

**APPLICABILITY OF FREEDOM OF INFORMATION ACT TO THE STATES OF THE  
FEDERATION OF NIGERIA\***

**Abstract**

*Freedom of information is access to Knowledge. Regular access to information will not only lead to the empowerment of the people, but will also prevent them from living on rumours and half truth. The right to access information underpins and supports other fundamental rights of freedoms and enhances democracy and its ideals. The Freedom of Information (FOI) Act 2011 provides for access to information with restrictions. It is an expansion of S.39 of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended) and covers item 4 of the Concurrent Legislative List in the second schedule of the said CFRN. The FOI Act is not a law of general and automatic application to the individual States of Nigeria. For it to apply to the States it must be domesticated by the said State. However, the provisions of the FOI Act are quite persuasive and enthrone the rule of Law and constitutional democracy.*

**Keywords:** Freedom of information, Act, States, Nigeria, Domestication, Public institution.

**1. Introduction**

Information dispenses ignorance and remains the most formidable basis for knowledge, and knowledge is power. Access to information is a great asset to nation building, engenders transparency and accountability in Government. It is one of the bedrocks of the rule of law and also a very important pillar in support of democracy. Access to and Freedom of Information are provided for in S. 39 and Item 4 of the Concurrent Legislative List in the Second Schedule of the Constitution of the Federal Republic of Nigeria (CFRN), 1999 (as amended). The Freedom of Information Act, which is an enactment of the National Assembly, is an expansion and elaboration of the above provisions of the CFRN, 1999. The Freedom of Information Act provides for access to public information and records by public institutions with exceptions. The implication is that access to information under this law is not absolute; it has its limits and scope. The extent of applicability of this law to States in Nigeria is a question to be answered. This paper seeks to discuss whether or not this law applies in the States of the Federation of Nigeria.

**2. Definition of Key Terms**

**Information and Freedom of Information**

The Freedom of Information (FOI) Act<sup>1</sup> defines information to include all records, documents and information stored in whatever form, including written, electronic, visual images, sound, audio recording, among others. According to the Oxford Advanced Learner's Dictionary<sup>2</sup>, information is facts or details about somebody or something. The question that then comes fore is - what is freedom of information? Freedom of information means access to information. This access to information could be from private or public institutions.

**Public Institution**

Public institution means any legislative, executive, judicial, administrative or advisory body of the government including Boards, Bureau, Committees or Commissions of the State and any subsidiary body of those bodies including, but not, limited to committees and sub-committees which are supported in whole or in part by public fund or which expends public fund and private bodies providing public services, performing public functions and utilizing public funds.<sup>3</sup> Public institution also means an institution that is operated by or controlled by Federal Government, a state, or a political subdivision of a state such as a city or country.<sup>4</sup> In the words of Lambo, Doma and Osagie public institution include ministries, departments, agencies, institutions, public corporation, publicly funded ventures and incorporated entities with government shareholding either at the Federal, State or Local Government Level.<sup>5</sup> Public institution gleaned from all the definitions above is a government institution whether Federal or State funded by public funds and open to all.

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<sup>1</sup> S. 31 of the Freedom of Information Act 2011.

<sup>2</sup> A. S. Hornby, *Oxford Advanced Learner's Dictionary*, Oxford University Press, 2015, p. 806

<sup>3</sup> S. 31 of the Freedom of Information Act, 2011.

<sup>4</sup> 'What is Public Institution,' <http://www.law.cornell.edu.defini...> Accessed on 12/9/2022.

