

# EXECUTIVE SUMMARY OF THE PUBLIC INTEREST TEST UNDER THE FREEDOM OF INFORMATION ACT, 2011



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## INTRODUCTION

The Freedom of Information Act, 2011 (the “FOIA” or “the Act”), was enacted on May 28, 2011. The FOIA was created to foster transparency in public institutions and private institutions carrying out public functions or utilizing government funds, by ensuring that every information regarding decision making process is made publicly available and disclosed voluntarily or following an FOI request. Some private companies fall under the definition of Public Institutions and would be mandated to receive and treat FOI requests.<sup>1</sup>

The official secrets practice, closed governance and restricted access to public information has resulted in corruption, mismanagement and abuse of power. The FOIA empowers individuals to seek, receive, analyse and where justified, hold their Government accountable for misgovernance.

## OVERVIEW OF THE FREEDOM OF INFORMATION ACT

1. Information required to be maintained and voluntarily disclosed by a Public Institution.

The FOIA mandates Public Institutions to organize and maintain records of all their activities, operations and businesses in line with the Public Access Objectives of the FOIA.<sup>2</sup>

Public institutions is described by the Act as;

- (a) Legislative, executive, judicial, administrative or advisory body of the Government, including boards, committees or commissions of the State;
- (b) 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;

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<sup>1</sup> EiE Nigeria project Limited. v. Coscharis Motors Limited and A.G. Federation (FHC/L/CS/27/2014)

EiE Nigeria project Limited v. First Bank of Nigeria Plc. And the A.G. Federation (FHC/L/CS/26/2014)

<sup>2</sup> Sections 2(1)&(2) and 9(1)&(2)

# EXECUTIVE SUMMARY OF THE PUBLIC INTEREST TEST UNDER THE FREEDOM OF INFORMATION ACT, 2011



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- (c) All companies in which the Government has a controlling interest and
- (d) Private bodies providing public services, performing public functions or utilizing public funds; the definition of this term has caused several misunderstanding, hence the court has made judicial pronouncements, putting to rest any confusion on the meaning.

*The Court made one such pronouncement in the case of Okoi Obono Obla v. CCEC Nigeria Limited;<sup>3</sup> Mr. Obla (the “Applicant”) made an application for information on the contract for the rehabilitation of the Calabar-Ugep-Katsina-Ala Road. CCEC failed to either disclose this information or issue a notice of refusal to the Applicant.*

*The applicant brought an application before the Court, seeking a judicial review and an Order of Mandamus compelling CCEC to disclose or make available the information requested (amongst other reliefs).*

*In opposition to the Applicant’s Application, CCEC filed a Counter Affidavit arguing that it is a private company and is therefore not an administrative body, tribunal nor public institution that is subject to judicial review. CCEC further argued that the funds it received from the government was in consideration for work done therefore they cannot be said to have utilized public funds.*

*In delivering its ruling, the High Court of the Federal Capital Territory held that, although CCEC is a private company, it is a public institution under the FOIA, as the fund it received from the government was to execute a project for the benefit of the public.*

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<sup>3</sup> Unreported Motion No: FCT/HC/M/34/2013

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*The purport of the above decision is that where a private institution undertakes a project for the benefit of the public or performs any public function, it becomes a Public institution under the FOIA and is subject to the provisions of the FOIA.*



Furthermore, the Act also requires public institutions to proactively disclose diverse classes of information/records<sup>4</sup> to the public on the following items:

- (a) The description and responsibilities of the Public Institution, including details and functions of each department of the institution;
- (b) A description of documents containing final opinions, dissenting opinions and orders made in deciding such cases. This also includes the rules, final planning policy, expenditure, factual/inspection reports, employment information of employees and the name of every official as well as the final records of voting in all proceedings of the Public Institution;
- (c) A list of documents such as the classes of records under the Public Institution's control, a list of files containing applications for contracts, permits, grants, licenses and agreements entered into by the Public Institution. The list also includes, publication, reports or studies conducted by independent contractors on behalf of the Public Institution and the materials containing information relating to any grant or contract made by or between the Public Institution and another public institution or private organization, and
- (d) The contact details of officers of the Public Institution to whom members of the public are to direct their request for information.

