

IMPLICATIONS OF THE FREEDOM OF INFORMATION LAW ON THE OFFICIAL SECRETS ACT

EMMANUEL ONWE

Commissioner for Information
Ebonyi State

Abstract

The story of the passage of the Freedom of Information Bill into law in Nigeria, though is generally seen and regarded as a welcome development especially to the mass media practitioners, the information and communication experts opens a line of challenges and implications on the effectiveness of the already existing Official Secrets Act. Closely examined, the two are less than partners but connotatively enemies in progress as far as the prevailing political order still stands in Nigeria. It is on this note that this work critically examines the implications of the FOI law on the Official Secrets Act toward achieving a healthy information and communication balance in Nigeria.

Key Words: Implications. Freedom of Information Law. Official Secrets Act.

Introduction

The struggle for the freedom of information and the press started long ago. In the eighteenth century which thrived with the printing press and the mass media, Ebo (1996:47) reveals that it was in the hands of royal or religious prerogative to exercise control to the corollary concept of freedom of expression. The nineteenth century saw the extraordinary development of the mass media marked by constant struggles to win freedom of the press.

The situation was triggered by the successive advent of other broadcast or electronic form of mass media leading to the expansion and complexity of their role in the society. This shortly brought conflicts among media practitioners and the need for a universal human rights paired with that of the press became obvious. In view of this, the universal declaration of human rights was enforced in the middle 1960s. It was supplemented by the International Covenant on Civil and Political Rights by the United Nations on 16 December, 1966.

A more specific concern was drawn by the UNESCO declaration on mass media which states that the mass media throughout the world, by reason of their role contribute to promoting human rights... (McBride, 1980:98). By doing this, the media have the power to promote public awareness and understanding of the culture, the social habits and traditions, the attitudes and hopes as well as the grievances of every group in the society.

More importantly, the role of the press as presented by Galadima and Enigbe (2001:62) reveals that as the fourth estate of the realm, press enhances not only the smooth operation and interaction between the executive, the legislative and the judiciary in the service of the people, but also prevents any oppression of the people by these arms of government.

The final report of UNESCO International Commission for the study of communication problems in 1980, gave condition necessary for press to exercise its functional powers. It says: Free access to news sources by journalists is an indispensable requirement for accurate, faithful, and balanced reporting. This necessarily involves access to unofficial as well as official sources of information and access to the entire spectrum of opinion within any country.

Aliede (2003:25) notes that "the inception of the military into Nigerian politics brought a lot of inconveniences to the mass media practice". As at then, Okonkwo(1996:60) laments that numerous cases

abound about the hazard and humiliation pressmen have been unduly subjugated to in the process of practising their profession. There were agony tales of the embarrassment and humiliation.

This situation drastically silenced all efforts towards promoting a healthy media practice anchored on freedom of information. After all, as Onwe (2003:6) posits: "no press can be freer than the political system it finds itself. Thus, the scenario lingered until 1999 when democracy fully returned to the Nigerian polity.

The struggle and pursuit for the enactment of Freedom of Information Act are stories themselves as noted by the Executive Director of Media Rights Agenda, (2011:1) that the FOI had a tortuous journey which spans over 18 years. The fight for the passage of the bill dates back to as far as 1993 with agitations in the form of workshops and sensitizations from civil societies such as the Media Rights Agenda, Civil Liberties Organisation and the Nigerian Union of Journalists. Eventually, it was celebrated on 28th May, 2011 when President Goodluck Jonathan signed it into law.

Though the signing brought too many jubilations and praises by individuals, groups and association whose personal and collective activities are directly and indirectly affected by the Act, the arising issue of the day is the applicable implications of the Act on the Official Secrets Act. Thus, one is compelled to ask what are the implications of these two instruments and the best ways of balancing the imbalance in order to achieve a healthy, smooth and a true liberal journalism practice in Nigeria.

It is this obvious problem that this paper attempts to proffer solutions, answers and results by critically examining the existence of the two legal tools – Freedom of Information Act and Official Secrets Act with a view of finding their extreme gaps, differences, similarities, strengths, weaknesses and opportunities for the good of the present day journalism, journalists and the entire Nigerian public.

