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## PROMOTING ENVIRONMENTAL JUSTICE IN NIGERIA THROUGH THE RIGHT OF ACCESS TO INFORMATION: SUCCESSIONS AND CHALLENGES

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### 1 Introduction

Legislators always emphasise the procedural element of access to information in human rights legislation, as the recognition and protection of certain rights rely on the quality of information available to lawmakers and those affected by the law. Access to information is the causeway that grants citizens seats at decision-making meetings. Relegating the environment's destiny to a few, whose interests may not extend beyond the benefits of investing in the earth's resources, without consulting the people who will be affected by the potentially irreversible consequences of a proposed activity, plan, or programme violates the fundamentals of democratisation and participation. This reflects the African adage 'you cannot shave the head of a person by proxy', which sums up the futility of attempting to implement any environment-related project without the participation of the people likely to be affected by it. Given that participation in environmental decision-making processes rests on access, interests, and respect, the importance of access to information to the attainment of environmental justice cannot be overemphasised.

Access to environmental information is an aspect of the procedural environmental rights found in domestic and international law. In international environmental law, the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (the Aarhus Convention) and other regional agreements offer a far-reaching international set of rules that provide directions for governments and protect the rights of people to information, participation in environmental decision-making, and justice. At the domestic level, the environmental impact assessment regulations of various countries offer procedures for determining the safety or otherwise

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of projects, and often reflect these procedural rights by requiring that the public be informed about proposed projects and invited to express their views and concerns.

The concept of ecological interest, which is concerned with interest in sustainable economic development, provides a rationale for participation in environmental decision-making and, consequently, access to information. Ecological interest raises a number of subjective premises that underpin the varying perspectives about what is good for the environment and the suitability of the environment for specific purposes. First, although ‘interests’ have swinging characteristics, in the case of the environment, interest gauges along the lines of citizens’ well-being and government responsibilities. Secondly, how the well-being of citizens intersects with the interests of public actors should naturally be mirrored by laws that define the rights and duties of citizens and government, respectively. The third premise of ecological interest, which underpins citizens’ participatory right in environmental decision-making, is the “respect” for the environmental rights of citizens and residents of affected areas. This relationship between ecological interest and participation makes it necessary to examine the extent to which the right of access to information ensures that the participatory right of citizens in decision-making processes is protected under Nigeria’s jurisprudence.

In the preceding chapter, the relationship between the right to access information and the right to share information was discussed in light of the democratic models that emphasise the strengthening of the statutory structures that recognise both rights as *sine qua non* for guaranteeing access to environmental justice in its institutional and substantive form.<sup>1</sup> However, how the right to access information is recognised in the national laws of different African states is not clear enough to guarantee access. In the case of Nigeria, for instance, the Constitution recognises freedom of expression and the press. However, the argument over whether the right to freedom of expression included freedom to access information remained until the Freedom of Information Act was enacted.<sup>2</sup>

1 G Walker *Environmental justice: Concepts, evidence and politics* (2012).

2 Nigeria’s Freedom of Information (FOI) Act was signed into law on 28 May 2011. According to the long title of the legislation, the purpose and objectives of the FOI Act are ‘to make public records and information more freely available, provide for public access to public records and information, protect public records and information to the extent consistent with the public interest and the protection of personal privacy, protect serving public officers from adverse consequences of disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and for related matters’.

This chapter recognises that access to credible, up-to-date information makes for a better understanding of environmental problems and promotes proper techniques and tools for their management. Being one of the pillars of procedural justice, access to information is a prerequisite for environmental awareness, environmental consciousness, and sustainable management of resources.

It is important to note that the commonly used United States Environmental Protection Agency's definition of environmental justice refers to the concept as 'the fair and equitable treatment of all people, regardless of race, ethnicity, income, national origin, or educational level, in the development and implementation of environmental laws, regulations, and policies'.<sup>3</sup> This definition recognises that meaningful public involvement is crucial to formulating equitable environmental policies and effective administrative decision-making.<sup>4</sup> Given that the public cannot meaningfully contribute to decision-making processes without adequate information,<sup>5</sup> access to information is key to ensuring that social equity is incorporated into environmental law and policy-making. Therefore, access to information is an essential determinant of environmental justice.

The right to access information requires governments to act proactively and reactively towards the public by providing information when requested, collating, preparing, and communicating certain information about the environment to members of the public even where no request for such information has been made.<sup>6</sup> In Nigeria, legal instruments such as the National Environmental Standards and Regulation Enforcement Agency (NESREA) Act<sup>7</sup> and the Environmental Impact Assessment Act<sup>8</sup> facilitate access to environmental information by providing information on the exercise of functions, requiring disclosure of information about

3 The United States Environmental Protection Agency 'Environmental justice' <https://www.epa.gov/environmentaljustice> (accessed 1 July 2021).

4 W Kellogg & A Mathur 'Environmental justice and information technologies: Overcoming the information access paradox in urban communities (2003) 63 *Public Administration Review* 573 at 574.

