information on a worldwide basis by combating censorship.

³⁷ Article 19, *The Public's Right To Know: Principles on Freedom of Information Legislation* (London: June 1990).

³⁸ Recommendation of the Committee of Ministers of the Council of Europe adopted on 21 February, 2002.

³⁹ African Commission on Human and Peoples' Rights *Declaration of Principles on Freedom of Expression in Africa*, adopted on October 2002.

⁴⁰ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*,

Advisory Opinion OC-5/85, 13 November 1985, para. 70.

right and should be subject to limited exceptions. Where a public authority is to deny this right it must justify its refusal based on recognised legal exceptions. Furthermore, in order to maintain the integrity and availability of records it should be a criminal offence to obstruct access to or wilfully destroy public records and the law should provide for the minimum standards for the maintenance and preservation of the records by public officers. It is thus required that a good freedom of information law should be guided by this principle.

The exception to the right to freedom to access public records common to most jurisdictions include the need to protect national security, international relations, public order, privacy of persons, and commercial confidentiality. Some countries' laws balance withholding information against disclosure based upon public interest. Hence, information should be released to the public if public interest in disclosing same outweighs the harm that may be prevented by not releasing same.⁴¹

5.2. Obligation to Publish

This principle demands that the government should publish widely documents that are of significant public interest without waiting for request from the public to do same, subject to limits based on resources available and capacity. The United Nations Standards, for instance provides that: "freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public..."⁴²

Similarly, Principle IV(2) of the African Declaration also provides that "public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest."⁴³ Therefore the law should determine which categories of information to publish and also create obligation to publish same. The categories of such information that need to be published as required under this principle include:

- Information on the operations of public bodies where they provide direct services to the public, which include their functions, cost of running the body, objectives, audited accounts, standards, achievements and so on;
- Information on any requests, complaints or direct actions which the members of the public may take in relation to the public body;

⁴¹ Banisar, D., (2004) "Freedom of Information and Access to Government Records Laws Around the World." Retrieved on 24 May, 2016 from https://www.ndi.org/files/freeinfo_010504.pdf

⁴² Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.

⁴³ African Commission on Human and Peoples' Rights *Declaration of Principles on Freedom of Expression in Africa*, adopted on October 2002.

- Guidance on processes or methods through which the members of the public can participate in major policy decisions and legislative proposal;⁴⁴
- The content of any decision or policy affecting the public, the reasons for making the decision and the background information or importance for framing the decision; and
- The types of information in the custody of the body and the form in which the information is held.⁴⁵

It is however opined that with the relatively nascent information technologies, publication of information could be done easily and with minima expenses, especially through the internet facilities. This could therefore facilitate the achievement of this principle.

5.3. Promotion of open government

Government is encouraged to promote the culture of openness and informing the public of their rights. Hence, freedom of information legislation must be such that it requires adequate resources to be put in place to promote openness of the government activities. Such steps that need be taken include provision of public education and information dissemination regarding the right to access information, scope of the available information and the manner in which such rights may be exercised. In addition, the law should provide for a number of mechanisms to address the problem of culture of official secrecy within government establishments. These include providing freedom of information training for the employees of public bodies and adoption of internal codes on access and openness. There could also be need to establish oversight bodies such as information commissioner, ombudsman, or human right commission to oversee the enforcement of promoting culture of openness in governance.⁴⁶ Hence, sanctions could be attached to wilful obstruction of access to information in any way, including destruction of records or preventing the work of oversight body.⁴⁷

⁴⁴ The extent to which this principle is been fulfilled in Nigeria remains a critical point for consideration. Many of the policies affecting the public are done without their contribution or participation. These policies are clandestinely done even if such will not be ordinarily welcome by or would have adverse effects on the public. In like manner, many legislative proposals are entertained on the floors of the legislative houses in which the public are not allowed to attend the sittings except in some cases when the members of the press are allowed to attend the proceedings. Many sensitive issues are brought up for discussion in the House which the public are ordinarily opposed to but are not allowed the opportunity to have a say or to attend. For instance, there were occasion when life pension proposal for principal law makers in Nigeria and also the immunity clause for the same category of legislators were discussed at the 8th National Assembly without the involvement of the public despite public adversity to such proposals.

