A Mixed Bag of Fortunes:

Compilation of Rulings and Judgments in FOI Cases in Nigeria (2012 - 2018)

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Acknowledgment

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Preface

This compilation of rulings and judgments in Freedom of Information cases in Nigeria presents a mixed bag of fortunes for the FOI Act in the Judiciary.

While some courts and judges within the Nigerian Judiciary have resolutely vindicated the rights of citizens to access information under the Freedom of Information Act, 2011, some have delivered verdicts of questionable validity and which have tended to set back the right.

There has been a progressive increase in the number of cases going to court to challenge the refusal by various public institutions to disclose information since the human rights lawyer, Mr. Bamidele Aturu (now of blessed memory) made the first known FOI request in Nigeria on June 7, 2011 less than two weeks after the Law came into force - on behalf of the Committee for the Defence of Human Rights (CDHR) to the Economic and Financial Crimes Commission (EFCC), asking the Commission to disclose the names of members of the CDHR alleged by the EFCC to have collected a bribe.

The EFCC had in statement accused the civil society organization of collecting N52 million from some suspects being investigated by the commission in order to weaken the agency's anti-corruption campaign.

Less than 30 days after he made the request and after the EFCC had failed to disclose the requested information, Bamidele Aturu launched the first FOI litigation in Nigeria when in the morning of July 6, he filed Suit No: FHC/L/CS/784/2011 on behalf of Olasupo Ojo (for himself and the Committee for the Defence of Human Rights) at the Federal High Court in Lagos, seeking an order of mandamus directing the EFCC to make available to the Applicant details of the information that the leadership of the CDHR collected the sum of N52 Million from an unnamed suspect being investigated by the EFCC.

It a judgment delivered on March 1, 2012, Justice B.F.M. Nyako of the Federal High Court in Lagos found in favour of the CDHR and ordered the EFCC to disclose the information. With the case, Bamidele Aturu appeared to have opened a floodgate of litigation arising from the FOI Act.

In many of the cases that have been litigated, many courts have unequivocally upheld the right of members of the public to access information under the FOI Act and have accordingly ordered the concerned public institutions to disclose the information requested.

However, over the years, there have also emerged from some courts a number of rulings and judgments whose reasoning defies logic and are difficult to reconcile with the clear provisions of the FOI Act. Some of these decisions have had the effect of eroding the right of access to the information expressly granted under the FOI Act.

With many public institutions seeming to prefer being sued to the alternative of willingly disclosing information to applicants for information, as required by the FOI Act, it is of absolute importance that ordinary citizens continue to view the courts as a place where they stand a fair chance of having their rights to information protected and given effect to. In many cases, by helping to clarify issues in the Act through their decisions, and affirming the right to information in a progressive manner, the courts have made significant contributions towards improving implementation and compliance with the provisions of the Act.

But it should be noted that decisions which give judicial cover to unjustifiable non-compliance with the provisions of the FOI Act only serve to encourage public institutions to willfully violate the provisions of the Act, based on a belief that even if they are clearly wrong, they nonetheless have a chance of persuading a court to decide in their favour. This will ultimately result in a lot of litigation which would otherwise not have been necessary. Such an attitude is costly for citizens and costly for the public institutions themselves. It amounts to a waste of public funds and should be discouraged.

In addition, it will encourage impunity in the form of brazen disregard for the Law by institutions supported and maintained with public funds.

Edetaen Ojo
Executive Director, Media Rights Agenda &
Co-Chair, National Steering Committee, Open Government Partnership (OGP) Nigeria
January 2019

Introduction

Despite some progress in the implementation of the Freedom of Information Act in Nigeria since its enactment in May 2011, the Law continues to face a variety of implementation challenges. Most notable among these is the high rate of denial of access to information by public institutions, with many of them in the form of mute refusals, whereby the public institutions to which the information requests are made simply ignore the requesters. This situation is resulting in a relatively high number of cases going before the courts.

The remedy provided in the FOI Act in cases of wrongful denial of access to information is for the affected requester to apply to the court for a review of the decision of the public institution denying access to the information requested.

This is proving to be challenging for many ordinary individuals who are unable to engage legal practitioners to represent them in initiating and prosecuting legal challenges to such denial of access to information and therefore, in most cases, they simply do nothing. Such situations have emboldened many public institutions to routinely deny citizens access to information or simply ignore those seeking information from them.

Regardless of this reality, Nigeria is nonetheless experiencing an impressive degree of vibrancy in the litigation of cases arising from the refusal by public institutions to provide individuals and organizations with the requested information. Admittedly, most of the legal challenges appear to be emanating from human rights and anti-corruption non-governmental organizations which have a long tradition of activism in Nigeria and are not afraid to confront governments or government agencies.

From the litigation experience today, it is clear that lawyers are at the core of ensuring the effective implementation of the FOI Act as all cases going before the courts require the involvement of lawyers. Yet, not much attention has been paid to the role of lawyers in the implementation process of the Act or how to enhance their effectiveness in litigating on behalf of persons who are wrongfully denied access to information under the Act.

This publication is a compilation of some of the decisions rendered by courts across Nigeria in FOI cases since the Act came into force in 2011. The objective of the publication, which is the first in a series of such compilations, is to make courts decisions and the thinking of the judges in FOI cases more readily available to legal practitioners litigating or interested in litigating similar cases in order to improve their effectiveness in such undertaking.

Through this process, such lawyers will be exposed to existing and emerging jurisprudence in FOI matters to equip them with the knowledge to better navigate FOI-related issues and develop a progressive attitude in the interpretation of the Act.

The availability of such decisions should also facilitate academic research and legal analysis which will contribute significantly to the development of the jurisprudence in this important but nonetheless novel area of Law in Nigeria.

Rulings and Judgments from State High Courts, the Federal High Court and the Court of Appeal

IN THE HIGH COURT OF LAGOS STATE
IN THE IKEJA JUDICIAL DIVISION
BEFORE THE HONOURABLE
JUSTICE Y.O. IDOWU (MRS)
SITTING AT COURT NO. 10
GENERAL CIVIL DIVISION IKEJA
TODAY WEDNESDAY 14TH MARCH, 2012

SUIT NO: ID/211/2009

BETWEEN:

INCORPORTED TRUSTEES OF THE CITIZENS
ASSISTANCE CENTRE ……. APPLICANT

AND

1. HON. S. ADEYEMI IKUFORIJI
2. LAGOS STATE HOUSE OF ASSEMBLY ……RESPONDENTS

RULING

The Applicants in this Suit brought a Motion on Notice dated 22nd November, 2011 pursuant to Order 40 Rules 3 and 5 of the High Court of Lagos State (Civil Procedure) Rules, 2004, Sections 1(1), 2, 3, 4, 20, 21, 22 & 25 of the Freedom of Information Act, 2011, Section 39, Constitution of the Federal Republic of Nigeria, 1999 (as amended), Article 13 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap A9, LFN (2004) and the inherent jurisdiction of this Honourable Court, praying for:-

1. An Order of mandamus compelling the Respondents to release or make available to the Applicants, the Information requested in the letter dated July 14, 2011 or "Exhibit Citizens Centre 1".
2. And for such further or other order(s) as this Honourable Court may deem fit to make in the Circumstances.

However, the Respondents have filed a Notice of Preliminary Objection dated 30th November, 2011 on the following grounds:-

1. That the Applicant lacks the requisite legal capacity/locus standi to commence this action.
2. That the Applicant in the Suit is an improper party.
3. That the Applicant is not a juristic person.
4. That the Applicant has no reasonable cause of action.
5. That the application for mandamus is speculative, academic, frivolous, vexations and an abuse of the Court process.
6. The relevant statute (Freedom of Information act 2011) relied upon by the Applicant in this application for an order of mandamus fails on the following grounds to wit:-

a. That the statute is not retrospective.
b. That by Section 14 (1) (6), the Respondents herein are precluded over exemption of personal information from publication as demanded by the Applicant (exception to the rule.).

This application is supported by a 20 paragraph counter-affidavit dated 5th December, 2011 wherein the department averred that the Applicant in this Suit is not a registered organization, unknown to law, hence cannot maintain or institute proceedings before a Court of Law.

That the overhead costs sought to be published cannot be published without creating crisis in the interest of the state and its security.

Further that the law relied upon by the Applicant that is, the Freedom of Information Act took effect the 28th of May, 2011 and as such cannot suffice for the Applicant requesting for information overhead costs from 1999 to September 2011.

That the Respondents can deny the Applicant where the subject of the information includes personal information maintained with respect to the Respondents' employees, appointees and or support staff.

That the Respondents and their support staff, appointees and or elected officials will suffer irreparable injury and or prejudice if the information is made available to the Applicant who may likely publish it in the media; and no indemnity can cure the damage that will result from such grant.

