

To cite: OA Osawe 'A comparative analysis of the right of access to information under the Nigerian Freedom of Information Act 2011 and the South African Promotion of Access to Information Act 2001' (2022) 22

African Human Rights Law Journal 476-492

<http://dx.doi.org/10.17159/1996-2096/2022/v22n2a7>

A comparative analysis of the right of access to information under the Nigerian Freedom of Information Act 2011 and the South African Promotion of Access to Information Act 2001

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Summary: *The right to information is a multi-faceted right that includes the right to express or disseminate, seek, receive and to impart information. This right of access to public information is crucial in order for citizens to be properly informed, as the greater part of public information is controlled by the state, formed, collected and processed using public resources, which makes it a public possession. Thus, the right not only is a requirement, but an inherent part of human existence. However, the efficacy of an access law is determined by the extent of access actually guaranteed without altering its form or content. This can be assured by adhering to the legal principles governing the right of access. This article adopts the doctrinal methodology in undertaking a comparative study of the Nigerian Freedom of Information Act (FOIA) and the South African Promotion of Access to Information Act (PAIA). The aim is to evaluate the strengths and weaknesses of both access laws, and the article finds that the PAIA is a more potent law in ensuring access to public information. Further, it canvasses that inspiration should be drawn from the robustness of the*

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PAIA in a bid to strengthen the FOIA to guarantee full access to information. The analysis reveals that the PAIA contains more innovative provisions, such as restricted exemptions to access information, measures to promote the right of access and a broader scope of the right of access, which are essential for effective access to public information.

Key words: *Freedom of Information Act; freedom/right of access to information; Promotion of Access to Information Act; public information; Nigeria, South Africa*

1 Introduction

The quintessential right of access to information is one that in actual fact provides access to information without modifying its form or content.¹ The right to information laws must conscientiously ensure optimal access to public information. Otherwise the law will be futile, as it is important to draft the access law in conformity with the laid-down guiding principles to ensure its efficacy. The effectiveness of an access law depends on a number of factors, such as the number of persons that actually make use of it; the number of requests attended to, within the stipulated time frame; the ability of interested persons to act on the information provided; how virile civil society and non-governmental organisations (NGOs) are; and its level of conformity with established principles and guidelines.² This article thus discusses the features of both the Nigerian Freedom of Information Act (FOIA) and the South African Promotion of Access to Information Act (PAIA) with a view to demonstrating that although the PAIA falls short in certain areas, there are a number of innovation provisions that guarantee better access to public information from which the FOIA can draw in strengthening its capacity of assuring an effective access to public information.

2 Background study

A background study on the access laws of Nigeria and South Africa is necessary in order to demonstrate that an effectual access law is convoluted with a number of factors, including the motive for the adoption of such laws.

1 O Jorgensen (ed) *Access to information in the Nordic countries: A comparison of the law of Sweden, Finland, Denmark, Norway, Iceland and international rules* trans S Harris (2014) 38.

2 M Escaleras et al 'Freedom of information acts and public sector corruption' (2010) 145 *Public Choice* 455.

The Nigerian civil service adopted a colonial bureaucracy, a system in which secrecy was the conventional mode of handling government information.³ This was heightened when the Nigerian government enacted the Official Secrets Act (OSA) in 1962,⁴ which authorised government officials to swear oaths of secrecy relating to public information. This was most evident in the military dispensation, where ruthless treatments were meted out to those who pried into the activities of government or its officials. Several decrees were promulgated during the military era to punish those who investigated or commented on government activities.⁵ For instance, Decree 2 State Security (Detention of Persons) of 1984, allowed indefinite detention on security grounds, and other decrees proscribed certain newspapers from publishing and circulating. It was not surprising that with the return of democracy, civil societies moved to lobby for access to government records and information.⁶

Historically, the journey of the Freedom of Information Bill in Nigeria commenced in 1993. This was during the rule of General Sani Abacha, when three organisations – Media Rights Agenda (MRA), Civil Liberties Organisation (CLO) and the Nigerian Union of Journalists (NUJ) – embarked on the agitation for the passage of the Freedom of Information Act.⁷ The Bill was first presented to the National Assembly in 2000 but the Assembly refused to pass the Bill. It was again presented to the National Assembly in 2003 and thereafter to President Olusegun Obasanjo, who did not assent to the Bill. It was once again presented to his successor, Umaru Yar'Adua, who also withheld assent to the Bill. During this time, supporters of the Bill continued to press for its enactment and it was again presented to the National Assembly in 2007. Finally, the harmonised version as passed by both Houses of the National Assembly was handed to President Goodluck Jonathan on 24 May 2011, who signed the Freedom of Information Bill into law on 28 May 2011.⁸ The Freedom of Information Act became law, nearly 12 years after it had first been

3 B Asogwa & I Ezema 'Freedom of access to government information in Africa: Trends, status and challenges' (2017) 27 *Records Management Journal* 328.

