GUIDELINES ON THE IMPLEMENTATION OF THE FREEDOM OF INFORMATION ACT 2011

ISSUED BY

THE HONOURABLE ATTORNEY GENERAL

OF THE FEDERATION AND MINISTER OF JUSTICE

15TH MARCH, 2012

FOREWORD

Since 1st June 2011, all requests for information received by a public institution have to be dealt with in accordance with Freedom of Information Act 2011 (FOIA).

Consequently, the Federal Ministry of Justice has produced these Guidelines for clearer implementation of the Freedom of Information Act 2011 and to aid the understanding and application of the FOIA by public Institutions. This is the second in a series of guidance notes to help public institutions understand their obligations and to promote good practice. The first of such advisories – Attorney General's Memorandum on the Reporting requirements under section 29 of the FOIA (HAGF/MDAS/FOIA/2012/I) - was published and circulated on January 29 this year and should be read together with these Guidelines.

The FOIA is not solely concerned with responding to requests for information. It also requires that all public institutions shall organize their records in a manner that makes them accessible to the public as well as publishing information using multimedia formats (i.e. print, electronic and online).

These Guidelines have therefore been crafted to cover a wide range of the subject, special care having been taken to highlight practical challenges and solutions. Naturally the guidelines will be revised from time to time in the light of practical experience.

Mr. Mohammed Bello Adoke SAN, CFR
Honourable Attorney General of the Federation
And Minister of Justice

TABLE OF CONTENTS

CHAPTER 1: FUNDAMENTAL PRINCIPLES IN DEALING WITH APPLICATIONS FOR INFORMATION

1.0 OVERVIEW

Ensuring that a public institution answers applications for information promptly is a shared responsibility.

- Ensure that people in your institution know who is responsible for dealing with applications under the Act.
- Transfer without delay any request which is not your responsibility.
- Practice good records management to ensure information can be quickly identified and retrieved.
- Remember that the 7-day limit begins as soon as a request is received by a public institution. Within this period a public institution must either provide the information or explain, as fully as possible, why it is not going to do so.

1.1 DOES THE ACT APPLY TO MY INSTITUTION?

The FOIA applies to all public Institutions. A public institution is any:

- Legislative, executive, judicial, administrative or advisory body of the Government, including boards, committees or commissions of the State which are supported in whole or in part by public fund or which expends public fund, and
- Private bodies providing public services, performing public functions or utilising public funds.

1.2 THE RIGHTS OF APPLICANTS UNDER THE ACT

Section 1 of FOIA establishes the rights of any person to apply for records in the possession of a public institution. Generally, an applicant's rights are:

- The right to access or request for any information that is in the custody or possession of any public institution.
- The right to be told whether the information or record exists.
- The right to have the requested information given to him, if the information is in the custody or possession of any public institution.
- The right not to demonstrate any specific interest or purpose in the requested information.
- The right to take legal action in the Courts to compel any public institution to comply with the Act.

1.3 WHAT RECORD IS SUBJECT TO THE ACT?

All recorded information held by, or on behalf of, a public institution is within the scope of the Act. The legislation applies regardless of the age, format, origin or classification of information. It also covers files, letters, databases, loose reports, e-mails, office notebooks, videos, photographs, wall charts and maps etc. It further extends to closed files and archived material as well as information in current use. However, Section 26 of the Act exempts certain materials publicly accessible by

other means from the application of the Act, (See Chapter 12).

In considering an application under the FOIA, it is important to consider that other parts of your organisation may hold recorded information relevant to the application.

Public institutions should also note that in addition to information produced by the institution, FOIA would also apply to information received from other institutions if the information so received is relevant to the application. **It is important to always consult with the originating public institution during consideration of the FOIA application.**

1.4 WHAT IS AN APPLICATION FOR A RECORD ("FOIA APPLICATION")?

There is a difference between an application under the FOIA and routine correspondence. Any requests for information that can be provided without any question – such as recruitment brochures, leaflets, press releases and the text of public speeches – should be treated as normal and routine correspondence.

However, any application for information that needs to be actively or seriously considered should be formally treated as an application under the Act especially if it seems likely that the requested information may not be disclosed. Accordingly, such application should be formally recorded, and treated as an application under the FOIA.

Note: **An application under the FOIA does not need to be made in writing, and an applicant does not need to demonstrate any specific interest or motive in the information applied for.**

1.4.1 Advice and Assistance under FOIA

An application under the FOIA would generally be made in writing. However, Illiterate or disabled applicants can still apply for information under the Act by making an oral application for information to any public institution. The Act provides an obligation for authorised officers of a public institution to assist such applicants by transcribing such oral applications into written form.

If the FOIA application is unclear, it is important to urgently consult with the applicant. The key requirement is to establish a dialogue with the applicant. If clarification of the application is needed in order to identify and locate the information, this must be requested promptly and in any event no later than 7 days from the date the application was received. It will be helpful to inform the applicant on the information that is readily available, or to explore ways in which an application could be made more specific. Mindful of the possibility of legal action, a written record of all conversations with the applicant should be kept. The 7-day period would commence on the date after the public institution receives the clarification it has sought.

1.5 PROACTIVE DISCLOSURE OF INFORMATION

Under the Act, public institutions must routinely publish certain information on an ongoing basis. This obligation is separate from the duty to make information available in response to applications for information under the Act.

Section 2

Under Section 2 (1) and (2), a public institution must:

- ensure that it records and keeps information about all its activities, operations and business.
- ensure the proper organisation and maintenance of all information in its custody in a manner that facilitates public access to such information; and,

The minimum information which must be published is listed in Section 2 (3) of the Act; and every public institution must make available any information is listed above except:

- the institution does not hold this information;
- the information would be exempt from disclosure under one of the exemptions found in the Act.

It is important for the institution to record why it believes any particular information is exempt, in case an applicant seeks to compel an institution to comply with section 2 by challenging the exclusion of the information in Court

1.6 THE FOIA APPLICATION

Under the Act there is a requirement to provide a substantive response to any application for information promptly and in any event within 7 days. There is some scope to extend this period by a maximum of 7 further days if: the requested information is for a large number of records; and the consultations that are necessary to comply with the application cannot be reasonably completed within the initial 7-day period. A notice of this extension informing the applicant that he has a right to have the decision to extend reviewed by a Court should be provided to the applicant within 7 days.

1.6.1 Fees

The fee chargeable to the FOIA applicant is limited to the standard charges to photocopy and transcribe the records where necessary.

1.6.2 The Response Process

Generally, the response process can be divided into 9 stages. These can be described as the 9 'R's. These are:

Stage 1.

Read: Read the correspondence and decide whether it constitutes a request or not and if you actually hold the Information, what it relates to and whether or not it needs to be transferred to another public institution. If so, don't delay as the Act states that the application must be transferred to another public institution with a greater interest in the requested information between 3 days and 7 days after the date the application is received.

Stage 2

Record: Due to the possibility of legal action before the Courts, it is important to maintain a formal system of making notes of all FOIA applications and record all key actions taken in dealing with the application. You will need to apply a tracking number to ensure an accurate and complete audit trail for each application, particularly if the requested information has to be transferred to another public institution.

Stage 3

Responsibility: Any application received by your institution that is not within your area of responsibility, should be transferred to the appropriate department within your institution as quickly as possible because the 7-day period starts when the public institution receives the application and NOT when it reaches the "right" department.

Stage 4

Retrieve: You need to retrieve and consider all the relevant information subject to the FOIA application.

Stage 5

Refer to others: Where necessary, consult with other officials both within your public institution and externally, especially with the Ministry or government department that specialises in, or is, primarily responsible for the information. Remember that sometimes it is necessary to seek specialist advice on the disclosure of information and the balance of public interest.

Stage 6

Redact and separate: Some records may contain both disclosable and exempt information. Section 18 of the Act permits the extraction of disclosable information from other information in a record that is either exempt or not relevant; this is known as redaction. Redaction can be made by deleting or blocking words, sentences, paragraphs and whole sections of record. Therefore any potentially sensitive information not relevant to the request or for which disclosure has not been authorised should be removed or "redacted" in the copy sent to the applicant. This will involve going through a document line by line. Please note that reasons for any redaction must always be given to the applicant

Stage 7

Review: Once the response to a request has been prepared, this will need to be reviewed by someone who has the necessary authority to release or refuse to disclose information. The process for authorising disclosure of information should be specified in local instructions. The use of exemptions to withhold information should be approved at the appropriate level within the public institution.

Stage 8

Reply: Once the necessary approval to disclose has been secured, the reply can be sent to the applicant. Replies must be in writing and public institutions are advised to develop template letters. Ensure the reply is filed, along with an exact copy of any enclosures

Stage 9
Release to Publication Scheme under Section 2: After disclosure, it should be considered whether or not the information provided is likely to be of general public interest. If so, consider whether it may be included in the public institution's publication scheme.