The Respondents submitted for determination the following issues:-

i. Whether or not the Applicant herein has the requisite legal capacity/locus standi to commence this action.
ii. Whether or not the Applicant in this Suit is a proper party.
iii. Whether or not the Applicant is a juristic person.
iv. Whether or not the Applicant discloses any reasonable cause of action.
v. Whether or not the application is an abuse of the Court process
vi. Whether the Freedom of Information Act 2011 relied upon by the Applicant is retrospective
vii. Whether the Respondents are clothed by the enabling law relied upon by Applicant with power to exempt certain personal information from disclosure to the public.

On issues 1, 2 and 3, Counsel stated that legal capacity **to sue connotes the very existence and recognition of a party under the law. He cited the case of FAWEHINMI V. NBA (N0. 2) (1989) 2 NWLR (PT. 105) 558**

Where the Supreme Court stated thus:-

> **"The right to form any association for the protection of interest of the members is an integrated right guaranteed under Section 37 of the 1979 Constitution. However, such association of persons, though recognized by the Constitution does not become vested ipso facto with the attributes of incorporation which alone confers legal personality. It is for this reason that the power to incorporate such association is provided under ……. the Constitution?**

He submitted that the Applicant has failed, refused and or neglected to exhibit their certificate or registration which ordinarily will show their registration and competence to sue.

He submitted further that the Applicant has no locus standi to institute this Suit either for themselves or on behalf of other people. He referred **to PACERS MULTI DYNAMIC V. M.V. DANCING SISTER (2003) 3 NWLR (PT. 648) 241;**

SHODIPO V. OGIDAN
(2008) 4 NWLR (PT. 1077) 342.

He stated that the issues submitted for adjudication by the Applicant are purely matter between the general public and the legislative arm of the Lagos State Government and not the Applicant alone; that the letter has not shown in any way why they want this information.

On issues 4 and 5, learned Counsel submitted that a cause of action is the bundle or aggregate set of facts which the law recognize as giving the Applicant a substantive right to make the claim against the Respondent and seek the relief or remedy being sought. Thus this factual situation must be recognized by the law as giving rise to the substantial right capable of being claimed or enforced against the Respondent; and that a perusal of the Applicant's processes do not reveal any cause of action. He referred to the cases of **ADESOKAN V. ADEGOROLU (1995) 6 NWLR (Pt.493) 267;**

RINCO CONSTRUCTION CO. V. VEEPEE IND. LTD (2005) 9 NWLR (PT. 929) 85;
ADENUGA V. ODUMENU (2003) 4 SC (PT. 1);
SPDCN LTD V. NWAKWA (2003) 6 NWLR (PT. 815) 2009.

On issue 6, Counsel submitted that it is irritating that a non-juristic person lacking the right to approach the Court will use the instrumentality of the Court process to irritate, provoke, harass, annoy and intimidate the Respondents. He cited the cases of **AFRICAN RE-CORO V. CONS. (NIG.) LTD (2002) 13 NWLR (PT. 838) 609;**
MOGAJI V. NEPA (2002) FWLR (PT. 153) 239;
OJO V. A.G. OYO STATE (2008) 15 NWLR (PT. 1110) 309.

On issue 7, learned counsel stated that it is trite law that under a democratic dispensation, the laws passed by the National Assembly and the State House of Assembly can neither be retroactive nor retrospective. He referred to Section 1 of the Freedom of Information Act 2011 and the case of **ADESANOYE V. ADEWOLE (2003) 9 NWLR (PT. 671) 127**.

He submitted that from the processes filed by the Applicant for mandamus to release or make available to the Applicant, the information requested in the Applicant's letter dated July 14th 2011 seeking for detailed overhead costs made to the 2nd Respondent by the Commissioner of Finance or the Accountant General of Lagos State from May 1999 to September, 2011, the application must fail as the commencement date of the enabling law which the Applicant relies on is neither retroactive nor retrospective.

Further that by the provision of Section 14(1) (b) of the Freedom of Information Act 2011, overhead costs are classified under Section 14(1) (6) and contain personal information and information exempted under that law; and this falls within the exemption permitted by the law to be prohibited from circulation to the public.

He posited that mandamus is a discretionary remedy which is available only when the legal remedy is equally beneficial, convenient and effective. He cited the case of **FAWEHINMI V. I.G. P. (2000) 7 NWLR (PT. 665) 48**

Where the Court held thus:-

> **"Mandamus lies to secure the performance of a public duty in the performance of which the Applicant has a sufficient legal interest. The Applicant must show that he has demanded performance has been refused by the authority obliged to discharge it it is pre-eminently a discretionary remedy, and the court will decline to award it if another legal remedy is equally beneficial, convenient and effective."**

Moving his objection in Court, Counsel argued that by Section 20 of the Freedom of Information Act 2011, section 20 which states thus 'any Applicant who has been denied access to information or a part thereof may apply to a Court for a review of the matter within 30 days, after the public institution denies or is seemed to have denied the application or within such further time as the Court may or either before the expiration of the 30 days fixed or allowed.

He stated that the request by letter was made on the 14th July, 2011 and invitation to the Honourable Court to intervene, sought on the 25th of October, 2011, clearly not within the period permitted by law. That they could have, but did not, come by the end of the 30 days for extension of time for the Honourable Court to intervene.

Thus that the Court is not entitled to intervene in the matter.

Further that the mechanism through which the Applicant can request the Honourable Court's intervention is by Judicial Review not mandamus, as the Court would be invited to review the decision of the public institution refusing to accede to the request.

Whereas that by the application for mandamus, the invitation extended to court is to direct the public officer to do what he sought to have done.
That in the case of judicial review, the discretion of the judge is to examine the merits and determine whether the refusal was justified or not but in that of mandamus it is an invitation to the Court to compel the affected person.

Further that by Section 21 of the Freedom of Information Act 2011, in dealing with whether the refusal is justified, the Court is required to do so by summary proceedings and not by the filing of affidavit evidence and without the necessity of filing contentious applications. In essence what is contemplated under the Freedom of Information Act, 2011 is not the rigorous procedure of mandamus but the absolute exercise of the Honourable Court's decision to deal with the matter expeditiously.

He contended further that the request even ought to have been made to the Accountant-General of the State, being the one who made the releases, rather than the recipient. He highlighted the wordings of the application that.- "The Respondents to make available to the Applicant the detailed overhead cost made to the 2nd Respondent by Commissioner of Finance or the Accountant-General of Lagos State." He stated that the Accountant-General should even have been made a party.

Even further that by **ADESANOYE V. ADEWOLE (2009) 9 NWLR (PT. 671) 127,**
the Court held that "accordingly the Court will not ascribe retrospective force to a new law affecting rights unless by

express words or necessary implication it appears that such was the intention of the law makers".

He urged this Honourable Court to uphold the Respondents' Preliminary Objection to this Suit.

The Applicant in response filed a Reply dated 12th December, 2011 where he stated that the Applicant is a registered Nigerian organization with Registration No. CAC/IT/NO 24927 and a certificate of Incorporation dated 30th August, 2007 issued by the Corporate Affairs Commission (CAC).

Applicant's Counsel's written address in response is dated 12th December, 2011 where he raised a preliminary point of law as per the validity, competency or otherwise of both the aforesaid counter-affidavit and the accompanying written address.

He submitted that the Respondent's counter affidavit and the written address dated 5th December, 2011 are incompetent having not been filed within the period specified by the High Court of Lagos State (Civil Procedure) Rules 2004, that is Order 39 Rule 1 (3). He cited the cases of **ENVIRONMENT DEV. CO. & ANOR V. UMARA ASSOCIATE NIG. (2000) 4 NWLR (Pt. 652) 293;**

BAKOSAI V. CHIEF OF NAVAL STAFF (2004) 15 NWLR (Pt. 896) 268;
BAMAIYI V.A.G. FED. & ORS. (2001) 12 NWLR (PT. 727) 456;
OGIDI & ORS. V. THE STATE (2005) 5 NWLR (PT. 918) 268.

Thus that there is no counter affidavit and or written address in opposition to their application, accordingly that their application be granted.
He contended that the Respondent's affidavit in response runs contrary to the provisions of Sections 86 to 89 of the Evidence Act which underscores the strict compliance required by the in affidavit evidence.

That contrary to Section 88, the deponent to the Respondent's affidavit did not set forth explicitly the facts and circumstance constituting the ground of her belief as required; not the time place as required by Section 89 of the Evidence Act.