The Emergence of Nigeria's Freedom of Information Act 2011

The idea of a Freedom of Information law for Nigeria was conceived in 1993 by three different organizations, working independently of each other. The organizations, Media Rights Agenda (MRA), Civil Liberties Organization (CLO) and the Nigeria Union of Journalists (NUJ), subsequently agreed to work together on a campaign for the enactment of a Freedom of Information Act.

According to Ojo (2010:4) the objective of the campaign was to lay down as a legal principle the right of access to documents and information in the custody of the government or its officials and agencies as a necessary corollary to the guarantee of freedom of expression. It was also aimed at creating mechanisms for the effective exercise of this right.

The consultations among the initial partner organizations were geared, among other things, towards determining the various interest groups likely to be affected by the legislation; those who should have a right or standing to request information under a freedom of information regime and under what circumstances information may be denied those seeking them; what departments or organs of government would be responsible for releasing information and documents to those seeking them; and determining the agencies and arms of government to which the legislation would extend.

Media Rights Agenda was designated the technical partner in the project under the arrangement agreed upon for taking the project forward. In keeping with this role, it was asked to produce a draft Freedom of Information Law. This tactfully expresses individuals' and group's zeal for a better platform for their professional practice.

Following extensive research, MRA's Legal Directorate headed by Mr. Tunde Fagbohun of the law firm of Aluko and Oyebode, produced in 1994 a draft bill entitled "Draft Access to Public Records and Official Information Act". The content of the draft drew substantially from the experiences of other countries operating freedom of information laws. But it was also based on consultations among the three organizations and suggestions made by practising Nigerian journalists in the questionnaire administered by Media Rights Agenda.

In 1994, the "Draft Access to Public Records and information Act" was produced by Media Rights Agenda to become the basis for further discussions and debates on the issue and was subsequently subjected to a series of review exercises involving various stakeholders.

The first of such exercises was a two-day technical workshop jointly organized by the three partner organizations on March 10 and 11, 1995 to examine and revise the draft, taking into consideration the views of other interest groups, which might use the proposed legislation. Participants in the workshop included human rights workers, journalists, lawyers, university lecturers and representatives of the National Broadcasting Commission and the Federal Ministry of Information. It was chaired by the nation's former Information Minister, Tony Momoh.

Coincidentally, however, the FOI got passed on 28th May on the eve of the inception of the current administration thereby ending a long, tortuous journey that started on December 9, 1999 when it was first gazetted. It was the oldest legislation in the works in Nigeria's legislative history. Kudos must be given to the Goodluck Jonathan for his speed and alacrity in assenting to the Bill. The Bill was conveyed to the Presidency on Friday, May 27, 2011. President Jonathan assented to it on Saturday, May 28.

The law enables citizens to hold the government accountable in the event of the misappropriation of public funds or failure to deliver public services. It also seeks to protect serving public officers against any adverse consequences from the unauthorized disclosure of certain kinds of official information, and to establish procedures for the achievement of these purposes.

FOI and OSA: Meaning and Basics

Freedom of Information stands as a cardinal point in the exercise of professionalism in the media industry. Freedom of information is closely related to reporters' shield laws, Bittner (1991:356) writes that: "Both are designed to help guarantee the ability of the news media to disseminate truthful, accurate and complete information." Freedom of Information laws attempt to assure the press access to (i) meetings of governmental bodies and (ii) documents that are classified or are part of public officials' files and reflect possible corrupt activities in government." Patton (1980:69) added that two key areas in which the press would like to see open information laws enforced are executive sessions and actions taken in meetings that violate the law. By this, he meant giving the press access to the closed door executive meetings and activities that are worth public hearing; hence they are public servants and should be truthfully accountable to the public.

The Director of Media rights Agenda (MRA), Lagos, Edetaen, Ojo notes that by virtue of the enactment of the Freedom of Information (FOI) Act, Nigeria has joined the countries of the world that have it whereas over 60% of countries in the world still do not have it. The Act specifically provides for among other things, 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 however described (Malu, 2011:59).

The Act serves as a clear and direct law that gives media practitioners the access to information even more than the provisions of the 1999 Constitution of the Federal Republic of Nigeria. This is because the section 39 of the Constitution which centered on right to freedom of expression and the press does not contain specific and categorical statements as contained in new FOI Act. The press and the public are more comfortable and dependable on the Act than any other form of press law.