1.7 EXEMPTIONS UNDER THE ACT

Applications for records should be granted and disclosed whenever possible. However, the Act also recognises that there are occasions where disclosure of information is inappropriate. As a result, the Act contains exemptions that may apply to justify a refusal of an application under the FOIA.

The exemptions under the Act are contained in Sections: 11, 12, 14, 15, 16, 17, and 19 of the Act These exemptions can be broadly classified into two types:

1. Absolute Exemptions

Sections 15 (2), 16 and 17 are absolute exemptions. This means that if the information or record is covered by these exemptions then it is exempt from disclosure (there is a discretion to disclose in section 16 and 17 – See Chapters 9 and 10). There is no need to consider whether there might be a stronger public interest in disclosing the information than in not disclosing it. Information covered by an absolute exemption is either exempt or it is not. Absolute exemptions contain an inbuilt prejudice test. This test means that the harm to the public interest that would result from the disclosure of information falling within an absolute exemption has already been established.

2. Qualified Exemptions

Sections 11, 12, 14, 15(1), and 19 are qualified exemptions, which demand that once the information is covered by these exemptions, the "public interest test must be considered. The qualified exemptions under the FOIA are mainly injury-based exemptions, which apply if disclosure will cause injury to the specified purpose of the exemption, for example, an injury to the conduct of International Affairs under Section 11.

1.7.1 The Public Interest Test

Under the Act, an application for information shall not be denied where the public interest in disclosing the information outweighs the injury or harm stated in the exemption.

Please see Chapter. 3 – The Public Interest Test.

1.7.2 Disclosing information

Before releasing information you must be satisfied that you have the necessary authority to do so. It is important to check with the appropriate person in your institution, especially if the record to be released:

- Has a "Top Secret" protective marking. However, note that under section 28 (1) of the Act, the fact that information is kept under a security classification, or is classified as "Top Secret" does not on its own preclude it from disclosure.
- Originated outside your public institution.
- Was produced under the terms of a contract or any other collaborative or legally binding arrangement.

If the requested information requires the involvement of more than one department, or if it involves information provided to the public institution by a third party (maybe a contractor, another public institution, or an NGO), it is important to consult all those concerned. In some cases, it will be necessary to consider the implications of disclosure beyond the boundaries of your institution because it could have an effect on future relationships with contractors or on the individuals who have supplied the information to your institution.

It is important to also note that sections 11, 12, 16, 17 and 19 provides a public institution with a discretion to still disclose the record or information despite the fact that the public interest in disclosure does not outweigh the injury or harm stated in the exemption. Therefore, under the above exemptions, there is no obligation to refuse the application and withhold the record. However, as a result of the consequences of a wrongful disclosure of information, it is prudent that disclosure is made only after a careful evaluation of: the information requested, the harm that would be caused from disclosure, and a consideration of the public interest test. Consequently, only the Chief Executive of a public institution should exercise this discretion to disclose information after evaluating the information and taking specialist advice.

However, under sections 14 and 15 of the Act, once it is determined that the public interest in disclosure does not clearly outweigh the harm specified, the public institution MUST withhold the information.

1.7.3 Refusal of access to information

The reasons for refusing to provide an applicant with access to information or record(s) FOIA must be explained in a Refusal Notice, which should generally be issued within the 7-day period provided by the Act[1]. It is not sufficient for your reply to simply include a broad statement such as: "injurious to the conduct of International Affairs and Defence". As a minimum, you must identify a specific exemption as the basis for withholding information and explain why it applies. The applicant must also be informed about his right to challenge the refusal and have it

[1] Subject to Sections 6, 7 and 8 of the FOIA.

reviewed by a Court. Due to the legal consequences of a Refusal Notice, this matter is dealt separately in Chapter 2.

CHAPTER 2: REFUSAL OF ACCESS TO INFORMATION

2.1 Obligations under FOIA

Section 4 of the Act places three obligations on a public institution. These are:

- An applicant is entitled to receive the record or information that he has applied for.
- If the public institution considers that the application should be denied, it should give a written notice ("Refusal Notice") to the applicant informing him that access to all or part of the requested information will not be granted.
- The reasons for this refusal of access to information must be stated.

2.2 Refusal Notice

A public institution may refuse an application for access to information if it is relying upon one or more of the exemptions contained in contained in Sections: 11, 12, 14, 15, 16, 17, and 19 of the Act. In refusing the application, the institution must issue a refusal notice clearly stating the exemption(s) it has relied on, and the reasons why it considers that the exemption(s) apply to withhold the information. It is not sufficient to merely state that a particular exemption applies. The institution must clearly explain why it believes a particular exemption applies, not just which exemption applies, unless to do so would involve the disclosure of exempt information.

Consequently, it is necessary that, in refusing to grant an information application, a public institution should make a well-considered decision on whether or not an exemption under the Act is applicable to the information sought because the applicant may challenge the refusal of the information application in Court.[2]

2.2.1 Injury-based exemptions

Where the institution relies on an exemption that is injury-based (for example, Section 11) the institution must also explain the injury or harm that would arise from the disclosure of the information.

Please see Chapter 4 – Injury-based exemptions.

2.2.2 The Public Interest Test

In cases where an institution decides that the public interest in disclosure does not outweigh, or clearly outweigh, the injury or harm specified in the exemption, it must make full reference to the public interest test in the refusal notice; and make it clear why it has made its decision by briefly stating:

- The reasoning the authority has followed in arriving at its decision.
- Why it feels one factor, or set of factors, outweighs another, unless to do so would involve disclosure of exempt information.

It is not sufficient for an authority to simply state that it is not in the public interest to disclose information in any particular instance.

[2]Where the Court establishes a case of wrongful denial of access, the public institution or the FOIA officer is liable to a fine of N500, 000.00 (Five hundred thousand naira).

2.3 The Internal review of a decision to refuse access to records

The refusal notice must also provide details about the applicant's right to challenge the decision refusing access and have it reviewed by the Courts.

However, and mindful of the costs of litigation, it is prudent if possible, to provide all applicants with another opportunity to have the decision reviewed by more senior members of the public institution.

2.4 ISSUING A REFUSAL NOTICE

- A refusal notice should be issued as soon as possible and not later than 7 days from the receipt of an application under the Act (Section 4).
- It is vital that the Refusal Notice is clear and specific and it should explain the institution's decision and reasons for withholding the information.
- State the precise record that has been applied for. In providing the precise information, it is prudent to quote directly from the FOIA Application.
- Give details of why the record cannot be disclosed, i.e. information not held, or that an exemption(s) has been applied.
- Specify the exemption that has applied, stating the full section and sub section number, and say why you have done so and fully explain why it applies. **Please Note: do not paraphrase the exemption.**
- If applying a qualified exemption, the institution must set out its reasoning regarding the specified injury that the exemption provides would result from disclosure. It is recommended that it should specify here whether disclosure: "may"; or "be reasonable expected to"; or "would" harm the purpose of the exemption that has been applied. For example under Section 11(1) a public institution may refuse to disclose information, which may be injurious to the conduct of international affairs.
- The public institution must also explain its application of the public interest test, setting out the public interest factors that it took into account before reaching a decision to refuse the application.
- The notice must inform the Applicant about the right to challenge the decision to refuse the FOIA application and the Court's judicial review powers. The Attorney General recommends that, when providing this information it should be suggested to the applicant that an internal review can be sought by writing to the Chief Executive of the institution. It should be emphasised that this internal review does not affect the right to seek a judicial review.

TEMPLATE 1 – INFORMATION NOT HELD BY PUBLIC INSTITUTION

Date

Dear (Applicant)

Thank you for your application for information dated ( ) and received on
(date of receipt), in which you applied for: (quote the exact request contained in the FOIA Application).This request has been handled under the Freedom of Information Act 2011.

***[For Information not held*]**
I am writing to inform you that we have searched our records and the information you applied for is not held by *(name of public institution)*.

[If the public institution thinks another institution may either hold the information]
However it is possible that *(name of a different public institution)* may hold some or all of the information you require. They can be contacted at: *(provide contact details of the other institution).*

[If the public institution thinks another institution has a greater interest in the information]
However after a careful review of the information, it is my opinion that, *(state name of public institution with greater interest*), has a greater interest in the information. I will therefore transfer your application to it so that it may reply direct to you. If you object to the transfer of your request, you have a right to ask the Court to review our decision to transfer your application.

Yours sincerely

FOIA OFFICER

TEMPLATE 2 – REQUEST FOR FURTHER CLARIFICATION

Date

Thank you for your application for information dated ( ) and received on
(date of receipt), in which you applied for: (quote the exact request contained in the FOIA Application).This request has been handled under the Freedom of Information Act 2011.