5 Article 19 *The public's right to know: Principles on freedom of information legislation* (1999) 1.

6 G Pring & S Noe 'The emerging international law of public participation, affecting global mining, energy and resource development' in D Zillman, A Lucas & G Pring (eds) *Human rights in natural resources development: Public participation in the sustainable development of mining and energy resources* (2002) 29-30.

7 National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007.

8 Environmental Impact Assessment Act, 2004.

environmentally harmful activities, and demanding that public authorities make environmental information in public registers available.

To gain an understanding of the interpretation and application of the procedural right of access to information in Nigeria, this chapter examines the relationship between the right of access to environmental information and the principle of democracy and analyses the extent to which Nigeria's freedom of information legislation promotes access to information held by public institutions. It also discusses the problems of access to environmental information in Nigeria.

## 2 Access to information as a principle of democracy

It is generally accepted that democracy as a concept promotes majority rule and emphasises the importance of the participation of the people in governance.<sup>9</sup> Since democratic decisions are primarily based on the interests of the majority, the principle of democracy also embodies the political philosophy of liberalism and its ideas of equality and autonomy as a means of obviating disregard for minority rights.<sup>10</sup> Given that they emphasise equal legal rights, treatment, and political opportunity, as well as the people's liberty to determine and pursue their perception of good, the principles of equality and autonomy require that people be allowed to make decisions that affect them.<sup>11</sup> It is in line with this reasoning that Arnstein has noted that the participation of the governed is the mainstay of democracy.<sup>12</sup> Democratic ideals form the basis of participatory rights in environmental matters, for which access to environmental information is vital.<sup>13</sup>

The right of access to information has been described as the concept that facilitates freedom of expression – a fundamental human right guaranteed by democratic states.<sup>14</sup> Although the Nigerian Constitution recognises the right to freedom of expression, which includes a right to

9 U Etemire 'Public access to environmental information: A comparative analysis of Nigerian legislation with international best practice' (2014) 3 *Transnational Environmental Law* 149.

10 M Hourdequin et al 'Ethical implications of democratic theory for US public participation in environmental impact assessment' (2012) 35 *Environmental Impact Assessment Review* 37.

11 As above.

12 S Arnstein 'A ladder of citizen participation' (1969) 35 *Journal of the American Institute of Planners* 216.

13 Etemire (n 9) 150.

14 Pring & Noe (n 6) 29.

receive and impart ideas and information without interference,<sup>15</sup> it does not guarantee access to environmental information.<sup>16</sup> Thankfully, the Freedom of Information Act<sup>17</sup> was enacted to remedy the inherent defects in the constitution, and it recognises the right to access information.

### **3 The contribution of Nigeria's freedom of information legislation to the realisation of the right of access to environmental information**

The enactment of Nigeria's Freedom of Information Act in 2011 marked the dawn of a new era of governmental transparency. This Act was enacted to:

make public records and information more freely available, provide for public access to public records and information, [and] protect public records and information to the extent consistent with the public interest and the protection of personal privacy.<sup>18</sup>

While the Act does not distinguish between environmental information and all other types of information in the custody or possession of public institutions, its importance cannot be overemphasised.

The Freedom of Information Act recognises the right of every person (natural and juristic) to access or request information held by public officials, agencies, or institutions, notwithstanding any provision in any Act, law, or regulation to the contrary.<sup>19</sup> This means that the Freedom of Information Act takes precedence over the Official Secrets Act<sup>20</sup> and other laws related to information access. However, the effect of this provision on statutes entrenched in the Nigerian Constitution, such as the Public Complaints Commission Act and the National Security Act, which grant the bodies they establish power to withhold information from the public, may be disputable because the Constitution is supreme<sup>21</sup> and existing laws must conform to its provisions.<sup>22</sup> Nevertheless, the Freedom of Information Act remains relevant to improving access to information. An analysis of the provisions of the Freedom of Information Act will be undertaken to

15 Section 39 of the Constitution of the Federal Republic of Nigeria, 1999.

16 Etemire (n 9) 157.

17 Freedom of Information Act, 2011.

18 Freedom of Information Act, long title.

19 Section 1(1) of the Freedom of Information Act.

20 Official Secrets Act, 2004.

21 Section 1 of the Constitution.

22 Section 315 of the Constitution.

determine how well this legal instrument meets international standards and enhances the public's access to environmental information.

#### **4 Principles of freedom of information: How effectively does Nigeria's legislation comply with international standards?**

A set of nine fundamental principles of freedom of information have been put forward as international standards against which to assess national law and determine how effectively it permits access to official information. These principles were developed through extensive study, analysis, and consultation conducted under the supervision of the Article 19 organisation<sup>23</sup> and the work and experiences of collaborating organisations in various parts of the world.<sup>24</sup> The principles emphasise ideals of full disclosure, publication of information, open government, the limited scope of exceptions, facilitation of access, affordable costs, and the like, to which national and international regimes must conform, to give effect to the right of access to information.<sup>25</sup> As these principles embody practical and effective freedom of information practices, they received the international community's endorsement and have been referred to in the reports of international organisations.<sup>26</sup> In this subsection, therefore, a critical analysis of Nigeria's freedom of information legislation will be made to determine the extent to which it conforms with these principles and by extension, to international best practices.