The benefit of the FoI is of twofold – First, it grants freedom to the Press to thoroughly perform their duties as watchdog since there is rapid access to information; Second, the right extends to all citizens generally who have the need to access any official information privately and act on same without relying on the Press.

On the other hand, the Official Secrets Act was first enacted in 1962 and later re-enacted as the Law of the Federation of Nigeria, 1990, cap 33. It is meant to safeguard secret and confidential documents and matters belonging to the government (Ufuophu-Biri (2006:140). According to Daramola (1999:47), the Act prevents reckless, garrulous and careless public servants and overzealous journalists from divulging such confidential document or information, which may jeopardize the security of a state. It is a law designed to protect official information and preclude the media from making public, information about what the government describes as "protected place" (Obodo (2006:75). Thus, the Act is for the security of public safety and for purpose connected therewith.

The nature of the Nigerian government is such that classified matters are regarded as secret until it is made officially public to both individuals and the press. For instance, if a journalist knows the fact of a case but if he goes on to publish it for public consumption without the information being passed on to him, he will be in breach of the law.

In the views of Obodo (2006:82), the following documents are classified as secret in the Nigeria context:

- a. Official documents;
- b. Diplomatic credentials of Ambassadors and High Commissioners
- c. Treaties, protocols, agreements and conventions.

Meanwhile, the Universal Declaration of Human Rights of 1948, to which Nigeria is a signatory, and therefore bound to uphold, provides that the "law may forbid only those actions which are against society".

The Official Secrets Act basically provides that any person who, for any purpose prejudicial to the security of Nigeria:

- a. Enters or is in the vicinity of or inspects a protected place; or
- b. Photograph, sketches or in any other manner whatsoever, makes record of the description of, or anything situated in a protected place;
- c. Obstructs, misleads or otherwise interferes with a person engaged in guarding protected place; or
- d. Obtains, reproduces or retains photograph, sketch, plan, model or document relating to or to anything situated in a protected place shall be guilty of an offence.

The Act goes further to state that any person who:

- i. Transmits any classified matter to a person to whom is not authorized, on behalf of the government to transmit it, or
- ii. Obtains, reproduces or retains any classified matter, which he is not authorized on behalf of government to obtain, reproduces or retains, as the case may be, shall be guilty of an offence.

From the above, it could be seen that the Official Secret Act is designed, not necessarily to prevent comment on public interest, but to prevent espionage, sabotage and the communication of transmission of information vital to the security of the state, from falling into the hands of an enemy.

Considering the above features of the Act, Ezeukwu and Nwanze (1998:11 -12) firmly state that the Official Secrets Act is a very dangerous and uncharted sea for journalists in this and other countries of the world. Under this law, all Government employees, including members of the civil service take an oath, promising not to divulge "official secrets". This is an Act of all embracing scope and technically under it a minor civil servant could be prosecuted for telling his wife what type of biscuit was provided in their office for lunch.

To them, this Act stipulates that a person who transmits any classified matter to a person not authorized on behalf of the government to receive it, or obtains, reproduces or retains any classified matter which he is not authorized on behalf of the government to obtain, produce or retain, as the case may be, shall be guilty of an offence. It covers the publication of all confidential Government information.

Theoretical Base

With instinct consideration of the nature and objective of this paper, the application of the social responsibility theory seems to be the most suitable. The theory according to Wogu (2008:69), Folarin (1998:27) and McQuail (1993:116) was articulated in 1947 by the Hutchins' commission Report on a free and responsible press. It argues that people's opportunity to get information should not be impaired. People should be exposed to all kinds of information and opinions and should be allowed to make decisions. According to Siebert et al (1963:71). The commission proposed that the media should:

- a. provide a truthful, comprehensive and intelligent account of the day's events in a context which gives them meaning;
- b. provide a forum for the exchange of comments and criticism;
- c. provide a representative picture of the constituent groups in society;

- d. be responsible for the presentation and classification of the goals and values of society;
- e. provide full access to the day's intelligence

The social responsibility theory of the press holds that the press should be free but responsible. Each publisher is not just free to publish anything without a sense of responsibility and commitment to the stability of the society. The media have a sacred obligation to provide a free market place of ideas for its readers.