I am writing to ask you to clarify your application. This is because we are not certain that we have understood your request correctly / we need further details from you in order to identify and locate the information *(delete as appropriate).* Therefore I

should be grateful if you would *(set out clearly what is required from the Applicant).*

If you need further assistance with this, please contact me on the following telephone number:

Yours sincerely

FOIA OFFICER

TEMPLATE 3 – APPLICATION REFUSED AND EXEMPTION (S) APPLIED

Date

Thank you for your application for information dated ( ) and received on *(date of receipt),* in which you applied for: (quote the exact request contained in the FOIA Application).This request has been handled under the Freedom of Information Act 2011.

I can confirm that *(name of public institution*) holds (some of) *(delete as appropriate)* the information you have requested. However we are withholding that information since we consider that the exemption(s) under section(s) *(list and specify these, with all sections and sub-sections)* apply / applies to it.

I appreciate that this will be a considerable disappointment to you, and hope that it might help if I explain to you in this refusal notice why I have reached the decision that I have taken.

ANALYSIS

[Set out detailed reasoning for each exemption cited and the information to which it applies]

i. Section _____

(State the exemption and the information it seeks to exempt).

ii. Assessment of injury if applicable.
(*If the institution assesses that an injury-based exemption applies, it must initially explain and demonstrate the harm which would arise from disclosure*

iii. Public Interest.

After engaging the exemption by demonstrating the harm from disclosure include a full explanation of the public interest test utilising the factors in

favour of disclosure[3] *against the harm that would arise from disclosure as specified in the exemption. The correct wording to use where information is withheld following consideration of the public interest test is: "in all the circumstances of the case, the public interest does not outweigh (or clearly outweigh) the (quote exactly the exact harm that has been specified in the exemption) that disclosure would cause."*

iv. Decision.

Consequently, section _____ is applicable to your request, which is hereby refused.

NEXT STEPS

If you remain dissatisfied with my decision, you have a right to appeal to the Court to review this decision. You may also request a review of this decision by writing to the *(name and address of the Chief Executive of the public institution)*. This review does not affect your right to challenge my decision in the Court.

Yours sincerely

FOIA OFFICER

[3] Please see Chapter 3 for these factors – Public Interest Test

CHAPTER 3: THE PUBLIC INTEREST TEST

Under the Act, the public interest only needs to be considered when dealing with a qualified exemption.

3.1 WHAT IS THE "PUBLIC INTEREST"?

The public interest" is not defined in the Act. When applying the test, the public institution is simply making an informed decision whether in any particular case it serves the interests of the public better to withhold or to disclose information. This decision involves balancing the competing interests between withholding information based on the purpose of the exemption (for example, injury to the conduct of international affairs of the Federal Republic of Nigeria) and the public interest in disclosing the information.

NOTE: Under the Act, an application for information shall not be denied where the public interest in disclosing the information outweighs, or clearly outweighs the injury or harm stated in the exemption. Consequently, if the balance between these competing interests is equal, a decision to withhold the requested information may be taken in respect of sections 11, 12 and 19; and with regards to sections 14 and 15, disclosure must be withheld.

The following examples may illustrate the above point. Section 12 (1) (a) of FOIA exempts the disclosure of information that contains records compiled by any law enforcement or correctional agency for law enforcement purposes. An application under the FOIA is received by the Nigeria Police Force to disclose all the information it holds with regard to a particular investigation. After an initial assessment of the information, the Police may consider that by responding to this application, there is some risk that disclosure would interfere with an actual investigation, and reveal the identity of a confidential source. It is therefore relevant to at least consider the exemptions in section 12 (1) (a) (i) and (iv)[4]. However, the risk of interference with an investigation and the disclosure of a confidential source must be weighed against the general public interest in openness, important aspects of which include promoting accountability and increasing participation in public debate about matters of public policy such as policing. It may also be beneficial for the public to know that the police are not acquiring information from dubious people. In refusing this application, the Police may successfully argue that the public interest in disclosure does not outweigh the risk to its investigation and the need to protect its confidential source.

Another application may relate to information about the number of police detectives currently deployed in its investigation of a particular crime. While there is also the risk that the disclosing this information may interfere with an investigation, the same public interest in openness and accountability must also be considered. The police may argue that the risk of interference presented in the first information application

[4] In this example section 14 can also be applied, and easy to utilise because it is an Absolute Exemption and the prejudice and the public interest in disclosure has been foreclosed.

(above) is considerably stronger than in this second application and as a result the public interest to disclose this second information application may outweigh this risk of harm resulting in the disclosure of the second information application.

3.1.1 THINGS TO BE CONSIDERED WHEN APPLYING THE PUBLIC INTEREST TEST

Two important factors to be taken into account in considering where the balance of the public interest rests are:

- The extent to which the information is already in the public domain; and
- The general rule that the public interest in preventing disclosure diminishes over time, particularly where the information becomes more widely available.

3.1.2 THINGS TO BE IGNORED WHEN APPLYING THE PUBLIC INTEREST TEST

In applying the public interest test, it is important to note:

(i) The distinction between *"what interests the public"* on one hand, and *"what is in the public interest"* on the other hand. Information is in the public interest if it serves the interest of the public at large.

(ii) The competing interests to be consider are: the public interest that favours disclosure against the risk or injury identified by the purpose of the exemption. There may often be a private interest in withholding information which would reveal corruption within the public institution, or which would simply cause embarrassment to the institution. However, the public interest may favour transparency, accountability and good governance; and it is this interest that must be weighed against the purpose of the exemption.

3.1.3 FACTORS IN FAVOUR OF THE DISCLOSURE OF INFORMATION

The following public interest factors have been generally accepted to encourage the disclosure of official information:

- Furthering the understanding of and participation in the public debate of issues of the day. This factor would come into play if disclosure would allow a more informed debate of issues under consideration by the Government (Federal or State level), or a local government council.
- Promoting accountability and transparency by public institutions for decisions taken by them.
- Promoting accountability and transparency in the spending of public money. The public interest is likely to be served, for instance in the context of private sector delivery of public services, if the disclosure of information ensures greater competition and better value for public money. Disclosure of information as to gifts and expenses may also assure the public of the personal probity of elected leaders and officials.
- Allowing individuals and companies to understand decisions made by public authorities affecting their lives and, in some cases, assisting individuals in challenging those decisions.

This list of factors is not exhaustive and there may be other factors that should be taken into account depending upon the information application. There is further need for public institutions to develop sector specific factors that will facilitate consideration of the public interest test.

3.1.4 FACTORS AGAINST THE DISCLOSURE OF INFORMATION

The main factors counting against the disclosure of information are those that are set out in the exemptions themselves. For instance, there is an obvious public interest that, no person should be deprived of a fair and impartial hearing (Section 12 (1) (a) (iii)). Therefore, if disclosure of information would deprive an individual of this right, it is relevant to consider the exemption and weigh the possible adverse effect of disclosure against the positive benefit of openness, etc.

3.2 DISCLOSURE OF INFORMATION

It is important to note that sections 11, 12, 16, 17 and 19 provides the public institution with a discretion to still disclose the record or information despite the fact that the public interest in disclosure does not outweigh the injury or harm stated in the exemption. Therefore, under the above exemptions, there is no obligation to refuse the application and withhold the record. However, in these circumstances, it is advised that, only the Chief Executive of the institution should exercise this discretion.

Sections 14 and 15 of the Act do not contain a discretion to disclose. Therefore, once it is determined that the public interest is in maintaining the exemption because the interest in disclosure does not clearly outweigh the harm specified, the public institution MUST withhold the information.

3.3 PRACTICAL ADVICE

There will be some FOIA applications in which it would be very difficult to make a well-informed decision on whether the public interest to disclose outweighs the public interest to withhold requested information. In these cases it is important for FOIA Officials to extend the 7-day time limit to consult with senior colleagues, the legal department of the institution, or other public institutions that may be affected by disclosure of the information.

CHAPTER 4: THE INJURY-BASED EXEMPTIONS UNDER THE ACT

4.1 OVERVIEW

Sections 11, 12, 14, 15(1), and 19 are qualified exemptions, which demand that once the information is covered by these exemptions, the "public interest test must be considered. These injury-based exemptions are exemptions in which disclosure of information 'may', 'would', or "could reasonably be expected" to cause injury or harm, or an interference, or a deprivation of the specified purpose of the exemption. For example:

- S11 – injury to the conduct of International Affairs and Defense.
- S12 (1) (a) (ii) – interference with pending administrative enforcement proceedings conducted by any public institution.

As would be noted, the wordings in these exemptions are different but the common thread is that, a public institution is required to demonstrate the detrimental effect(s) of disclosure on the specified purpose or activity of the exemption.

4.1.1 Dealing with the injury-based exemptions.

There are two issues that need to be resolved when dealing with an injury-based exemption. Firstly, it has to be considered if the information requested is of the type covered by the exemption. Secondly, the public institution must then determine and demonstrate that disclosing the requested information may, or would, or could reasonably be expected to cause the harm identified in the exemption. The exemption is engaged, after it has been determined that, injury could arise from the disclosure of the record. The public institution must then proceed to apply the public interest test. A public institution must therefore explain to an applicant(s) the detrimental effects of disclosure to the requested information.