⁴⁵ Article 19, *The Public's Right to Know: Principles on Freedom of Information Legislation* (London: June 1990).

⁴⁶ Mendel, T., *Freedom of Information: A Comparative Legal Survey*, 2nd edition, (UNESCO: Paris, 2008), 34.

⁴⁷ *Ibid.*

5.4. Limited scope of exception

There should be limited scope of exception to the right of freedom of information of individuals to public documents or government information which shall be clearly and narrowly drawn and subject to strict “harm” and “public interest” test. This applies to all branches of government as well as to all functions of government, including security and defence. Restraint to have access to information mainly to prevent the government from embarrassment or exposure of wrongdoing is not tenable or justifiable. The limited exceptions prescribed must conform to the standards under international law for restricting freedom of expression.⁴⁸ The UN Standards support this principle of freedom by providing thus:

“A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest.”

5.5. Processes to facilitate access

This requires establishment of process for deciding upon requests made of government or public information. The process for accessing information about the government should not be complex or tedious, and in case of refusal there should be an inbuilt mechanism for reconsideration of such request. This should take three stages which include:

- a. Need for public bodies to establish open, accessible internal mechanisms for ensuring public access to information;
- b. Provision of internal appeal to designated higher authorities within the public establishments, which could be an existing body like Ombudsman or Human Rights Commission, to review original decisions, especially where access is refused;
- c. The applicant and the public body should be able to appeal to a court of law should any of them be unsatisfied with the decision of the designated authority established to review the decision of the public body.

5.6. Non excessive access costs

Public bodies should not use excessive costs to prevent individuals from requesting for information. In some jurisdictions two levels of costing have been adopted which include flat rate for each request and graduated fees which depends on the actual cost of retrieving and making the information available to the applicant. The cost must however not be too much to deter request of information where it is for personal information or is in the public interest.

⁴⁸ Mendel, *op. cit.* at 35.

5.7. Open meetings

One of the principles developed for the promotion of freedom of information by ARTICLE 19 include the idea of open meeting. Since one of the merits of freedom of information is participatory governance it is important that the freedom of information legislation should create a presumption that the public should be given access to all meetings of the governing bodies. Notice of meeting, where necessary, is also to be adequately given and sufficiently in advance to allow for participation of the public. The principle of open meeting finds expression under the UN Standards stating that: "The [right to information] law should establish a presumption that all meetings of governing bodies are open to the public." Meeting should be closed where adequate reasons for closure are provided. Such reasons may include "public health and safety, law enforcement or investigation, employee or personnel matters, privacy, commercial matters and national security."⁴⁹

5.8. Disclosure takes precedence

This principle demands that laws which are not consistent with the principle of maximum disclosure should be amended or repealed. The scope of limitations placed on maximum disclosure of information by the freedom of information law should not be extended by any other law. Therefore, secrecy laws should be given restrictive interpretations where necessary and law promoting freedom of information should take precedence. Secrecy laws in particular should not make it illegal for officials to let out information which can be legally disclosed under the freedom of information law. Furthermore, officials should be protected from liability for divulging official secret, where they do that reasonably and in good faith, with the motive of acceding requests in fulfilling the freedom of information right, though it is later discovered that such secrets/information is not subject to disclosure.

5.9. Protection for whistle-blowers

Protection should be offered to individuals from any legal, administrative or employment-related sanctions for releasing information on wrongdoing where "they have acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing."⁵⁰ Similarly, Principle IV of the African Declaration states as follows:

"[N]o one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society."

Having examined the principles of freedom of information developed by ARTICLE 19 and endorsed by the United Nations Special Rapporteur on Freedom of

⁴⁹Article 19, *The Public's Right to Know: supra.*

⁵⁰ *Ibid.*

Information and Expression in 2000 it is relevant to state that there are certain common characteristics of Freedom of Information Laws of countries around the world. Aside that the Laws entail right to access and receive government documents and records there are some common features in the Laws of most countries which include the categories of bodies covered; creation of certain exemptions; duties of government to routinely release certain types of information *suo motu* without request.

