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Confidentiality and Protection of Official Records in the Freedom of Information Era: Nigeria's Situation

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Abstract

Records of great value are generated daily in the public sector in the course of carrying out the affairs of the state. These records document the activities of the government and much of the information they contain is crucial for decision making. The information may, however, also be of strategic value or sensitive nature such that unrestricted access to them may be inimical to national or personal interests. This paper examines the specific provisions in existing laws and public service rules in Nigeria which restrict access to public records and information in Nigeria. It reviews the provisions in terms of the need to protect the privacy of individuals and safeguard national security and interests. It also examines potential areas of conflict between these restrictive provisions and some of the provisions of the Freedom of Information (FOI) Bill which the country is seeking to pass into law. The paper highlights the importance of striking a right balance between the need to promote access to public records in the interest of open and responsible government through FOI legislation and the equally important need to restrict access to such records and information in order to protect national strategic security and interests.

Keywords

Official records, official secrets, public service rules, freedom of information, privacy.

Introduction

Records and information are interdependent concepts. The term 'information' has been defined as "knowledge that is communicated" (International Records Management Trust [IRMT], 1999). On the other hand, an often cited definition of a record provided by the same source is that it is "a document regardless of form or medium created, received, maintained and used by an organisation (public or private) or an individual in pursuance of legal obligations or in the transaction of business, of which it forms a part or provides evidence" ((IRMT, 1999). The documents mentioned in this definition clearly contain information; thus, the definition implies that records are recorded information regardless of form or medium. In other words, information becomes a record once it is recorded. Not all pieces of information are in recorded or permanent form (records), and that is why there is oral information, which is ephemeral in nature. Among the essential attributes of records are reliability and trustworthiness, uniqueness and authenticity (Azangweo, 2000). Also of importance in the context of this paper is the concept of 'official record', which is a record generated by an organisation (private or public) in the course of official transactions.

Records and information are indispensable for decision making in all organisations. Records document the activities of an organisation and constitute its collective memory. Subsequently, records facilitate the day-to-day transactions and

form a solid base for rational decisions. The main reason for maintaining records is to ensure timely access to information. This paper is focused on official public records and the information they contain, for which the terms "records" or "records and information" will be used interchangeably.

Records and information in the public service of a country are the veritable tools that keep the machinery of government going. The efficacy and efficiency of government, as well as the security of the society which it governs, depend on how well records and information are generated, processed and disseminated. Documentation is important in the public service not only for availability of information for decision making and for supporting activities of the government, but also for accountability and continuity in the transaction of government business. The protection of the physical integrity and informational content of records is, therefore, of paramount importance in records keeping and records management in the public sector.

At the same time, access to the records and the information they contain is a contentious matter in a world "where information is power and where the owners may be extremely wary of permitting the use of such information" (Ford, 2004). In the context of governance, ownership of public sector records resides in society in theory, as the machinery of government is deemed a creation of society itself, working through democratic or other arrangements. In reality however, a government may end up exercising ownership and use rights over public records in the interests of only those in government. It is in this environment of potentially conflicting interests of government, the governed, and society as a whole that regulatory and legal provisions are usually defined or enacted to restrict or facilitate access to public records and information for the public good.

A Freedom of Information (FOI) bill is currently being debated in the Nigerian legislature for the second time, after President Olusegun Obasanjo failed to assent to it as passed before he left office in 2007. Debate is ongoing in the country on the desirability of, and the provisions of the Bill, in the circumstances of the country's socio-political history and level of development. It is in that context that this paper aims to contribute to knowledge and understanding on the issue by comparing the provisions of the existing legislations and regulations in Nigeria with those of the FOI bill, thereby highlighting potential areas of conflicts that should be carefully considered and would need to be managed by all stakeholders of FOI during and after the passage of the bill.

Protection of Records and Information

Various laws and rules operate to protect classified information and official secrets in the public service in Nigeria. These include the Official Secrets Act, the Public Service Rules, and the Criminal Code Act.