On the other hand, if the harm cannot be established (and the exemption is not engaged) the application must be granted and the record disclosed.

4.1.2 What does 'injurious' and 'injury' mean?

The words 'injurious' or 'injury' are not defined in the Act. However, the Collins Dictionary defines "injurious" as causing damage or harm and 'injury' is also commonly understood to mean harm. The Attorney General therefore regards these terms as meaning the same thing. So, when considering how disclosure of information would cause injury to the subject of the exemption being claimed, the public institution may find it more helpful to consider issues of harm or damage.

Under the Act, the degree of harm is not specified, so strictly any level of harm or damage might be argued. However, public institutions should bear in mind that the less significant the prejudice is shown to be, the higher the likelihood that the public interest test will require disclosure.

4.1.3 The Injury test

A public institution cannot withhold information unless the disclosure would injure any of the purposes or activities listed in the exemption that the institution has

relied upon. The injury need not be substantial but it must be genuine and its likelihood should be decided on a case-by-case basis.

Under the injury test:

- Public institution are expected to demonstrate that there is a causal relationship (or implied link) between the potential disclosure and the specified injury.
- A public institution cannot be expected to prove exactly what would happen on disclosure. Therefore, it does not have to prove that prejudice would occur beyond any doubt. However, it is not sufficient for an institution to put forward unsupported speculation or opinion.
- Public institutions must also be able to provide some evidence from which it can then use as a basis for its decision on whether or not to grant the FOIA application.

Under the Act, there are three alternative parts to the injury test. These are:

i. "may "

Subject to any discretion to disclose granted by the exemption, the FOIA application shall be denied if disclosure of the information may cause harm to the activities or purposes specified in the exemption. Therefore, if the public institution considers that the injury may occur it would need to show that there is a fair but not a remote possibility of that injury occurring.

ii. "Reasonably expected"

Subject to any discretion to disclose granted by an exemption, the FOIA application shall be denied if the information could reasonably be expected to cause harm to the activities or purposes specified in the exemption. In this instance, a public institute needs to demonstrate that the expectation of injury is reasonable, likely and more probable than not. Therefore, the evidential burden for demonstrating this reasonable expectation is stronger than when considering whether injury may occur.

Iii. "would"

Subject to any discretion to disclose granted by an exemption, the FOIA application shall be denied if the information would cause harm. In this instance, the public institute needs to demonstrate that harm caused by disclosure to the specified purpose of the exemption is both real and significant. The evidential burden for demonstrating that harm would occur is therefore stronger than when considering whether injury may, or be reasonably expected to occur.

4.1.4 Information already publicly available

It will be extremely difficult for a public institution to argue the harmful effects of disclosing information if it is already in the public domain. However, a public institution may legitimately decide to withhold information which can cause injury in combination with another piece of information which has already been put in the public domain.

4.2 PRACTICAL ADVICE

Some FOIA applications may present difficulties in making a well-informed decision on whether disclosure would result in the harm specified in the exemption. In these cases, it is prudent for FOIA Officials to extend the 7-day time limit and seek legal or specialist advice.

CHAPTER 5: CONDUCT OF INTERNATIONAL AFFAIRS AND DEFENSE OF THE FEDERAL REPUBLIC OF NIGERIA (FRN)

5.1 OVERVIEW OF SECTION 11

Section 11 actually contains two sub-exemptions: a sub-exemption for information whose disclosure may be injurious to the conduct of international affairs; and another sub-exemption for information whose disclosure may be injurious to the defense of the FRN.

5.1.1 THE CONDUCT OF INTERNATIONAL AFFAIRS

Section 11 provides for information to be exempt if its disclosure may injure or harm the conduct of international affairs. International affairs would mean:

- Relations between the FRN and any other country.
- Relations between FRN and any international organisation, or international court.
- The overseas interests of the FRN.
- the promotion or protection by the FRN of its interests and citizens abroad

It is important to note that, the injury caused by disclosure must be to the interests of Federal Republic of Nigeria itself rather than simply to the public institution which holds the information.

5.1.2 Information covered by the International Affairs exemption

Many public institutions carry out functions and activities that, relate directly to, or have the potential to affect, the conduct of international affairs of the FRN. For example, the Ministry of Foreign Affairs, Ministry of Trade and Investments, Nigerian National Petroleum Company, The Economic and Financial Crimes Commission, and the Ministry of Justice will receive applications for information, the disclosure of which may be exempt under section 11 if it may injure the conduct of international affairs or interests of the FRN.

The international affairs of the FRN would cover a wide range of issues, such as:

- Communications between public institutions in Nigeria and other states, international organisations or organs of other states
- The exchange of political views between FRN and other countries.
- FRN policy and strategic positioning in relation to other states or to international organisations like the United Nations, ECOWAS etc.
- Diplomatic matters between Nigeria and other countries.
- International trade partnerships.
- Consular matters in relation to Nigerian citizens abroad or visitors to Nigeria.
- State visits by overseas Heads of State, officials and Ministers of foreign countries.
- International funding matters with the IMF, World Bank and other similar organisations.
- Cases before the International Courts.

The exemption does not necessarily focus on the scale or importance of the issue or

on the subject or type of the information, but on whether the conduct of international affairs of the FRN may be harmed through the disclosure of the information relating to the issue.

Section 11 would only apply if the disclosure of information held by a public institution may harm the conduct of international affairs of the FRN and not a State within the FRN. For example, the disclosure of direct negotiations between Delta State and the WHO would not necessarily harm the conduct of international affairs of the FRN. However, if it was part of a programme involving the Federal Ministry of Health, the disclosure of certain information held by the Delta State Ministry of Health might harm FRN's contribution or policy regarding the programme.

5.1.3 Injury to the conduct of international affairs

For Section 11 to be engaged, there are three issues that need to be resolved. Firstly, it has to be considered if the information requested relates to the conduct of international affairs of the FRN. Secondly, it is necessary to establish the nature of the injury (or the stated harm) that might result from the disclosure of the requested information. Thirdly, the public institution must then determine and demonstrate that disclosing the requested information may harm the conduct of the international affairs of the FRN. Section 11 is engaged after the institution has determined that disclosure may harm the conduct of international affairs. The public institution should then proceed to apply the public interest test. However, if the harm cannot be established (and the exemption is not engaged) the application must be granted and the record disclosed. For example, the Ministry of Foreign Affairs may hold an unfavourable assessment of the political situation of a close ally. It may reasonably judge that disclosure of this assessment may exacerbate those political difficulties, leading to a deterioration of the relationship between the FRN and the ally. On the other hand, the same ministry may hold a similar assessment about a state with which it has less friendly relations, and disclosure might not harm the relationship between FRN and that other country. However, if disclosure would lead to attacks on Nigerians resident in that country, it will be prudent to rely on the exemption.

In its refusal notice to the applicant, the public institution must explain the detrimental effects of disclosure to the conduct of international affairs of the FRN. Under this exemption, it is sufficient if the public institution demonstrates the fair (but not remote) possibility that disclosure of the requested information may be capable of causing harm to the conduct of international affairs. Whether injury may occur is to be decided on a case-by-case basis. The injury test is a dynamic concept and different levels of injury will occur at different times according to the varying circumstances affecting the international affairs of the FRN.

5.2. THE DEFENSE OF THE FRN

Section 11 also provides for information to be exempt if its disclosure may be injurious or harmful to the defense of the FRN. In basic terms, information will be covered by this exemption if its disclosure may assist an enemy or a potential enemy of the FRN. Therefore the likelihood of harm does not have to be very high.
The defense exemption is subject to the public interest test (see below). This means

that even if it is considered that disclosure of information might assist an enemy, the public authority holding the information must consider whether there is a stronger public interest in its disclosure.

5.2.1 Information covered by the Defense Exemption

It is important to understand that, this exemption is not for defense information but for information whose disclosure may harm the defense of the FRN. Therefore information about weaponry, troop deployments, the state of alert of the Armed Forces, etc might be expected to be covered by the exemption. There may be other information, for instance information as to the communications network of the armed forces that might assist an enemy in some circumstances.

It should not also be assumed that the information covered by the exemption will only be held by the Ministry of Defence (MoD) or the armed forces. For instance, there may be information held by the Nigerian Civil Defence Corps, Nigerian Immigration Services, and the National Emergency Management Authority which may be covered.

5.2.3 Injury to the defense of the FRN

In assessing the likelihood of harm that a disclosure of information might cause to the defense of the FRN, it will be necessary to identify the particular injury that may arise. For example, the disclosure of information about the reliability of a piece of military equipment might be covered by the exemption if it would enable an enemy to sabotage that equipment but not if the weakness was impossible to exploit or if it were one that was impossible to conceal.