<sup>5</sup> J. Lambo, U. Doma and B. Osagie, 'Nigerian Public Institutions- What you need,' <http://www.modaq.com.nigeria>. Accessed 13/9/2022

### **3. What is Freedom of Information (FOI) Act?**

The Freedom of Information Act is an enactment of the National Assembly that provides for access to public information and records by public institutions with reservations. The extant Freedom of Information Act in Nigeria is that of the year 2011. The aim of this Act is 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 kinds of official information and establish procedures achieving those purposes.<sup>6</sup>

It then follows that the aim of the FOI Act is to give access to information. The Freedom of Information Act is an expansion of S. 39 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), which provides for right to freedom of expression and the press. Access to and freedom of information is also protected under some international human right treaties such as Article 19 of the International Convention on Civil and Political Rights which states that everyone has the right to his opinion and free expression. Access to and freedom to information are very important pillars in support of democracy and Nigerian democracy is not an exception. However, access to and freedom of information is not absolute under the Act, there are exceptions and restrictions.<sup>7</sup> The FOI Act is not a law of general application in the federation (in the States of the country). For it to apply to the States, it has to be domesticated by whichever State that wants it to apply within it.

### **4. Meaning of Domestication of Law**

In the words of Garner<sup>8</sup>, domestication is the act of making a legal instrument recognized and enforceable in a jurisdiction foreign to the one in which the instrument was originally issued. While domestic is of or relating to one's own country or jurisdiction.<sup>9</sup> The implication is that domestication is to bring into local/indigenous use a particular law of other jurisdiction, for example, treaties between Nigeria and other countries by the Nigerian Legislature legislating on them, Acts of the National Assembly by the State Legislature legislating on them etc. Nigeria is a federating state and for any Act of the National Assembly to apply to the individual States particularly where the item is within the Concurrent Legislative List of the CFRN, 1999 (as amended), it must be legislated upon by the House of Assembly of the said State. The domestication of treaties/laws in Nigeria is enshrined in S. 12 CFRN<sup>10</sup> wherein it provides thus:

- (i) No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.
- (ii) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.
- (iii) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House of Assembly of the State in the Federation.

By extension therefore, the FOI Act which is an Act (Law of the National Assembly) can only apply to a State which domesticates it.

### **5. Applicability of Freedom of Information Act to the States of Nigeria**

The Freedom of Information Act being an enactment of the National Assembly applies only to the Federal Government, its agencies, institutions and/or officers and to states that have domesticated it. Non-domestication of Freedom of Information Act by any State of the Federation of Nigeria renders it inapplicable to the said state. It is not a law of general application to all the States of Nigeria. The said Act imposes duties on the Agencies, Institutions and Officers of the Federal Government and no corresponding duty on the State Governments in Nigeria. This is evident in the provision of S. 29 of the Freedom of Information Act, 2011, which provides that the institutions should submit reports of the implementation of the Act to the Attorney General of the Federation who shall make same available to the public and no corresponding submission to the States. In support of the fact that the Freedom of Information Act is not a law of general application; the Court of Appeal, Benin Division in

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<sup>6</sup> Long title to the Freedom of Information Act, 2011.

<sup>7</sup> Ss. 11, 12, 14, 15, 16, 17, 19 of the Freedom of Information Act, 2011.

<sup>8</sup> B. A. Garner, *Black's Law Dictionary*, 11th Ed., 2019.

<sup>9</sup> *Ibid.*

<sup>10</sup> S. 12 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

*EDOSACA v. Osakwe*<sup>11</sup> held that there is nothing in the Freedom of Information Act that suggests that the provisions of the Act shall apply to the States of the Federation. The Court while dismissing the application brought under the Freedom of Information Act, 2011 against Edo State Agency for the Control of Aids (EDOSACA) held that the Act does not have general and automatic application to all federating states but will only apply to a state when the State has domesticated the Act, consequently it held thus:

The Freedom of Information Act, though a noble and worthwhile piece of legislation, does not have automatic application to the States. It therefore behoves any state interested in adopting the provisions of the Act in its territory to set the necessary machinery in motion for the enactment of a similar law by the House of Assembly of the State.