Official Secrets Act

The Official Secrets Act, first enacted in 1962, and which has been re-enacted as Cap. 335, Laws of the Federation of Nigeria, 1990 and now re-branded Cap.O3, Laws of the Federation of Nigeria, 2004, contains many provisions that restrict access to records and information, which are presented here under various subheadings for clarity:

Classified information: Classified matter is defined in section 9 (1) of the Act to mean "any information or thing which under any system of security classification from time to time in use by or by any branch of government, is not to be disclosed to the public and of which the disclosure to the public would be prejudicial to the security of Nigeria". A public officer, for the purpose of the Act, includes a person who formerly exercised, for the purpose of the government, the functions of any office or employment under the State (section 9 (1). Security classification of information is based on the principle that the degree of importance or sensitivity of information varies. As such, different degrees of protection are required for different kinds of information. Security marking evolved out of the need to protect defence-related information (The National Archives, 2009). Among the factors usually considered for classification of information in the public sector are the sensitivity of information, the age, and what the law and other regulatory stipulations enjoin. Systems for the security classification of records vary from country to country. For countries following the British system, common classification labels include restricted, confidential, secret and top (or most) secret (The National

Archives, 2009) in the ascending order of sensitivity. Nigeria, by virtue of its colonial experience, adopts these classification labels. A restricted material is considered capable of causing undesirable effects if made generally available to the public and can, therefore, only be released to particular individuals. Confidential materials are those materials that can cause damage or be prejudicial to national security if publicly available. So also are the materials tagged 'secret' which are particularly sensitive records. Materials with 'top secret' marking are considered capable of causing exceptionally grave damage to national security if made public. In the past, the marking meant "no disclosure to foreign powers without exceptional permission" (The National Archives, 2009).

Prohibition of transmission of classified matter: Section 1 of the Official Secrets Act states that:

1. Subject to subsection (3) of this section, a person who –
   (a) transmits any classified matter to a person to whom he is not authorised on behalf of the government to transmit it; or
   (b) obtains, reproduces or retains any classified matter which he is not authorised on behalf of the government to obtain, reproduce or retain, as the case may be, shall be guilty of an offence.
2. A public officer who fails to comply with any instructions given to him on behalf of the government as to the safeguarding of any classified matter which by virtue of his office is obtained by him or under his control shall be guilty of an offence.

Public Service Rules (PSR)

In Nigeria, the Public Service Rules (PSR) of 2006 also contains provisions relating to official information and records and complements the provisions of the Official Secrets Act. The following provisions therein are relevant to this discussion:

Classified information: Rule 010103 defines classified correspondence to mean "correspondence which has been graded Restricted, Confidential, Secret or Top Secret". Rule 030415 of the PSR makes it mandatory for every permanent secretary/ head of extra-ministerial office to ensure that all officers, employees and temporary staff in his or her ministry/extra-ministerial office who have access to classified or restricted papers have signed the Oath of Secrecy in the appropriate form before they are granted such access and that the declarations so signed are safely preserved. This is similar to the provisions of the UK Official Secrets Act of 1989, which requires individuals working with sensitive information to sign a statement to the effect that they agree to abide by the restrictions of the Act. The recent administration of the Oath of Secrecy and Declaration of Secrecy on the aides of President Yar'Adua and the Vice President to "checkmate possible disclosures of confidential reports to outsiders, particularly the media and the opposition, which have been most critical of the Presidency" (Chedozie, 2008) was probably an attempt to give effect to the provision of this rule. The exercise has, however, been heavily criticised, particularly against the background that the aides concerned "are not civil servants who fall under the Civil Service Regulation" (Amokeodo and Ketefe, 2008).

Public Officers and the Official Secrets Act: Rule 030416 of the PSR states that every officer is subject to the Official Secrets Act and prohibits unauthorised disclosure of official information. In view of the importance of this rule to this subject matter, the provision is substantially quoted as follows:

> Every officer is subject to the Official Secrets Act…and is prohibited from disclosing to any person, except in accordance with official routine or with special permission of Government, any article, note, document or information entrusted to him/her in confidence by any person holding office under any Government in the Federal Republic of Nigeria, or which he/she has obtained in the course of his/her official duties. Similarly, every officer shall exercise due care and diligence to prevent the knowledge of any such article, note, document or information being communicated to any person against the interest of the Government.