Principle 1 on maximum disclosure captures the basis of the right to freedom of information. It creates a presumption that all information in the possession of public bodies is subject to disclosure except in limited, specified circumstances.<sup>27</sup> Maximum disclosure recognises that access to information is a fundamental right, which requires the criminalisation of the destruction of records and a broad definition of 'information' and 'public bodies' (or public institutions) in national legislation. The

23 Article 19 is a registered charity working to protect the public's right of expression and right to request and receive information held by governments, through the courts, international organisations, and civil society. Article 19 'Our mission' [www.article19.org/about-us/](http://www.article19.org/about-us/) (accessed 1 July 2021).

24 Article 19 (n 5) 2.

25 As above.

26 Article 19 (n 5) 2. These principles were endorsed by the Organisation of American States Special Rapporteur on Freedom of Expression and the United Nations Special Rapporteur on Freedom of Opinion and Expression in their reports of 1999 and 2000, respectively.

27 Article 19 (n 5) 2.

requirements of Principle 1 appear to be met by Nigeria's Freedom of Information Act.

The Act recognises the right of every person to access information<sup>28</sup> and makes the destruction or alteration of records by public bodies a criminal offence.<sup>29</sup> It also defines 'public institutions' broadly to cater for situations where private bodies undertake critical public functions. Hence, private bodies that provide public services, perform public functions, and utilise public funds are also classified as public institutions.<sup>30</sup>

The meaning of 'private company' in the context of the Freedom of Information Act has been the subject of debate and an issue for determination before the courts. For instance, in *Okoi Obono-Obla v China Civil Engineering Construction Corporation (CCECC) Nigeria Limited*,<sup>31</sup> the Court, by judicial review, had to determine whether the defendant is a public institution as defined in the Freedom of Information Act and from which the plaintiff can request and obtain information. The facts of the case are as follows:

The plaintiff's request for information concerning the award of a road rehabilitation contract by the Federal Government of Nigeria to the defendant was not met. After the expiration of the time within which the request for information ought to have been granted, the plaintiff applied to the court for a judicial review of the issue, pursuant to the provisions of Section 20 of the Freedom of Information Act. The defendant challenged the jurisdiction of the Court to entertain the matter on the grounds that, unlike administrative bodies and tribunals, being a private company, it is therefore not subject to judicial review. Further, the defendant contended that as a private company 'which does not utilise public funds, provide public services; or perform public functions ... and in which the government has no controlling interest', it does not qualify as a public institution under the Freedom of Information Act. Rejecting the defendant's argument, the Court held that since the subject matter of the contract is the rehabilitation of roads for the convenience and benefit of the public, carried out on behalf of the government, the defendant's

28 Section 1(1) of the Freedom of Information Act. The type of information that can be accessed is defined in broad terms in section 30(3) to include: 'all records, documents and information stored in whatever form including written, electronic, visual image, sound, audio recording etc.'

29 Section 10 of the Freedom of Information Act.

30 Section 2(7) of the Freedom of Information Act.

31 *Okoi Obono-Obla v China Civil Engineering Construction Corporation (CCECC) Nigeria Limited* (HC 21 January 2014).



argument is weak.<sup>32</sup> In addition, as payment for the contract cannot be made without the authorisation of the legislative arm of government (the National Assembly), payments made to the defendant in respect of the contract amounts to the utilisation of public funds instead of mere consideration for services rendered.<sup>33</sup> The Court's willingness to interpret this provision widely is highly commendable.

The situation was no different in the case of *The EIE Project Limited/ GTE v Coscharis Motors Limited and the Attorney General of the Federation*,<sup>34</sup> where the Court had to determine whether a request for information in respect of the purchase of two bulletproof BMW vehicles by a private company on behalf of the Federal Government of Nigeria was wrongfully denied. The Court upheld the plaintiff's rights to access the information requested on the grounds that the applicant enjoyed a waiver of import duty in purchasing the vehicles, a privilege exclusive to public institutions.<sup>35</sup> It therefore held that the plaintiff's request was a request for information on the purchase of cars made by a public institution, using public funds for use in public functions.<sup>36</sup> The denial of access to the information was wrongful. Remarkably, privatising a public service does not affect a person's right to access information from a private institution.<sup>37</sup>

In accordance with principle 2 of the freedom of information principles, which places an obligation to publish on public bodies, Nigeria's freedom of information legislation requires public institutions to publish information. It lists the information that public bodies must publish<sup>38</sup> and requires widespread dissemination of such information to the public.<sup>39</sup> The Act also promotes access to information through public education

32 As above.

33 As above.

34 *The EIE Project Limited/GTE v Coscharis Motors Limited and the Attorney General of the Federation* (FHC 28 April 2015).