McQuil (1987:117-118) provides an apt summary of the major assumptions of social responsibility theory as follows:

- media should accept and fulfill certain obligations to society,
- these obligations are mainly to be met by setting high or professional standards of information, truth, accuracy, objectivity and balance.
- In accepting and applying these obligations media should be self regulating within the framework of law and established institutions.
- The media should avoid whatever might lead to crime, violence or civil disorder or give offence to minority group.
- The media as a whole should be pluralist and reflect the diversity of their society, giving access to various points of view and to rights of reply.

Beckoning on this theory, it is safe to say that by virtue of the prevalence of the freedom of information act in Nigeria, the press is automatically obliged to be socially responsible to the society in the course of discharging its professional duties. With this theory as a framework and examining the implication of the Freedom of Information Act is a sure way of revealing, reviving and revisiting the social responsibility needs and expectations of the Nigerian press especially in the environment of the Official Secrets Act 1962.

Basic Tenets of the Freedom of Information Act

Following the enactment of the Freedom of Information Bill into law, Nigerians have been given the power and resources to unearth facts, battle corruption and hold officials and institutions accountable. The Act in brief should basically ensure that the following expectations as stipulated by Ajulo (2011:4) are achieved:

1. Guarantees the right of access to information held by public institutions, irrespective of the form in which it is kept and is applicable to private institutions where they utilize public funds, perform public functions or provide public services.
2. Requires all institutions to proactively disclose basic information about their structure and processes and mandates them to build the capacity of their staff to effectively implement and comply with the provisions of the Act
3. Provides protection for whistleblowers.
4. Makes adequate provision for the information needs of illiterate and disabled applicants;
5. Recognizes a range of legitimate exemptions and limitations to the public's right to know, but it makes these exemptions subject to a public interest test that, in deserving cases, may override such exemptions.
6. Creates reporting obligations on compliance with the law for all institutions affected by it. These reports are to be provided annually to the Federal Attorney General's office, which will in turn make them available to both the National Assembly and the public.
7. Requires the Federal Attorney-General to oversee the effective implementation of the Act and report on execution of this duty to Parliament annually.

Implications of the Freedom of Information Act on the Official Secrets Act

That the FOI has become law in Nigeria is no longer news. The news now is how the Official Secret Act which provisions are indirect conflict with the tenets of the Freedom of Information Act will co-exist.

A plethora of laws prevents civil servants from divulging official facts and figures, notably the Official Secrets Act which makes it an offence not only for civil servants to give out government

information – but also for anyone to receive or reproduce such information. Further restrictions are contained in the Evidence Act, the Public Complaints Commission Act, the Statistics Act and the Criminal Code.

Prior to the passage of the FoI Act, virtually all government information in Nigeria was classified as top secret. This veil of secrecy makes it difficult to get information from a state agency. If you want useful information from a government department, you are told it is classified information. So impenetrable is the veil of secrecy that government departments withhold information from each other under the guise of official secrets legislation. There are also instances where civil servants refuse to give the National Assembly documentation after being asked to do so.

The result of this was that journalists were denied access to information that are critical for accurate reporting, and unravelling the web of corruption in Nigeria. When you are in public office and have soiled your hands in the pot of corruption, you will try to prevent your being exposed by classifying as top secret documents that can implicate you. Students also find themselves barred from reading documents necessary for their research. In the name of official secrets, somebody sits on information that will benefit millions of people. In advanced countries, some of the classified pieces of information would ordinarily be found on the Internet.

Following our colonial heritage and the long period of military rule, there has become entrenched in the conduct of government business in Nigeria, a culture of secrecy, which insulates governments and their actions from public scrutiny. In fact, Nigeria “if the records” is one of the most secretive nations in the world. The Government's promise to run an open and transparent administration and fight corruption will remain a dream because accountability and transparency in government cannot be possible if the government's books are not open to members of the public, including the media. For example section 1 of Official Secrets Act, (cap.13), Laws of the Federation of Nigeria 2004), makes it an offence for any person to transmit, obtain, reproduce or retain any classified matter. The Official Secrets Act is often blamed for the obscurity in government transactions and ease of corruption in Nigerian government agencies.