Limitations to freedom of expression must meet three strict requirements, which are that it must be clearly provided by law; it must come in line with one of the specific purposes set out in Article 19(3) of the ICCPR, which are "national security or public order," or "public health or morals"; and it must be necessary and the least restrictive means required to achieve its purpose.⁵¹

6. Freedom of expression and the information communication technology

According to Balkin,

"Media companies have interpreted the free speech principle broadly to combat regulation of digital networks and narrowly in order to protect and extend their intellectual property right. The digital age greatly expands the possibilities for individual participation in the growth and spread of culture, and thus greatly expands the possibilities for the realization of a truly democratic culture. But the same technologies also produce new methods of control that can limit democratic cultural participation."⁵²

Some countries make provisions under their freedom of information laws for making available certain government information on the internet for public access. Poland, for instance requires public bodies to upload detailed information about their policies, legal organisation, principles of operation, contents of administrative acts and decisions, and public assets on their websites.⁵³

Similarly, Estonia requires under its access to information law that government departments and other public information holders at all levels should maintain websites and post extensive lists of information thereon which include "statistics on crime and economics; enabling statutes and structural units of agencies; job descriptions of officials, their addresses, qualifications and salary rates;⁵⁴ information relating to health or safety; budgets and draft budgets; information on

⁵¹ "The Right to Freedom of Expression: Restrictions on a Foundational Rights" Global Trends in NGO Law, A Quarterly Review of NGO Legal Trends around the World, Vol. 6, Issue 1, p. 3.

⁵² Balkin, J. M., "Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society" (2004) 79 (1) *New York University Law Review*, 1.

⁵³ Banisar, D., "Freedom of Information around the World 2006: A Global Survey of Access to Government Information Laws" 25.

⁵⁴ For instance, it is a serious tug of war in Nigeria for the public to have an inkling of the take home pay of the political office holders which they have surreptitiously hidden from the public.

the state of the environment; and draft acts, regulations and plans including explanatory memoranda.”⁵⁵ According to a writer, “... a government that operates in the interests of people naturally seeks better methods of delivery and e-government offers the potential to provide just that. E-government...can offer more than just a set of effective means of delivering services: it carries with it the potential for a broader e-democracy based on freer access to information.”⁵⁶

In Nigeria many government departments and agencies do not keep vibrant websites to give the public access to information held by them. Even those government bodies and information custodians that have websites do not create access to official phone lines of the public officers who may be contacted for information that is not of sensitive nature. Electronic freedom of information (E-FOI) is a trending means of obtaining information, especially in the developed economies and it is obviously at its infant stage in Nigeria and is not being given a pride of place as a very important avenue to express the right to freedom of information.

Moreover, there is no provision under the Freedom of Information Act 2011 for promoting access to government information through the internet. This is an area where much needs to be done in accentuation and realisation of access to information right in Nigeria; especially that electronic government (e-Government) in Nigerian is still at its embryonic age.

7. Appraising Freedom of Information Law in Nigeria

It should be reiterated that Freedom of Information Law, as a distinct aspect of human right, only came into existence in Nigeria through the Freedom of Information Act 2011 after much clamour for the enactment of such law. It is therefore necessary to determine whether the Act complies with international standards. Foremost, the requirement of disclosure of information is satisfied under section 1 of the Freedom of Information Act which guarantees the right of any person to access or request information which is in the custody or possession of any public official, agency or institution, whether or not contained in written form, and notwithstanding anything contained in any other Act, law or regulation. Such a disclosure is not limited to documents or records but extends to any information regardless of the medium in which it is held, which signifies a robust approach in supplying the public with requested information.

A freedom of information principle requires obligation to publish necessary documents on the part of the government. The Freedom of Information Act requires public institution to publish certain lists of records or information and descriptions of some of the institutional documents and activities.⁵⁷ The scope of publication required under the Act is not sufficient for the expected standard at the international level, which does not only require publication of operational information about how the public body functions but also the content of any decision or policy

⁵⁵ Banisar, at 25.

⁵⁶ Sturges, *op. cit.*, at 5.

