

THE NIGERIAN JURIDICAL REVIEW

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UNDERSTANDING AND APPLYING THE PUBLIC INTEREST OVERRIDE TO FREEDOM OF INFORMATION EXEMPTIONS: GUIDELINES FROM INTERNATIONAL BEST PRACTICES*

Abstract

Nigeria joined the league of progressive States in promulgating a Freedom of Information Act in 2011, which seeks inter alia to make public records and information more freely available, and to protect public records and information to the extent consistent with the public interest and protection of personal privacy. In line with the objective of protecting public records, the Act incorporates exceptions as to documents that are not subject to disclosure under the FOI Act. This is intended to cater to legitimate secrecy interests of the State while at the same time not denying the public's need or right to know. These exemptions are made subject to the "Public Interest" test or override. This test has never been legislatively defined in any FOI Act and is usually left to the discretion of the public authority. This article attempts to critically examine the public interest test as it has operated in other jurisdictions as well in order to facilitate the understanding of its application for policy makers, lawyers, the judiciary called upon to review a denial of access to information, and the general public desirous of gaining access to public information.

1. Introduction

Freedom of information has been recognized as a fundamental human right,¹ bedrock of rights² and an essential aspect of the right to freedom of expression.³ The importance of the right to freedom of information has resulted in promulgation of freedom of information legislation in many countries of the world as well as constitutional provisions implicitly recognizing this right and making provisions for its enforcement. Nigeria joined the league of progressive states with a Freedom of Information Law when

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¹ UNGA Res 59(1) 1946.

² *Ibid.*

³ T. Mendel, *Freedom of Information: A Comparative Legal Survey* (New Delhi, UNESCO, 2003).

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the Nigerian Freedom of Information Act received presidential assent on May 28 2011.

Freedom of Information legislation have been in existence for over 250 years beginning with the Swedish legislation. Also attempts have been made by international organisations to develop a model Freedom of Information Law and also to define the essential features of a good Freedom of Information Law.⁴ Therefore the Nigerian law was modelled on the freedom of information legislation existing in some countries of the world.⁵ One of the principles recognized as a feature of a good freedom of information legislation is the principle of limited scope of exceptions which stipulates that exceptions to the right of access to public information should be clearly and narrowly drawn and be subject to strict 'harm' and 'public interest' tests.⁶

This principle reflects the underlying conflict between the need to cater to legitimate secrecy interests of the State and the public's need or right to know. Exemptions are necessary to ensure that government is not under a legal obligation to disclose information that would harm essential government interests. Equally to allow broad and undefined exceptions to the right to know would defeat the objective of the freedom of information and leave the government with wide latitude to deny request for information on flimsy grounds, thus the 'harm' test or the 'public interest' test. The Public interest test is a common feature of Freedom of Information laws deriving from the Model Freedom of Information Law drafted by an organisation called 'Article 19.' Article 22 of the Model freedom of information Law reads:

Notwithstanding any provision in this Part, a body may not refuse to indicate whether or not it holds a record, or refuse to

⁴ Article 19, *The Public's Right To Know: Principles on Freedom of Information Legislation*, (London: 1999), *A Model Freedom of Information Law*, (London: 2001).

⁵ As at 2006, nearly 70 countries around the world had adopted comprehensive Freedom of Information Acts to facilitate access to records held by government bodies and another fifty have pending efforts see D. Banisar, *Freedom of Information Around the World 2006*, available at http://www.freedominfo.org/documents/global_survey2006.pdf last accessed on 20 October 2011.

⁶ *Ibid.*, 'The Public's Right to Know: Principles on Freedom of Information Legislations', Principle 4,

communicate information, unless the harm to the protected interest outweighs the public interest in disclosure.⁷

Thus the concept of public interest test is a universally acknowledged principle underlying all freedom of information legislation, though subject to different interpretations in different jurisdictions. Even though in this work, we draw examples from few jurisdictions (New Zealand and Australia), the practices and interpretations are almost universal and may be seen as best practices at least within the Common law jurisdiction to which Nigeria belongs. The Nigerian Freedom of Information Act follows the globally accepted practice and provides for the 'public interest' test. Thus the following exemptions in the Act are all subject to the 'public interest' test.

1. Defence and international affairs exemption;⁸
2. Law enforcement and investigation exemption;⁹
3. Personal information exemption;¹⁰
4. Third party information exemption.¹¹

The Act also recognizes a public institution's right to deny requests for information relating to the test questions, scoring keys and examination data used by them for administering examinations or determining the qualifications of an application for a licence or employment and similar information. This exemption is also subject to the 'public interest' test.¹² It is worthy to note from the outset that the test of public interest will only come into play where first of all, the information being requested falls within any of the above exemptions under the Act. The Act however leaves out two exemptions without expressly subjecting them to the 'public interest' test. These are the professional and statutory privileges exemption¹³ and course or research material exemption¹⁴. The rationale for not subjecting these exceptions to the usual test of 'public interest' is not apparent from the Act especially as these exceptions are regarded as qualified

⁷ Model Freedom of Information Law, available at <http://www.article19.org/data/files/pdfs/standards/modelfoiaw.pdf> last accessed on 21 November 2012.

⁸ Freedom of Information Act 2011, s. 11(2).

⁹ *Ibid*, s. 12(2).

¹⁰ *Ibid*, s. 14(3).

¹¹ *Ibid*, s. 15(4).

¹² S. 19(2).

¹³ S. 16.

¹⁴ *Ibid*, s. 17.

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exemptions in other freedom of information laws and subject to the 'public interest' test.