The timing of a disclosure is also likely to be crucial. Information which might harm the effectiveness of a military or defense operation might cause no harm once the operation had been concluded. This is not an absolute rule, and there will certainly be many cases where the disclosure of information about the tactics or weaponry involved in a successful operation might harm the chances of success in a similar operation in the future.

When assessing whether disclosure might harm the defense of the FRN, consideration should also be given to what information is already in the public domain. Where the same information is available from other reliable sources, e.g. The “Soja Magazine” for the army, it would be difficult to argue that repeated disclosure might cause injury. By contrast, where the information available from is of a more speculative nature (even though, in fact, true), then it will be easier to argue the injury. Similarly, a public institution may legitimately decide to withhold information, which may cause injury in combination with another piece of information which has already been put in the public domain.

5.3 THE PUBLIC INTEREST TEST

Section 11 is a qualified exemption. This means that even if the information is exempt because of the likelihood of harm, the public institution must determine public interest test by weighing the benefits of the disclosure of information against

the harm that might be caused to the conduct of international affairs or the defense of the FRN. Where the public interest for disclosure is evenly balanced against the harm that might be caused, information may be NOT be disclosed.

The Act does not list the factors that would favour disclosure. However it is suggested that among the factors that would weigh in favour of disclosure are:

- Furthering the understanding and participation in the public debate of issues of the day.

- Promoting accountability and transparency by public authorities for decisions taken by them.

- Promoting accountability and transparency in the spending of public money.

- Allowing individuals, companies and other bodies to understand decisions made by public institutions affecting their lives.

- Bringing to light information affecting public health and safety.

Applying the public interest test means weighing the harm that is identified in a particular exemption against the wider public interest that may be served by disclosure. The test must be applied on a case-by-case basis. For example, the an application may be made to the Federal Ministry of Aviation (MoA) to disclose all information concerning negotiations with the UK over the issue of airline landing rights and tax surcharges. The MoA can argue that, premature disclosure of this information might harm the outcome of those negotiations and might result in damage to the relations between the FRN and the UK. The exemption would then apply. However, the Nigerian public also has a clear interest in knowing whether the bi-lateral landing agreements bring any benefits to the Nigerian public as claimed. Therefore, the MoA must consider whether in this particular case, there may be a stronger public interest in disclosing the information, despite the harm that may be caused, since disclosure will inform public debate and promote understanding of how the MoA (and by extension, the FRN) conducts its international affairs for the benefit of Nigerians.

5.4 DISCLOSURE OF INFORMATION

It is important to note that section 11 (1) provides the public institution with a discretion to grant the information application as there is no obligation to rely on the exemption and withhold the information. This discretion would still persist even where the exemption is used and the public interest in disclosure does not outweigh the injury stated in the exemption. Therefore there is no obligation to refuse an application and withhold the record. However, in these circumstances, it is advised that the Chief Executive of the institution should exercise this discretion after consideration of the injury that may arise from disclosure and the results of the public interest test.

5.5 PRACTICAL ISSUES

Public institutions intending to rely on section 11 should consider whether there is an interaction between section 11 and section 12 (1) (a) (iv) i.e. information that will disclose the identity of a confidential source as confidential information may have been obtained from another country, or source. Public institutions relying on this exemption should also take appropriate legal advice on general questions of law, such as the law of confidence and the interpretation of international agreements and defense contracts.

In addition, when applying section 12 (1) (a) (iv) to information that may have international criminal implications, it should be considered whether it might be better to also apply section 14 (1) (e) which exempts information revealing the identity of persons who file complaints or provide information to agencies on the commission of crime.

Finally, when dealing with an application for information that may have implications on the defense of the FRN, it is prudent to consult with relevant officials in the MoD or the armed forces or the appropriate institution who may be able to assist in judging whether it is appropriate to rely upon the Defense Exemption.

CHAPTER 6: LAW ENFORCEMENT AND INVESTIGATION

6.1 OVERVIEW OF SECTION 12

Section 12 of the FOIA sets out an exemption from the right of access to records if the information requested is used for law enforcement and investigation activities. Section 12 is a qualified exemption. Therefore the public institution would need to engage the exemption by demonstrating the detrimental effects of disclosure on the purposes / activities specified in the section before going on to determine the public interest test.

6.1.1 What information might be covered?

Information falls within the exemption if disclosure harms a range of law and administrative and law enforcement activities. In considering the application of this exemption, a public institution should concentrate on the negative effects of disclosure in order to assess whether there is any likely injury to the activities listed in the exemption.

The activities and events covered by the exemption are:

- Pending or actual and reasonably contemplated law enforcement proceedings by any law enforcement or correctional agency. For example, the Nigerian Police or NDLEA.
- Pending administrative enforcement proceeding conducted by **any** public institution. For example, a disciplinary panel.
- The fair and impartial trial of any person.
- Maintaining the secret identity of a confidential source.
- The personal privacy of any person except it is in the greater public interest to do so.
- Ongoing criminal investigations.
- Security of penal institutions, such as the various prisons and detention centers.

A public institution may also deny an application for information that could reasonably be expected to facilitate the commission of an offence.

6.2 DEALING WITH SECTION 12

There are two issues that need to be considered when dealing with the injury-based exemption in section 12. Firstly, it is necessary to establish that the information requested is covered by the exemption. Secondly, the public institution must then determine and demonstrate that disclosing the requested information would harm the activities contained in section 12 (1) (a), or could reasonably be expected to facilitate the harm identified in section 12 (1) (b) and 12 (3). After the harm has been determined, the exemption is engaged and the public institution must then proceed to apply the public interest test.

On the other hand, if the harm cannot be established (and the exemption is not engaged) the application must be granted and the record disclosed.

6.2.1 The Injury Test

A public institution cannot withhold information unless the disclosure would injure any of the purposes or activities listed in the exemption. The injury must be genuine and of substance and its likelihood must be decided on a case-by-case basis.

A public institution must always explain the harm caused by disclosure of the record in its Refusal Notice. A public institution cannot be expected to prove exactly what would happen on disclosure. However, it must be able to provide some evidence from which it can then use in reaching a well-informed conclusion about the nature of harm resulting from disclosure. It is not sufficient for an institution to put forward unsupported speculation or opinion.

In Section 12, there are two alternative parts to the injury test. These are:

i. "would"

Section 12 (1) (a) (i) – (vi) provides that, the FOIA application may be denied if the information would harm the activities or events specified within the sub-section. In this instance, the public institute needs to demonstrate that harm is real and significant. The evidential burden for demonstrating that harm would occur is therefore stronger than it is when considering whether injury may reasonably be expected to occur.

ii. "reasonably expected"

Section 12 (1) (b) and 12 (3) provides that, the FOIA application may be denied if the information could reasonably be expected to facilitate the commission of an offence. In this instance, a public institute needs to demonstrate that the expectation of harm is reasonable, likely and more probable than not.

6.2.2 Information already publicly available

It will be extremely difficult for a public institution to argue the harmful effects of disclosing information if it is already in the public domain. However, a public institution can legitimately decide to withhold information which may cause injury in combination with another piece of information which has already been put in the public domain.

6.3 THE PUBLIC INTEREST TEST

Section 12 is a qualified exemption, and so, even if disclosure would be likely to injure one of the law enforcement activities or purposes, a public institution must still go on to consider whether the public interest in disclosure outweighs whatever injury disclosure will cause. The test must be applied on a case-by-case basis to the actual information application.

The following examples may illustrate the above point. Section 12 (3) exempts the disclosure of information that could reasonably be expected to facilitate the commission of an offence. An information application is received by the NDLEA to disclose the technical data of the equipment it deploys at the Nnamdi Azikwe International Airport. NDLEA may consider that disclosure of this information can be

reasonably expected to facilitate drug smuggling using the airport because drug pushers may be able to make use of this information to smuggle hard drugs out of the country. It is therefore relevant to at least consider the exemption. However, the risk of assistance being given to drug smugglers must be weighed against the general public interest in openness, important aspects of which include promoting accountability and increasing participation in public debate about matters of public policy such as crime prevention. It may also be beneficial for the Nigerian public to know whether or not the airports are very secure and well covered by the NDLEA. In this example, the NDLEA may refuse this application by arguing that the public interest to disclose does not outweigh the reasonable expectation that disclosure would facilitate drug smuggling.

A second application is for information about the number of operatives deployed in the same airport. There is also the same public interest in: openness and accountability, for the public to be assured that the airports are well covered by NDLEA, and that Nigeria is not being used as a conduit in international drug trafficking. On the other hand, the NDLEA may argue that knowledge of their deployment may be used to facilitate drug smuggling. However in this case, the NDLEA may decide that the risk presented in the first information application is considerably stronger than in this second application and as a result the public interest to disclose could outweigh the injury in disclosure.