Thus that it is trite that any affidavit that contravenes any of the provisions of the Evidence Act cannot be spared at all and same will be discarded by the Court. He urged the Court to so hold.
Counsel adopting the issues for determination proffered by the Respondents, in response to issues 1, 2 and 3 cited the provisions of Sections 1 (1), (2) and (3) as well as Section 2 (6) which state thus:-

1. (1) Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether in the custody or possession of any public official, agency or institution, howsoever described, is established.

(2) An application under Act needs not demonstrate any specific interest in the information being applied for.

(3) Any person entitled to the right to information under this Act, shall have the right to institute proceedings in the Court to compel any public institute to comply with the provisions of this Act.

2. (6) Any person entitled to the right of access conferred by this Act shall have the right to institute proceedings in the Court to compel any public institution to comply with the provisions of this Section.

He submitted that issues 4 and 5 formulated by learned counsel to the Respondents are academic and otiose having regard to the provisions of Sections 1(1), (2) and (3), Section 2 (6) of the Freedom of Information Act, 2011 as well as Order 40 Rules 3 and 5 of the High Court of Lagos State (Civil Procedure) Rules 2004.

On Issues 6 and 7, Counsel stated that the Act is not retrospective but rather that the information from 28th May, 2011 to September, 2011 as required under Sections 4 (a) and (b) as well as Sections 7 (1) to (4) of the Freedom of Information Act instead of the unresponsive and indifferent posture exhibited by them.

Learned Counsel contended that the Respondents ought to have given the Applicant a written notice of denial and the reasons for the denial within 7 days of receiving the letter in accordance with Section 4 (b), and that having not done so,

they are stopped from doing so now.

He stated that this Honourable Court has the power to and should compel the Respondents to make available the requested information from the 28th of May 2011 to September, 2011.
He concluded that Sections 14 (a) to (e) clearly, distinctly, elaborately and specifically set out five categories of information exempted and none of them include overhead costs. He cited the case of **DR. TAIWO OLORUNTOBA-OJU & 4 ORS V. PROF. SHUAIB OBAABDUL-RAHEEM & 3 ORS. ALR (PT. 1) 1;**
and if the law makers intended to exempt overhead costs, whether detailed or otherwise, they would have specifically so stated by clear words. He referred to the case of **VICKERS. SONS OF MAIM LIMITED V. EVANS (1910) AC 444; THOMPSON V. GOOLD & CO. (1910) AC 409.**

In his reply on points of law, learned counsel to the Respondents stated that where learned counsel to the Applicants have conceded that the Act is not retrospective, can the Court legally make an Order of mandamus in that respect.

Also that the order being sought is not to direct the Respondents to respond to the request but compelling them to furnish the information, thus that the relief being sought is not consistent with Section 4 of the Freedom of Information Act.

The gravamen of the preliminary objection to be considered "is whether the Applicant's motion on notice is properly before this Court with regards to Sections 20 and 21 of the Freedom of Information Act, 2011 and shall be my focus in considering this application.

In this vein, I shall also adopt the issues for determination raised by the Respondent.

I shall answer the first four issues together.

Locus standi means that legal capacity or authority to sue in a cause or matter. For a plaintiff to sue in a matter, he has to disclose his interest in the matter. **See AYORNDE V. KUFORIJI (2007) 4 NWLR (PT. 1024) 341.**

It is trite law that only juristic persons can sue or be sued. They include natural persons, incorporated companies, corporations with perpetual succession and unincorporated associations granted the status of legal persons by law. See **GOV. KWARA STATE V. LAWAL (2007) 13 NWLR (PT. 1051) 347.**

On whether there is a reasonable cause of action; the law is that there must be a controversy between parties that a Court is called upon to resolve in a suit otherwise the Court will lack jurisdiction to entertain the suit. In other words, there must exist a cause of action between the parties, which term may be described as a civil right or obligation for the determination by a Court of law or a dispute in respect of which a Court of law is entitled to invoke its judicial powers to determine. See **FEDERATION V. ABUBAKAR (SUPRA).**

The grouse between the parties is quite apparent which is on the refusal to grant information requested by the applicant. This answers the issue of locus standi and cause of action of the Applicant in the affirmative.

Also the Applicant has in their counter affidavit exhibited their certificate of incorporation thereby laying to rest the issue of it not being a juristic person.

At this juncture, I shall consider the provisions of this act and give a step by step analysis of the procedure of applying for information from a public institution in accordance with the Freedom of Information Act 2011, and at the end of that place the facts on ground by its side 1 order to guide this Honourable Court in its attendant decision.

First the Preamble to the Act reads that thus: AN ACT 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 FOR DISCLOSING CERTAIN KINDS OF OFFICIAL INFORMATION WITHOUT AUTHORISATION AND ESTABLISH PROCEDURES FOR THE ACHIEVEMENT OF THOSE PURPOSES AND FOR RELATED MATTERS.

I must say here that this clearly answers the issue of whether this act is meant to be retrospective in nature. This would have been clearly stated here if intended. The commencement date of operation of the act follows as the 28th day of May, 2011. This again lays to rest the issue of whether the act is intended to be retrospective in nature.

The Respondent in arguing their preliminary objection stated that the Applicant has not shown any reasonable interest for wanting the information and thus cannot be obliged with it. I must say that this assertion is unfounded as section 1(2) of the act reads that an Applicant under this act need not demonstrate any specific interest in the information being applied for. Once it is a public information, no interest or purpose to which the information is to be used is required to be shown.

Section 4 reads further that where information is applied for under the act, the public institution to which the application is made shall subject to sections 6, 7 and 8 of the act, within 7 days after the application is received

a. Make the information available to the Applicant;
b. Where the public institution considers that the application should be denied, the institution shall give written notice to the Applicant that access to all or part of the information will not be granted, stating reasons for the denial, and the section of this act under which the denial is made.

The Respondent has not denied the Applicant's allegation that it never gave it a written refusal, and that it is here in Court in its preliminary objection that (the Applicant) is just learning the basis of the refusal.

The act goes on in its Section 7(1) that where the government or public institution refuses to give access to a record or information applied for under the act, or a part thereof, the institution shall state in the notice given to the Applicant the grounds for the refusal, the specific provision of the act that it relates to and that the Applicant has a right to challenge the decision refusing access and have it received by a Court.

Its Subsection (4) that where the government or public institution fails to give access to information or record applied for under this act or part thereof within the time limit set out in this act, the institution shall for the purposes of this act, be deemed to have refused to give access
This Subsection (4) answers the Applicants assertion that the Respondent never wrote the Applicant on its refusal to grant the application for information.

Subsection 1 of Section 7 above is quite clear and unambiguous. "the Applicant has a right to challenge the decision refusing access and have it reviewed by a Court". Thus I shall agree with the Respondent's argument that what is open for an Applicant to do is to bring an action to Court asking it to consider the refusal, reasons for it and review it; and not straight up an application for mandamus

This is where Section 20 of the act comes in which reads thus:- "any applicant who has been denied access to information, or a part thereof may apply to the Court for a review of the matter within 30 days after the public institution denies or is deemed to have denied the application; or within such further time as the Court may either before or after the expiration of the 30 days fix or allow.

It is the Respondent's argument that the Applicant delayed beyond the approved 30 days before filing this action which the Applicant has been unable to refute.

The primary concern of the Court in the construction of statutes is to ascertain the intention of lawmakers as deducible from the language of the statute being construed. See **A.G. FEDERATION V. ABUBAKAR (2007) 10 NWLR (PT. 1041) 1.**

In other words a court can only determine the intention of the legislature as expressed in a particular provision of the constitution or a statute by critically examining the words used to couch that particular provision. Thus the Court can only interpret the words according to their literal meaning, and the sentences therein, according to their grammatical meaning**. See A.G. FEDERATION V. ABUBAKAR (SUPRA).**

The Court in **DANGOTE V. C.S.C PLATEAU STATE (2001) 4 S.C (PT. II, 43 at 56**

Held that "it is a well settled principle that where a special procedure is prescribed for the enforcement of a particular right or remedy, non-compliance with or departure from such a procedure is fatal to the enforcement of the remedy". Thus the non-observance of section 20 by the Applicant is fatal to their application

Mandamus is an extraordinary and residuary remedy that ought to be granted only when there is no other means of obtaining justice. It lies to secure the performance of a public duty, in the performance of which the Applicant has a sufficient legal interest. Consequently, irrespective of the fact that an Applicant for an order of mandamus has satisfied other requirements for securing the remedy, the Court will not grant the order if a specific alternative remedy which is equally convenient, beneficial and effectual is available. **See ATTA V. C.O.P (SUPRA), FAWEHINMI V I.G.P (2000) 7 NWLR (PT. 665) 481.**

The following are conditions precedent to grant of order of mandamus:-

a. The order of mandamus lies to secure the performance of a public duty, in the performance of which the Applicant has a sufficient legal interest. The Applicant must show that he has demanded the performance of the duty and that performance has been refused by the authority obliged to discharge it.
b. The duty to be performed must be of a public nature. See C.B.N V. S.A.P (NIG) LTD (2005) 3 NWLR (PT. 911) 152.