4 Cap O3, LFN 2010.

5 These decrees are the Concord Newspapers and African Concord Weekly Magazine (Proscription and Prohibition from Circulation) Decree 6; the Punch Newspapers (Proscription and Prohibition from Circulation) Decree 7; and the Guardian Newspaper and African Guardian Weekly Magazine (Proscription and Prohibition from Circulation) Decree 8, all of 1994.

6 A Ojebode 'Nigeria's Freedom of Information Act: Provisions, strengths and challenges' 269, <https://www.academia.edu/4253994/Nigeria-s-Freedom-of-Information> (accessed 31 August 2019).

7 N Madubuike-Ekwe & J Mbadugha 'Obstacles to the implementation of Freedom of Information Act 2011 in Nigeria' (2018) 9 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 98.

8 Ojebode (n 6) 270 271.

presented to the legislature, earning it the longest legislative debate in the history of Nigeria.⁹

Before the enactment of the Freedom of Information Act, the Official Secrets Act 1962, modelled after the British Secrets Law of 1911, was widely recognised as one of the statutes obstructing free access to information in Nigeria and, thus, encouraging official secrecy.¹⁰ The aim of the law was to protect state secrets and other official information mainly relating to national security. In *Abba v Joint Admission Matriculation Board & Another*¹¹ the Court stated that the spirit behind the promulgation of the Official Secrets Act evidently was to deal with persons in sensitive positions of state/government entrusted with sensitive top-secret documents and materials and who are in a position to divulge such sensitive information, otherwise referred to as classified information, which could undermine and endanger the security, defence or safety of Nigeria as a nation state.

The enactment of Freedom of Information Act in 2011 ushered in renewed hope of imminent conquest over the culture of secrecy that has plausibly characterised the Nigerian public service. Conceivably, Nigeria has a low threshold of accountability and transparency, as public servants are made to keep government information secret, besides other laws prohibiting access to information.¹² The Freedom of Information Act should ordinarily contain far-reaching provisions capable of transforming the culture of secrecy in governance that exists in Nigeria's public institutions. The fundamental purpose for which the Freedom of Information Act was passed is to license the public to access certain government information.

The aim of the Freedom of Information Act is to guarantee the availability of public records and information; to provide access to and protect public records and information to the extent compatible with the interests of the public and to safeguard privacy rights; to shield serving public officers from detrimental repercussions for disclosing certain kinds of official information without approval;

9 C Duru 'The relevance of Nigeria's Freedom of Information Act (2011) to the country's anti-corruption war' (2016) *Journalism and Mass Communication* 759.

10 T Ocheja 'Freedom of information versus the issue of the official secret' in E Azinge & F Waziri (eds) *Freedom of information law and regulation in Nigeria* (2012) 172.

11 (2014) LCN/7590(CA). The appellant in this case was a clerk in a tertiary institution and was not employed by an arm or agency of government where government secrets are classified. The Court held that divulging information in this case can neither be equated to nor elevated to the level of compromising the security of Nigeria as a country.

12 N Udombana 'Addressing the implementation challenges of institutional obligations and reporting requirements under the Nigerian Freedom of Information Act 2011' (2019) 10 *Beijing Law Review* 1306.

and to establish procedures for the attainment of those purposes.¹³ The Act furnishes citizens and interested parties with the right to access documents held by the government without being compelled to prove any legal interest or standing. The rationale is that these documents are presumed to be public unless clearly exempted by law, and individuals can access these without stating reasons why they need them.¹⁴

Furthermore, the Act affirms the right of individuals to access unimpeded public information held by all federal, state and local government branches, and private bodies in which the government has a controlling interest or that perform government functions.¹⁵ It denotes having access to government information in any form.