Apart from the possible criminal liability under the Official Secrets Act, the PSR in Rule 030402(i) defines unauthorised disclosure of official information as a serious act of misconduct and the ultimate penalty for serious misconduct, according to Rule 030407, is dismissal. The implication of dismissal for the officer dismissed is that he forfeits all claims to retiring benefits.

Copying and removal of records: Rule 030417 of the PSR prohibits a public officer from abstracting or copying official minutes, records or other documents except in accordance with official routine or with special permission of his Permanent Secretary/Head of Extra-Ministerial Office. It is also a contravention of the PSR for an officer, on disengagement from the public service, to take with him any public record without the written permission of the Permanent Secretary in the Office of Establishments and Pension.

Access to own personal records: The general rule in the Nigerian public service, according to Rule 030418, is that an officer should not have access to official and secret records relating personally to them.

Publications and Public Utterances: Rule 030421 regulates publications and public utterances. of particular interest are the provisions of sub rule (i) (b) (c) and (d) of the Rule which are quoted hereunder for emphasis:

> Except in pursuance of his/her official duties, no officer shall, without the express permission of his/her permanent secretary/ head of extra-ministerial office, whether on duty or on leave of absence:
>
> (a) contribute to, whether anonymously or otherwise, or publish in any newspaper, magazine or periodical or otherwise publish, cause to be published in any manner anything which may reasonably be regarded as of a political or administrative nature;
>
> (b) speak in public or broadcast on any matter which may reasonably be regarded as of a political or administrative nature;
>
> (c) allow himself/herself to be interviewed or express any opinion for publication on any question of a political or administrative nature or on matters affecting the administration, public policy, defence or military resources of the Federation or any other country.

These provisions are meant to ensure that public officers are to be seen and not heard except when authorised in order to prevent vital information of government from being divulged through careless and unguarded utterances. They also confirm the age-long administrative practice under which the civil service is regarded as neutral and anonymous (Lamb, 1966).

Criminal Code Act

The Criminal Code Act makes provisions relating to disclosure of official secrets in Nigeria. Section 97 of the Act stipulates that:

> (a) Any person who, being employed in the public service, publishes or communicates any fact which comes to his knowledge by virtue of his office, and which it is his duty to keep secret, or any document which comes to his possession by virtue of his office and which it is his duty to keep secret, except to some person to whom he is bound to publish or communicate it, is guilty of a misdemeanour, and is liable to imprisonment for two years.
>
> (b) Any person who, being employed in the public service, without proper authority abstracts, or makes a copy of, any document the property of his employer is guilty of a misdemeanour and is liable to imprisonment for one year.

Facilitation of Access to Official Records and Information

Alongside legislative provisions and public service rules that restrict access to public records and information are also other laws and rules that seek

to facilitate the acquisition, proper maintenance and public access to such records and information. One such legislation is the National Archives of Nigeria Act. Access to public archives in the National Archives in Nigeria is regulated by the provisions of the National Archives Decree (now Act) No. 30 of 1992. The Act stipulates that public archives of the age of twenty-five years or more are to be open for the inspection of the public. It, however, recognises a longer period of closure that might have been stipulated by the head of the public office that had the custody of the public archives before they were transferred to the National Archives, The need to protect the privacy of individuals is also recognised when the Act stipulates that public archives relating to the private life of individuals shall not be made available for the inspection of members of the public except with the written permission of the persons concerned or their heirs or executors, if known to the Director of National Archives.

Access to records, particularly official records, is determined by a number of factors, the most important being the need to know. The concept of the need to know postulates that only those who have official role to play in the transaction or activity requiring the use of records are allowed access to the records that are relevant to such transaction. This implies that as a member of an organisation, an individual can have access only to the records of the organisation that can facilitate the discharge of his official duties. In other words, there must be justification for access to official records. Records and official information will be used interchangeably in this paper in the context of official records and information. Access to official records is, therefore, based on the need to know, as well as legal authorisation.