The public duty, the performance of which may be commanded by an order of mandamus is one that must be imposed upon the person against whom the order is sought. Such public duty need not to be imposed by statute only. It may be a duty under that common law and even a duty under customary law. See **C.B.N. V. S.A.P. (NIG) LTD (2005) 3 NWLR (PT. 911) 152**

A Court may refuse to make an order of mandamus:-

A. Unless it has been shown that a distinct demand for performance of the duty has been made and that the demand has deliberately not been complied with;
b. Whether there is undue delay;
c. Where the motives of the Applicant are unreasonable.
See ATTA V. C.O.P. (2003) 17 NWLR (PT. 849) 250

A Court before whom an application for mandamus is made has a discretion to grant on refuse it. The Court must however, exercise its discretion judicially and judiciously. **See ATTA V. C.O.P. (2003) 17 NWLR (PT. 849) 250.**

Court, tribunals and administrative bodies, in general have a duty to exercise their statutory discretions one way or the other when the circumstances calling for the exercise of those discretion arise, but are normally under any duty to determine that matter or exercise such discretion in a particular way. **See ATTA V. C.O.P. (SUPRA)**. However a Court does not make an order which it cannot enforce. **FAWEHINMI V. I.G.P (SUPRA).**

Back to the issues for determination on issue 5, Abuse of process of Court simply means that the process of the Court has not been used bona fide and properly. It is a term generally applied to a proceeding which is frivolous, vexatious or oppressive. It can also mean abuse of legal process. **See IWUAGOLU V. AZYKA (2007) 5 NWLR (PT. 1028) 613**.

I do not agree that the Applicant's application is an abuse of Court process. Where a procedure for redress is provided by the law and a litigant fails to follow this procedure this cannot be termed as an abuse of Court process.

Issue 6 is whether the act is retrospective in nature, I refer to the paragraph on the preamble I highlighted earlier which answers succinctly this question.

In ADESANOYE V. ADEWOLE (2000) 9 NWLR (PT. 671) 127

the Court held that:- "although the legislative has the authority and competence to make retrospective legislation within the constitution which allocates legislative functions to it, in which case the retrospective nature of the legislation may be partial or total, merely procedural or substantive, an interpretation giving a retrospective effect to a statute should not be readily accepted where that would affect vested rights or impose liability or disqualification for past events."

There are three kinds of statutes that can be said to be retrospective, namely:-

a. Statutes that attach benevolent consequences to a prior event;
b. Statutes that impose a penalty on a person who is described by reference to a prior event, but the penalty is not a consequence of the event; and

c. Statutes that attach prejudicial consequences to a prior event. **See ADESANOYE V. ADEWOLE (SUPRA).**

The Applicant is seeking for information from May 1999 to September but as the commencement date of the act is 28th May 2011, and the act clearly not retrospective in nature, the application could never have been granted.

Finally is the whether the Respondents have the power to exempt certain information from the public. I would answer this question affirmatively by reason of Section 14 of the act as raised by the Respondent.

Section 14 (1) reads that subject to subsection (2), a public institution must deny an application for information that contains personal information and information exempted under the section which includes:

(b) Personal files and personal information maintained with respect to employees, appointees or elected officials of any public institution or Applicants for such positions;
(2) A public institution shall disclose any information that contains personal information if-
(a) The individual to whom it relates consents to the disclosure; or
(b) The information is publicly available
(3) Where disclosure of any information referred to in this section would be in the public interest, and if the public interest in the disclosure of such information clearly outweighs the protection of the privacy of the individual to whom such information relates, the public institution to whom a request for disclosure is made shall disclose such information subject to section 14(2) of this Act.

I agree with the Respondents argument that the overhead expenses sought fall under information precluded from public knowledge by section 14(1) (b) of the Act.
The term 'judicial review' means a Court's power to review the actions of other branches of levels of government; especially, the Court's power to invalidate legislative and executive action as being unconstitutional. **See A.G. FED. V. ABULE (2005) 11 NWLR (PT. 936) 369.**

When a Suit is instituted, its contents may be considered either from the points of view of its inherent benefits to the proponent of the action or from the benefit derivable jurisprudentially speaking, by the society at large such as in a case on constitutional or administrative law. Speaking analytically, it is safe to postulate that the determination of justice while demonstrating the latitude of individual liberty ought generally to be consistent with the welfare and ethic of the society. **See MAGIT V. UNIVERSITY OF AGRIC MAKURDI (2005) 19 NWLR (PT. 959) 211.**

Section 20 is clear as to the time limit and procedure to be adopted in bringing this kind of application and ought to be complied with.

I also agree with the Counsel for the Respondents that the extension obtained was to bring the mandamus application before the Court and not in view of Section 20 which requires that extension may be got from Court before the expiration of the 30 days to bring an application for judicial review as to refusal of the request for information. The Applicant's letter was dated July 14th 2011 and this action was not commenced until well after the required 30 days.

It is trite that where the words of a statute are clear and unambiguous, the function of the Court is to apply the words in their simple and ordinary meaning. **See AWOLOWO V. SHAGARI (1979) ALL NLR 120.**

In view of the foregoing I agree with the objection and hereby hold that the application for mandamus fails for the following reasons:-

A. That the application is clearly out of the time specified to be brought by Section 20 of the Freedom of Information Act 2011.
A Court does not make an order which it cannot enforce. FAWEHINMI V. I.G.P (SUPRA).
b. That the statute is not retrospective.
c. That by Section 14 (i) (b), the Respondents herein are precluded over exemption of personal information from publication as demanded by the Applicant.

HON. JUSTICE Y.O. IDOWU (MRS)
JUDGE
14/03/2012

IN THE HIGH COURT OF JUSTICE
OYO STATE OF NIGERIA
IN THE IBADAN JUDICIAL DIVISION
HOLDEN AT IBADAN
BEFORE THE HONOURABLE JUSTICE P.O. IGE
THIS MONDAY THE 28TH DAY OF MAY, 2012

COURT NO. 11

SUIT NO: 1/778/2011

BETWEEN:

THE REGISTERED TRUSTEES OF THE SOCIO-ECONOMIC RIGHTS AND ACCOUNTABILITY PROJECT (SERAP)) ……. PLAINTIFF

AND

1. THE GOVERNOR OF OYO STATE
2. THE ATTORNEY-GENERAL OF OYO STATE) ……. DEFENDANTS

Parties absent
Solomon Edoh Esq. for the Claimant
Olayanju Morolari (Miss) for 1st and 2nd Defendants.

R U L I N G

The Plaintiff in this action, the Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) by its Originating Summons against the Defendants seeks for the determination of the following question:

"Whether by the provision of Section 4(a) of the Freedom of Information Act, 2011, the defendant Project (SERAP) by its Originating Summons against the Defendants seeks for the determination of the following question:

AND THE PLAINTIFF CLAIMS AGAINST DEFENFANT AS FOLLOWS:

1. A declaration that the provisions of the Freedom of Information Act 2011 are binding on the 1st Defendant and the Oyo State Government
2. A declaration that by virtue of the provisions of Section 4(a) of the Freedom of Information Act, 2011, the 1st Defendant is under a binding legal obligation to provide the Plaintiff with up to date information on government/public spending relating to primary education in Oyo State including:
   a. *Detailed information on the total amount of the Universal Basic Education Commission (UBEC) intervention funds that have been accessed by Oyo State through the State Universal Basic Education Commission of Oyo State.*
   b. *The total amount of the counterpart fund Oyo State Government has provided in Oyo State since 2005 and a detailed and up to date information on the spending of the fund; and*
   c. *Details of projects on which the UBEC intervention and Counterpart Funds were spent and the exact amount of money expended on each of such projects since 2005 in Oyo State.*
   2. *AN ORDER directing the 1st Defendant to provide the Plaintiff with up to date information on government/public spending relating to primary education in Oyo State including:*

      (a) Detailed information on the total amount of the Universal Basic Education Commission (UBEC) intervention funds that have been accessed by Oyo State through the State Universal Basic Education Commission of Oyo State:
      (b) The total amount of the counterpart fund provided by Oyo State Government to the state universal basic education commission (UBEC) program in Oyo Sate since 2005 and a details and up to date information on the spending of the fund; and
      (c) Details of projects on which the UBEC intervention and counterpart funds were spent and the exact mount of money expended on each of such projects since 2005 in Oyo State."