The Act also makes provisions for what may be referred to as absolute exemptions for published materials available for purchase by the public, library or museum materials kept solely for public reference or exhibition purpose and materials placed in the National Library, Museum or non-public sections of the National Archives on behalf of private persons or organisations other than government or public institutions.¹⁵ The Act does not apply to such information and any public institution receiving a request for such information can out rightly reject the request without applying any public interest test.

The Act also provides that one of the grounds on which the Court can order an institution to disclose information after it has denied the application for information is, where the Court makes a finding that the interest of the public in having the record being made available is greater and more vital than the interest being served if the application is denied.¹⁶ Having recognised the centrality of the 'public interest' test in the effective administration of the freedom of information regime, the need for a proper understanding of the meaning of the phrase, the various aspects of the public interest and the factors that should be considered in coming to this finding cannot be over-emphasized. This is more cogently reinforced by the realization that most litigation surrounding the freedom of information requests would revolve around refusals to disclose information which would stand or fall on the requirement of 'public interest.' This article therefore attempts to throw light on this all important aspect of the freedom of information Act, highlighting its importance to lawyers, policy administrators, judges and even the public interested in access to public information and record.

2. Meaning of 'Public Interest'

Freedom of Information legislation, deliberately do not define 'public interest'. This is in recognition of the fact that public interest would vary with time and the circumstances of each situation. This failure to define it categorically therefore allows individual determinations to be made with regard to the specifics of each case. At general law, public interest' is wide and

¹⁵ *Ibid*, s. 26.

¹⁶ *Ibid.*, s. 25(1)(c).

expansive and according to Lord Hailsham, “categories of public interest are not closed.”¹⁷ Thus public interests cover a wide range of situations and interests which are not static, but are dynamic and evolving continually with the progress and development of every society. That is the reason why, the courts have held that questions to be considered in identifying the public interest are inevitably subjective.¹⁸

According to the Black’s dictionary, public interest is:

1. The general welfare of the public that warrants recognition and protection.
2. Something in which the public as a whole has a stake; esp., an interest that justifies governmental regulation.¹⁹

Public interest has been described as “a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and the wellbeing of its members.”²⁰ The Office of the Information Commissioner Queensland defines it as follows:

The ‘public interest refers to considerations affecting the good order and functioning of community and governmental affairs, for the well-being of citizens. In general, a public Interest consideration is one which is common to all members of the community, or a substantial segment of them, and for their benefit.’²¹

In the United Kingdom’s Information Commissioner’s Office Guidelines, it is simply defined as ‘something that serves the interest of the public’.²² From the above definitions, a common thread that is identified in the concept of public interest is the notion of well-being or general welfare of the public and the promotion of good order and functioning of community and governmental affairs. Therefore the concept of ‘public interest’ refers to matters which foster the good order of society, as well as the well-being or welfare of citizens and which the public has a

¹⁷ *D v. National Society for the Prevention of Cruelty to Children* [1971] AC 170 at 230.

¹⁸ *O Sullivan v. Farrer* (1989) 168 CLR 210 at 216.

¹⁹ B. A Garner. (ed.). *Black’s Law Dictionary* 8th ed.. (USA. Thompson West. 2004).

²⁰ *Director of Public Prosecution v. Smith* 199111 VR 63 at 75.

²¹ M. Carter and A. Bouris, *Freedom of Information: Balancing the Public Interest* (London, University College London, 2006).

²² *Ibid.*

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stake in ensuring its existence and which merits legal regulation and recognition. The courts have held that public interest does not mean the same thing as that which satisfies curiosity or merely provides information or entertainment.²³ For a matter to be in the public interest it must be relevant for maintaining the good order and welfare or well-being of the public. It has also been held to be distinguishable from “what is of interest to the public to know”.²⁴ The court differentiated the two ideas as follows:

Similarly it is necessary to distinguish between ‘what is in the public interest and what is of interest to know’... The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and governmental institutions tacitly accepted and acknowledged to be for the good order of the society and for the wellbeing of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals.... There are several and different factors and facets of interest which form the public interest. **On the other hand, in the daily affairs of the community events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public it follows that such form of interest per se is not a facet of public interest.**²⁵

In essence, events which are in the interest of the public to know are merely events which attract public attention and may or may not be for the benefit or wellbeing of the public. Thus, where it merely attracts attention without more, it will not be sufficient to override the exemptions clearly enacted for withholding information under the Act. In Australia, the courts have held that the concept of public interest is not synonymous with the interest of government²⁶ and may also in certain cases embody the public concern for the right of an individual.²⁷

Many Nigerian statutes incorporate the idea of public interest without necessarily defining what is meant by the concept. Others simply give specific instances of what constitutes public

²³ *R. V Inhabitants of the County of Bedfordshire* (1855) 24 L.J.Q.B. 81 at 84 Per Lord Campbell LJ.

²⁴ *Lion Laboratories Ltd V. Evans*’ (1985) QB 526 at 533 Per Griffith LJ.

²⁵ *Supra*, footnote 20. Emphasis added.

²⁶ *Harris v Australian Broadcasting Corporation* (1998) 78 ELR 236.

²⁷ *Re Bartlett and the Department of Prime Minister and Cabinet* (1987) 7 AAR 355.

interest in the context of the particular Act. For example the Preamble to the Land Use Act provides that whereas it is in the public interest that the right of all Nigerians to the land of Nigeria be asserted and preserved by law; and whereas it is also in the public interest that the rights of all Nigerians to use and enjoy land in Nigeria and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves and their families should be assured, protected and preserved.