For more advice see Public Interest Test (Chapter 3).

6.4 DISCLOSURE OF INFORMATION

It is important to note that section 12 (1) provides the public institution with a discretion to disclose the record or information as there is no obligation to rely on the exemption. This discretion would still remain after the exemption is used and the public interest in disclosure does not outweigh the injury or harm stated in the exemption. Therefore there is no obligation to refuse an application and withhold the record. However, in these circumstances, it is advised that, only the Chief Executive of the institution should exercise this discretion after due consideration of the injury that may arise from disclosure and the results of the public interest test.

CHAPTER 7: PERSONAL INFORMATION

7.1 OVERVIEW OF SECTION 14

Section 14 of the FOIA sets out an exemption from the right of access to records if the information requested is personal information. Personal information can be in any form, including electronic data, images, and paper files or documents. This exemption is designed to address the tension between the public right to access official information and the need to protect the right to privacy of an individual. This tension is demonstrated by the fact that, while the Act requires public institutions to release information unless it is exempt[5]; wrongful release of an individual's personal information can breach the right to privacy. It is therefore very important to understand and apply this exemption correctly.

Section 14 is a qualified exemption, designed to protect all information listed in section 14 (1) (a) – (e). However, under this exemption, it has already been pre-determined that disclosure of personal information would harm the right to protect the privacy of an individual. Therefore, a public institution is not required to demonstrate that release of the information would cause an identified harm before it considers the public interest test.

7.2 IS THE INFORMATION PERSONAL INFORMATION?

The first step is to determine whether the requested information is covered by, or belongs to the class of information contained in section 14 (1). Personal information and information exempted include:

- Files and personal information maintained with respect to individuals receiving social, medical, educational, vocational, financial, supervisory or custodial care or services directly or indirectly from public institutions.
- Personnel files and personal information maintained in relation to employees, appointees or elected officials of public institutions or applicants for such positions.
- Files and personal information held by any government of public institution dealing with professional or occupational registration, licensure or discipline.
- Tax information required from an individual unless disclosure is authorised by another statute.
- Information revealing the identity of 'whistleblowers' and other persons who file complaints to administrative, investigative, law enforcement or penal agencies on the commission of any crime.

Section 14 also makes it compulsory for personal information to be disclosed if:

- The individual to whom the information relates consents to its disclosure.
- The information is publicly available. However, a public institution may legitimately decide to withhold personal information which may cause injury to the person in combination with another piece of information which has already been put in the public domain.

[5] Section 7 (5) imposes a penalty of N500, 000.00 for wrongfully withholding information and a breach of the Act.

7.3 THE PUBLIC INTEREST TEST

A public institution must refuse an application for information unless the public interest in disclosure clearly outweighs an individual's right to privacy. In determination of this issue, the legitimate interests of the public in disclosure need to be balanced against the protection of the privacy of the individual whose information it is. For example, in promoting accountability and transparency in the spending of public money there will be occasions where the requirement to demonstrate accountability and transparency in the spending of public funds will outweigh the rights of a person. Therefore, regard can be had to the general benefits of transparency and accountability, which arise from the disclosure of information by public bodies and also to the specific circumstances of individual cases.

For further advice on the factors in favour of disclosure under the public interest test see Chapter No. 3

7.4 PROTECTION OF THE PRIVACY OF THE INDIVIDUAL

In considering the protection of the privacy of the individual against the public interest in disclosure, it is important that full consideration should be made on the following:

7.4.1 Fairness

Fairness can be a difficult concept to define. In the context of disclosing personal information under the Act it will usually mean considering:

- The possible consequences of disclosure on the individual. Personal information should not be disclosed if it would have an unjustified adverse effect on the individual concerned. For example, it will be unfair and unjustified to disclose the home addresses and private telephone numbers of security services intelligence officers as it may put them (and their family members) at risk from terrorist attacks.
- The reasonable expectations of the individual, taking into account expectations both at the time the information was collected and at the time of the request. For example, were assurances given to the individual when he provided the information that, it would not be disclosed to the public? It would be also be generally unfair and unjustified to disclose information of an individual's medical condition.
- There will often be circumstances where due to the nature of the information and/or the consequences of its being released, the individual will have a strong expectation that information will not be disclosed. For example, it is a reasonable expectation that, the internal disciplinary matters of an individual will remain private.

- The circumstances in which the information was obtained as the expectations of an individual will also be determined by the circumstances in which the information was initially obtained. For example, where a "whistleblower" provides solid information to the relevant authorities on the corruption within his public institution, the whistleblower would not normally expect their identity

to be revealed to the person who has allegedly committed the corrupt act.

7.4.2 Private v Public Life

The expectations of an individual will be influenced by the distinction between his or her public and private life. It is generally accepted that, where individuals perform public functions, hold elective office or spend public funds they should have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives. This means that it is more likely to be fair to release information that relates to the professional life of the individual. It will still be a matter of degree as, for example, there may be an expectation that information relating to personnel matters would not be disclosed. Other factors to take into account when considering the fairness of disclosure in this context will include:

- the seniority of the role.
- whether the role is public facing.
- whether the position involves responsibility for making decisions on how public money is spent.

7.4.3 Press Articles

It may not be fair to disclose information where it is in the public domain only by virtue of an article in the press. Public institutions must consider whether the article is: mischievous, contains substantiated information or is merely speculative and the full background context of the article, before it can make a well-informed decision on whether information can be said to be publicly available.

7.5 DISCRETION TO DISCLOSE INFORMATION

Under section 14, there is no discretion to disclose. Therefore, once the information is personal information and it is determined that the public interest in disclosure does not clearly outweigh the harm specified, the public institution MUST withhold the information.

CHAPTER 8: THIRD PARTY INFORMATION

8.1 OVERVIEW OF SECTION 15

Section 15 of the FOIA sets out an exemption from the right of access to records if the information requested is third party information. Section 15 contains both injury-based and absolute exemptions. For the injury-based exemptions, the public institution would need to engage the exemption by demonstrating that harm will occur to the purposes / activities specified in the section before proceeding to deal with the public interest test. Information covered by an absolute exemption is exempt from disclosure without the need to consider the public interest test.

8.2 WHAT INFORMATION IS COVERED BY SECTION 15?

8.2.1 Injury-based third party information. Section 15 (1)

Subject to the public interest test, a public institution shall not disclose any information that contains:

- Any trade secret and commercial or financial information obtained from a person or business where such information is proprietary, privileged or confidential; or proprietary, privileged or confidential trade secret, commercial or financial information which may cause harm to the interests of a third party. This information can be disclosed if the person or business that provided the information consents to its disclosure.
- Information which could be reasonably expected to interfere with the contractual or other negotiations of a third party.
- Proposal and bids for any contract, grants, or agreement, including information which if it were disclosed would frustrate procurement or give advantage to any person.

8.2.2 Absolute third party exemption. (Section 15 (2).

A public institution shall not disclose any third party information that forms part of a record containing the result or product of environmental testing carried out by or on behalf of a public institution. As an absolute exemption, there is no need to consider whether there might be a stronger public interest in disclosing the information than in not disclosing it. The information is either exempt or it is not. Absolute exemptions contain an inbuilt prejudice test. This test means that the harm to the public interest which would result from the disclosure of the information has already been established.

8.3 DEALING WITH SECTION 15 (1)

There are two issues that need to be considered when dealing with the injury-based exemption in section 15. Firstly, it is necessary to establish that the information requested is third party information. Secondly, the public institution must then determine and demonstrate that disclosing this information may, or would, or could reasonably be expected to cause the harm identified in the exemption. After the harm has been determined, the exemption is engaged and the public institution must then proceed to apply the public interest test.

On the other hand, if the harm cannot be established (and the exemption is not

engaged) the application must be granted and the record disclosed.

8.3.1 Trade Secret

The Act does not define the term "trade secret". This term has a fairly wide meaning and will cover: secret formulae or recipes; the names of customers and the goods they buy; and a company's pricing structure (if these are not generally known and are the source of a trading advantage) to name a few. For a trade secret to be covered by the exemption in Section 15 (1), it must have the essential elements of being proprietary, privileged and confidential.

8.3.2 Commercial and financial information

Likewise, commercial and financial information covers a broad range of information such as bank statements, advertising budgets, etc. Commercial or financial information is generally held for the purpose of finance, budgets, exploiting business opportunities, advertising, and statutory or regulatory compliance. For commercial and financial information to be covered by the exemption in Section 15 (1), it must be proprietary, privileged and confidential.

8.3.3 Contract bid or proposal

It should not be difficult to determine if the information is a proposal or bid for a contract, grant or agreement because it would generally be determined from a careful review of the information.

Once the information is found to be third party information, then subject to the public interest test, the public institution must deny the application and withhold the information.