The Originating Summons was accompanied by 5 paragraph Affidavit. The Originating Summons was taken out on 1st day of September, 2011.

Conditional Appearance was entered on behalf of the Defendants by O.A. Ladapo Esq. Senior Legal Officer on 10th day of October, 2011.

On the same date the Defendants through the Learned Senior Legal Officer filed Notice of Preliminary Objection pursuant to Section 6(6) (a) of the 1999 Constitution of the Federal Republic of Nigeria as amended. The said Notice of Preliminary Objection was accompanied with 4 paragraphs Affidavit in Support. They also filed what they titled "Affidavit in response to Originating Summons" it consists of 4 paragraphs.

O.A. Ladapo State Legal Officer for the Defendants/Applicants also filed a Written Address in Support of the Preliminary Objection of the Defendants. It is dated and filed on the 18th day of October, 2011.

The Claimant through its Executive Director on 11th day of November, 2011 filed Counter Affidavit in opposition to the Notice of Preliminary Objection filed by Defendants. It has 11 paragraphs. On 6th day of January, 2012 the Claimant's Learned Counsel filed Written Address in opposition to the Notice of Preliminary Objection filed by the defendants. It is dated 5th January, 2012.

O.A. Ladapo Esq. Senior Legal filed Reply on Points of Law t the Written Address of the claimant on 23rd day of February, 2012. It is dated 23rd February, 2012.
The Notice of Preliminary Objection filed by the defendants was heard on 26th day of March, 2012 and the Learned Counsel to the parties adopted their Written Address. The Notice of Preliminary Objection is couched as follows:

> *Take Notice that this Honourable Court on ……. The ……... day of ……..…... 2011 at the hour of 9 O'clock in the forenoon or so soon thereafter as counsel for all the Defendants may be heard, the defendants shall be objecting to the hearing and determination of this suit on the ground:*
>
> > *That this Honourable court lacks the jurisdiction to entertain and determine the cause of the Claimant as it is presently constituted.*
> > *Particulars*
> > *The suit of the claimant was not commended by the power originating process as provided for by Section 20 of the Freedom of Information Act, 2011*
> > *And the Defendant shall be praying this Honourable Court for an order striking out this suit for the incompetence of its originating processes which robs this Honourable Court of its jurisdiction to hear and determine the Claimant's cause."*

The Learned Senior Legal Officer for the Defendants opened his address by stating that the Claimant instituted this action against the two Defendants on alleged violation of Section 4(a) of the Freedom of Information Act, 2011 and that the Claimant initiated this suit by originating Summons. He informed the Court that the Defendants are challenging the court's jurisdiction to hear and determine this matter on the ground that the Claimant did not commence the action as mandated by Section 20 of the Freedom of Information Act, 2011.

He therefore formulated two issues for determination viz:

1. Whether the claimant can successfully commence its action against an alleged breach of Freedom of Information Act, 2011 by way of originating summons, when Section 20 of the Freedom of Information Act specifically mandates that all actions pursuant to the Act shall be commended by way of Judicial Review.
2. What is the consequence an action by way other than the Originating Process prescribed by law?

On issue one the Learned Counsel to the Defendants/Applicants reproduced Section 20 of the Freedom of Information Act, 2011 and submitted that the side note to Section 20 of the said Act is helpful in the interpretation of Section 20 in that it states categorically the words "Judicial review" and that the word "may" used in Side note 20 the Act can only be properly construed upon what he called "a holistic reading of the side note of the Section" which Ladapo Esq. believes would reveal that the word "may" used therein refers to the rights of the application to commence legal action when denied information and not an option as to whether or not to commence the action by way of judicial review. That judicial review is a mode of commencing legal proceedings which is employed when a judicial, quasi judicial body or administrative tribunal has taken a decision which is complained against as a violation of rights of individual. That the

remedy available after a judicial review is either the quashing of the decision complained against or an order of mandamus compelling the violator to proceed to do an act in favour of the Applicant. He relied on the definition of judicial review as contained on page 924 of the Black's Law Dictionary 9th Edition.

He relied on the case of AG Lagos State Vs. Eko Hotels (2006) 18 NWLR (part 1101) 378 at 460 1 to contend that it was inferable that the 1st Defendant while acting on the application of the Claimant was acting in quasi-judicial or as an administrative Tribunal pursuant to Section 4 of the Freedom of Information Act. That the only method by which 1st Defendant could be challenged is by judicial review. He submitted that actions in judicial review in Oyo State High court must be commenced in accordance with the provisions of Order 40 Rule 3 of the High Court (Civil Procedure) Rules 2010. That it could only be commended by leave and that such leave must be obtained before a Claimant file other processes. That the claimant did not see for nor did he obtain the leave of this Court before proceeding to file its Originating Summons. He therefore submitted that the action herein was not commenced by way of judicial review.

Ladapo Esq. Senior Legal Officer submitted that where a statute prescribes a way of doing a thing, a person cannot do that same thing in another way relying on the case of AJUTA II CS. NGEGE (2002) 1 NWLR (PART 748) 278 at 3000. That what the freedom of Information Act, 2011 prescribes is that an action under it would be by way of judicial review. And that the same mode was prescribed by the Oyo State High Court Civil Procedure Rules Law enacted by the Oyo Sate House of Assembly which he said provides that applications for judicial review must be preceded by an application for leave.

Ladapo Esq. submitted that in the light of his foregoing arguments I should hold that the claimant has contravened both Section 20 of the Freedom of Information Act, 2011 and the Oyo State High Court (Civil Procedure) Rules 2011 therefore the Originating process is incompetent.

On issue two as to what is the consequence of commencing an action in a manner different from the mode prescribed by law, O.A. Ladapo Esq, for the Defendants/Applicants submitted that there is long line of cases of Court of Appeal and Supreme Court to the effect that where an action is commenced other than by the originating process prescribed for its commencement, it robs the court of its competence to exercise its jurisdiction and renders the suit incompetent and that it is liable to be struck out. He relied on the cases of:

1. **DOHERTY VS. DOHERTY (1968) NWLR 241**
2. **A.G. FEDERATION VS. GUARDIAN NEWSPAPERS (1999) OF NWLR (PART 618) 187 at 233** and
3. **LADOJA VS. INEC & ORS (2007) ALL FWLR (PART 377) 34 at 91-2**

He further submitted that since jurisdiction is the threshold and basis for the competence of a Court and its power to validly adjudicate on a matter and that Court would decline jurisdiction over a matter it has no jurisdiction and would make an order striking the matter. He cited the cases of TRADE BANK PLC VS. UDEGBUNAM (2003) 17 NWLR (PT.84) 508 to the effect that it is injustice for a court without jurisdiction to exercise such jurisdiction. He urged me to resolve issue two also in favour of Defendants/Applicants and to strike the suit for want of competence to exercise jurisdiction.

In his reply to the above submissions of Ladapo Esq. the Learned Counsel to the Claimant, Solomon Edo Esq., relied on the Counter Affidavit filed against the Notice of Preliminary Objection. He then traced the background facts to the effect that the Originating Summons was filed on 26th August 2011 and the appearance of the Defendants and subsequent filing of the Objection to the Claimant's Action herein. That the Claimant is vehemently opposed to the Primary Objection raised by the Defendants. He raised an issue for determination namely:-

> *"Whether on a proper construction of Section 20 of the Freedom of Information Act, 2011, the Claimant's action as currently constitute is improperly commenced."*

Solomon Edoh Esq., is of the view that Section 20 of the Freedom of Information Act, 2011 does not stipulate a particular mode or procedure for commencing an action by a person who has been denied access to information by a public institution. According to Learned Counsel to the Claimant, under it (Section 20) an aggrieved Applicant who has been denied access to information may apply to the Court for a review of the matter within 30 days after the public institution denies or is deemed to have denied the Applicant access to the information sought. He too quoted Section 20 of the Act and emphasized that the word "may" applies to the Court for a review of the matter.

According to the Learned Counsel to the Claimant the Operative words in Section 20 of the Act are:

"May apply to the court or a review of the matter."

The import of those words Learned Counsel submitted, is that an Applicant may if he so chooses apply to the Court for a review of the decision by the public institution denying him access to the information sought for. That the provision does not stipulate the mode through which the aggrieved applicant will invoke the court's jurisdiction of the review of the decision denying him access to the information sought.

The Learned Counsel to the Claimants called in aid, the Black's Law Dictionary 6th Edition and Chambers 20th Century Dictionary as defining the word *"review"* to mean:

> *"To examine judicial or administratively, A reconsideration, consideration for purpose of correction and as "a viewing again, a reconsideration."*

Solomon Edoh Esq. for Claimant submitted that having regard to those definitions of the word "review" it all com down to one conclusion as meaning to apply to the court for a reconsideration of the decision denying access to information

He also submitted that Section 20 of Freedom of Information Act does not stipulate the mode or manner in which an aggrieved Applicant ought to approach o invoke court's jurisdiction for a reconsideration of the decision denying or refusing him access to the information required. That if the law maker or the draftsman had wanted to tell the Applicant a particular manner or mode he would have said so. That there is nothing in Section 20 contemplating an application for judicial review.