35 As above.

36 As above.

37 For instance, in *Public and Private Development Centre Limited (PPDC) (for itself and on behalf of Nigeria Contract Monitoring Coalition) v Power Holding Company of Nigeria (PHCN) and Attorney General of the Federation* (FHC 1 March 2013), the jurisdiction of the court to entertain the matter was not in issue because the first defendant carries out a public service (the distribution of electricity) notwithstanding its status as a private company.

38 Section 2(3) of the Freedom of Information Act. Some of these include 'a list of all classes of records under the control of the institution, a description of documents containing final opinions, including concurring opinions'.

39 Section 2(4) of the Freedom of Information Act.



and other mechanisms<sup>40</sup> set up to address official secrecy. In so doing, it satisfies the requirement of principle 3 of the principles of freedom of information.<sup>41</sup> Furthermore, in accordance with principles 8<sup>42</sup> and 9,<sup>43</sup> the Freedom of Information Act requires all other legislation on publicly held information in Nigeria to be subject to its provisions<sup>44</sup> and provides protection for whistleblowers.<sup>45</sup>

International best practice requires that all information requests from public bodies be granted unless a refusal is justified under one or more of the *limited* exceptions recognised by law.<sup>46</sup> More importantly, a rejection is unfounded unless the public authority can demonstrate that the information satisfies the requirements of a strict three-part test:

- (1) the information must relate to a legitimate aim listed in the law, (2) disclosure must threaten to cause substantial harm to that aim; and (3) the harm to the aim must be greater than the public interest in having the information.<sup>47</sup>

Therefore, it is not enough that the information requested falls within an exemption; the public authority must weigh the interest to be served in non-disclosure against the public interest in having the information to determine whether the exemption can be put into effect appropriately.<sup>48</sup> Where there is a disagreement with the public authority's assessment, an aggrieved applicant may seek redress through judicial review.<sup>49</sup>

40 For instance, section 13 of the Freedom of Information Act provides that: 'every government or public institution must ensure the provision of appropriate training for its officials on the public's right to access information or records held by government or public institutions, as provided for in this Act and for the effective implementation of this Act.'

41 Article 19 (n 5) 4-5. Principle 3 encourages the use of promotional activities such as trainings as a means of ensuring a cooperative civil service.

42 The gist of principle 8 is that maximum disclosure is key, and therefore, laws that do not permit maximum disclosure must be amended or repealed.

43 Principle 9 protects whistle-blowers from all forms of sanctions arising from their release of information on wrongdoing.

44 Section 1 of the Freedom of Information Act.

45 Section 27 of the Freedom of Information Act.

46 Principle 4 of the Principles on Freedom of Information Legislation. Article 19 (n 5) 6.

47 As above.

48 Etemire (n 9) 168.

49 Sections 1(3), 2(7) and 20 of the Freedom of Information Act give persons whose request for information have been refused, a right to approach the court for a review of the public authority's decision.

Nigeria's legislation lists exceptions by which public authorities may justify a refusal to grant information. These exceptions relate to national security,<sup>50</sup> law enforcement,<sup>51</sup> public or individual safety,<sup>52</sup> privacy,<sup>53</sup> commercial and other confidentiality,<sup>54</sup> professional privileges,<sup>55</sup> and the like. However, while this is remarkable, what matters most is that these exceptions are sufficiently narrow to ensure broad access to information and precise enough to prevent public authorities from restricting access to information and negating the public interest test through the arbitrary exercise of discretion.<sup>56</sup>

A remarkable feature of Nigeria's Freedom of Information legislation is that, in accordance with international best practices, the above exceptions are not absolute. Indeed, exemptions to disclosure are subject to a public interest override, which ensures that 'where the public interest in disclosing the information outweighs whatever injury the disclosure would cause',<sup>57</sup> the exemption is inapplicable. The application of the public interest test is well illustrated in the case of *Boniface Okezie v Central Bank of Nigeria*,<sup>58</sup> where the Federal High Court of Nigeria had to decide whether the plaintiff had been wrongfully denied information on:

- (a) The amount of legal fees paid and to be paid by the defendant to 3 named firms of legal practitioners for the enforcement of its banking reform processes and;

50 Section 11(1) of the Freedom of Information Act. An applicant may be denied access to information which will be injurious to the international affairs or defence of the Federal Republic of Nigeria if disclosed. Similarly, section 12(1)(b) is to the effect that a public institution may refuse to disclose information which is injurious to the security of penal institutions.

51 Section 12(1) of the Freedom of Information Act.

52 Section 12(3) of the Freedom of Information Act. Information which a public institution has reasonable grounds to believe will aid the commission of an offence may be denied.

53 Section 14(1) of the Freedom of Information Act. There may be non-disclosure of personal information unless the person to whom it relates consents to the disclosure, or the information is publicly available.

54 Section 15(1) of the Freedom of Information Act. The Act protects trade secrets and commercial and third-party contractual information.

55 Section 16 of the Freedom of Information Act. Information that is subject to privileges such as legal practitioner-client privileges, health worker-client privileges etc falls within the exceptions to access to information.