Thus, under the Land Use Act, there is a public interest in recognizing and preserving the right of all Nigerians to the land of Nigeria by law and similarly protecting and preserving the rights of all Nigerians to use and enjoy land in Nigeria and the natural fruits of the land in sufficient quantity to enable them to provide for their individual sustenance and that of their family. This is the particular public welfare and well being or public interest identified in the context of the Land Use Act. This is a particular instance of public interest defined by our statutes.

Order 1 Rule 2 of the Fundamental Rights Enforcement Rules 2009 (as amended) provides that “Public interest” includes the interest of Nigeria society or any segment of it in promoting human rights and advancing human rights law.” This definition under the Fundamental Rights Enforcement Rules also does not delineate the parameters for determining public interest but also identifies one instance of public interest which is the promotion of human rights and advancement of human rights law by the Nigerian society. It achieves this by the use of the legislative device “includes.” Another instance is provided by the Land Use Act in section 28 also defines overriding public interest as it relates to the specific cases of customary and statutory right of occupancy. The same situation obtains in respect of Nigerian case law, which has so far not yet made a pronouncement on what amounts to public interest and only defined public welfare in the case of *Kabirikim v Emefor*.²⁸ The court in that case while interpreting the Commission of Inquiry Law Cap. 25 Laws of Northern Nigeria 1963, held that “Public welfare means a society’s well-being in matters of health, safety, order, morality, economics and politics”.²⁹

²⁸ (2009) 14NWLR (Pt. 1162) 602 SC.

²⁹ *Supra*, p. 641.

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In a freedom of information context, it has primarily been held that in a representative democracy, the citizens have a right to seek to participate in policy formulation on any issue of concern to them. Therefore, FOI legislation are important in that they provide the means for a person to have access to the knowledge and information that will assist a more meaningful and effective exercise of that right. This implies that there is a public interest in access to government information *per se*. The public's wellbeing and welfare in democratic participation is thus served by access to government information.

Therefore in the light of all the above explanations, it is our humble submission, that in the Nigerian context, public interest would cover the need to protect the rights guaranteed to the individual by both national and international legislation, fight the cankerworm of corruption and terrorism, ensure access to government information, enhance the development of the economy and ensure the smooth and effective running of government. It is also our view that Chapter 2 of the 1999 Constitution providing for the Fundamental Objectives and Directive Principles of State Policy is indispensable to a proper understanding of what constitutes 'Public Interest' in the Nigerian context. We will now examine other jurisdictions that have operated a Freedom of Information Law to see this concept in operation.

3. Practical Guidelines from other Jurisdictions

The exemptions contained in any Freedom of Information Act are either absolute exemptions or qualified exemptions. Absolute exemptions are cases where the right to know is totally and wholly displaced. Qualified exemptions are instances where a public authority, despite having identified a possible exemption, must still consider whether there is a greater public interest in providing the information to the applicant or in maintaining the exemption.

Where a qualified exemption applies to information that has been requested, the public institutions are required to carry out a 'public interest' test. This test requires weighing the public interest considerations in favour of disclosing the information and the public interest consideration in favour of protecting it from disclosure. Whenever the public interest in withholding the information outweighs that of disclosing it, it is then validly withheld. The courts have held that:

The public Interest is not one homogenous undivided concept. It will often be multi-faceted and the decision maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where the public interest resides. This ultimate evaluation of the public interest will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that “the public interest” can be ascertained and served. In some circumstances, one or more considerations will be of such overriding significance that they will prevail over all others. In other circumstances, the competing considerations will be more finely balanced so that the outcome is not so clearly predictable. For example, in some contexts, interests such as public health, national security, anti-terrorism, defence or international obligations may be of overriding significance when compared with other considerations.³⁰

The expression “in the public interest” has been held to “impart a discretionary value judgment to be made by reference to undefined factual matters, confined only in so far as the subject matter and the scope or purpose of the statutory enactment may enable”.³¹ It is submitted that to aid the public official in making this discretionary value judgment, the decision maker may receive guidance from international materials where elements of public interest have been identified in a variety of contexts. This is without prejudice to the overriding importance of the decision maker being socially aware and conversant of the prevailing socio-economic circumstances of his particular environment (in this case Nigeria), which will circumscribe and define matters that are for the welfare of the public and also serve as a yardstick in measuring the relevance of foreign materials.

Foreign jurisdictions recognize certain factors as relevant in determinations of what constitutes public interest. Some of those recognised are as follows:

1. Public participation in government: This factor becomes relevant if disclosure would allow a more informed debate of issues under consideration by the Government or a local authority or encourage participation in public debates.

³⁰ *Mckinnon v Security Department of Treasury* [2005] FCARC 142, per Tambalin J.

³¹ *O Sullivan v Farrar* (1989) 168 CLR 210 at 216.

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2. Government accountability: Disclosure in this context promotes accountability and transparency by placing an obligation on authorities and officials to provide reasoned explanations for their decisions, in order to improve the quality of decisions and administration.
3. Promoting accountability and transparency in the spending of public money:
 - a. The disclosure of information may lead to greater competition and better value for public money. It may also assure the public of the personal probity of elected leaders and officials.
4. Public awareness: There is public interest in allowing individuals and companies to understand decisions made by public authorities affecting their lives, to know the reasons for the decisions and, in some cases, assisting individuals in challenging those decisions.
5. There is public interest in bringing to light information affecting public health and public safety. The prompt disclosure of information by scientific and other experts may contribute not only to the prevention of accidents or outbreaks of disease but may also increase public confidence in official scientific advice.
6. Special interest of class (Justice to an individual): This includes the public interest in the right of individuals to have access to records, of community members being provided with ways to ensure the accuracy of personal information held by the government, of individuals receiving fair treatment in accordance with the law in their dealings with the government, and in the right of individuals to pursue legitimate private rights and interest.³²

There are also factors that can favour non-disclosure. These include:

1. Potential damage to community interests;
2. Protecting Private interests (Fairness to an individual); and

³² See generally, M. Carter & A. Bouris, *Freedom of Information: Balancing the Public Interest* (London: University College, 2006). See also Dundas & Williams, "Freedom of Information and the Public Interest Test", available at www.jiscleal.ac.uk/Portals/12/.../ last accessed on 24 November, 2012.