In addition to the general legislations regulating access to information, each organisation, whether public or private, has its own access policy. This consists of the guiding principles governing access to information. Access policy may vary from country to country and from one organisation to another. This means that access to records may be determined by either organisational or societal culture. It also depends on the nature of information or records, whether current or non-current, and whether classified or unclassified. Access to current records is based on 'the need to know' while access to non-current records depends on custody, i.e. whether records are in the records centre or archives. The depositors or the depositing agencies have the right of access to records while they are in the records centre.

Freedom of Information versus Restriction of Access to Records

It is now fashionable for nations to enact FOI law to grant the members of the public the right of access to information or official documents held by the State. Although the enactment of FOI legislation started in the 1960s, Sweden's Freedom of Press Act of 1766 is considered to be the oldest law in this regard (Katuu, 2008). The principle of FOI is rooted in the "concept of open and transparent government" (Adams, 2006). Free access to information preserves democratic ideas (Mason, 2008) and it is "an essential element of a vibrant democracy" (South African History Archive (SAHA), 2003). It is a significant paradigm shift from secrecy and concealment to openness and transparency (Millar, 2003). The right of access to information held by the State has become a benchmark of democratic development (Justice Initiative, 2004). The main goal of FOI, as succinctly captured by Mnjama (2000), is, therefore, to ensure that public bodies are more transparent and accountable in conducting the affairs of the State. Successful implementation of FOI legislation itself is achieved under a good records management regime (Mnjama, 2003).

The United States of America (USA) FOI Act is one of the earliest FOI legislations, having been signed into law on July 4, 1966 by President Lyndon B. Johnson "with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded" (SourceWatch, 2008). The Act was recently strengthened by the Open Government Act of 2007 which confers the National Archives and Records Administration (NARA) with "the authority to establish the Office of Government Information Services (OGIS) to work in cooperation with Federal agencies to promote accessibility, accountability, and openness in government" (Thomas, 2009). In Canada, the FOI was enacted in 1982 and titled "Access to Information

Act". South Africa is one of the African countries with FOI legislations having enacted the Promotion of Access to Information Act, 2000.

Although motivations for freedom of information vary from country to country, the need to engender openness in reaction to endemic corruption and graft often seems to be a fundamental consideration (Blanton, 2002). The purpose of the law, according to the explanatory memorandum of the FOI Bill is "…to increase the availability of public records and information to citizens of the country in order to participate more effectively in the making and administration of laws and policies and to promote accountability of public officers." Not surprisingly however, the FOI bill currently before the Nigerian legislature borrows most of its provisions from many

Table 1: Official Secrets Act/Criminal Code Versus FOI Bill

Official Secrets Act/Criminal Code Act	Freedom of Information Bill
Official Secrets Act **S.1.** (1) Subject to subsection (3) of this section, a person who - (a) transmits any classified matter to a person to whom he is not authorised on behalf of the government to transmit it; or (b) obtains, reproduces or retains any classified matter which he is not authorised on behalf of the government to obtain, reproduce or retain, as the case may be, shall be guilty of an offence. (2) A public officer who fails to comply with any instructions given to him on behalf of the government as to the safeguarding of any classified matter which by virtue of his office is obtained by him or under his control shall be guilty of an offence.	**S.30** (2) Nothing contained in the Criminal Code or the Official Secrets Act shall prejudicially affect any public officer who, without authorisation, discloses to any person, any public record and/or information which he reasonably believes to show – (a) a violation of any law, rule or regulation; (b) mismanagement, gross waste of funds, and abuse of authority; or (c) a substantial and specific danger to public health or safety notwithstanding that such information was not disclosed pursuant to the provision of this Act. (3) No civil or criminal proceedings shall lie against any person receiving the information or further disclosing it.
Criminal Code Act **S.97** (1) Any person who, being employed in the public service, publishes or communicates any fact which comes to his knowledge by virtue of his office, and which it is his duty to keep secret, or any document which comes to his possession by virtue of his office and which it is his duty to keep secret, except to some person to whom he is bound to publish or communicate it, is guilty of a misdemeanour, and is liable to imprisonment for two years. (2) Any person who, being employed in the public service, without proper authority abstracts, or makes a copy of, any document the property of his employer is guilty of a misdemeanour and is liable to imprisonment for one year.	**S.31**(1) The fact that any record in the custody of government and/or public institution is kept by that institution under security classification or is classified document within the meaning of the Official Secrets Act does not preclude it from being disclosed pursuant to a request for disclosure under the provisions of this Act, but in every case the head of the security government and/or public institution to which a request for such record is made shall decide whether such record is of a type referred to in Sections 14, 15, 16, 17, 18, 19, 20 or 21 of this Act.

of the existing FOI laws of other countries, most of which are developed countries, but a growing number of which are developing countries.