56 Etemire (n 9) 168-169.

57 Sections 11(2), 12(2), 14(3), 15(4), and 19(2) of Nigeria's Freedom of Information Act, all provide for the public interest limitation.

58 *Boniface Okezie v Central Bank of Nigeria* (FHC 22 February 2013).

- (b) The total cash and properties recovered from a named ex-bank chief executive, and the whereabouts of same.

The Court considered the defendant's argument that the information requested relates to its contractual relationship with legal practitioners, which is exempted from disclosure under the Freedom of Information Act. In reaching its decision, the Court examined sections 15(1)(b) of the Freedom of Information Act, which exempts from release information of which disclosure will 'interfere with contractual and other negotiations of a third party', and 16(a) which protects legal practitioner-client privilege, and upheld the plaintiff's case in part.<sup>59</sup>

With regards to the first issue, the Court refused to grant the plaintiff access to the information requested because information on legal fees is exempted from disclosure under sections 15(1)(b) and 16(a). Furthermore, it held that although the exemptions in sections 15(1)(b) and 16(a) are subject to the public interest override, there was no evidence of exceptional circumstances, such as mismanagement of funds or misconduct on the part of the defendant to persuade the Court to give way to the public interest, over and above the duty of confidentiality. On the other hand, regarding the second issue, recognising that it is in the public interest that assets recovered and the whereabouts of the same are disclosed, the Court granted the relief sought.

Notwithstanding the foregoing, Nigeria's Freedom of Information Act deviates from best practice by including an exception that directly impedes the public right to access information. Section 15(2) authorises public institutions to 'deny disclosure of a part of a record if that part contains the result or product of environmental testing carried out by or on behalf of a public institution'. This means it is immaterial whether an interest is affected, as the public institution has the power to approve or refuse to disclose such information.<sup>60</sup> Etemire has rightly criticised this provision on the grounds that since the scope of environmental testing is not defined by the Act, broad discretion is given to public authorities, which could be used arbitrarily.<sup>61</sup>

The Act has also been extensively criticised for the broad scope of its exemptions. Apuke has observed that the exemption clauses contained in the Act far exceed sections guaranteeing access to information, thereby leaving room for corrupt public officers to use them for improper

59 As above.

60 Section 15(2) of the Freedom of Information Act.

61 Etemire (n 9) 170.

purposes.<sup>62</sup> Worse still, not all exemptions in the Act are subject to the public interest override.<sup>63</sup> It is hoped that the inclusion of processes that facilitate access to information in the Act can help cure the defects created by these exemptions.

On a positive note, however, in accordance with principle 5 of the freedom of information legislation principles, the Freedom of Information Act makes it possible for an applicant to approach a court for review where a public institution has denied an application for access to information.<sup>64</sup> However, it must be noted that principle 5 favours a three-level process for deciding requests for information: complaints must first be made to the public authority concerned before an appeal to an independent administrative body is made, and finally, an appeal may lie to a court or tribunal, where necessary. Therefore, Nigeria's Freedom of Information Act could have more appropriately fulfilled the requirements of Principle 5 by first requiring public authorities to have internal procedures for dealing with complaints that relate to their handling of information requests before granting applicants a right of appeal to an independent administrative body whose decisions can then be challenged before a court of law. In the United Kingdom, for instance, a person whose request for information from a public authority has been inadequately dealt with, can make a complaint to the Information Commissioner by virtue of Section 50(1) of the Freedom of Information Act,<sup>65</sup> but the Information Commissioner is not obligated to decide on the matter unless such a person has exhausted the public authority's complaint procedure.<sup>66</sup> Where necessary, an appeal may be made to the Tribunal by the complainant or public authority against the decision of the Information Commissioner.<sup>67</sup>

Nigeria's legislation further contradicts international best practices because, contrary to principle 6, individuals may be discouraged from requesting information because of the costs they may have to bear. While it is true that under the freedom of information Act, fees are 'limited to standard charges for document duplication and transcription where

62 O Apuke 'An appraisal of the Freedom of Information Act (FoIA) in Nigeria' (2017) 13 *Canadian Social Science* 40.

63 A good example is found in section 17 of the Freedom of Information Act which deals with information containing course and research materials made by faculty members.

64 Sections (1)3, 7 and 20 of the Freedom of Information Act. These provisions make it possible for an applicant to challenge a decision of a public institution before a law court.

65 Freedom of Information Act.

66 Section 50(2)(a) of the Freedom of Information Act.

67 Section 57(1) of the Freedom of Information Act.

necessary’,<sup>68</sup> the fact that an applicant must bear the total cost of duplication and transcription, notwithstanding how excessive or unreasonable it may be, is in itself a barrier to access to information.<sup>69</sup>

Therefore, where the information requested forms part of an extensive record, the cost of transcription or duplication of the same may be unreasonable. This contradicts the provisions of the Aarhus Convention, the Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation, and Access to Justice in Environmental Matters (Bali Guidelines) and the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazu Agreement),<sup>70</sup> which call for a ‘reasonable amount’,<sup>71</sup> ‘affordable access to information’ and reasonable costs respectively.<sup>72</sup> It is instructive to note that under article 5(17) of the Escazu Agreement, the cost of reproduction and delivery of environmental information may ‘be waived in the event that the applicant is deemed to be in a vulnerable situation or to have special circumstances warranting such a waiver’.