In South Africa the political and social structure of the apartheid system was framed on the basis of institutionalised violation of basic human rights.¹⁶ Hence, one of the principal prerequisites of the post-apartheid period was to lay down a new foundation of an institutionalised affirmation of basic human rights – the adoption of the Constitution of the Republic of South Africa in 1996. The incorporation of a constitutional right of access to information was unquestionably galvanised by the ambition not to re-enact past mistakes.¹⁷

Prior to this time, the manner in which government interacted with its citizens in the performance of governmental duties and administration was a contentious issue in South Africa.¹⁸ The control of information and enforced secrecy was the core of the anti-democratic character of the apartheid system.¹⁹ That period was a dark space for the South African people, as the majority of the people were treated as subjects only and not as citizens. It was a pure regulatory relationship.²⁰ Not long after 1996, the Promotion of Access to Information Act (PAIA) came into being in 2001, and became the

13 See the Preamble to the FOIA Cap F43 LFN 2013.

14 Sec 1(2) of the FOIA; J Ackerman & I Sandoval-Ballesteros 'The global explosion of freedom of information laws' (2006) 58 *Administrative Law Review* 93.

15 Secs 2(7) & 30(3); Udombana (n 12) 1307.

16 DL Marais & M Quayle 'The role of access for information in enabling transparency and public participation in governance' (2017) 9 *African Journal of Public Affairs* 37.

17 Sec 32 of the South African Constitution, <https://www.gov.za> (accessed 7 May 2021).

18 Marais & Quayle (n 16) 37.

19 D Mckinley 'The access to information in South Africa', <https://www.humanrightsinitiative.org> (accessed 14 September 2021).

20 R Mathekoya 'Enforcement of anti-corruption agencies in Southern Africa, Angola, Botswana, DRC, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia, Zimbabwe' 2017, <https://www.corruptionwatch.org.za> (accessed 4 September 2021).

follow-up action from affirmation to realisation. Not surprisingly, the PAIA was well received by most South Africans, especially in light of the possibilities that the law could be used in accessing information around apartheid era violations of human rights and corrupt acts.²¹ The end of apartheid redefined the relationship between the state and the people. Citizenship entails that citizens are consulted regarding the management of public resources.

With the emergence of the democratic dispensation in South Africa arose the need for government to fully account to the people, and citizens were obliged to demand that accountability.²² As in the case of the South African Constitution, the Promotion of Access to Information Act has been widely lauded as a revolutionary law.²³ The access law of South Africa assisted highly in exposing irregularities, especially regarding the actions of the past apartheid government. For instance, the Khulumani Support Group comprises persons who were victims of abuse and other related crimes at the hand of security agencies under the apartheid government. Information disclosure obtained through the access law led to some form of compensation to victims of abuse or those who lost loved ones.²⁴ The law is one of the most innovative access to information laws globally, and contains very robust procedural guarantees, with a carefully-couched set of exceptions.²⁵

3 Comparative analysis of the right of access under the Nigerian Freedom of Information Act and the South African Promotion of Access to Information Act with respect to international rules

The comparative analysis will be undertaken under the nine sub-headings.

3.1 Right of access

The principle governing the right to access information requires that the law should be extensive and should apply to everyone and without

21 As above.

22 As above.

23 Transparency International 'Open data and the fight against corruption', www.transparency.org (accessed 10 May 2021).

24 M Dimba & R Calland 'Freedom of information laws in South Africa', www.humanrightsinitiative.org (accessed 11 May 2021).

25 T Mendel *Freedom of information: A comparative legal study* (2008) 94.

the need to demonstrate the use for the specific information.²⁶ The access legislation should make access as general as possible and it should not be dependent on a citizenship prerequisite. Disclosure should be made the rule and non-disclosure the exception.²⁷ The Freedom of Information Act establishes the right of persons to access public information and the applicant need not demonstrate any specific interest in the information applied for.²⁸ In the same vein, the right of access to public records is set out in section 11(1) of the Promotion of Access to Information Act, which provides that an applicant must be given access to a record if he or she complies with the procedural requirements set out in the law and the record is not covered by an exception. There is no need for the requester to give reasons for the request.²⁹ Any person (without the restriction of citizenship) can apply for information under the Freedom of Information Act and the Promotion of Access to Information Act.