⁵⁷ See generally, section 2 of the Freedom of Information Act, 2011.

affecting the public.⁵⁸In other words, mere list of important records meant for public consumption will not suffice but actual content publication through whatever means of such important records or information is necessary.⁵⁹

Notably, the Freedom of Information Act tends to promote disclosure of information which is in the custody or possession of public institutions, or held by corporations established by law and all companies in which the government has a controlling interest.⁶⁰ Such institutions also include private companies utilising public funds, providing public services or performing public functions.⁶¹ However, access to such information can only be had upon request by the members of the public which does not agree with the principle of maximum disclosure. This principle demands that public institutions should publish documents or information that matter to the public and not necessarily upon requests. This standard will help the public to have access to information which they do not even know of its existence. Certain restrictions are placed on disclosure of information under the Act by way of exceptions to information that can be disclosed by public institutions. The Act seems to give priority weight on disclosure of information notwithstanding any provision to the contrary in any other Acts, laws or regulations.⁶² This shows that the provisions of the Official Secrets Act, the Evidence Act and any other laws putting limitations on disclosure of information will be interpreted in such a way as not to deny anyone the right to information. If freedom of information is a subset or inseparable right of 'freedom of expression' which has expression under the 1999 Nigerian Constitution, one can therefore conclude that there are certain constitutional limitations, albeit positive, to the exercise of this right.

Section 45 of the Constitution provides that nothing in the provision of section 39 guaranteeing freedom of expression shall invalidate "any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom of other persons."⁶³ This provision creates a balance between the right of the public to access information and also its right to be protected. In other words, this provision does not stipulate violation of freedom of expression or information of the people by any enacted law, but rather the law must be for the purpose of protecting the interest of the public against any unwholesome claim by any individual.⁶⁴Hence, public interest takes pre-eminence over private claims. The provision of section 45 of the Constitution also guarantees protection of the

⁵⁸Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.

⁵⁹ Such means may include print, electronic and online sources, and at the office of the concerned public institutions. See section 2(4) of the FOI Act 2011.

⁶⁰ Section 2(7) of the Freedom of Information Act 2011.

⁶¹ *Ibid.*

⁶² Section 1 of the Freedom of Information Act.

⁶³ Section 45(1)(2) of the 1999 Constitution of the Federal Republic of Nigeria.

⁶⁴Note that Freedom of information is an individual right as well as a collective right. Therefore, no individual has a better right than the other except where issue of right to privacy of individual is involved, which may not be respected in qualified circumstances.

rights and freedoms of individuals where democratically justifiable through enacted laws which could have a superior weight against any individual claims made under section 39 of the Constitution.

However, certain limitations are placed in the Act for disclosure of information by public institutions based on public interest. Though, section 14 of the Freedom of Information Act provides that a public institution must deny any application for information that contains personal information.⁶⁵ The aim of this provision is to protect personal data and the identity of whistle-blowers in criminal matters. However, certain limitations to this right in which a public institution can disclose personal information include if it would be in the public interest and such public interest outweighs the protection of the privacy of the individual to whom the information relates.⁶⁶

Disclosure of such personal information by the public institution shall be done either if the individual to whom it relates consents to the disclosure; or the information is publicly available.⁶⁷ These qualified instances in section 14 of the Freedom of Information Act create the need to have a clear consent of the individual whose personal information is in question before such information can come to the knowledge of a third party even where public interest to access such information outweighs the individual's interest. This provision stifles the right of the public to have access to information even in the face of allegation of crime or misbehaviours by individuals. Full disclosure of identity and adequate information about the personal life of an offender or a criminal may be necessary to better appreciate the situation of the crime committed and how dangerous such a person can be to the society. Moreover, this provision is against the spirit of section 45 of the Constitution which requires disclosure where public interest demands.

In a like manner, it ought to be an exception under the Act for public institutions to be able to disclose trade secrets and commercial or financial information obtained from a person or business on demand even if such trade secrets or information are proprietary, privilege or confidential, where criminal investigation is involved; this would help in proper investigation, facts gathering and prosecution of the case.⁶⁸

According to Principle 8 of Article 19, laws which are inconsistent with principle of maximum disclosure should be repealed or amended. Duty to disclose information, where necessary, must tilt towards overriding public interest rather than selfish private interest. Private interest may be protected where there is a risk of substantial harm to the interest which is greater than the overall public interest in having access to the information. In other words, duty to disclose information must be weighed on the balance of risk of disclosing the information or not in the light of the interest needing protection.

⁶⁵ Section 14(1) of the FOI Act.

⁶⁶ See sections 12(1)(a)(v), 14(3) and 19(2) of the FOI Act 2011.

⁶⁷ Section 14(2) of the FOI Act 2011.