On the contrary, in *Alo v. Speaker, Ondo State House of Assembly & Anor.*<sup>12</sup>, the Court of Appeal, Akure Division also held that the Freedom of Information Act, 2011 applies to all the States of the Federation. *EDOSACA v. Osakwe (supra)* delivered on 28/3/2018 and *Alo v. Speaker, Ondo State House of Assembly & Anor. (supra)* delivered on 27/3/2018 are two conflicting judgements of the Court of Appeal. Also in *Governor of Delta State v. Olukunle*<sup>13</sup> the Court of Appeal held that the Freedom of Information Act is not a law of general and automatic application. The law is settled that where there are two or more conflicting judgements of a court of coordinate jurisdiction the later in time prevails and forms *res judicata* see *Ikeni v. Efamo & Ors*<sup>14</sup> and *Dara & Ors. v. Umar*<sup>15</sup>. Moreso, when the later judgement referred to the earlier ones and distinguished them as in *Governor of Delta State v. Olukunle (supra)* thus:

The earlier decision appears to have been given *per incuriam*. The later decision of this Court in Benin is instructive... What is more the earlier decision of this Court in the matter (ie. Alor's Case) referred to, would appear to have been concerned with the question as to types of records that was contemplated by the Act; it was in that respect that reference was made to the records as enumerated or described in the concurrent legislative list of the Constitution; that is to say that the earlier decision of this Court at the Akure Division in the Alor's case was only concerned with the nature or character or type of the documents covered as public records. That was the ratio decidendi of the said case. It is therefore inapplicable.

It then follows that the position of the law is the decision of the court in *EDOSACA v. Osakwe (supra)* and *Governor of Delta State v. Olukunle (supra)* which is that the FOI Act, 2011 does not have automatic application to the States, but must be domesticated before it applies to the States of the Federation of Nigeria. Meaning that a State House of Assembly must pass similar law for it to apply in the State in issue.

Nigeria is a federation with a constitution, wherein powers have been allotted constitutionally to the Federal, State and Local Governments as tiers of government. Hence, the power to make laws for the peace, order and good government of respective tiers has been accordingly allotted. In the States (State Government) the rights of persons to obtain and access information, documents or records shall be as provided by the law of the said State or the Evidence Act which is of general application throughout Nigeria. Therefore, the Freedom of Information Act, 2011 applies to Bodies stated in the Act. By Sections 1, 2, 3, 5, 14, 15, 16, 29, 31, 32 of the Freedom of Information (FOI) Act 2011, it is obvious that it applies only to the Federal Government and its agencies.

The Court of Appeal in the *Governor of Delta State v. Olukunle*<sup>16</sup> held that Nigeria is a Federation with a Constitution where power to make laws for the peace order and good government has been allotted to the different tiers of government. The rights of persons to obtain and access information or documents and records of Boards shall be as provided by the law of the State or the Evidence Act. That the Act<sup>17</sup> obviously applies to the Federal Government and its agencies.

Paragraph 5 of the Concurrent Legislative List<sup>18</sup> provides that the State House of Assembly has powers to make laws for that State and any part with respect to archives and public records of government of a State. The Court of Appeal in elucidation of the above provision held in *Governor of Delta State v. Olukunle (supra)* thus:

... Each component state does have powers under the Constitution pursuant to the Concurrent Legislative List Schedule to make it laws relating to discoveries and demand of

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<sup>11</sup> 2018 16NWLR (Pt. 1645) 100 at 221 – 227.

<sup>12</sup> 2018, LPELR 45143 (CA).

<sup>13</sup> 2020 LPELR 51263

<sup>14</sup> 2001 LPELR-SC 99/1997.

<sup>15</sup> 2013 LPELR-CA/J/272/2009.

<sup>16</sup> 2020, LPELR 51263 (CA) [latest and most current decision]

<sup>17</sup> Freedom of Information Act, 2011.

<sup>18</sup> Constitution of the Federal Republic of Nigeria, 1999 (as amended).

records, information etc. and until and unless made, a state is not bound to supply or provide and an applicant is *ipso facto* not entitled, as of right to have such records or information. Where he seeks and it is refused, there does not exist a justifiable cause of action. The FOI Act is to me, therefore a legislation of high persuasive value to States including Delta State and Local Governments but without any element of legal compulsion; rather it is a legislation of moral suave and colouration; as relating to State Governments.