<sup>4</sup> Sections 2 (3) (a) – (f), (4) & (5)

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## 2. Application for Information

The right to apply for information or records from a public institution does not lie specifically with a certain class of persons neither does it require an elaborate procedure. By virtue of Sections 1 and 2 of the FOIA, any person<sup>5</sup> can apply for information or records and they need not specify a reason for the request. The Act also provides for a cost limited application in the sense that the application for information is at almost no cost to the applicant, the fees to be paid is limited to the standard charges of photocopying and transcribing the records where necessary.<sup>6</sup>



Where an applicant makes an application for information at the public institution, the institution is by the Act obligated to release the information or record in its custody as Section 2 (6) of the FOIA empowers an applicant (person seeking the information) to compel the institution to release the information by taking legal action in court where the institution fails to do so.

Failure of an institution or an officer in the institution to give an applicant access to the information sought after is a criminal offence and such officer or institution is liable to pay a fine of not less than ₦500,000.00 (Five Hundred thousand Naira) or as the court deems appropriate.

Furthermore, where an institution or officer of an institution attempts to alter an information to conceal the true facts of it before releasing same to the applicant, such head of institution or officer has committed an offence punishable on conviction by the court with a minimum of 1 year imprisonment. Where an applicant has been denied information, the

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<sup>5</sup> Including non-citizens

<sup>6</sup> However, public institutions may charge an applicant a fair amount where extra protocols are needed.

# EXECUTIVE SUMMARY OF THE PUBLIC INTEREST TEST UNDER THE FREEDOM OF INFORMATION ACT, 2011



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applicant can apply to the Court for a review of the matter within 30 days after the public institution denies his application.

## The Public Interest

### 1. Exemptions

Although the Act provides that applications for public records should be granted and disclosed whenever possible, it also recognizes that there are occasions where disclosure of information will be inappropriate. The Act specifies two classes of Exemptions to wit: *Unqualified Exemption and Qualified Exemption*.

#### 1.1 Unqualified Exemption

Information that falls under this class of exemption are completely exempted from disclosure. The information under this class is automatically prejudicial to the public interest hence there is no need to consider whether there might be a stronger public interest in disclosing the information than in not disclosing.<sup>7</sup> Information that fall under this class are:

- a. Records/Parts of records containing the result or product of environmental testing carried out by or on behalf of a public institution.
- b. Information subject to professional privilege.<sup>8</sup>
- c. Information containing course or research materials prepared by faculty members.

#### 1.2 Qualified Exemption

Records and Information under this class of exemption are subject to the “public interest test”. The information under this class of exemption are mainly “Injury Based Exemptions” which apply if disclosure will cause injury to the specified purpose of the exemption. Hence, there is need to conduct a

<sup>7</sup> Sections 15(2), 16 & 17

<sup>8</sup> E.g. Legal practitioner – Client Privilege.



# EXECUTIVE SUMMARY OF THE PUBLIC INTEREST TEST UNDER THE FREEDOM OF INFORMATION ACT, 2011



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public interest test to ascertain whether the injury that may be caused by the disclosure of such information outweighs the public interest of such disclosure. The Information exempted hereunder are:

- a. Information which may be injurious to the conduct of international Affairs and the defence of the Federal Republic of Nigeria.
- b. 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.
- c. Information which may be injurious to the security of penal institutions.
- d. Information that contains personal information of individuals.
- e. Information containing trade secrets or which may interfere with contractual negotiations of a third party.

## 2. Public Interest Test

In order to facilitate the FOI process, the Act requires that a unit be established for the proactive disclosure of information upon request. The officials in the prescribed unit shall be responsible for the entire FOI process.<sup>9</sup>

Section 13 of the Act mandates every public institution to provide adequate training for its officials on receipt and treatment of FOI requests. This means that these officials must understand how to scrutinize an FOI request, ascertain the effect of disclosure of such information and disclose within the required timelines, where mandated by the FOIA.