⁶⁸ See section 15 of the FOI Act 2011. It should be noted, however, that where disclosure to the public may hinder investigation or any administrative enforcement proceedings or is likely to deprive a person of fair hearing such disclosure may be refused. See section 12 of the Freedom of Information Act 2011.

It should be noted that section 14(3) and section 12(1)(a)(v) of the *Freedom of Information Act* are contradictory in term. The former section requires the consent of the private person for information concerning him under that section to be disclosed where such information is not already in the public domain as provided in subsection (2), while the latter section does not require such consent before such information can be disclosed where public interest outweighs that individual's interest.

The drafter of the Act tries to segregate the categories of information that falls under the treatment of each of the two sections; unfortunately the same information can come under the two sections as there is possibility of overlap of information held by the public authorities or institutions concerned. For instance, section 14(1)(c) of the Act provides that subject to subsection (2), a public institution must deny an application for information that contains personal information which include "file and personal information maintained with respect to any applicant, registrant or licensee by any government or public institution cooperating with or engaged in professional or occupational registration, licensure and discipline." This remains the case even where public interest outweighs private or individual interest as indicated in section 14(3) of the Act. Whereas by section 12 (1) of the Act a public institution may deny an application for any information which contains-

(a) Records compiled by any public institution for administrative enforcement proceedings and by any law enforcement or correctional agency for law enforcement purposes or for internal matters of a public institution, but only to the extent that disclosure would-

(v) constitute an invasion of personal privacy under Section 15 of this Act, except, where the interest of the public would be better served by having such record being made available, this exemption to disclosure shall not apply.

It can be deciphered from the two sections that administrative duties engaged in under each of the sections can fall in the same category; but different conditions are given under the two sections as regards the freedom to give out information. This anomaly needs to be given incisive review to bring the sections in question in line with regular principle or standard that promotes public interest above individual interest not to disclose information in the custody of public institutions, bodies or agencies where it outweighs individual interest.

There is no requirement for blanket disclosure of information in the custody of public institutions, therefore the need for qualified exceptions which are required to be legislatively prescribed, and must be narrow in scope. Though there are no generally agreed standards of exceptions that can come under this scope, Article 19 Principles prescribe three-part tests for qualifying the exceptions, which are:

1. The information in question must relate to legitimate aim listed in the law;
2. Disclosure must threaten or cause harm to that aim; and
3. The harm to that aim must be greater than the public interest in having the information.

The above requirements should be sufficient yardsticks in determining whether to disclose information or not, and should be the philosophy driving enacted laws in specifying exceptions to disclosure of information.

In case of refusal by public institution to grant access to information it is an established standard that such refusal shall be subjected to appeal. It is required under many national laws that such appeal should be made to a higher authority within the same public institution to which such a request was made. Such approach would "help address mistakes, build confidence among lower-ranking officials to disclose information and ensure internal consistency."⁶⁹ Under the Freedom of Information Act a refusal or denial of access to information or any part thereof can go to the court of law for a judicial review.⁷⁰ The common trend in some national laws and many international instruments is to have appeal for refusal to supply or access information made to an independent person or body set up for that purpose. Such body may include information commission, ombudsman or human right commission. While some nations go in line of Nigeria which requires appeal to court of law, some stipulate appeal to independent bodies while some combine the two approaches, i.e., appeal to both independent body and court.⁷¹

The practical reality is that aggrieved persons who have been denied access to information by public institution may find appeal of such decision to independent body more convenient and accessible compared to the court of law. The court system is too legalistic, technical, expensive, time consuming and too formal compared to a non-adjudicatory system which is a more relaxed system for resolving complaints. However, the independent body should not be the final appeal authority so that appeals should lie from its decisions to a court of justice. This will encourage a review of such a decision where an aggrieved party is not satisfied with the outcome of the appeal as it is the court that should have the final authority to set standards of disclosure in controversial areas and to knit a well-reasoned approach to disclosure in difficult areas.⁷² The two-track system is therefore advisable to be adopted in Nigeria where a public institution has denied access to information.

Another important concept that needs to be considered in promoting freedom of information right is the need to encourage disclosure of information. Before the enactment of the Freedom of Information Act in Nigeria, there are certain laws which have provisions militating against access to information which include

⁶⁹ Mendel, *op. cit.*, at 37.