## **5 Access to environmental information in Nigeria**

As earlier noted, the obligation to provide the public with access to information goes beyond collecting and disseminating information. It includes a duty to provide information to the public where a request for the

68 Section 8 of the Freedom of Information Act.

69 Etemire (n 9) 166.

70 The Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters was developed by the Governing Council of the United Nations Environment Programme in decision SS.XI/5 of 26 February 2010 to provide guidance for states on how best to implement principle 10 of the Rio Declaration. The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean C.N.195.2018, TREATIES-XXVII.18 of 9 April 2018; adopted at Escazú, Costa Rica, on 4 March 2018 also seeks to guarantee full and effective implementation of the rights of access to information, public participation, and justice in environmental matters in Latin America and the Caribbean.

71 Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (1998) 38 ILM 517 art 4(8).

72 UNEP ‘Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters’ (2011) guideline 1 <https://wedocs.unep.org/bitstream/handle/20.500.11822/22925/Bali%20Guidelines%20for%20the%20Development%20of%20National%20Legislation%20on%20Access%20to%20information%2c%20Public%20Participation%20and%20Access%20to%20Justice%20in%20Environmental%20Matters.pdf?sequence=1&isAllowed=y> (accessed 30 January 2023). A similar requirement is contained in art 5(17) of the Escazu Agreement.

same is made. It is commendable that Nigeria's Freedom of Information Act recognises the right of every person to access or request information held by public officials or bodies without the need to show an interest in the information.<sup>73</sup> This has gone a long way towards improving the rights of members of the public to access information in Nigeria.

It is also worthy of note that the Freedom of Information Act guarantees timely access to information. A public institution is generally required to decide on a request for information within seven days,<sup>74</sup> unless certain exceptions requiring an extension of no more than seven days apply.<sup>75</sup> A failure to grant access to the information requested within the time specified amounts to a denial of access,<sup>76</sup> which, if wrongful, is an offence and attracts a fine of N500 000 (five hundred thousand naira)<sup>77</sup> upon conviction.<sup>78</sup>

While the contribution of the Freedom of Information Act to the realisation of the right of access to information in Nigeria is not in doubt, certain questions regarding the accessibility of environmental information in terms of the cost of obtaining information arise. In addition, the scope of information that the public is entitled to receive has also been called into question. The critical issue in this regard is determining when exceptions to the right of access to information apply. Exceptions under the Freedom of Information Act are subject to overriding public interest and raise questions such as, what is the public interest? How do we accurately weigh the public interest against the injury caused by disclosing information?<sup>79</sup> By implication, in some instances, the scope (and adequacy thereof) of information members of the public receive will differ. This will depend on the interpretation of the public interest and the weight attached to the public interest, both of which are subjective.

Beyond the weaknesses of the Freedom of Information Act, a review of the literature and case law has revealed that broader issues are affecting the realisation of the right of access to information in Nigeria. As Haider, McLoughlin, and Scott have observed, some structural issues in developing countries impact the ability of relevant bodies to produce

73 Section 1 of the Freedom of Information Act.

74 Section 4 of the Freedom of Information Act.

75 Section 6 of the Freedom of Information Act.

76 Section 7(4) of the Freedom of Information Act.

77 One thousand and eighty-five dollars (\$1,085).

78 Section 7(5) of the Freedom of Information Act.

79 A Ojebode 'Nigeria's Freedom of Information Act: Provisions, strengths, challenges' (2011) 4 *African Communication Research* 267 at 280.

information and the public's capacity to demand and use their right to access such information.<sup>80</sup> Therefore, while it is commendable that the basic legal requirements of access to information above have largely been met, the importance of addressing certain broader issues relating to the right of access to information, such as the availability of information and the quality of information dispensed, cannot be overemphasised. In many respects, these issues affect the appropriateness and meaningfulness of the information received.

In Nigeria, most corporations neither publish information on environmental monitoring (since they are not required by law) nor readily disclose information relating to their activities' environmental and social impacts, even where environmental assessments have been undertaken.<sup>81</sup> It is no surprise that a report by Amnesty International pointed out (and rightly so) that local people in the Niger Delta region of Nigeria are not often provided with enough information on the benefits and risks of projects during the environmental impact assessment process.<sup>82</sup> This issue was brought before the African Commission on Human and Peoples' Rights in the case of *Social and Economic Rights Action Centre (SERAC) v Nigeria*,<sup>83</sup> wherein the applicants alleged that the Nigerian government had, through the Nigerian National Petroleum Corporation (NNPC), been directly involved in the production of oil in the Ogoni Community, which caused severe environmental and health problems. Further, it was alleged that the respondents withheld information about the impacts of its activities from the Ogoni people and denied the host community opportunities to make decisions affecting them.<sup>84</sup> In deciding this issue, the Court recognised the right to a satisfactory environment and the right to enjoy the best attainable state of physical and mental health guaranteed through articles 24 and 16 of the African Charter on Human and Peoples' Rights,<sup>85</sup> respectively, and held that compliance with these provisions requires that the Nigerian government provide access to environmental information, especially to communities imperilled by dangerous activities and hazardous materials.<sup>86</sup>