The Act further regulates conflicts between its provisions and those of other legislation (e.g., the Criminal Code, Penal Code) that prescribe criminal penalties for actions connected with the disclosure of information. Section 27 of the law provides that no civil or criminal proceedings may be brought against an officer of any public institution, or against anyone acting on behalf of a public institution, for the disclosure in good faith of any information pursuant to the act. Section 30(1) further provides that the act is intended to complement, not replace, the existing procedures for access to public records, and is not intended to limit public access to information.

Ordinarily, the idea behind these laws is to protect vital government information, but the level of secrecy is so ridiculous that some classified government files contain ordinary information like newspaper cuttings which are already in the public domain. This position is reinforced by the dawn of the Internet. There is hardly any space or walls now in information. The world was shocked to its marrow when it woke up very recently to discover that Internet gurus, Wikileaks had hacked into the official site of the UK government and splashed freely on the internet information that as hitherto classified as ‘secret, official or confidential’. So which way forward for the FOI viz-a-viz the Official Secrets Act?

Discussion: Balancing the Imbalance

The existence and application of FOI to the right order will remain a hook and big stain on the Official Secrets Act. Both, if not properly balanced, may find the Nigerian society hard to prevail. For instance, the more the Freedom of Information Act penetrates into the top marked secrets files and documents of the government, the more OSA tries to block it. Thus, no government under sincerity is ready to let every cat and skeleton out of its cupboard probably because of his secret deal.

There is surely a conflicting interest of the two: Freedom of Information Act and Official Secret Act are two opposing legal instruments facing press practice in Nigeria. The existence of the two especially in the on-going democratic governance is not without peculiar interest which when paired together is conflicting. The reasons are manifold and clear. First, it is in direct conflict with sections 28 and 29 of the

FOI and the canon of interpretation is that where two statutes or laws are in conflict with each other, the latter prevails as the latter is deemed to have come into existence to correct the mischief or anomalies of the former.

Second, the Freedom of Information Law has constitutional flavour in the sense that it derives from and has its foundation from sections 22 and 39 of the 1999 Constitution of the Federal Republic of Nigeria. Also, section 1 (3) of it is clear on this that where any enactment is inconsistent with the provisions of the constitution, the constitution would prevail and that other law would be null and void to the extent of the said inconsistency.

Thirdly, judicial activism: the judiciary has always strived to find means and ways of giving purposive interpretation to the constitution and statutes to the end that societal good is attained and the aim of the drafters of any legislation is not defeated. The attitude is fairly represented by the view that the fundamental rights under Chapter IV of the constitution are sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate section in Chapter IV of the constitution.

Indeed, the fundamental rights guaranteed in Chapter IV of the constitution were specifically designed and intended to limit the powers of the Executive and the legislature both at the national and state levels. This position has also been borne out by the several occasions when the courts have had to pronounce on "ouster clauses" fairly illustrate the point.

Thus, as long as the Freedom of Information Act stands firm, the Official Secrets Act is already dead in the eyes of the law for the reasons aforesaid and the judiciary will scarcely hesitate to say so in appropriate cases.

Therefore, the position taken by this paper is that the Press should go ahead to invoke and enjoy the numerous benefits conferred by the newly passed FOI without giving the legislation called Official Secrets Act so much as a final backward glance.

Conclusions and Recommendations

This work concludes that when a government is open, it is possible for citizens and stakeholders to participate in the decision-making process because openness has a great capacity to improve the quality of governance. This is demonstrated by making Freedom of Information Act a reality in Nigeria. Accordingly, the FoI Act has opened an atmosphere of fresh breath for effective journalism in Nigeria. On this note, we recommend that:

1. The press with this added advantage of FOI should be willing to rise up and take its glorious position as the "fourth estate of the realm" just like the other three arms of government.

2. It behoves on the Press to enhance transparency and good governance and to work towards achieving a zero tolerance for corruption and impunity in the country. It should seize this opportunity to transform the words of agony into concrete positive action by holding government establishments responsible for their actions.

3. Not just that alone, now that the Freedom of Information Bill has been passed into law, the reading, viewing, and listening public should demand high sense of commitment and responsibility on the part of journalists to check information thoroughly and endeavour to publish the truth for the public good. This would also require the journalist to avoid all forms of self-censorship as the Act will protect them and their sources from official reprisals.