The fundamental question which this paper addresses is whether the provisions of the FOI bill would be in serious conflict with existing legislations and rules that had been used since the country's political independence to restrict access to official records and information. In order to answer this question, it is necessary to consider certain provisions of the FOI Bill as they relate to corresponding provisions of the Official Secrets Act, Civil Service Rules and the Criminal Code Act that were reviewed above. The relevant and seemingly contradicting provisions of the FOI Bill vis-à-vis the provisions of the Official Secrets Act and the Criminal Code Act are highlighted in Table 1.

A comparative study of the corresponding provisions in Table 1 would reveal potentially conflicting aspects. However, the seemingly conflicting provisions of the FOI Bill are meant to remove any impediment or road block to the right of access and strengthen the doctrine of openness which is the general intendment of FOI legislation. The implication is that rules, regulations and legal provisions relating to the protection of official records are no longer sacrosanct under the FOI regime. Whatever access rules that hitherto existed are now subordinated and subject to the provisions of the FOI legislation which Allen Weinstein, the Ninth Archivist of the USA, has described as the "cornerstone of access to public records" (Harris, 2007).

Protection of Official Records and Exemptions under FOI

The FOI law makes provision for exemptions to the right of access, which tend to promote the aims of the restrictive provisions of the Official Secrets and Criminal Code acts, albeit under the supervisory institutional frameworks that a FOI law normally provides. FOI legislations in other countries admit of exemptions, in varying degrees, to the right of access to information. These exemptions, in the case of Canada, include information obtained in confidence, information whose disclosure will be injurious to the conduct of government affairs, defence, national security and national safety of individuals, as well as information whose disclosure will be adverse to the economic interests of the country.

Under the proposed Nigerian FOI Bill, exemptions to disclosure are contained in Sections 14 to 21 and they include records containing information, the disclosure of which is injurious to the conduct of international affairs and defence, law enforcement and investigation, economic interest of the country, and privacy of individuals. The FOI Bill also allows the scrutiny of a request to ensure that the record requested is not a type that is exempted from access (Section 31(2) and (3)). The provision of Section 30(2) which renders ineffective the provisions of the Official Secrets Act and the Criminal Code Act relating to unauthorised disclosure of information, however, seems to overreach the FOI law by permitting unauthorised disclosure "notwithstanding that such information was not disclosed pursuant to the provision of this Act" (i.e. FOI Act when passed).

This shows that FOI law is, therefore, not at variance with and inimical to the protection of the security of official information. Denial of access in appropriate cases is allowed under the FOI regime to safeguard privacy, the conduct of foreign affairs, national defence and security which, after all, are the basic considerations in the protection of official information. All the FOI law does is to prevent unreasonable and blanket denial of access to information, ensure that refusal of access is justified under any of the exemptions to the right of access, and promote openness in State affairs.

Access to Records or Information?

It is controversial whether FOI laws grant the right of access to information or actual records. The distinction between information and record is important because information and records may have differing status as evidence in litigations. While a school of thought holds the view that the right granted is to information instead of providing copies of original records when meeting FOI requests (Shepherd and Ennion, 2007), another argued strongly that access to information, in fact, means access to records and that when citizens exercise their right of access under the FOI legislation, "they expect to receive the original records" (Millar, 2003). It is submitted that, whether

or not the actual record is to be provided depends on the nature of request and the FOI legislation under which it is made. Section 11 of the UK FOI Act 2000, for instance, deals with the means by which communication is to be made. It stipulates in subsection (1) that:

> (1) Where on making his request for information, the applicant expresses a
>
> (a) preference for communication by any one or more of the following means namely:-
>
> (b) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,
>
> (c) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and
>
> (d) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant, the public authority shall so far as reasonably practicable give effect to that preference.