80 H Haider, C McLoughlin & Z Scott *Topic guide on communication and governance* 2nd ed (2011) 56.

81 Amnesty International *Nigeria: Petroleum, pollution and poverty in the Niger Delta Region* (2009) 61.

82 Amnesty International (n 81) 57.

83 *Social and Economic Rights Action Centre and Another v Nigeria* [2001] AHRLR 60 (SERAC).

84 SERAC (n 83) para 4.

85 This Charter has been ratified by Nigeria.

86 SERAC (n 83) para 53.



Based on the foregoing, it is evident that the realisation of good governance through access to information rests not only on transparency but also on the capacity of members of the public to request for and use information, both of which may be severely limited in 'low-capacity settings'<sup>87</sup> like Nigeria.

## **6 Problems of access to environmental information in Nigeria**

Several international agreements have established a link between regulatory measures and the availability of environmental information. In the Rio Declaration,<sup>88</sup> Agenda 21,<sup>89</sup> the Aarhus Convention,<sup>90</sup> and various other multilateral environmental agreements, this right has gained currency as one of the key drivers of environmental democracy. The past decades have witnessed ardent calls for better public access to environmental information.

Nigeria is a signatory to several multilateral environmental agreements, many of which it has ratified. Although greeted with enthusiasm by the international community, these international regimes do not produce any meaningful outcomes nationally, as the legal mechanisms necessary to give domestic effect to them are not often put in place.<sup>91</sup> Consequently, Nigeria's legislation hardly ever reflects international best practices; until recently, Nigeria's environmental governance remained practically engulfed in the shadows of secrecy.<sup>92</sup>

Besides legislative incompetence, administrative secrecy is another major issue affecting access to environmental information. Administrative secrecy is inconsistent with democratic ideals, which emphasise popular sovereignty and all forms of civic participation. This is because it produces varying levels of knowledge and power, thereby restricting the capacity

87 Haider, McLoughlin & Scott (n 80) 56.

88 Rio Declaration on Environment and Development (1992) 31 ILM 874.

89 Agenda 21: Programme of Action for Sustainable Development UN CAOR 46th Sess. Agenda Item 21 UN Doc A/Conf. 151/26 (1992).

90 Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (n 71).

91 The effect of section 12(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) is that treaties to which Nigeria is a party do not have the force law except by legislative enactment giving domestic effect to them.

92 Etemire (n 9) 149.

of citizens and their elected representatives to make fully informed decisions.<sup>93</sup>

However, a contrary argument is that although absolute openness and full access to information are extremely useful concepts in theory, they are irreconcilable with efficient and pragmatic approaches to governance in practice.<sup>94</sup> Kramer, for instance, argues that 'complete transparency is unsustainable as it will paralyse initiatives, make a problem-oriented governmental policy difficult, if not impossible, and reduce administrative creativity'.<sup>95</sup> Notwithstanding these arguments, freedom of information remains an essential right of every person, guaranteed by legislation in most legal systems.<sup>96</sup>

The problems affecting access to environmental information in Nigeria have also been attributed to administrative secrecy instituted and sustained by the abundance of colonial laws such as the Evidence Act,<sup>97</sup> Public Complaints Commission Act,<sup>98</sup> the Statistics Act,<sup>99</sup> and the Criminal Code Act,<sup>100</sup> which were in force in the country post-independence and continue to operate in the present democratic dispensation.<sup>101</sup> Under the Evidence Act, for instance, the Minister or Governor has the power to oppose the production of documents or call for the exclusion of oral evidence in any proceedings where he is satisfied that it is in the public interest.<sup>102</sup> Similarly, public officers cannot be compelled to disclose information made known to them in official confidence if such disclosure will affect the public interest.<sup>103</sup> Broad discretion is given to public officers here, and this could be used for improper purposes. The only exception is that by order of the Court, such information can be disclosed to a judge alone, who can receive it as evidence in private where it is deemed necessary to do so.<sup>104</sup>

93 L Kramer 'Transnational access to environmental information' (2012) 1 *Transnational Environmental Law* 95.

94 Kramer (n 93) 95-96.

95 Kramer (n 93) 96.

96 In the United Kingdom for instance, the Freedom of Information Act 2000 gives people the right to access recorded information held by public bodies.