The Court of Appeal<sup>19</sup> went on to state that it must be reiterated that the fact of having FOI Act in the concurrent list of the Constitution also reinforces the argument that it is not in the exclusive domain of the Federal Government and thus depriving the states from controlling same. Therefore, the denial or refusal of a state or any of its agencies cannot be compelled on the basis of this Act of the National Assembly.

However, flowing from the provisions of the Constitution earlier referred to some of the provisions of FOI Act and the decision of this Court of Appeal in EDOSACA case (*supra*) and *Governor of Delta State v. Olukunle (supra)*, it is clear and trite law that the FOI Act which is an enactment of the National Assembly does not apply to the State Governments, consequently not compelling, it is only persuasive. Of particular mention is S. 29 of FOI Act which provides for the submission of reports by each public institution to the Attorney General of the Federation and includes what the Attorney General of Federation shall do; to submit to the Government and judiciary committees in the Senate and House of Representatives while the State Attorney General or State House of Assembly are not mentioned at all. It should also be noted that the Minister of Information is mentioned, and nowhere in this FOI Act is the Commissioner for Information of State mentioned. The provision of Section 29(9) of FOI Act shows that Government mentioned relates to Federal Government. The Office of the President is clearly mentioned. Nothing is stated about the Office of the Governor of States. A holistic reading of the Freedom of Information Act 2011 shows that it applies only to Federal Ministries, Agencies, Parastatals and Board etc. S. 4(7) (b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides that,

the House of Assembly of a State shall have powers to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters – (a) any matter included in the concurrent legislative list set out in the 1st column of Part II of the Second Schedule to the Constitution to the extent prescribed in the second column opposite thereto.

Part II Paragraph 4 of the Second Schedule of the Constitution provides that, ‘the National Assembly may make laws for the Federation or any part thereof with respect to the archives and public records of the Federation’. While Paragraph 5 provides that ‘a House of Assembly may subject to Paragraph 4 hereof make laws for that State or any part thereof with respect to archives and public records of the Government of the State.’ Based on the above provisions, the National Assembly enacted the Freedom of Information Act which applies to the records of the Federal Government, its Parastatals and Agencies. The Court of Appeal in support of the above in *Governor of Delta State v. Olukunle (supra)* held that it is in consonant with Section 4 and Second Schedule of the Constitution enunciated above, that the National Assembly enacted the Freedom of Information Act 2011 which applies to the records of the Federal Government, its agencies and parastatals. Until the Edo State Government enacts its own Freedom of Information Law pursuant to do under Section 4 and the Second Schedule of the CFRN 1999 (as amended) the Edo State Government or any of the Appellants is not bound by FOI Act, 2011. The decision of the Court of Appeal stated above is the correct position of the law. It is then trite law that the FOI Act, 2011 applies to Federal Government, its Agencies and Parastatals and not to State Governments and its agencies. It can only apply to any state government when the House of Assembly of the said state domesticates it or otherwise enacts it into law, that is, ‘Freedom of Information Law.’

## 6. Conclusion and Recommendations

Information dispenses ignorance. The right to access information underpins and supports other fundamental rights and enhances democracy. Where access to or freedom of information is restricted, social evils like abuse of power, corruption and violation of fundamental human rights cannot be exposed and rectified. The Freedom of Information Act (FOI) 2011 which is an enactment of the National Assembly provides for access to information. Its applicability is to the federal government, its agencies and parastatals and not to the State Governments or its agencies. It is not a law of general and automatic application to the States of Nigeria, for the items legislated upon in the FOI Act are provided for within the concurrent legislative list of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended). It can only apply to any State when it has been legislated upon by the House of Assembly of the said State. The provisions of the FOI Act are persuasive to the States and not compelling. Access to and Freedom of Information is an important pillar of the rule of law and must be encouraged by the State Government for purpose of transparency and constitutional democracy. However, it is my recommendation that the States of the Federation of Nigeria domesticate it, because of its necessity and importance.

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<sup>19</sup> *Governor of Delta State v. Olukunle*, 2020.