3.2 Scope of the law

Generally, the class of bodies bound to disclose public information should be wide in scope.³⁰ The Freedom of Information Act covers all public bodies and private institutions where they utilise public funds, and perform public functions or services.³¹ The law affirms the right of individuals to access unimpeded public information held by all federal, state and local government branches, private bodies in which the government has a controlling interest or that perform government functions or utilise public funds. The South African Promotion of Access to Information Act covers information/ records held by both public and private bodies (when it involves the protection and exercise of any right).³² This provision makes the law distinct from the access laws of most countries, including that

26 Article 19 'The public's right to know: Principles on right to information legislation' 2016, www.article19.org/standards (accessed 2 May 2021) Article 19 is a human rights organisation with a special mandate and has its focal point on the safeguarding of freedom of information and expression globally. The organisation was established in 1987 and draws its name from art 19 of the Universal Declaration of Human Rights which authorises the right to freedom of opinion and expression.

27 I Venkat 'Freedom of information: The principles for legislation', <https://unpan1.un.org/intradoc/groups/public/documents> (accessed 14 April 2021).

28 Sec 1(2)(3).

29 Sec 11(3).

30 Article 19 (n 26) 4; A Paddephatt & R Zausmer 'Towards open and transparent government: International experiences and best practice' December 2011, www.gp.digital.org (accessed 18 May 2021).

31 Sec 2(7); sec 30(3); Udombana (n 12) 1306.

32 Secs 3, 11 & 50. Sec 50 provides for the right to access information held by private bodies. In *Claase v Information Officer of South African Airways* (2006) 39/2006 a retired pilot was entitled under the PAIA to records held by private airlines because he was able to establish that he needed the information to protect a right under sec 50(a).

of Nigeria, which often apply to public bodies. The right to access information held by private bodies is set out in section 50(1) of PAIA.³³ However, there is an inept exclusion of certain public bodies from its scope, such as the cabinet and its committees, judicial functions of a court and judicial officers or an individual member of parliament.³⁴

3.3 Proactive disclosure

Public bodies should not only receive requests for information but they must of their own volition disclose and disseminate widely information of significant public interest, subject only to rational limits on the premise of availability of resources and capacity.³⁵ The various dissemination channels include printing hard copies and online channels, such as the internet.³⁶ A functional access to public information is determined by extensive publication and dissemination of key categories of information by public bodies, even in the absence of a request. The law should set both a general obligation to disclose and key classes of information that must be disclosed. Examples of specific information that should be disclosed by public bodies include operational information about how the public body functions, the type of information held by the body, and the form in which the information is held.³⁷ The Freedom of Information Act provides for proactive disclosure of information by public bodies and specifies the categories of information to be published and reviewed periodically.³⁸ Unfortunately, the South African Promotion of Access to Information Act did not include a duty to publish. This is a grave omission to fostering the right of access to public information.

3.4 Promotional measures

Promotional measures hinge on the fact that openness in government transactions must be promoted. Openness and transparency can be attained by a number of measures, which include public enlightenment and education on access to information matters, and the training of

33 www.justice.gov.za/legislation/acts/2000-002.pdf. The law covers both public and private bodies and the provisions are substantially identical, with the important difference that, with respect to private bodies, it is only engaged where the information is required for the exercise or protection of a right.

34 Sec 12.

35 Article 19 (n 26) 4.

36 Ch 1, Regulation 1.4.2 of the Guidelines on the Implementation of the Freedom of Information Act 2011 (Revised Edition 2013), <https://r2knigeria.org/index.php/publication/reports/guidelines-on-the-implementation-of-the-foia> (accessed 20 October 2022).

37 Article 19 (n 26) 4.

38 An example of information to be published proactively includes a description of the responsibilities and functions of the public body; sec 2.

both public officers and citizens on how to administer an access to information regime.³⁹ The Freedom of Information Act contains a few promotional measures, as compared to the access law of South Africa. These measures include provisions for appropriate training for public officials on the public's right to access information or records and appropriate organisation and maintenance of all information in a way that promotes public access to such information.⁴⁰

The South African Promotion of Access to Information Act contains an impressive array of promotional measures. These include the publication of a manual in at least three official languages which must be updated annually;⁴¹ the publication of a user's guide in 11 official languages by the Human Rights Commission (section 10); the development and conducting of educational programmes to advance the understanding of the Act and of how to exercise the rights contemplated in the Act; and the promotion of timely and effective dissemination of accurate information by public bodies about their activities (section 83). The inclusion of more promotional measures in the Freedom of Information Act would address some of the implementation hurdles confronting the utilisation of the law in accessing public information. For instance, the provision for the simplification of the law for easy comprehension in the Act would guarantee a better understanding and utilisation of the law in accessing information in Nigeria.