Similarly, section 11(2) of the Nigeria's FOI Bill stipulates that where a requester has requested access in a particular form, access shall be given in that form. There is a proviso in subsection (3) of section 11 that:

> (2) If the giving of access in the form requested by the person –
>
> (a) would interfere unreasonably with the operations of the government and or public institution, or the performance by any officer or employee thereof of his functions,
>
> (b) would be detrimental to the preservation of the record or, having regard to the physical nature of the record, would not be appropriate; or
>
> (c) would, but for the provisions of this Act, involve an infringement of copyright (other than copyright owned by the Federal Republic of Nigeria, a state or a local government, or a government and or public institution thereof) subsisting in matter contained in the record, being matter that does not relate to the affairs of a government and/or public institution, access in that form may be refused and access shall be given in another form.

Implementing FOI Law in the Nigerian setting

The FOI law is a veritable facilitator of the democratic ideals of open and accountable government. Nevertheless, the implementation of FOI law also depends on the strength of existing democratic institutions in society. The development of democratic institutions in Nigeria re-started only as recently as 1999. That was after a thirty-nine-year (1960-1999) post-independence period dominated by dictatorial military regimes for about thirty years. Not satisfied with the restrictive provisions of the Official Secrets Act, Criminal Code Act and the Public Service Rules, the various military regimes also enacted various other decrees which sought to restrict access to and purveyance of information about government. This shows that Nigeria, like many other African countries, have very young and weak democratic institutions, processes and belief systems. As observed by Tiamiyu and Aina (2008), most African societies have evolved through historical periods dominated by dictatorial kings, chiefs or sultans, followed by equally dictatorial colonial rulers, military regimes and, in Nigeria's case, dots of transient, incompetent, corrupt and undemocratic governments and ruling parties. These regimes endorsed, promoted and/or strengthened laws and regulations that restricted public access to records and information. Hence, one should expect that the dominant culture and belief systems in respect of public records and information both within government and in society would be those that support restriction of access to such records and information.

Given the political history and the very young and weak democratic institutions in Nigeria, many

within government and in society are fearful or uncertain about how the FOI Act will play out when passed. Those in government are fearful that a FOI act will enable the governed to be able to ascertain incompetence, wastefulness and corruption in government; thus, the undesirable protection and the mischievous concealment of government activity and information behind the provisions of the Official Secrets Act, Public Service Rules and the Criminal Code Law will, legally, become a vestige of history. Those in society are uncertain because they are unsure as to how the provisions of the FOI will be implemented in the Nigeria polity where instances of disregard of individual basic rights under laws by institutions and law enforcement agents are rife, and where costly litigation may be required to enforce such rights. It should be expected that the passage of the FOI bill would be the first step in a tortuous journey towards ensuring that both the government and the governed in society accept and facilitate the effective implementation of the FOI law. The media organisations, as information seeking, collating and purveying entities, are expected to represent the governed and the society in spearheading records and information request initiatives to test and deepen the implementation of the FOI bill when passed into law. This is the reason why some antagonists of the FOI bill brand it as a (freedom of the) media bill, and consider it as granting media organisations too much power of access to public records and information. Nevertheless, various other institutions, including the civil liberty and non-government organisations, legal bodies, political parties, and ordinary citizens all have a stake in the FOI bill.

Conclusion

Records and information constitute a veritable tool for decision making in the public sector. Historically in most countries, laws and rules were made to protect such records and information against unauthorised access, as well as prevent disclosure of sensitive information without authorisation. On the other hand, FOI legislation is meant to engender openness in governance and has become a hallmark of democracy. It has, to a very large extent, modified the existing legislations, rules and regulations governing access to public sector records and disclosure of government information in various countries. While promoting the right of access in order to ensure transparency, accountability and good governance, FOI law is not inconsiderate to the sensitive nature of some of these records, hence the exemptions to the right of access provided for in the law. These exemptions are in recognition of the fact that it is impracticable for any government, no matter how liberal, to allow access to all kinds of information in its custody without some interests being jeopardised. It is, therefore, desirable to have the FOI law to maintain the right balance between openness and the culture of secrecy.

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