97 Evidence Act, 2011.

98 Public Complaint Commission Act, 2004.

99 Statistics Act, 2004.

100 Criminal Code Act. 2004.

101 Etemire (n 9) 157.

102 Section 243 of the Evidence Act.

103 Section 191 of the Evidence Act.

104 As above.

Also worthy of note is the provision of section 1 of the Official Secrets Act,<sup>105</sup> which makes it an offence for any person (including public officers) to transmit classified matter without the authorisation of the government; and for such classified matter to be obtained, reproduced, or kept by any person without the necessary approval. Worse still, under this Act, classified matter is defined as information that, according to the security classification in use, is not to be disclosed to the public and will adversely affect national security.<sup>106</sup> Again, this definition has been highly criticised and described as 'wide and vague', functioning only to restrict the disclosure of virtually all government information.<sup>107</sup> Indeed, this broad definition of classified matter has been capitalised on and inappropriately utilised to conceal information about corrupt practices from the public.<sup>108</sup>

In Nigeria, almost all government information is designated 'Top Secret' and is not readily accessible, even where such information is part of a newspaper publication that has already been made available to the public.<sup>109</sup> This unhealthy culture of administrative secrecy can directly contradict legislative intent. Unsurprisingly, while the long title of the Official Secrets Act clearly describes it as an 'Act' aimed at securing public safety, it functions to impede the public's right to environmental information, through which they are made aware of the state of their health and safety and which ensures that they can protect themselves from harm.

One argument favouring secrecy is that the general rule in favour of access to environmental information is subject to exceptions where disclosure of such information will be detrimental to certain legitimate interests.<sup>110</sup> Therefore, in accordance with this reasoning, while it is generally agreed that broad access to environmental information is desirable because it makes for a more informed and better society, restrictions may sometimes be necessary. In the United States, for instance, in the aftermath of the terrorist attack on September 11 2001, information on the environment, public health, and physical infrastructure which featured on the websites of government agencies was removed for fear that

105 Official Secrets Act (n 20).

106 Section 9 of the Official Secrets Act.

107 Etemire (n 9) 157.

108 S Olukoya 'Rights-Nigeria: Freedom of Information Bill proves elusive' *Inter Press Service* 21 June 2004 <http://www.ipsnews.net/2004/06/rights-nigeria-freedom-of-information-bill-proves-elusive/> (accessed 1 July 2021).

109 As above.

110 R Dahl 'Does secrecy equal security? Limiting access to environmental information' (2004) 112 *Environmental Health Perspectives* A104 at A107.

the vulnerable sectors identified in these resources could be easily targeted for future attacks.<sup>111</sup> Clearly, secrecy may be beneficial in the interest of sensitive issues such as national security. However, the key questions remain: What is the cost of non-disclosure? Is the non-disclosure of environmental information without its problems?

What is most important is striking the right balance between protection from terrorism and the need to have a fully informed public that can safeguard themselves against the harmful activities of their neighbours.<sup>112</sup> A good way of achieving this is by identifying these exceptions clearly and definitely in the relevant legal instruments and applying them only after carefully weighing the harm caused by disclosure against the public interest in accessing such information.<sup>113</sup>

The Freedom of Information Act satisfies this requirement to the extent that it lists circumstances in which public institutions may deny an application for information<sup>114</sup> while also recognising that 'an application for information shall not be denied where the public interest in disclosing the information outweighs whatever injury that disclosure would cause'.<sup>115</sup> However, the Act falls short because of the broad scope of exceptions it recognises.

## **7 Conclusion**

Like many other jurisdictions, providing access to timely and full information concerning the environment has proven to be problematic in Nigeria: efforts towards granting the necessary protection to the right of access to information are unsatisfactory. In theory, the Freedom of Information Act provides an excellent framework for disseminating information concerning environmental decisions, which will help citizens and residents exercise their participatory rights. But what counts is how the legal requirements set up by legislation fare in practice.

The foregoing discussion has revealed that although there are some areas of good practice, there are also fundamental flaws in the processes

111 Dahl (n 110) A104.

112 Dahl (n 110) A107.

113 European Environment Agency 'Access to environmental information: Key elements and good practices' <https://www.eea.europa.eu/publications/92-9167-020-0/page007.html> (accessed 30 January 2023).

114 Section 12(1) of the Freedom of Information Act.

115 Section 12(2) of the Freedom of Information Act. Similar provisions are contained in sections 14(3) 15(4) and 19(2).

utilised by the legal and regulatory regimes. Notwithstanding its shortcomings, however, there is no doubt that the Freedom of Information Act makes a valuable contribution to realising the right to access information.

To guarantee meaningful and effective access to environmental information, there is need for proper implementation of legislation and an amendment of flawed legislative provisions to bring them into conformity with international best practices. Broader issues of transparency in governance must also be addressed. This requires a departure from internal cultures of secrecy, delay, poor record-keeping, misuse of discretion, and the like.

Given that environmental health is put at risk when there are restrictions on the flow of information,<sup>116</sup> as a democratic state, it behoves the Nigerian government to break barriers of non-disclosure and to set in motion processes that facilitate true access of members of the public to environmental information held by public institutions. To advance environmental justice, efforts must be made to achieve transparency and accountability in governance.

116 K. Silver 'Access to environmental information' (2004) 112 *Environmental Health Perspectives* A458.

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