3.5 Narrow scope of exceptions

Exceptions to the right to access information should be precise and clearly drawn and should be subject to the strict harm and public interest test.⁴² The harm test means that exceptions should apply only where there is a threat of considerable damage to the protected interest and where that damage is greater than the general public interest in having access to the information. The public interest test presupposes that where there is an overwhelming public interest in the information, disclosure is mandated even when such disclosure could cause some damage to the legitimate aim.⁴³ A broad set of exceptions can severely compromise an access law.⁴⁴ Attempts at drawing a balance between access to information and protecting

39 Mendel (n 25) 33.

40 Secs 13 and 9 respectively.

41 Sec 14. The manual contains information such as the structure of the public body, how to make information requests, etc. Sec 51 contains a similar provision for private bodies.

42 Article 19 (n 26) 7; Paddephatt & Zauster (n 30) 12.

43 Mendel (n 25) 36.

44 As above.

legitimate exceptions remain a formidable challenge.⁴⁵ The access to information structure must strike a balance between promoting adequate access to quality information, while also protecting information that is considered privileged and sensitive. The focus should be on the content, rather than on the type of information.⁴⁶

The exemptions contained in the Freedom of Information Act not only are numerous, but also broad.⁴⁷ It is laudable that all the exemptions are subject to the public interest test. A typical example is section 11 which protects national security. However, the section neglects to delineate what constitutes national security. Also, section 14 protects privacy in such a manner that no personal information can be released without the consent of the person. This is regardless of the public interest test contained in sub-section (3). Arguably, the exemption clauses contained in the Act overrides almost entirely what it permits.⁴⁸ In contrast, the Promotion of Access to Information Act provides for national defence and security and further specifies the categories of information that constitute national defence and security. Such categories include information relating to military tactics; the quantity, characteristics and capabilities of weapons used for the curtailment of hostile activities; and so forth.⁴⁹ Furthermore, the access law contains a very detailed, comprehensive and narrow regime of exceptions. Most exceptions in the law contain a form of harm test but all the exceptions are subject to public interest override.⁵⁰ Also, the Promotion of Access to Information Act is one of the few access laws in the world to apply both to public and private bodies, as well as to records regardless of when they came into existence.⁵¹ These exceptions are carefully delineated in a clear attempt to ensure that only authorised privileged information is as a matter of fact kept secret.⁵²

Section 45 contains a peculiar exemption which provides that information may not be disclosed if the request is manifestly frivolous or vexatious, or where the work involved in processing the request would substantially and unreasonably divert the resources of the public body. The inclusion of such a provision in the Freedom of

45 D Epps 'Mechanisms of secrecy' (2008) 121 *Harvard Law Review* 1556.

46 Article 19 (n 26) 8.

47 Secs 11-19.

48 U Nwoke 'Access to information under the Nigerian Freedom of Information Act, 2011: Challenges to implementation and rhetoric of radical change' (2019) 63 *Journal of African Law* 450.

49 Secs 41(2)(a)-(h) of PAIA, <https://www.gov.za/documents/promotion-access-information-act> (accessed 11 May 2021).

50 Exemptions are contained in ch 4 (secs 33-46).

51 Sec 3.

52 Mendel (n 25) 99.

Information Act would assist in examining unjustifiable requests for information, especially since the right of access is guaranteed without the need to show reasons for requesting information.⁵³

3.6 Efficient dispute resolution process

The process for information requests should be expeditious with an independent review of any refusal.⁵⁴ The processes for resolving disputes arising from the right to access information should be, first, within the public institution; second, appeals to an independent administrative body; and, lastly, appeals to courts. The pertinence of having an efficient dispute resolution process is that it fosters access to public information. It is important that the dispute resolution procedure should be readily accessible, as excessive delays and costs could defeat the aim of requesting the information in the first place.⁵⁵ Unfortunately, the only mode of redress in the Freedom of Information Act is a direct recourse to court.⁵⁶ This is a clog to the right of access under the Act, considering the expenses and the amount of time consumed in litigation in Nigeria. In other words, the onerous and tedious process of resolving disputes arising from information requests has a potentially adverse impact on the utility of the information requested due to time sensitivity of information.⁵⁷ One advantage of resolving information disputes with an independent administrative body, such as an information commissioner or ombudsperson, is that the process is swift and does not depend upon the services of a professional lawyer.⁵⁸