8.3.4 Test of injury under Section 15(1)

Section 15 (1) primarily deals with the disclosure of information, which has an effect on a person or business commercial and financial interest. Therefore in deciding whether the release of the information may, or would, or could be reasonably expected to harm someone's commercial interests it will be necessary to examine fully all the circumstances in question. For example whether the price of goods is commercially sensitive and a trade secret will depend on a number of factors. Releasing information on the price of goods purchased from an internet site freely available to all would not necessarily prejudice the supplier's commercial interests. The price submitted by a contractor is likely to be commercially sensitive during the bidding process, but less likely to be so once all bids have been formally opened to all bidders as required by the Public Procurement Act, or after the contract has been awarded.

A public institution cannot be expected to prove exactly what would happen on disclosure. However, it must be able to provide some evidence from which it can then utilise to come to a well-informed conclusion about the nature of harm that may result from disclosure. It is not sufficient for an institution to put forward unsupported speculation or opinion.

In Section 15 (1), there are three alternative parts to the injury test. These are:

i. "may cause harm"

Section 15 (1) (a) states that, the FOIA application shall be denied if disclosure of the information may cause harm to the interest of the third party. Therefore, if the public institution considers that the injury may occur it would need to show that there is a fair but not remote possibility of that injury occurring.

ii. "Reasonably expected"

Section 15 (1) (b) provides that, the FOIA application shall be denied if the information could reasonably be expected to interfere with the contractual or other negotiations of a third party. In this instance, a public institute needs to demonstrate that the expectation of interference is reasonable, likely and more probable than not. The evidential burden for demonstrating reasonable expectation is therefore stronger than it is when considering whether injury may occur.

Iii. "would"

Section 15 (1) (c) provides that, the FOIA application shall be denied if the information would frustrate procurement or give an advantage to any person. In this instance, the public institute needs to demonstrate that the frustration to a fair procurement process is real and significant. The evidential burden for demonstrating that harm would occur is therefore stronger than it is when considering whether injury may or be reasonably expected to occur.

8.3.5 Information already publicly available

It will be extremely difficult for a public institution to argue the harmful effects of disclosing information if it is already in the public domain. However, a public institution may legitimately decide to withhold information which may cause injury in combination with another piece of information which has already been put in the public domain.

8.4 THE PUBLIC INTEREST TEST

Section 15 (4) provides for a different mechanism for dealing with the public interest test. Firstly, the only factors to be considered in determination of where the public interest lies are those of: public health, public safety or protection of the environment. Therefore, if disclosure is not in the public interest as it relates to these particular factors, the application must be denied and the information withheld. Secondly, the information can only be disclosed if the public interest in public health, public safety or the protection of the environment clearly outweighs in importance any financial loss or gain to, or prejudice to the competitive of, or interferes with contractual or other negotiation of a third party.

8.5 DISCRETION TO DISCLOSE INFORMATION

Under section 15, there is no discretion to disclose. Therefore, once the information is third party information and engaged, the harm has been established, and it is determined that the public interest in disclosure does not clearly outweigh the harm specified, the public institution MUST withhold the information.

8.6 PRACTICAL ISSUES

8.6.1 Consultation

In order to determine whether the disclosure of information would prejudice a commercial interest, a public institute should consult with the parties likely to be affected by any disclosure. Time is, however, likely to be limited since the public institute must decide whether the exemption applies within 7 days. Therefore, the institute should use Section 6 of the Act to extend the time limit by another 7 days. The failure of the third party to respond to the consultation does not remove the obligation to respond within the statutory time limits.

NOTE: **Although public authorities should consider the views of the affected party, it is the responsibility of the public institute to decide whether or not the exemption applies. The public institute can only withhold information if is satisfied that any arguments for withholding the information are justified.**

8.6.2 Review of Contracts/Confidentiality Clauses

There are instances where contracts between public institutes and contractors may have confidentiality clauses. It is important these clauses are carefully evaluated. It is also possible that these confidentiality clauses will reveal the injury that may be caused to the contractor. When faced with the interpretation of these clauses it is always prudent to seek specialist or legal advice.

CHAPTER 9: PROFESSIONAL AND OTHER PRIVILEGES CONFERRED BY LAW.

9.1 OVERVIEW OF SECTION 16

Section 16 of the FOIA sets out an exemption from the right of access to records if the information requested is protected by professional privilege or other statutory privilege. Privilege refers to the legal right to refuse to disclose information obtained in a professional or other confidential relationship. Under this exemption a public institution may deny an application for information that is subject to any of the confidential relationships specified in the Act.

9.2 WHAT INFORMATION IS COVERED BY THE EXEMPTION?

A public institution may deny an application for information that is subject to the following privileges:

9.2.1 Legal Practitioner – client privilege

Legal privilege (LP) covers all communications between lawyers and their clients for the purpose of obtaining legal advice, and other documents created by or for lawyers for the purpose of litigation. Legal privilege would also cover advise from:

- external lawyers to a public institution.
- the in-house lawyer employed in the legal department of a public institution.
- legal advise from the Ministry of Justice.

Legal privilege is not defined in the Act, or in any other legislation. It is a common law concept shaped by the courts over time. LP is intended to provide confidential space between professional legal advisers and their clients that is free from public scrutiny. This space enables full and frank openness between them, which safeguards the provision of fully informed, realistic and frank legal advice, including potential weaknesses and counter-arguments. Therefore, it is safe to conclude that LP is fundamental to the administration of justice.

9.2.2 Health workers – client privilege

Health privilege covers all communication between health worker and their patients or clients. It is intended to provide confidentiality between health workers and their patients to ensure complete openness between them in order to enable efficient prognosis, a fully informed diagnosis of medical condition, and ensure effective medical treatment. The term health worker is not defined in the Act, but it will include doctors, nurses, and dentists. The essential element of a health worker is that the person is medically qualified, and is medically involved in providing physical and mental medical treatment to a patient/client. So it would not cover administrative or personnel management communications.

9.2.3 Journalism confidentiality privileges (JP)

JP is the right to refuse to divulge sources of information; and/or disclose the actual or entire content of the information provided by these confidential sources. The ultimate purpose of this exemption is to protect journalistic integrity by carving out a creative and journalistic space for journalist to engage in their profession free from

the interference and scrutiny of the public. It can be argued that invasion of this space is a restriction on a journalists' ability to exercise and facilitate free speech. JP also provides effective protection and encouragement to sources of information who are comforted by the fact that, providing information to journalists will not have a detrimental effect on them. JP is essential to the maintenance and effectiveness of the "fourth estate of the realm".

9.2.4 Other statutory professional privileges

To determine whether any professional privilege has been conferred by an Act, it is necessary to undertake a careful evaluation of the conferring Act to confirm that the nature and exact conditions of the conferred privilege.

9.3 INJURY TEST AND THE PUBLIC INTEREST TEST

As an absolute exemption, there is no need to consider whether there would be any injury caused by disclosing the requested information; or, whether there might be a stronger public interest in disclosing the information than in not disclosing it. Information covered by section 16 is either exempt or it is not. Absolute exemptions contain an inbuilt prejudice test. This test means that the harm to the public interest that would result from the disclosure of information falling within an absolute exemption has already been established.

9.4 DISCLOSING INFORMATION

It is important to note that section 16 provides a public institution with the discretion to disclose the information as there is no obligation on a public institution to rely on the exemption. Therefore there is no obligation to refuse an application and withhold the record. However, as a result of the legal and potential devastating consequences of a wrongful disclosure of information covered by privilege, it is advised that, the Chief Executive of a public institution should approve the disclosure of privileged information after taking specialist and other legal advice.

CHAPTER 10: COURSE OR RESEARCH MATERIAL

10.1 OVERVIEW OF SECTION 17

Section 17 of the FOIA sets out an exemption from the right of access to records if the information requested contains course or research materials prepared by faculty members.

10.2 WHAT INFORMATION IS COVERED BY THE EXEMPTION?

10.2.1 Course material

The term course material is not defined in the Act. However, this term will include any academic material prepared in furtherance of a curriculum offered by an institution of higher learning such as: universities, polytechnics, and other specialist academic or professional institutes like the Institute of Advance Legal Studies, National Institute of Policy and Strategic Studies and National Institute of Policy and Strategic Studies, to name a few, ("tertiary institution").

10.2.2 Research material

Research material connotes records produced from a systematic investigation undertaken by an academic member of a faculty of a tertiary institute ("Lecturer") to establish facts, solve new or existing problems, prove new ideas or develop new theories.

10.3 PURPOSE OF THE EXEMPTION

The ultimate purpose of this exemption is to protect academic integrity and the pursuit of academic and professional excellence for lecturers by carving out a scholastic and research space for lecturers to impart knowledge to their students, and contribute to the knowledge base of the country. It can be argued that this space is integral to the skills, knowledge and manpower development of the country.