⁷⁰ Sections 7 and 20 of the FOI Act 2011.

⁷¹ For instance, Commonwealth Principle 5 provides that appeal for refusal to disclose shall be subject to independent review, Joint Declaration of the special mandates refers appeal to an independent body with full powers to investigate and resolve such complaints, while the Council of Europe Recommendation refers appeal to court of law or another independent and impartial body established by law. The African Declaration in Principle IV(2) also refers to two levels of appeal which are appeal to an independent body and/or the courts. See Mendel Toby, *op. cit.* p. 38.

⁷² Mendel, *op. cit.* at 38.

some provisions in the Criminal Code,⁷³ the Evidence Act, the Official Secrets Act, the Public Complaints Commission Act, the Statistics Act, etc. The debilitating effects of these laws could serve as obstacles to the exercise of right to information. Though on the passage of the Freedom of Information Act in Nigeria the provision of section 1(1) of the Act provides that “notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established.” This notwithstanding, the provisions of other laws debilitating the exercise of the right of freedom of information still subsist. There is need for a actual repeal or amendment of these laws otherwise there may be serious clash between the provisions of the Freedom of Information Act and other laws militating against the right in the court of justice based on their diverse philosophies. Thus, it is important to avoid unnecessary extraneous statutory rules of interpretation to circumvent certain unwanted laws in given circumstances in order to promote intendment of some enacted laws. In consonance with this approach, Principle IV(2) of the African Declaration states that “Secrecy laws shall be amended as necessary to comply with freedom of information principles.”

8. Conclusion

Nigeria has had her own fair experience in the assurance of protection of right of freedom of information. After much requests for the enactment of law guaranteeing freedom of information in Nigeria, the government responded by enacting the Freedom of Information Act 2011. The enactment of the Act serves as positive step in complying with the demand at the international level in guaranteeing freedom of information which is considered as one of the fundamental rights human beings possess. Although the Act is a veritable document which could encourage the governed to demand or request for information that are believed to be in the custody of public institutions, there is lop-sidedness in some of the provisions of the law which could hinder effective promotion or protection of such right. Having examined the legal regime of right to freedom of information in Nigeria, certain suggestions are made as to how the law can come up to standard required at the international level.

Rightly observed, enactment of freedom of information law is only a beginning in the promotion of right to information. Even where there is a very good document entrenching the actualisation of such freedom, there is also a need for government to change their internal cultures, especially that of hoarding away information from the public to discourage transparency. Long delay or too much bureaucracy

⁷³ Law criminalising national betrayal, such as sedition, espionage, treason and the likes are often effectively used by government to silent criticism against the government actions and policies. Such laws are vulnerable to governmental abuse where there are no clear legal provisions protecting right to express oneself and dissent against governmental policies and actions. See “Right to Freedom of Expression: Restrictions on a Foundational Right” *Global Trends in NGO Law, A Quarterly Review of NGO Legal Trends Around the World*, Vol. 6, Issue 1, at 5, published by The International Centre for Not-for-profit Law.

in getting the information requested may discourage applicants. Also, long delays in courts where appeals from refusal to accede requests and the legal technicalities and quibbles experienced in courts may discourage prospective applicants for information in the custody of governmental institutions.⁷⁴ Quick and easy implementation of the legal requirements of the law on freedom of information will definitely act as a catalyst in submitting requests for information in the custody of governmental agencies. Implementation of this requirement in Nigeria will imply that the enactment of the Freedom of Information Act will not amount to mere paying lip service to guaranteeing such a right, or grudging submission to international pressure as a mere ploy to douse unwanted tensions. It is submitted that reasonableness, genuineness and practicability of freedom of information law will portray Nigeria as a true democratic society.

The limitation to the exercise of freedom of information right in Nigeria is the obvious ignorance of many people of the existence of such right. It is therefore important that the society is sensitized and properly educated about the existence of this right. If this is not done the Act will remain a paper tiger. Moreover, the government should make important information readily available to the public without actual demands.

⁷⁴ Banisar, D. (May, 2004) "The FreedomInfo.org Global Survey of Freedom of Information and Access to Government Record Laws around the World," P. 7. Accessed on 17 May, 2016 from https://www.ndi.org/files/freeinfo_010504.pdf