In the case of South Africa the Promotion of Access to Information Act initially made provision for two levels of appeal. The first is the internal appeal (appeal within the public body) and subsequently to court.⁵⁹ There was no provision for appeal to an independent administrative body, which posed a serious shortcoming, since court appeals are expensive and time consuming. Therefore, the amendment to the Act created the office of an information regulator – an independent appeal body. Section 77A provides that a requester or third party may submit a complaint to the information regulator only after the internal appeal procedure has been exhausted and if

53 Sec 1.

54 Article 19 (n 26) 9.

55 Article 19 (n 26) 10.

56 Sec 7.

57 F Omotayo 'The Nigeria freedom of information law: Progress, implementation challenges and prospects' (2015) 1 *Library, Philosophy and Practice* 10.

58 N Kocaoglu & A Figari *Using the right to information as an anti-corruption tool* (2006) 12.

59 Sec 74.

they are not satisfied with the decision of the information officer of a public body.⁶⁰ Appeal lies from the information regulator to the court.⁶¹

3.7 Time frame for response to information requests

The response time frame for information request should be specific and relatively short, due to the time-sensitive nature of information.⁶² However, most public bodies are unable to respond to information requests within the stipulated time frame, which varies from jurisdiction to jurisdiction.⁶³ The Freedom of Information Act provides a time limit of seven days and an extension of another seven days, if the application is for a large number of records, or where consultations are necessary to comply with the application.⁶⁴ My view is that the time frame of seven days is short, especially because of the deplorable state of record keeping in Nigeria.⁶⁵ Findings reveal that it takes an average of 32 to 40 days to get answers to information requested.⁶⁶ Moreover, jurisdictions with better access systems provide for longer time frames. For instance, the Electronic Freedom of Information Act of 1996 of the United States of America extended the time frame from 10 to 20 working days.⁶⁷ Also, the South African Promotion of Access to Information Act provides for a time limit not exceeding 30 days, which period may be extended for a further 30 days, under special circumstances.⁶⁸

60 Secs 77(A)-(K) contain details of appeal procedure to the Information Regulator.

61 Sec 82.

62 Article 19 (n 26) 9.

63 FOIA compliance for annual reporting, <https://www.opengovpartnership.org> (accessed 30 May 2021).

64 Secs 4 & 6.

65 J Igbokwe-Ibeto 'Record management in the Nigerian public sector and Freedom of Information Act: The horn of dilemma' (2013) 8 *International Journal of Development and Management Review* 225.

66 FOIA compliance (n 63).

67 Sec 8(b) of the Electronic FOIA Amendments 1996 amended sec 552(a)(6)(A) (i) of title 5 US Code by striking out '10 days' and inserting '20 days'. The Act also made provision for multi-track processing of requests for records based on the amount of work or time (or both) involved in processing requests. This was introduced in a bid to ensure compliance with the time frame for responding to requests; see sec 7(a)(D)(i), <https://www.govinfo.gov> (accessed 7 December 2021).

68 Secs 25 & 26. An extension of response time frame is allowed in cases, such as where the request is for a large number of records and to comply within 30 days would unreasonably interfere with the activities of the body, or where a search must be conducted in a different city, or where inter-agency consultation is required, that cannot reasonably be completed within the original 30 days.