It is the submission of Solomon Edoh for Claimant that the court ought not to read into an act or enactments words not contained therein. That to suggest that an Applicant is required by Section 20 of the Act to come to Court vide a judicial review action is to read into section 20 words which are not contained therein. This he said is not allowed as it will alter their operation effect. He relied on the cases of

1. **U.T.B (NIG.) LTD VS UKPABIA & ORS (2000) 8 NWLR (PT. 670) 570 at 380 Per Fabiyi JCA**
2. **BELLO VS A.G. OF OYO STATE (1986) 5 NWLR (PART 45) 828**
3. **TUKUR VS. GOVT. OF GONGOLA STATE (1988) 1 NWLR (PART 68) 51 G.**
4. **N.E.P.A. VS. AWKFOR (2001) 1 NWLR (PART 693) PAGE at 108-109**
5. **SUNMONU VS. OLADOKUN (1996) 8 NWLR (part 467) 387.**

Solomon Edoh Esq. is also of the view that this Court cannot reckon with marginal notes in the construction of statutes. That reliance on marginal noted on the part of the Defendant is a misconception of what is the true meaning of judicial review. On the submission that marginal notes cannot be used to interpret a statute he relied on Section 3(2) (a) of the Interpretation Act Cap 123 LFN 2004. That interpretation Act has made the position clear that Marginal Notes do not form, part of a statute. In other word marginal note is not a useful aid in construing the purpose and intendment of a particular statute. He relied on the cases of:

1. **FMB LTD VS. N.D.I.C. (1995) 6 NWLR (PART 400) 226 at 244 245 per Kalgo JCA**
2. **NTC LTD VS> AGUNANNE (1995) 5 NWLR (PART 397) 541 at 573 C F per Uwais JSC later CJN.**

It is the further a submission of the Learned Counsel to the Claimant that the National Assembly lacks the Legislative competence to enact a law which would govern or establish the rules of Practice and procedure in State High Courts. That Freedom of Information Act is an Act of National Assembly pursuant to the powers conferred upon it by provisions of Section 4(4)(a) and item 4 of Part II of the second schedule to the 1999 constitution of the Federal Republic of Nigeria (as amended).

That the Law is a substantive law which, according to Solomon Edoh Esq. creates the right to information. That it does not however stipulates or prescribed the rules of procedure for enforcing the right in any court.

The Learned Counsel also opined that a combined or community reading of Section 20 and 31 of the Act is to be effect that the provisions of the Act can be enforced in both at the Federal High Court and State High Courts. That since National Assembly could not have prescribed a procedure for applying since it cannot make Rules for the State High Court the said Section 20 could not have prescribed procedure applicable in State High Court for the enforcement of the Provisions of the Act. That the powers to make Rules applicable in High Court of a State lies with the House of

Assembly of a State and Not National Assembly because according to Solomon Edoh Esq. it is a residual matter.

However, the Learned Counsel to the claimant made alternative submission to the effect that even if it could be held that Section 20 of Freedom of Information Act stipulates the procedure for the enforcement of the provisions of the Act (he did not concede it) or the right to information in a Court then according to Ehoh Esq. the rules of procedure so created will only be applicable to the Federal High Court as the National Assembly can only make laws that will govern rules of procedure in Federal Courts and not State Courts.

In the light of the foregoing submissions, he urged the court to dismiss the defendant's Preliminary Objection and resolve the sole issue submitted by the Claimant in its favour by holding that the present action is properly commenced. He concluded by urging m to dismiss the objection without much ado and proceed to hear the case on the merits in the interest Justice.

Learned Counsel to the two Defendants Ladapo Esq. filed Reply on Points of Law on 23rd day of February, 2012, same for the repeat of his arguments in the main, he tried to justify his position on what a judicial review is. He relied on Constitutional and Administrative Law by O. Hood Philips and Jackson Page 698 and the case of Council of Civil Service Union Vs. Minister for Civil Service (1995) A.C. 374 at 410.

On whether marginal note can be of any help in interpreting a law he relied on the case of Schroeder & Co. Ltd Vs. Major & Co. Ltd (1989) 2 NWLR (Part 161 1 at 18 to the effect that marginal note can resolve any ensuring doubt while interpreting a statute or law.

The above is the resume of all matters leading to the application under consideration .

Now the Kernel of the 1st and 2nd Defendants/Applicants application is that I have no jurisdiction to entertain or adjudicate on the Claimant's suit in that the Claimant according to them did not commence this action by the relevant originating process as prescribed by Section 20 of the Freedom of Information Act, 2011.

They are therefore asking me to terminate the suit in limine. Jurisdiction is the life wire and is vital element in adjudicatory process of the court in administering justice to parties in litigation before it.

It has also been stated that jurisdiction is the body and soul of every judicial proceeding and deliberation and without jurisdiction anything done in a matter will be null and void. See the case of ALHAJI M. MAIGARI DINGYADI & ANO. VS. INEC & ors (2011) 4 SCM 87 at 114 per Adekeye JSC who held thus:

> *"Jurisdiction is the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. Such authority of the court is controlled or circumscribed by the Statute creating the court itself or it may even be circumscribed by a condition precedent created by legislation which must be fulfilled before the court can entertain the suit. All of the above touch on the legal authority of the court to adjudicate in the matter. Jurisdiction is fundamental and it is the centre pin the entire litigation hinges on Madukolu Vs. Nkemdilim (1972) 2 SCNLR Pg. 341, Rossek Vs. ACB Ltd. (1993) 8 NWLR (pt.312) Pg. 382."*

Thus where as in this case a Defendant conceives that he has a Preliminary point of law capable of terminating in limine the life of a suit such a Defendant is entitled to file Notice of Preliminary Objection especially where it challenges the jurisdiction of the Court at the earliest opportunity. Jurisdiction is the pillar of adjudication. **See CHIEF YAKUBU SANI VS. OKENE LOCAL GOVERNMENT & ANOR. (2008) 12 NWLR (PART 1102) at 699 H to 700 A C Niki Tobi J.S.C.** who said:

> *"A Preliminary Objection is raised where party fails to comply with the enabling law and or the rules of court. See* ***Mohammed Vs. Olawunmi (1993) 4 NWLR (part 288) 384; OLORIODE Vs. OYEBI (1984) 1SCNLR 390***
> *The proper stage at which a defendant should raise a preliminary objection to the Plaintiff's suit should be either at the inception or early stage of the proceedings. See* ***Carlen (Nig.) Limited Vs. University of Jos (1994) 1 NWLR (PART 323) 631****.*
>
> *There are instances where it is permissible to raise a preliminary objection that can terminate a case at the threshold the incompetence of which is where the competence of an action is called into question. In*

a case where the competence of action is in issue, the court not only has the authority but also the duty to determine the action in limine, as in this appeal, where lack of competence is established. This is because the incompetence of an action robs on the jurisdiction of the court to hear it within the classification of the elements that make jurisdiction a expounded ***in Madukolu Vs. Nkemdilim (1962) 2 SCNLR 341."***

The imperativeness and the need to deal instanteously with matters concerning jurisdiction was copiously reiterated by Niki Tobi JSC in the case of **ATTORNEY-GENERAL OF THE FEDERATION & ORS. VS. USMAN ABUBAKAR & ORS. (2008) 16 NWLR (PART 1112) 135 at 158 A E.**

"There is no jurisdiction in law in a court saying it has jurisdiction in all disputes. A court of law has jurisdiction to expand the limits of its jurisdiction; it has not jurisdiction to expand it. Jurisdiction is a matter of hard and rigid law and courts of law must comply strictly with their jurisdiction as spelt out in either the Constitution or a statute. On no account should courts of law be hungry or have the gluttony for jurisdiction, to the extent that they arrogate to themselves jurisdiction where they have none. By such an injudicious conduct, the particular court does not only erode to the jurisdiction of other courts, but also erode to the legislative power of the legislature. Both are illegal and courts of law established to do legality, cannot afford any illegality.
As jurisdiction is the pillar of every adjudication and its cynosure, courts of law must take it first before the merits of the matter. They must not, in any case, keep the issue of jurisdiction till, late in the litigation or when the merits of the case are heard. This is because if the court holds that it has no jurisdiction that it the end of the matter. The suit will be struck out and the Plaintiff goes home in vanquish. Of course, the law allows him to return to the courts after repairing the jurisdictional blunder."