4. In order for journalists to adequately utilize the Freedom of Information Act, media owners need to train and re-train their journalists to ensure that they satisfy the highest standards in ethical conduct and are adequately equipped professionally to meet the challenges of the profession.

5. The Nigerian Press Organization, comprising the Nigeria Union of Journalists (NUJ), the Nigerian Guild of Editors (NGE), and the Newspapers Proprietors Association of Nigeria (NPAN) should publicize and enforce the Code of Ethics for Journalists in order to ensure that the Freedom of Information Act now that it has become law, is not abused and that journalists are able to meet the highest standards of accuracy and fairness which will be required of them.

References

- Ajulo, A. (2011). *FOI Act: The challenges of official secret act*, A paper presented at a workshop Organized by Nigerian Press Council in conjunction with NUJ, Abuja.
- Aliede, J.E. (2003). "Mass media and politics in Nigeria: A historical and contemporary overview" in E. Nwosu, (ed), *Polimedia: media and politics in Nigeria*, Enugu: Prime Targets Ltd.
- Bittner, J.R. (1991). *Mass communication: An introduction, 5th Edition*, New Jersey: Prentice Hall.
- Coke, O. (2011). *The emergence of Nigeria's freedom of information act 2011*, Lagos: Dramaola, I (1999). *Law and ethics of media practice*, Random House, Vintage Book.
- Ebo, S.J. (1996). *Mass media and society: An introduction*, Enugu: ACENA Publishers.
- Ezeukwu, G. and Nwanze, F. (1998). *Mass media law and ethics* Enugu: Felocks Communication.
- Folarin, B. (1998). *Theories of mass communication: An introduction*, Ibadan: Stirling-Horden Pub.
- Freedom of information act*, (2011). Sections 11, 12, 14, 16, 17, & 20, Abuja.
- Galadima, D.J. and Enigbe, J. (2001). "The press in Nigerian politics: A historical analysis of issues and pattern of news coverage" in *the Nigerian journal of communications*, Enugu: ACCE/Pnme Targets.
- Malu, L.N. (2011). "The 2011 freedom of information act issues and perspectives" in *The Guardian Newspaper, Tuesday, August 30, 2011*.
- McQuail, D. (1993), *Mass communication theory: An introduction (2nd Edition)*, New Delhi: Sage Publications.
- Media Rights Agenda (2011). *The emergence of the Nigeria's freedom of information act*, Lagos.
- Nwogbunyama, E. (2007), *Law and Ethics of mass communication*, Enugu: Academic Publishing Company.
- Nwosu, I. (1993). *Mass media and the Nigerian society*, Enugu: The Reader's Choice Company.
- Obodo Nick O. (2005) *Mass communication law and ethics* (Lecture Mimeograph).
- Ojo, E. (2010) *Freedom of information: Current status, challenges and the implications*, Lagos.
- Okonkwo, K.C. (1996). *The Nigerian press: How far? What future?* Enugu: Kenc Communication.
- Onwe, C.E. (2003). *Communication and world press*, (unpublished), Ebonyi State University, Abakaliki.
- Orji, O.R. (1997). *An introduction to political science*, Enugu: M. Dan Printing Company.
- Patton, W.L. (1980). *Author's guide to the copyright law*, Lexington Mass: Lexington Book. ' *Punch Newspaper* (1988:3). Constraints on Nigerian journalists, September 18, Lagos.
- The 1999 Constitution of the Federal Republic of Nigeria*, Abuja
- The global campaign for free expression (2000). *Memorandum on the Nigerian freedom of information bill by article 19*, London.
- Ufuophu, B. (2006). *Emmanuel art of news reporting*, Ibadan University Press.
- Umechukwu, J.O.J. (2001). *Mass media and Nigerian society (Developmental issues and Problems)*, Enugu: Thompson Printing and Publishing Company.
- Umechukwu, P.O.J. (2002). *Topical issues in the mass media and democratic Nigerians society*, Nsukka; Fulladu Publishing Company.
- Wogu, J.O. (2008), *Introduction to mass communication theories*, Nsukka: University of Nigeria.