3.8 Costs of accessing information

The costs of accessing public information must be kept as minimal as possible, such that no person is precluded from requesting information due to excessive costs.⁶⁹ Generally, the cost of accessing information should be confined to the actual cost of duplication and delivery. Furthermore, cost should be waived or drastically reduced for personal information, public interest information and for indigent persons. Essentially, the issue of cost is vital in determining the efficacy of access laws, as excessive cost would dissuade users of the law from maximally utilising it in accessing vital public information. The issue of costs is catered for in section 8, which provides that fees shall be limited to the standard charges for document duplication and transcription where necessary. Nevertheless, the Act fails to acknowledge a special provision for circumstances that warrant a waiver or subsidisation of costs. This is a significant setback, as indigent persons are deterred from utilising the law in accessing public information, thereby deflating effective access under the Freedom of Information Act. However, it is noted that the Guidelines on the Implementation of the FOIA provides for a waiver of costs where the cost is negligible or where the cost of collecting or recovering the fees would be equal to or greater than the amount being collected, when the information may be provided at no cost.⁷⁰

The South African Promotion of Access to Information Act empowers the minister to exempt any person from paying the fees for access; to set limits on fees; to determine the manner in which fees are to be calculated; to exempt certain categories of records from the fee; and to determine that where the cost of collecting the fee exceeds the value of the fee, it shall be waived.⁷¹ This demonstrates the potency of the law on the provision for costs, thus guaranteeing better access to public information.

3.9 Enforcement of the right of access to information

Section 29 mandates all public bodies to submit to the Attorney-General of the Federation an annual report on or before 1 February of each year; covering their activities for the preceding fiscal

⁶⁹ Article 19 (n 26) 10.

⁷⁰ Ch 1, Regulation 1.11. Guidelines on Implementation (n 36).

⁷¹ Sec 22; Mendel (n 25) 96. Applicants under the PAIA (South Africa) may be charged fees for requests for reproduction, search and preparation of records. However, this provision has been amended by the Protection of Personal Information Act (2013), <https://www.gov.za/files>. The cost of access to information is now restricted to fees for reproduction in line with international standards.

year. These reports are to be made accessible to the public. The Attorney-General has the oversight responsibility of ensuring that all public bodies comply with the provisions of the Act in fulfilment of international standards. The Act neglects to impose penalties for non-compliance with this requirement. It is argued that, since Attorney-Generals are public officials, it may be arduous for them to exercise their power judiciously. Also, it would amount to being a judge in their own cause.⁷² Thus, entrusting the Attorney-General of the Federation with the task of overseeing the enforcement of the Freedom of Information Act under section 29 is not pragmatic. There are doubts as to whether the Attorney-General will carry out this responsibility objectively. It arguably is for this reason that some other access laws assign the task to independent bodies. Under the Promotion of Access to Information Act such responsibility is carried out by the Human Rights Commission.⁷³

4 Right of access to information under the Freedom of Information Act and the Promotion of Access to Information Act

From the foregoing it is deduced that the Promotion of Access to Information Act engenders better access to public information than the Freedom of Information Act on the following premises. First, while the FOIA applies only to public and to private bodies when utilising public funds or performing public services, the PAIA covers all public and private bodies where the information is necessary for the protection of human rights. It is rather unfortunate that the law omits certain bodies, such as the cabinet and the courts, from its purview.

Second, the promotional measures contained in the Freedom of Information Act are too scanty. These measures are indispensable for the effective implementation of any access law. A poorly-implemented law is as good as a defective law. On the other hand, the Promotion of Access to Information Act contains stirring promotional measures. This plausibly is why the Act has been widely lauded as a revolutionary law.⁷⁴

⁷² Nwoke (n 48) 452. According to Media Rights Agenda, between 2011 to 2016 fewer than 10% of public bodies had submitted their annual reports to the Attorney-General, although the compliance level has since then slowly increased. In 2017 only 73 out of 900 public bodies submitted their FOI annual reports to the Attorney-General. Open Government Partnership: Amplifying access to information, <https://www.opengovpartnership.org> (accessed 3 May 2020).

⁷³ Secs 83-85.

⁷⁴ Transparency International (n 23).

Third, the broad and numerous exemptions in the Freedom of Information Act have made inane the essence of accessing public information. Unlike the Freedom of Information Act, the Promotion of Access to Information Act contains very robust procedural guarantees, with a carefully-couched set of exemptions to access information, and is generally considered as one of the most innovative access to information laws globally.⁷⁵

Fourth, the resolution of dispute mechanism under the Freedom of Information Act is largely faulty. Litigation as the only option to resolving access to information matters is a clog to effective access as a result of the hurdles associated with court processes in Nigeria. The three-tier system provided for in the Promotion of Access to Information Act is a more efficient way of resolving issues arising from information access. The first level requires that any matter arising from information requests would be settled by the body to whom the application is made. The second level requires that where the dispute cannot be resolved by the public or private body, as the case may be, the matter is brought before an independent body, the information regulator, and, lastly, to the courts, where there is no resolution of the matter. Therefore, it is crucial to have an independent and neutral umpire, such as an information commissioner or tribunal or ombudsman, to resolve disputes arising from the interpretation of the Freedom of Information Act. These independent bodies would speedily resolve issues and the courts should always be the last resort.

