FoI: State Security v The People's Right to Know

CHUDI ONWUASOANYA delves into provisions of the contentious FoI Bill and points out that in a country suffering under the weight of massive corruption and abuse of office, the embarrassment potentials of disclosure of the activities of public officials are potent tools in the anti-corruption armoury

The Freedom of Information (FoI) Bill has generated considerable debate from its first introduction in the House of Representatives in July 1999 to its final approval in both Houses of the National Assembly in February 2007 down to the reluctance, and eventual refusal of former President Obasanjo to assent to the Bill.

The background is that in Nigeria, individuals and the press do not enjoy a general right to acquire information in the possession of third parties who are unwilling to divulge such information although specific contexts may impose a duty on one party to furnish information to another. For example, insurance contracts place a duty of material disclosure on the insured in favour of the insurer. Between private citizens, the prevailing concern of the law is the protection of the privacy of individuals and the commercial interests of entrepreneurs.

Different considerations arise however over information in the custody of public officials and departments. Since notionally such information is held in trust for the public, any member of that group ought to have access to it on request, subject to interests of public security and law enforcement. NEW YORK TIMES CO v UNITED STATES 430 US 713 was an American case which examined the tensions between access to public records and security concerns of the state. It involved the unauthorised disclosure and publication of a classified report titled "United States-Vietnam Relations, 1945–1967: A Study Prepared by the Department of Defense". In 1971, this report was leaked to journalists and the New York Times began to publish it. The United States government sought to halt the publication citing national security. It obtained an injunction at the trial court against the New York Times. Shortly after, the Washington Post began to publish its own series of the report. The government again sought an injunction against the Post. The District Court for the District of Columbia refused the government's application and its decision was upheld on appeal by the US Court of Appeal. At the same time, the New York Times' appeal against the injunction earlier granted against her reached the Supreme Court. Both appeals (New York Times' and Washington Post's) were consolidated and heard by the US Supreme Court. The court considered the injunctions in the light of the words of the First Amendment to the US Constitution. The First Amendment reads in part 'Congress shall make no law ... abridging the freedom ... of the Press.'

The Supreme Court held: 'In the First Amendment, the founding Fathers gave the free press the protection it must have to fulfil its essential role in our democracy. The Press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose'.

Perhaps the single biggest obstacle hindering access to public records in Nigeria is the Official Secrets Act (S.9) which authorises the executive arm to classify public documents as not being eligible for disclosure to the public on the ground that disclosure would be prejudicial to the security of Nigeria. The disclosure of such documents attracts criminal sanctions (S 1 &7). The Minister of Internal Affairs may by order designate any place in Nigeria a 'protected place', and thereby exclude the public from the place on the ground of public security. Any person who produces or reproduces a picture or sketch or any record of anything in such a protected place is liable to punishment for between two and fourteen years (S 2 & 7).

It was under S.2 of this Act that the Federal Government in November 2007 charged three aliens and one Nigerian, who had taken photographs of items in 'protected places' in Port Harcourt and Warri, with espionage. Though the charges against them were later withdrawn, the incident drew attention to the continued application of laws vesting extensive powers on the executive to stifle access to public records. The power to stifle access to public records on the ground of public security is liable to abuse by politicians whose personal interests may be served by secrecy. In the NEW YORK TIMES' CASE,

Mr Justice Black had reasoned that the word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the freedom of expression.
The FoI Bill is designed to address the problem of access to public records by the press and individuals. It seeks to confer a right on individuals to apply for and gain access to any record under the control of a government or public institution. This right is exercisable notwithstanding any inconsistent provisions in any other legislation such as the Official Secrets Act. An applicant for access to any records need not demonstrate any specific interest in the information being applied for. Thus public departments are denied discretion to determine the sufficiency of an applicant's interest in a particular record. 'Public or Government Institution' is expansively defined as 'any legislative, executive, judicial, administrative or advisory body of the Federal, State and Local Governments, boards, bureau, committees or commissions of the State, and any subsidiary body of those public bodies including but not limited to committees and sub-committees which are supported in whole or in part by public fund or which expend public fund and private bodies carrying out public functions.'

Records of companies in which any government participates as a controlling shareholder may also be examined. Where access is refused, the head of that public institution must give notice of the refusal in writing to the applicant within fourteen days, stating reasons for the refusal. The applicant may apply for a judicial review of the decision. The reviewing court shall have powers to examine any records to which the Bill applies notwithstanding anything else contained in any other Act. Each public institution must issue regulations indicating reasonable fees payable by an applicant for search, duplication, review and transcription where necessary.

Several forms of records are exempted from disclosure. These include records the disclosure of which may: be injurious to the conduct of international affairs or defence of Nigeria; interfere with law enforcement or fair trial; be injurious to protected intellectual property rights, or the economic interests of Nigeria; breach the privacy or confidence of other individuals.

Stringent restrictions on the flow of information on public affairs provide an easy cover for corruption. Erring officials are fortified by the knowledge that the details of their decisions and actions will be sealed from public scrutiny simply by their setting up a plea that the disclosure of such matters would constitute a risk to public security. One of former President Obasanjo's avowed reasons for refusal to sign the Freedom of Information Bill into law was that a President [or indeed any other official] may be compelled by courts to disclose information passed on to him by a predecessor 'in confidence'. This raises the question of who the beneficiary of such confidence is. The confidence, in public affairs, must inure to the benefit of the entire community and it is legitimate for the courts to participate in determining at any point in time whether it better serves the interest of the community that such information be disclosed. In a country groaning under the weight of massive corruption and abuse of office, the embarrassment potentials of disclosure of the activities of public officials might prove a potent tool in the anti-corruption armoury.

According to Ademola Popoola in Freedom of Information Bill: A Doctrinal and Comparative Perspective of the Enhancement of Citizens' Participation in Democratic Governance, 'The fact that their conduct is open to public disclosure and debate in the mass media may be the greatest check on official misconduct. The truth is that administration of government has become more complex. The opportunities for malfeasance and corruption have also multiplied. Crime has grown to most serious proportions and the dangers of its protection by officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, enhances the primary need for a vigilant, courageous and well informed citizenry and press.

These words and those of the US Supreme Court in the New York Times case afford jurisprudential nourishment for the encouragement of free access to public records in Nigeria through such means as the enactment of the Freedom of Information Act (or Laws).

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