3. Need to avoid serious damage to the proper working of government at higher levels.³³

Factors which are irrelevant include:

1. The possible embarrassment of Institutions or other officials;
2. The possible loss of confidence in Institutions or public authority;
3. The seniority of persons involved; and
4. The risk of an applicant misinterpreting the information.³⁴
5. The overtly technical nature of the information.³⁵

In relation to possibility of criticism and embarrassment consequent on disclosure the court in Australia held as follows:

It may be sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be relevant detriment to the government that publication of materials concerning its action will merely expose it to public discussion and criticism. It is unacceptable that there should be a restraint on the publication of information relating to government, when the only evil of that information is that it enables the public to discuss, review or criticize government actions.³⁶

In relation to the risk of an applicant misinterpreting the information, the Australian court held that such claims are ...based on rather elitist and paternalistic assumptions that government officials and external review authorities can judge what information should be withheld from the public for fear of confusing it, and can judge what is necessary or unnecessary in democratic society.³⁷ According to the court, it is best left to the judgment of individuals and the public generally as to whether information is too confusing to be of benefit or whether debate is necessary.³⁸ The court simply said that the government is not in the

³³ *Ibid.*

³⁴ Scottish Ministers' Code of Practice on the Discharge of Functions by Public Authorities under the Freedom of Information (Scotland) Act 2002.

³⁵ *Coulthart and Princess Alexandra Hospital and Health Services District* (2001) 6 QAR 94

³⁶ *Commonwealth of Australia v John Fairfax and Sons Ltd.* [1980]147 CLR 39 at 51.

³⁷ *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60.

³⁸ *Ibid.*

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role of a patriarch nor of a special superior class and should not assume it is in the best position to determine what is confusing or not, but should leave such decisions to the individual or to the public.

The New Zealand Ombudsman has provided certain practical guidelines for making public interest determinations which we have modified to fit into our own freedom of information Act. The guidelines provide step by step procedure to be followed by a decision maker in arriving at a determination of the public interest to be given priority in any freedom of information request. It provides that for an agency to answer the question of public interest it would have to take the following steps:

- (1) Identify whether one of the grounds for exemption set out in the Act applies to the information at issue.³⁹
- (2) Identify the considerations which render it desirable, in the public interest, for the information to be disclosed.⁴⁰ The guideline lists the following factors that can often assist an agency in identifying those considerations which favour the release of information:
 - a. The content of the information requested. What does the information requested actually say? Is the content of the information such that its release would, in some way, promote the public interest?
 - b. The context in which that information was generated. Such background information if released will often enable the public to participate in the decision making process.
 - c. The purpose of the request. Although a requester is not required to explain his or her purpose in requesting information, knowing why the information is required by the requester is often helpful in identifying the considerations favouring disclosure of the information and assessing whether those considerations outweigh the interest in withholding the information.

³⁹ For example, the relevant exemptions under our law are defence, international relations, personal information, law enforcement and administrative enforcement proceedings, commercial information etc and these are the relevant public interests to weigh against other considerations favouring release.

⁴⁰ We have examined some of these interests earlier as including public awareness, transparency and accountability of government, accountability in spending public funds etc.

- (3) Assess the weight of these competing considerations and decide whether, in the particular circumstances of the case, the desirability of disclosing the information, in the public interest, outweighs the interest in withholding the information. If an agency, after identifying and weighing these competing interests, finds them to be evenly balanced then the information at issue should be withheld. An agency will need to consider how the public interest is best served. Are the considerations favouring disclosure of the information such, that the public interest would be best served by disclosure of the actual information requested? While there may be a public interest in release of some information about a particular situation, this may not necessarily be met by release of the particular information requested. There is no easy formula for deciding which interest will be stronger in any particular case. Rather, each case needs to be considered carefully on its own merits”.⁴¹

It is clear therefore that there is no easy formula for deciding which interest will be stronger in any particular case. Rather, each case needs to be considered carefully on its own merits and calls for exercise of discretionary value judgment. This has led to the recognition that it requires a certain level of skill to make the determinations that stand the test of reasonableness. Accordingly, “... it (public interest) is a test that must be applied by an adjudicator who has no interest in the outcome of the proceeding and who is skilled by professional experience in weighing ... one against another.”⁴² This calls for every institution to put a procedure in place that will make possible an objective evaluation of any request for information. However each determination should still be made on its own merit and must take into account different relevant factors that may influence the decision. This also calls for highly skilled and professionally experienced public officials to be involved in these determinations. This highlights the importance of proper training for staff in the operation of the Act as provided for in the Act itself as a duty that a person entitled can compel its performance through a court action⁴³. In the final analysis, it was held in *Eccleston’s case* that “It is inherent in the process of balancing competing interest that one or more interests

⁴¹ <http://www.ombudsmen.govt.nz/irnagelibrary/100100.pdf> last accessed on 19 February, 2012.

⁴² Report of Australian Senate Committee on Constitutional and Legal Affairs (1979).