Fifth, providing for minimal or no cost at all for the indigent persons is indispensable to guaranteeing effective access to information. The Freedom of Information Act neglects to take into consideration economically-disadvantaged persons for the purpose of accessing public information. This is a setback as these persons are disenfranchised from exercising their right of access to information. The Promotion of Access to Information Act gives the Minister a discretion in dealing with the issue of costs for accessing information. For instance, the minister can exempt certain persons from paying for public information or reduce the costs or even exclude certain records from the fee regime.⁷⁶ In this way, better access to public information is guaranteed for all persons regardless of social standing.

Finally, the independence of the oversight body for access law is of the utmost importance. In the long run, effective access to public information is fostered when autonomy is established. It was earlier

⁷⁵ Mendel (n 25) 94.

⁷⁶ Sec 22; Mendel (n 25) 96.

contended that the Attorney-General of the Nigerian Federation saddled with this task may not be as autonomous as neutral bodies. For instance, it is noted that the Promotion of Access to Information Act entrusts its oversight responsibility on the South African Human Rights Commission.

5 Recommendations

For effective access to public information under the Freedom of Information Act, the following are recommended:

First, the scope of the Freedom of Information Act should be expanded to include private bodies where the information sought is for the purposes of protecting the rights and safety of persons.

Second, measures necessary to promote access to information should be increased to ensure the effective implementation of the Freedom of Information Act. It is a fact that the best law can be rendered inane, when the numerous implementation hurdles are not managed.

Third, the broad scope of exceptions contained in the Freedom of Information Act should be addressed as a matter of urgency. The Freedom of Information Act and the courts should, through judicial pronouncements, elucidate on nebulous concepts in the Act, such as national security, the harm test and public interest, in furtherance of effectual access.

Fourth, the time limit of seven days to respond to a request by the public institution, in my opinion, is too short especially considering the outlook of poor record keeping and bottleneck bureaucracy of the public service. A time frame of at least ten working days is recommended.

Fifth, the defective dispute resolution system should be redressed. The enforcement of the Freedom of Information Act rests solely on litigation and only a few organisations and individuals have the means to seek legal redress. Consequently, public bodies are seldom perturbed over the remote risk of legal action when they decide to withhold information. The indifference of some public bodies towards the implementation of the Act, and the frustrations experienced by the few requesters who have the temerity to pursue law suits, compel the demand for an independent appeal system. The independence of the appeal system must be guaranteed for effective access. Hence, the multi-tiered mechanism is recommended.

Sixth, the regime guiding costs for accessing public information should be reviewed to include protection for economically-disadvantaged persons.

Lastly, the Attorney-General is an agent of government and may not be able to act independently in carrying out its oversight functions. The Freedom of Information Act should be amended to empower an independent body to exercise this power, such as the National Human Rights Commission, as is the case of some more progressive information regimes such as that of South Africa.

6 Conclusion

The relevance of access laws that as a matter of fact guarantee unimpeded access to public information without alterations and manipulations cannot be overemphasised. For this reason, several attempts have been made by international bodies, such as the United Nations, to formulate rules. The reason for these fundamental rules is that public bodies usually are more inclined to release public information that they can control and manipulate.⁷⁷ However, access to information is concerned with publishing information without altering its form or content. An ideal access to information is predicated on rules that require public bodies to allow access to authentic documents and data upon request, or at the initiative of the public body.

Access to public information is a right to which every citizen of Nigeria is entitled. This access is secured only when the law is properly drafted in accordance with guiding rules and effective implementation. Thus, the Freedom of Information Act would guarantee effectual access to all persons when it is reviewed in line with some of the merits noted in the Promotion of Access to Information Act and, further, conforms to established rules guiding access to public information. These include the incorporation of a narrower scope of exceptions to access; more promotional measures to assure effectual implementation; an operative resolution system; and an independent oversight body to ensure speedy dispute resolution arising from access to information matters.

⁷⁷ Jorgensen (n 1) 38.