It is noteworthy that “public interest” differs from “what interests the public”, therefore in conducting a public interest test on an FOI request, the official must be able to distinguish what information is in the interest of the public and what information simply draws the curious interests of the public.

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<sup>9</sup> Sections 2(3)(f), 3(4), 29(1)(h)

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An information is deemed to be in the interest of the public if it deepens public accountability in governance, exposes corruption/abuse of governmental power and/or probes the use of government funds. This is in contradistinction to a sensational topic which may not have any governmental accountability implication.

The public interest test principally entails balancing the competing interests between withholding information based on the purpose of the exemption and the public interest in disclosing the information. This is often done via a PIT Advice by the FOI officer. The anatomy of a PIT advice are as follows:

- a. Paragraph 1 would typically analyse the information requested and what qualified exemption it falls under.
- b. Paragraph 2 would typically outline the benefits of such disclosure.
- c. Paragraph 3 would outline the probable injury of such disclosure. Such injury should be probable and not imaginary or remote.
- d. Paragraph 4 will weigh the benefits against the probable injury.
- e. Paragraph 5 will make a decision on the outweighing option between the benefit and the probable injury. This decision would inform the advice. Where there will be partial benefits and partial injury, the PIT Advisor will recommend a part redaction/refusal and a part disclosure as applicable.
- f. Where the benefit and the probable injury are evenly balanced, the PIT Advisor can exercise his/her discretion in favour of a disclosure or a refusal. Discretion must be judiciously and judicially exercised in the interest of open governance, transparency and accountability. However, the institution must withhold disclosure of the information where it entails disclosure of personal secret or trade/contractual secrets.

## 2. Response to a FOI Request

There are typically 10 stages in the response to an FOI request, they are:

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- a. Registering and recording the application to note the day it was received.
- b. Reading the correspondence and deciding whether it constitutes a request or not, if you have the Information requested for, what it relates to and whether or not it needs to be transferred to another public institution.
- c. Recording and maintaining a formal system of making note of all FOIA applications and keeping a record of all key actions taken in dealing with the application.
- d. Responding to the request within the 7-day period stipulated by the Act.<sup>10</sup>
- e. Retrieving all relevant information subject to the FOIA request.
- f. Referring to or seeking specialist advice especially where the balance of public interest in an application is complex.
- g. Redact sensitive information not essential to the disclosure and proceed with disclosing essential information.
- h. Review and approve the information sought to be disclosed
- i. Reply to be filed and sent in writing with the necessary enclosures upon approval.
- j. Release the information in the institutions public scheme where it has been decided that the information is in the public interest.

## CONCLUSION

The knowledge to conduct and issue a fool-proof PIT opinion comes from sufficient training. As we have established in this training, a wrong PIT may lead to a

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<sup>10</sup> Sections 4, 5 & 6



# EXECUTIVE SUMMARY OF THE PUBLIC INTEREST TEST UNDER THE FREEDOM OF INFORMATION ACT, 2011



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wrongful denial of an FOI request, which attracts a fine of N500,000 (Five Hundred Thousand Naira) and the possibility of imprisonment for the erring officer.

We have also established that Public Institutions include private companies/bodies that perform public tasks or utilise public funds. This connotes that private companies and partnerships that secure Federal Government contracts may qualify as public institutions as seen in a plethora of judicial decisions.

Section 13 of the FOIA which makes an FOI training an imperative for Public Institutions provides that:

*“Every Government or Public Institution must ensure the provision of appropriate training for its officials on the public’s right to access information or records held by government or public institutions, as provided for in this Act and for the effective implementation of this Act.”*



The FOIA focuses on the relevance of the information in the advancement of public interest of open governance, accountability, and transparency. With the exception of information required to be proactively disclosed, any FOI request covered under the qualified exemption will not be granted simpliciter unless the FOI request survives an objective PIT.