⁴³ FOI Act 2011, s. 12.

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whether public, individual or government interest, will in fact suffer some prejudice, but that prejudice will be justified in the overall public interest.”⁴⁴

Those are true words, recognizing the conflicting interests which exist in the society and which can only be met by the fine art of social engineering and applying the principle of utilitarianism. That is the difficult task the public official is called upon to perform and he must not fold his hands and declare that he has been left with no guidelines to assist him. He must draw from his wealth of experience, his practical knowledge and he must derive assistance from such foreign materials where the public interest has been identified in various contexts.

4. Illustrative Cases

4.1. Defence and International Relations Exemption

In a UK case,⁴⁵ the office of the Deputy Prime Minister was asked for a copy of the London Resilience Team Report which contains findings and recommendations for improving the emergency planning and response arrangements in London for coping with serious terrorist incidents. This request was refused on grounds of national security and defence and the denial was upheld by the ombudsman. Despite recognizing the very strong public interest in matters that had the potential to cause harm to the security of London and the importance of such independent scrutiny in holding the government to account, it was found that the benefit of disclosure was outweighed by the harm that would be caused to security. Such release of the information could allow terrorists access to information about weaknesses and vulnerabilities of London to respond to a terrorist attack.

4.2. Personal Information

In another case,⁴⁶ a journalist suspected that a university staff member was being paid by a university without having to perform any duties and he asked the university whether the staff member was receiving a salary and for details of her duties. The university refused the request on the grounds of withholding her personal information in order to protect her privacy. It was held on appeal

⁴⁴ *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60,

⁴⁵ Case No. A.21/04.

⁴⁶ No A6737.

to the Ombudsman that the public interest in the accountability of a public body overrode the staff member's privacy interests.

In a case decided in Ireland,⁴⁷ a requester sought access to the total expenses paid to each member of the Oireachtas in relation to travel expenses, telephone and party expenses, secretarial and office administrative expenses and all other expenses paid as from April 1998. The office released information on an anonymous basis but argued that the identities of the members and how much each received was personal information which was entitled to exemption. The Irish information commissioner held that the public interest in ensuring accountability for the use of public funds greatly outweighed any right to privacy which the members might enjoy in relation to details of their expenses claims. He also held that a failure to disclose the requested information has the potential to damage public confidence in the integrity of members of the house.

In *Burke and Department of Families, Youth and Community Care*⁴⁸ certain documents involving an Anglican Youth Service and the former Director of that Service was involved. The information sought was in connection to the former Director who had prior convictions for indecent dealings with young persons. The former Director was also acquitted of other charges relating to improper dealings with a young person. Based on this, the Information Commissioner considered the strong public interest in maintaining the privacy of the affairs of the Director and in ensuring that he was treated fairly in respect of allegations of wrongdoing which had not yet been proven in a court of law, and of which he had been acquitted in one respect. Balanced against that were also significant public interests favouring disclosure of the information like the protection of the welfare of children in care and children 'at risk' which was one of the most important responsibility of the state and which was undertaken by the respondent agency. Also the fact that there was a funding arrangement entered into by the agency with community

⁴⁷ Mr Richard Oakley, The Sunday Irish newspaper and the Office of the House of the Oireachtas, Case 99168 [http://www.oic.gov.ie/en/ Decisionofthecommissioner/longformDecisions/n](http://www.oic.gov.ie/en/Decisionofthecommissioner/longformDecisions/n) cited in M. Carter and A. Bouris, *Freedom of Information: Balancing the Public Interest* (London. University College London, 2006).

⁴⁸ *Burke and Department of Families, Youth and Community Care; King (third party)* [1997] QICmr 19, (1997)4 QAR 205.

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service organisations such as the youth service, under which public funds were advanced to such organisations, imposed a duty to ensure that public funds were properly targeted to achieve the objects for which the funds were advanced. Thus disclosure of the information would serve the public interest in accountability for the discharge of the function of child welfare and child protection and promote informed scrutiny and debate on such issues of community concern. He thus concluded that the public interests both for and against disclosure was finely balanced, but that the public interest favouring disclosure was stronger and therefore disclosure was in the public interest.

In *NHL and the University of Queensland*,⁴⁹ the request was made for documents relating to the handling by the respondent university of complaints of sexual harassment made by the applicant and others against an employee of the university. As regarding information which concerned the shared personal affairs of the alleged sexual harasser and the applicant, the Information Commissioner accepted that there was a public interest in a person whom has made a complaint of sexual harassment being given access to information which will provide an understanding of how the agency dealt with the complaint, the outcome of the complaint and the reasons for that outcome. Thus such information could be disclosed to the applicant.

However as concerning information which solely concerned the personal affairs of the alleged sexual harasser and information which concerned the shared personal affairs of the alleged sexual harasser and persons other than the applicant, he held that there was a strong public interest in preserving the privacy of individuals other than the applicant. There was also a public interest in the agency's ability to respond constructively to incidents of sexual harassment. This ability would only have reasonable prospect of success if the process was kept confidential to the parties involved as disclosure under the FOT Act might discourage and prevent others from making legitimate complaints. Thus the weight of public interest did not favour disclosure of information which did not relate at all to the personal affairs of the applicant.

4.3 Commercial Information

⁴⁹ *NHL & University of Queensland* [1997] QICmr 1, (1997) 3 QAR 436.