10.4 INJURY TEST AND THE PUBLIC INTEREST TEST

As an absolute exemption, there is no need to consider whether there would be any injury caused by disclosing the requested information; or, whether there might be a stronger public interest in disclosing the information than in not disclosing it. Information covered by section 17 is either exempt or it is not. Absolute exemptions contain an inbuilt prejudice test. This test means that the harm to the public interest that would result from the disclosure of information falling within an absolute exemption has already been established.

10.5 DISCLOSING INFORMATION

It is important to note that section 17 provides a public institution with the discretion to disclose the record, as there is no obligation on a public institution to rely on the exemption and refuse an application by withholding the record. However, as a result of the consequences of a wrongful disclosure of information, it is prudent that only the Chief Executive of a public institution should exercise this discretion after evaluating the information and taking specialist advice.

CHAPTER 11: DISCLOSURE OF RECORDS

11.1 OVERVIEW OF SECTION 19

Section 19 of the FOIA sets out an exemption from the right of access to certain specified records held by public institutions.

11.2 WHAT INFORMATION IS COVERED BY THE EXEMPTION?

11.2.1 Test questions, scoring keys and examination data ("test data")

A public institution may refuse to disclose test data used to: administer an academic examination, or determine the qualifications of an application for a license or employment. The purpose of this sub-exemption is to ensure that the assessment of students and applicants for a license or employment is conducted in an atmosphere that guarantees fairness and impartiality. Therefore, it can be argued that the disclosure of test data information may give certain students, applicants and candidates an advantage over others, which will prejudice the fairness and impartiality of the assessment procedure.

11.2.2 Architects and engineering plans (Design plans") for buildings not constructed in whole or part by public funds ("Private buildings")

Architects and engineers are paid to deploy their skills in designing unique and bespoke buildings for their clients. Under the planning laws, these design plans have to be submitted to various public institutions (for example, the Development and Control Department of the Federal Capital Development Authority) for planning permission and building approval. It can be argued that disclosure of these plans would prejudice the professional integrity of architects and engineers because it would enable people to freely copy these designs, thereby infringing the professional skills and ingenuity utilised; and the right of an architect or engineer to be adequately remunerated for their professional work. It can be argued that the protection of this professional skill is integral to the professional development of architects and engineers in the country.

Additionally, this protection also has public safety implications. While a design plan may be suitable for a particular area, its mindless reproduction (through copying) and use in another area may be dangerous and lead to unsuitable and unsafe buildings.

11.2.3 Architects and engineering plans for publicly funded buildings ("Public buildings")

In addition to the arguments above, the disclosure of design plans of public buildings may have security implications as it can be utilised by terrorists and criminals to commit offences; and may also facilitate espionage by intelligence agents of foreign countries. A public institution should disclose the design plans for a public building if the disclosure would not compromise security.

11.2.4 Library circulation and other records

Libraries play an important role in the literary and cultural education of the public by providing the public with easy and often free access to information and publications. This important role would be injured if libraries were forced to disclose records that would identify library users with specific material. The purpose of this sub-exemption is to provide an atmosphere where the public can freely satisfy their quest for knowledge with the full expectation that their choice of publication, books, reading material or research would not be used to discriminate against them or harm them in any way. It can be argued that disclosure of any record that identifies users with specific material would prejudice library usage in the country.

11.3 DEALING WITH SECTION 19

There are two alternative issues that need to be considered when dealing with the qualified exemption in section 19. Firstly, it is necessary to establish whether the information requested falls within the class of information relating to private buildings. Once it falls into this class of information the exemption is engaged and the public institution must proceed to consider the public interest test. In the case of public buildings, the public institution must determine and demonstrate that disclosing the requested information would compromise security. Once this harm (or compromise to security) has been determined, the exemption is engaged and the public institution must then proceed to apply the public interest test.

If the harm cannot be established (and the exemption is not engaged) the application must be granted and the record disclosed.

11.3.1 Test of injury Section 19 (b)

This subsection deals with the denial of disclosure, which would compromise security. Security is not defined in the Act but it is accepted as a state of being secure. Therefore this term can be applied widely to include: personal security, the security of public institutions, public security, national security, and so on.

In deciding whether the release of the information would have this detrimental effect on security, it will be necessary to consider the application within a full background context by examining all the circumstances in question. For example, a request for access to the design plans of the National Tourism Development Commission head office would not necessarily compromise the security of the commission or the nation and can be disclosed. On the other hand, it can be argued that, disclosure of the design plans for the State Security Services Headquarters would compromise national security.

A public institution cannot be expected to prove exactly what would happen on disclosure. However, it must be able to provide some evidence from which it can then utilise to come to a well-informed conclusion about the nature of harm that may result from disclosure. It is not sufficient for an institution to put forward unsupported speculation or opinion.

Section19 (1) (b) provides that, the FOIA application may be denied if the

information would compromise security. In this instance, the public institute needs to demonstrate that the compromise to security is real and significant.

11.3.2 Information already publicly available

It will be extremely difficult for a public institution to argue the harmful effects of disclosing information if it is already in the public domain. However, a public institution may legitimately decide to withhold information which may compromise security in combination with another piece of information which has already been put in the public domain.

11.4 THE PUBLIC INTEREST TEST

Section 19 provides that, a public institution shall disclose information where the public interest in disclosure outweighs whatever injury that disclosure will cause.

11.4.1 FACTORS IN FAVOUR OF THE DISCLOSURE OF INFORMATION

After a careful evaluation of judicial decisions regarding the issue of the public interest test, the following public interest factors that would encourage the disclosure of information have been distilled:

- Furthering the understanding of and participation in the public debate of issues of the day. This factor would come into play if disclosure would allow a more informed debate of issues under consideration by the Government (Federal or State level), or a local government council.
- Promoting accountability and transparency by public institutions for decisions taken by them.
- Promoting accountability and transparency in the spending of public money. The public interest is likely to be served, for instance in the context of private sector delivery of public services, if the disclosure of information ensures greater competition and better value for money that is public. Disclosure of information as to gifts and expenses may also assure the public of the personal probity of elected leaders and officials.
- Allowing individuals and companies to understand decisions made by public authorities affecting their lives and, in some cases, assisting individuals in challenging those decisions.

This list of factors is not exhaustive and there may be other factors that should be taken into account depending upon the request for information.

11.4.2 FACTORS AGAINST THE DISCLOSURE OF INFORMATION

The public institution can look at whatever injury it believes that disclosure will cause. For instance, there is an obvious public interest that, no person should be deprived of a right to a fair and impartial application for a license and employment. Therefore, if disclosure of information would deprive an individual of this right, it is relevant to consider this exemption and weigh the possible adverse effect of disclosure against the positive benefit of openness and transparency.

11.5 DISCLOSING INFORMATION

Section 19 provides a public institution with the discretion to disclose a record as there is no obligation on a public institution to rely on the exemption and refuse an application by withholding the record. However, as a result of the consequences of a wrongful disclosure of information, it is prudent that disclosure is made only after a careful evaluation of: the information requested, the harm to security that would be caused from disclosure, and a consideration of the public interest test. Consequently, it is advised that the Chief Executive of a public institution should approve the application for information after evaluating the information and taking specialist advice.

11.6 PRACTICAL ISSUES

There may often be information that will be exempt under Section 17 and Section 19 (1) (a). In this instance both exemptions should be utilised. However, as an absolute exemption, it is easier to exempt information under Section 17.

CHAPTER 12: EXCLUDED RECORDS

12.1 OVERVIEW OF SECTION 26

Under Section 1, all public institutions are subject to the Act. However, the application of the Act is excluded and does not apply to information, which is publicly accessible to the applicant by other means.

12.1.1 Purpose of the exclusion

The purpose of the exclusion is that, if there is another route by which someone can obtain information, there is no need for the Act to provide the person with further means of access to records.

12.2 WHAT INFORMATION IS COVERED BY THE EXCLUSION?

The materials excluded from application of the Act are:

- Published material or material available for purchase by the public.
- Library or museum material made or acquired and preserved solely for public reference or exhibition purposes.
- Material placed in the National Library, National Museum or non-public section of the National Archives of the Federal Republic of Nigeria on behalf of any person or organisation other than a government or public institution.

12.3 DEALING WITH SECTION 26

There is only one question to be considered when dealing with Section 26. Is the material listed under this section? If it is, then the material is exempt from the Act. If the information is not listed in the section, then the public institution should deal with the application in accordance with the Act.

12.3.1 Advice and assistance

There is an implied obligation on public institutions to provide reasonable advice and assistance to Applicants. Therefore, when dealing with this section, an institution should make the Applicant aware that the material requested is publicly available by other means, and provide the Applicant with the information or directions on where, and how, the material requested can be assessed.

DATED THIS 15TH DAY OF MARCH, 2012

…….

MR. MOHAMMED BELLO ADOKE SAN, CFR
HONOURABLE ATTORNEY GENERAL OF THE FEDERATION AND MINISTER OF JUSTICE