The sole issue for consideration on the Defendants/Applicants application is whether the action herein was on 1st day of September, 2011 initiated or commenced in accordance with due process of the law.

The entire submission and or arguments of Learned Counsel to the Defendants/Applications and Claimant/Respondent revolves around Section 20 of the FREEDOM OF INFORMATION ACT, 2011 which provides as follows:

"Any Applicant who has been denied access to information or a part thereof may apply to the court for a review of the matter within 30 days after the public institution denies or is deemed to have denied the application, or within such further time as the court may either before or after the expiration of the thirty days fix or allow."

It has long been settled that Constitution or statute must be construed literally giving the word in such constitution or statute their ordinary grammatical meanings. It is also the law that in ascertaining the true meanings of the provisions of the constitutional and statute the constitution or the statute being interpreted or construed must be read and construed as a whole. **See:**

ACTION CONGRESS AC & ANOR V. INCE (2007) 12 NWLR (PART 1048) 222 at B D where KATSINA-ALU J.S.C later C.J.N. had this to say viz:

"It is necessary to bear in mind that the Electoral Act 2006 is a subsidiary legislation which operates side by side with the 1999 Constitution. Both the Constitution and Electoral Act shall read together in order to give effect and meaning to the rights and obligation of individuals. It is settled principle of interpretation that a provision of the constitution or a statute should not be interpreted in isolation but rather in the context of the constitution or statute as a whole. Therefore, in construing the provisions of a section of a statute the whole of the statute must be read in order to determine the meaning and effect of the words being interpreted. **See Buhari & Anor. V. Obasanjo & Ors. (2005) 13 NWLR (PT.941) 1 (219)**. But where the words of a statute are plain and unambiguous, no interpretation is required, the words must be given their natural and ordinary meaning",

AND (2) R.T. HON. ROTIMI CHIBUKE AMAECHI V INCE & ORS (2008) 5 NWLR (PART 1080) 227 at 314 H where OGUNTADE J.S.C. said:

"It is settled law that the court in interpreting the provisions of a Statute or constitution must read together related provisions of the constitution in order to discover the meaning of the provisions. The court ought to not to interpret related provisions of a statute or constitution in isolation and then destroy

in the process the true meaning and effect of particular provisions: see **Obayuwana V. Governor, Bendel State (1982) 12 SC 47 at 211; 1983 4 NCLR 96;** and **AWOLOWO V. SHAGARI (1979) 6-9 SC 51 at Bendel State (1982) 12 SC 47 at 211; 1983 4 NCLR 96**; and **AWOLOWO V. SHAGARI (1979) 6-9 sc 51** at……"

I have carefully gone through all the Sections of the Freedom of Information Act, 2011 and I am of the solemn view that the "words may apply to the court for a review of the matter" could only mean that, if the Applicant that is, the person who had applied for an information from a public officer or institution and was denied the necessary information he can apply to the court vide an application for a Judicial Review of the decision of the Public Officer or public institution concerned for an order of mandamus to compel the Public Office or Public Institution to provide the Applicant the information required if the Court considers it appropriate that the Applicant for the information is entitled to it.

The Applicant must approach the Court under Order 40 Rules 3 of the High Court (Civil Procedure) of Rules 2010 of Oyo State to seek the leave of Court to bring application for appropriate order against the recalcitrant public institution or public officer refusing to give the Applicant the information he requires.

The purpose of application for leave is to enable the court assess whether the Applicant has sufficient interest legal, or equitable in the information he seeks from the public officer or institution concerned so as to ward off meddlesome interlopers and busybodies. See Order 40 Rules 1-5(1) & (2) of the High Court Civil Procedure Rules 2010 which provide:

APPLICATION FOR JUDICIAL REVIEW

(1) 1. An application for:
(a) an order of mandamus, prohibition or certiorari; or
(b) an injunction restraining a person from acting in any office in which he is not entitled to act shall be made by way of an application for judicial review in accordance with the provision of this order.

(2) An application for a declaration or an injunction (not being an injunction in rule (1) (b) rule) of this Rule) may be granted by the way of an application for judicial review and the court may grant the declaration or injunction if it deems it just and convenient to grant it by way of judicial review, having regard to:
(a) The nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari;
(b) The nature of the persons and bodies against whom relief may be granted by way of such an order.
(c) All the circumstances of the case.

2. On an application for judicial review any relief mentioned in Rule 1 may be claimed as an alternative or in addition to any other relief so mentioned if it arise out of, relates to or is connected with the same matters.

3. (1) No application for judicial review shall be made unless the leave of the court has been obtained in accordance with this rule judge and shall be supported by:
(2) An application for leave shall be made ex-parte to the judge and shall be supported by:
(a) A statement settling out the name and description of the application, the reliefs sought and the grounds on which they are sought;
(b) an Affidavit verifying the facts relied on; and
(c) a written address in support of application for leave.
` (3) The Judge hearing an application for leave may allow the applicant's statement to be amended, whether by specifying different or additional grounds on relief or otherwise on such terms if any, as he deems fit.
(4) The judge shall not grant leave unless he considers that the applicant has a sufficient interest in the matter to which the applicant relates.
(5) Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction or other proceeding which is subject t appeal and a time is limited for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.
(6) Where leave to apply for judicial review is granted then:

i. if the relief sought is an order of prohibition of certiorari and the Judge so directs, the grant shall operate as a stay of the proceedings to which are application relates until the determination of the application or until the judge otherwise orders;
ii. if any other relief is sought, the judge may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ;
iii. the judge may impose such terms as to cost and as to giving security as he deems fit.

4. An application for judicial review shall be brought within 3 months of the date of occurrence of the subject of the application.

5. (1) When leave has been granted the application shall be made by motion or by originating summons.
(2) the notice of motion or summons shall be served on all persons directly affected and where it related to any proceedings before a judge and the object of the application is either to compel the judge or an offer of the court to do any act in relation to the proceedings, or to quash them or any other mad therein the notice or summons shall also be served on the clerk or Registrar of the court and where any objection to the conduct of the judge is to be made, on the Judge".

In addition the opening word "Any Applicant" and "may apply to the court for a review of the matter within thirty days" brings any matter concerning denial to access information within the penumbra of procedure in Judicial Review.

Section 21 of the Act also makes it clear that action must be through Judicial Review because it says an application under Section 20 shall be heard and determined summarily. And Section 25 enables the Court to make an order against any institution failing to disclose the information or part thereof to the Applicant where the Applicant is able to show or established his entitlement to the information requested.

That is the whole essence of import of Section 272(1) & (2) of the constitution of Federal Republic of Nigeria as amended which provides:

272(1) *Subject to the provisions of Section 251 and other provisions of this constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power duty, liability, privilege, interest, obligation or claim is in issue or to her and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.*

(2) *The reference to civil or criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of a State and those which are brought before the High Court to be dealt with by the court in the exercise of its appellate or supervisory jurisdiction."*

Section 6(6) (b) of our constitution, that a cause of action is the question s to civil rights and obligations of the Plaintiffs founding the action to be determined by the Court of favour of one party against the other.

On the import of Section 272(2) of 1999 Constitution I call in aid the decision of our apex court in the case **of HON. EHIOZE EGHAREVBA VS. HON. CROBY O. ERIBO (2010) 9 SC M 121 at 13 C E** Per Adekeye JSC who said:

> "Ordinary our laws by virtue of Section 272(2) of the 1999 constitution our High Courts have the power to review administrative determination of inferior tribunals in that High Court has an inherent jurisdiction to control all inferior tribunals not in appellant capacity, but in a supervisory capacity. That control extends not only to seeing that it observes the law, but also that he inferior tribunal keeps within its jurisdiction.

The control is exercised by means of a power to quash any determination by the tribunal which on the face of it offends against the law. This power is exercised in respect of administrative decisions of any inferior tribunals on the grounds of illegality or procedural impropriety or irrationality. **OKEAHIALANI VS. NWAMAVA (2003) NWLR (PART 835 Page 597."**

Therefore on that position of the Constitution and authorities if an Applicant for application of prerogative writs can establish that all or any of the above facts and the provisions of the constitution are breached or proved to have been violated upon the materials placed before the court, the court would exercise its discretion to quash the impugned

proceedings and or decision.