In a case in the United Kingdom, a requester asked the Department of Transport to disclose the prices at which 27 British Rail businesses were sold to buyers in the private sector. The request was denied on the ground of third party commercial confidences and on another ground not contained in our Act. The ombudsman in his decision noted that:

It is common ground that the public interest requires the details of the proceeds from the sales of assets formerly in public ownership should be made public. The question is when? I appreciate the department's arguments that, where there remains to be sold businesses akin to those already sold, the premature disclosure of the selling prices achieved is capable of having a prejudicial effect on the negotiations for the sale of the remaining businesses.

Thus, where there was no similarity between the business sold and the businesses left to be sold, and so, where releasing the price would not prejudice future negotiations, the public interest recognised above prevails and the exemption would not apply.

In another case,⁵⁰ a requester demanded access to certain records related to two companies involved in poultry processing. The Department of Agric and Food refused access on the ground of commercial information and on another ground. The information commissioner accepted that the records contained information which could damage the reputation and commercial interests of the companies. But he however found that there was significant public interest in the public knowing that the department carried out its regulatory functions in the area of health, food safety and the control of diseases. And therefore, the interest of the public, as ultimate consumers of poultry products outweighed any public interest in protecting the commercial interests of the companies.

In another United Kingdom request,⁵¹ the complainant requested details of service standards, waiting times and persons

⁵⁰ ABC Ltd., and DEF Ltd., and the Department of Agric and Food, Case 98198, <http://www.oic.gov.ie/en/Decisionsofthecommissioner/BetterDecisions/NameI486.en.htm> cited in Carter and Bouris, *ibid*.

⁵¹ Fs50066054, 30/11/05, Public Authority: The Post Office Limited, <http://www.ico.gov.uk/cms/DocumentUploads/DecisionNotice66054.pdf> cited in Carter and Bouris *ibid*.

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who gave up waiting at a specified post office. The Post-Office withheld information concerning service standards on the grounds of prejudice to commercial interests. The Information Commissioner agreed that the nature of the withheld information engaged the commercial interests of the Post-Office, which was increasingly losing its monopoly and was competing with other service providers. He recognised the public interest in the openness and accountability of the post office in the use of public funds, but this was of a lesser weight as the information requested was not entirely useful or meaningful in assisting public understanding. Public interest against disclosure included the fact that the information would disclose marketing strategy used at post office service counters, the information could be used by competitors in a misleading way; disclosure could prejudice the marketing strategies of post offices in selling certain private sector goods and services.

4.4. Public Interest in a Particular Applicant Having Access to Information

In Pemberton and the University of Queensland, the Information Commissioner considered the possibility of the circumstances of an individual applicant raising the weight of the individual's "need to know", thereby making the public interest in the disclosure of documents to that particular applicant of determinative weight, depending on the factors favouring non-disclosure. It involved a claim by an academic for access to certain referee reports provided in connection with applications for promotion made by the requester. The Commissioner held that the provision that an applicant for access need not show a special interest in the information sought does not carry necessary implication that an applicant having a personal stake or involvement in the subject matter of particular documents, which is greater than other members of the public, has no greater right to obtain than anyone else. He decided that the public interest in a person having access to what is recorded against him or her is to be taken into account in determining the scope of the public interests involved. He concluded that:

Dr Pemberton is a researcher (and teacher) in a field of science (molecular microbial genetics) where progressive research is capable of producing significant benefits for the wider community. His duties include supervising research undertaken by graduate students in his specialist field. If senior academics,

of Professorial calibre, hold opinions to the effect that Dr. Pemberton's work on behalf of the university (and indirectly on behalf of the wider community has shortcomings, or needs to be redirected or improved in some way in order for him to be accessed as having made a sufficiently distinguished contribution to the university, and his academic discipline, as to make him worthy of promotion to professor, then I consider it to be not only in Dr Pemberton's personal interest, but in the wider public interest, that those opinions be conveyed to Dr Pemberton. Significant sums of public money are contributed to fund research of the kind in which Dr Pemberton is engaged, and to fund the employment of academics generally. **It is in the public interest that academics and researchers direct their efforts in a way that optimises the benefit to the wider community from the investment it makes in the tertiary education sector and in scientific research.**⁵²

In *Shaw v. The University of Queensland*,⁵³ the requested documents related to disputes between some members of staff in a faculty at the University of Queensland. The Information Commissioner upheld the review decision to grant access to most of the documents to the requester. He regarded the decisive interest in this case to be the public interest in the requester having access to documents which concerned her as an individual, allied with the public interest in the fair treatment of an individual against whom allegations damaging to professional reputation and career prospects had been made. He rejected the claim that substantial adverse effect on the management or assessment by the university of its personnel could reasonably be expected from disclosure.

4.5 Other Instances of Public Interest

1. Public interest in not releasing list of questions and answers used by a regulatory agency in conducting a fit person assessment in respect of carers of children where the questions were intended to assess a person's character and integrity, physical and mental fitness, qualifications, skills

⁵² *Ibid.* Emphasis added.

⁵³ *Shaw v. The University of Queensland; L Estrange (Third Party)* [1995] QICmr32, (1995) 3 QAR 107.

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- and experience as opposed to merely demonstrating knowledge by the applicant⁵⁴.
2. Strong public interest in enabling police officers to make comprehensive and unreserved statements to assist with the process of law and order. Release of witness statements, police internal reports and related letters would inhibit officers' and witness' statements and be prejudicial to their function. Thus such disclosure is against public interest.⁵⁵
 3. Considerable public interest in public having information about criminal acts committed by persons who have diplomatic immunity and publication of details of the countries involved may act as deterrent against commission of future offences. However prejudice to international relations with countries involved that may refuse to cooperate with authorities in the future would outweigh the public interest in disclosure.⁵⁶
 4. It is contrary to public interest in the fair treatment of individuals, in cases of unfounded and damaging allegations of improper conduct, to prematurely disclose such allegations which had not been properly investigated. But where the public officer had been fairly treated procedurally and given opportunity to answer adverse comments, the public interest in fair treatment of individuals should be weighed against clear public interest in ensuring that allegations of improper conduct against government agencies and employees were properly investigated and appropriate corrective actions taken⁵⁷.
 5. Significant public interest in enhancing the accountability of government agencies and officials in respect of performing their duties in dealing with proposals of large scale development which was likely to have substantial social, economic and environmental effects on an area. Such interest extends to reports of experts about the possible effects of such developments and also to factors which may

⁵⁴ *Mrs S and the Scottish Commissioner for the Regulation of Care (Care Commission)*, Decision 007/2005.

⁵⁵ *Mr Robert Bennett and Chief Constable of Grampian Police*. Decision 018/2005.

⁵⁶ Public Authority: Foreign and Commonwealth 0/jice., FAC0069504, 05/01/06

⁵⁷ *Pope & Queens/and Health: Hammond and Robbins (Third Parties)* [1994] QICmr 16, (1994) 1 QAR 616.

- have influenced government agencies and officials in deciding whether to approve a particular land use and what conditions should apply to that land use⁵⁸.
6. Public interest in a land owner being treated fairly in the course of government acquiring his property and as such disclosing to him information that would give him an opportunity to subject the agency's valuation to detailed critical analysis is not against public interest⁵⁹.
 7. Public interest in applicant having information that would enable him/her pursue a remedy⁶⁰.
 8. Public interest in the rights of an individual⁶¹.
 9. Public interest in disclosing information useful to taxpayers in seeking to comply lawfully with the requirements of Taxation Office⁶².
 10. Public interest in an individual having access to the substance of allegations made against the individual so as to enable the individual present his/her case in answer to such allegation. Also there is a public interest in a prisoner having access to documents relevant to his or her incarceration⁶³.
 11. Public interest in a person who complained to a government agency having access to documents relevant to that complaint⁶⁴.
 12. Strong public interest in protecting the privacy of victims of crime and their families especially in circumstances where

⁵⁸ *Cardwell Properties Pty. Limited & Williams and Department of the Premier, Economic & Trade Development; North Queensland Conservation Council (Third Party)* [1995] QICmr 19 (1995) 2 QAR 671, *Bouilly and Department of Natural Resources; Stevenson Finance Corporation Pty Ltd and Stevenson (Third Parties)* [1998] QICmrl, (1998) 4 QAR 236.

⁵⁹ *Little v. Department of Natural Resources* [1996] QICmr 2, (1996) 3 QAR 170.

⁶⁰ *Wilisford v. Brisbane City Council* [1996] QICmr 17, (1996) 3 QAR 386, *Hobden v. Ipswich City Council* [1998] QICmr 7, (1998) 4 QAR 404.

⁶¹ *Re James* [1984] 6 AUD 687 at 701.

⁶² *Re Murtagh and Commissioner of Taxation* (1984) 6 ALD 112.

⁶³ *Brack and Queensland Corrective Services Commission* (1994) QIC mr 5, (1994) 1 QAR 414.

⁶⁴ *Green and Parliamentary Commissions for Administrative Investigation* (1994) QICmr. 15, (1994) 1 QAR 598

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the victim was a minor and the crime was of a sexual nature⁶⁵.

13. Public interest in applicant checking to see whether records held about him were accurate and being able to correct any inaccurate or out of date information⁶⁶.
14. Public interest in fair treatment being accorded to an applicant in a case where the university awarded him a doctorate degree 14 years after it was submitted and seven years after it had been initially rejected⁶⁷.
15. Public interest in the office expenditure of the Prime Minister's office in terms of total personnel salaries while withholding details of each individual employee's salary to protect the privacy of such individuals⁶⁸.

5. Nigerian Freedom of Information Cases

The Nigerian Freedom of Information Act has been in operation for a short period of time and has not yet generated very copious requests and court action in respect of denials of information. A few human rights organisations have, however, instituted action against public institutions and bodies on the refusal or neglect to provide requested information.

The first case on the FOI Act was filed by the Committee for the Defence of Human Rights against the Economic and Financial Crimes Commission seeking an order of Mandamus directing the EFCC to make available information to the applicant on the allegation that the leadership of the CDHR collected 52 million Naira from an unnamed suspect being investigated by the Commission.⁶⁹ In July 2011, the Federal High Court agreed with the Counsel to the CDHR, that the EFCC should disclose the source of its information⁷⁰.

⁶⁵ *Mentink v. Department of Queensland Corrective services Commission* (1997) Letter Decision of the Information.

⁶⁶ *Ainsworth v Department of Gaming and Racing District Court of NSW* (unreported) cited in M. Carter and A. Bannis, *Freedom of Information: Balancing the Public Interest*, 2nd ed. (London, University College London 2006).

⁶⁷ *Bennett v Vice Chancellor, University of New England* [2000] NSW ADT 8.

⁶⁸ Case No. W41517.

⁶⁹ FHC/L/CS/784/201 J Unreported.

⁷⁰ Available at <http://saharareporters.com/news-page/freedom-rnformanon-lawsuit-efcc-ordered-substantiate-n52m-allegation-against-cdhr>,

Socio-Economic Rights and Accountability Project (SERAP) equally filed another suit⁷¹ against the Petroleum Product Pricing Regulatory Agency and 2 others seeking for information on the details and basis of spending of the fuel subsidy in 2011.⁷²

In February 2012, the FHC in Lagos, granted leave to Socio-Economic Rights and Accountability Project (SERAP) to seek an order of Mandamus compelling the Federal Government to make available to it documents on spending of received public funds.

Two civil society organisations, Socio-Economic Rights and Accountability Project (SERAP) and Women Advocates Research and Documentation Centre (WARDC) also in 2012, sued⁷³ the Governor of the Central Bank of Nigeria (CBN), Sanusi Lamido over a request for information relating to the spending on fuel 'subsidy' in 2011 and in particular, the authorisation of the sum of ₦1.26 trillion, paid by the CBN⁷⁴

In June 2012, the courts held, in a case filed by Legal Defence and Assistance Project (LEDAP) against the National Assembly leadership that the Act permitted the Non-Governmental Organisation to demand any public information such as the details of salaries, emoluments and allowances earned by the Legislators. It was held that the information was of public interest since the salaries, emoluments and allowances were paid from public funds. This was contrary to the previous decision of a Lagos High Court that salaries and emoluments of lawmakers were personal information not covered by the FOI Act.⁷⁵

<http://www.nationalmirroronline.net/news/15728.rss>, last accessed on 15 July 2012 .

⁷¹ Suit no. FHC/CS/L/222/20 11 Unreported.

⁷² Available at <http://saharareporters.com/news-page/fuel-subsidy-spending-court-grants-permission-interrogate-government>, last accessed on 15 July 2012.

⁷³ Suit no. FH/IKICS/23//201 2 unreported.

⁷⁴ Available at <http://www.thenigerianvoice.com/nvnews/86833/1/court-to-hear-fuel-subsidy-suit-against-cbn-on-may.html>, last accessed on 15 July 2012; http://teadership.ng/nga/articles/16825/2012/02_/20/serap_sues_sanusi_over_fuel_subsidy_payment_document.html last accessed on 15 July 2012.

⁷⁵ Available at <http://saharareporters.com/news-page/court-orders-release-information-legislators%E2%80%99C2%A0salaries%C2%A0and%C2%A0allowances-2007-2011>; <http://tribune.com.ng/index.php/news/35651-court->

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This motley assortment of few cases will demonstrate the difficulties that can arise from applying the public interest test. The case between the CDHR and the EFCC best illustrates this. Ordinarily the EFCC could have justified its refusal to provide the information on the grounds of it being a record compiled for law enforcement purposes which would unavoidably disclose the identity of a confidential source as provided under Section 12(1)(a)(iv). This would have raised very germane issues of the correct interpretation of the word “source”, the required confidentiality whether explicit or implicit and the nature of information entitled to the protection which is beyond the scope of this article and has been treated in another as yet unpublished work. Also the conflicting decisions on the request for lawmaker’s remuneration and allowances would not have occurred had the court been conversant with the case cited above regarding the Irish Members of parliament (Oireachtas)⁷⁶

6. Conclusion

It is our conclusion that public interest invariably changes with time and with changes in the conception of the society as to its interests and as to what would foster its welfare and order. It is dependent on a people’s level of development, education, culture and exposure. It would also differ in different geographical and cultural *milieus*. Thus what might fall under public interest in England, might not necessarily qualify as public interest in Nigeria. We therefore submit that it is important in a democratic dispensation like ours that is just setting out on the journey of information freedom, for the Attorney- General to publish guidelines identifying factors to be taken into consideration in making decisions about ‘public interest’ as it relates to the Act and should review and update these guidelines periodically as circumstances change. These guidelines will assist those involved in implementing the Act in making valid decisions of what constitutes public interest.

Such a guideline would also be of immense help to the judiciary called upon to judicially review a decision denying access to information and the public who will be bringing requests for information. This is even more compelling in view of the duty imposed by the Act on Public institutions to provide adequate

grants-leave-to-serap-to-see-order-of-mandamus-against-fg;
<http://pmnewsnigeria.com/2012/06/251in-nigeria-one-up-for-freedom-of-information/> last accessed on 15 July 2012.

⁷⁶ Note 37 above.

training for its officials on the public's access to information or record held by the government or public institutions.⁷⁷ We would suggest that such guidelines need not reinvent the wheel as ample illustrations abound in our laws. Relevant considerations may include protection of proprietary rights of individuals, advancing human rights law and promoting human rights, government accountability and transparency in spending public funds, public awareness of government actions and reasons for them, and most importantly curbing corruption. Proper and adequate training should also be given to public officials who are involved in processing requests for information as provided for by the Act as determination of what lies in the public interest calls for exercise of discretion. This discretion can only be properly exercised by public official who possess certain skills.⁷⁸

Equally, Freedom of Information legislation are not self executing and can only become relevant when they are utilized by the public. It is therefore imperative that the informed public, mass media and academic community armed with examples that demonstrate public interest are emboldened to bring requests for information that will serve the public interest. In that way, the freedom of information regime would succeed in Nigeria.

Making decisions about public interest involves a discretionary judgment, which requires balancing various interests some of which are conflicting. The ability to do so successfully would depend on so many factors. The public officer must be armed with sufficient knowledge of typical situations engaging the public interest, and so must the lawyer and the judge. The words of Lord Hailsham remain apposite that "the categories of public interest are not closed".⁷⁹ We must discover with each situation our peculiar public interest which disclosure or withholding of information would serve in line with international best practices.

⁷⁷ Freedom of Information Act 2011, s. 13.

⁷⁸ *Re Eccleson and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60, paragraph 46.

⁷⁹ *D v. National Society for the Prevention of Cruelty to Children* [1971] AC 170 at 230.