I am of the firm view therefore that the method or mode prescribed for challenging the refusal of a Public Institution or public office to supply information requesting under the Freedom of Information Act, 2011 is by application for Judicial Review. It is trite law that where any proceedings are begun other than as provided by the rules such proceedings are incompetent. And a court is only competent when a case comes before it by due process of law and upon fulfillment of condition precedent to the exercise of jurisdiction. **See AGIP (NIGERIA) LTD VS. AGIP PETROL INTERNATIONAL & ORS (2010) 2 SCM 1 at 56 B** F per Adekeye J.S.C who had this to say:

> "The cross-appellant wrongly argued that the provisions of the companies proceedings Rule particularly Rule 2 (1) is merely directory and not mandatory. I disagreed with this view because of the word SHALL, in the provision. The word shall in the ordinary meaning is a word of command which is normally given a compulsory meaning because it is intended to denote obligation. When the word shall is used in a statute it is not permissive it is mandatory, it imports that a thing must be done.
> **Nigerian LNG Ltd V. African Development Insurance Co. Ltd. (1005) 8 NWLR (PT. 416) PG. 677, COL KALTEL (Rtd) V. Alhaji Ailero (1999) 4 NWLR PT. 597 139.**
> More important is that where a statute or Rule of court provides for a procedure for the commencement of action failure to follow that that procedure renders any suit commenced otherwise incompetent. In the case of Obasanjo Vs. Yusuf (2004) 9 NWLR PT. 877 PG. 144 at page 221, (2004) 5 SCM, 152, the court decided that:
>
> > "It is elementary law that a plaintiff in the commencement of an action must comply strictly with the provision of the enabling law. He cannot go outside the enabling law for redress."
> > In effect, to commence a suit by a writ of summons instead of Originating Summons as enacted in a status cannot be overlooked as a mere
> > "irregularity by virtue of Rule 18 of the Companies Procedure Rules 1992 as argued by the cross-appellant."

I therefore hold that the action herein ought to have been commenced or initiated via Application for Judicial Review and not by Originating Summons as was done in this matter.

Consequently this action 1/778/2011 shall be and same is hereby struck out for want of jurisdiction on the part of this Court to entertain or adjudicate over the action as it is incompetent.

There will be no order as costs.

HON. JUSTICE P.O. IGE
JUDGE
28TH MAY, 2012

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON MONDAY, THE 25TH DAY OF JUNE, 2012

BEFORE THE HON. JUSTICE BALKISU BELLO ALIYU (JUDGE)

SUIT NO: FHC/ABJ/CS/805/2011

IN THE MATTER OF THE APPLICATION BY LEGAL DEFENCE AND ASSISTANCE PROJECT (Gte) LTD FOR AN ORDER FOR THE ENFORCEMENT OF THE FREEDOM OF INFORMATION ACT, 2011

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT, 2011

BETWEEN:

LEGAL DEFENCE & ASSISTANCE PROJECT (Gte) LTD …….. APPLICANT

AND

CLERK OF THE NATIONAL ASSEMBLY OF NIGERIA ……. RESPONDENT

RULING

By its motion on notice filed on the 28th November, 2011, the Applicant, Legal Defence & Assistance Project (Gte) Ltd sought for extension of time within which it will file an application for the review of denial of information it requested from the Respondent, Clerk of the National Assembly of Nigeria. In this court's ruling delivered on the 8th of March, 2011, time was extended within which the Applicant may file its originating motion. The originating motion already filed on 20th September, 2011 was deemed duly filed, pursuant to Section 20 of the Freedom of Information Act, 2011.

In that originating motion, the Applicant seeks for two orders against the Respondent the Clerk of the National Assembly of Nigeria. The orders are declaratory and mandatory orders as follows:

1. "A DECLARATION that the Respondent's deemed denial of the information requested by the Applicant in its letter dated 6th July, 2011 to the Respondents, on details of the salary, emolument and allowances paid to all Honourable Members and Distinguished Senators, both of the 6th Assembly, from June 2007 to May 2011 is an infraction of Section 1(1) of the Freedom of Information Act, 2011 and of the Applicant's rights to such information under the said Section.

2. AN ORDER of court compelling the Respondent to disclose to the Applicant within 14 days of the order the detailed information as requested by the Applicant in its letter of 6th July, 2011 to the Respondent."

The applicant relied on the following grounds for seeking the above reliefs:

1. The Applicant has the right to the information it requested from the Respondent in its letter of 6th July 2011 (attached to the Affidavit in support of this motion as Exhibits B) by virtue of Section 1(1) of the Freedom of Information Act, 2011.
2. The Respondent is deemed to have denied the application for information, having failed to respond to the Applicant's request after the number of days stipulated under section 4 of the Act.
3. The information sought by the Applicant from the Respondent does not fall within any of the exemptions provided under the Act.
4. This Honourable Court has the jurisdiction to order the Respondent to disclose the requested information under Section 25 of the Act. The application is supported by affidavit and a written address of counsel to the Applicants.

In support of the motion is a ten paragraphed affidavit sworn to by Chigozie Eburuo, the litigation officer in the law firm of Obiagwu & Obiagwu, the law firm representing the Applicant in this suit. In this affidavit, the deponent said that the Applicant is a registered non-governmental, non-profit organization with over 15000 registered members. The

objectives of the Applicant includes protecting and promoting good governance, public accountability and the rule of law in Nigeria. As part of its work, the Applicant made an application to the Respondent dated 6th July, 2011 by which it requested information on details of salary, emolument, and allowances paid to the Honourable Members of the House of Representatives and Distinguished Senators, both of the 6th Assembly, from June 2007 to May, 2011. The Respondent did not respond to this request even though it was delivered to him by courier on 6th July, 2011. Attached to the affidavit are copies of Certificate of Registration of the Applicant as a company limited by guarantee (exhibit 'A') and the letter of request sent by the Applicant to the Respondent dated 6th July, 2011 (exhibit 'B').

The counsel to the Applicant Mr. Chino Edmond Obiagwu, filed an address which he adopted as his arguments and submissions in support of the application. In that address, he submitted two issues for determination as follows:

1. **"Whether the Respondent's deemed denial of the information requested by the Applicant in its letter of 6th July, 2011 to the Respondent is authorized under the Freedom of Information Act, 2011;**
2. **If issue (1) above is decided in favour of the Plaintiff, whether, having refused to provide the requested information, then this Honourable Court can order the Respondent to do so**.

Counsel made submissions on the above issues relying on the provisions of section 1(1), 7(4) and 25(1)(a) to argue that this court has power to order the Respondent to provide the said information requested to the Applicant.
The Respondents entered a conditional appearance and filed a counter affidavit in opposition to the originating motion. In addition, the Respondent gave notice of his intention to rely on a preliminary objection to the competence of this application at its hearing. The Respondent by that notice said that this suit is "incurably incompetent" on the following four grounds:

1. "The mode of commencement of this suit is alien to the Federal High Court (Civil Procedure) Rules, 2009.
2. The suit is statute barred.
3. The Hon. Court lacks the Jurisdiction to hear and entertain this suit.
4. The suit ought to be dismissed or struck out."

In his address in support of the grounds of objection, Mr. J.J. Usman, counsel of the Respondent formulated two issues for determination as:-

1. Whether this suit as constituted is competent and
2. Whether the suit is statute barred.

In answering issue one above, Mr. Usman said that this originating motion was brought by the Applicant pursuant to Order 3 of this Court's Rules of Civil Procedure, 2009. He submitted that neither Order 3 nor any other order in the Rules of the Civil Procedure of this Court permits the commencement of the suit through motion simplicita. He contended that the mode of commencement of this suit is incurably defective and incompetent. He placed reliance on several cases including the cases of **C.C.B. (Nig.) Plc Vs. A.G. Anambra State (1992) 10 SCNJ 137 at 163; and Okparanta vs. Elechi (2007) ALL FWLR (pt. 358) 1185 at 1193,** to support his submissions. He submitted that this Court has no jurisdiction to entertain an incompetent suit which has not been commenced by due process of law.

In arguing issue two which he formulated for determination, Mr. Usman said that this suit is statute barred in view of section 21 of the Freedom of Information Act, 2011. That section provides that where an applicant for information has been denied access to that information by a public institution, he may apply to the Court for the review of that refusal within thirty days after the denial or deemed denial. He submitted that this suit was filed by the applicant outside the 30 days of the denial or deemed denial of the information it requested from the Respondent. This is in contravention of the provisions of section 21 of the Freedom of Information Act aforesaid. Counsel relied on the cases of **N.P.A Plc vs. Lotus Plastic Ltd (2005) 9 NWLR (pt. 959) 158 and Lamina Vs. Ikeja L.G.C. (1993) 3 NWLR (pt. 314) 759 at 771**, in urging the Court to find that this suit is statute barred and to dismiss same. At the hearing of this suit, while adumbrating on his address, Mr. Usman said that the complaint of the Respondent is that the Applicant has filed to seek for and obtain leave of Court before filing this application for judicial review. This is in contravention of Order 34 of this Court's Rules of Civil Procedure.

The Applicant's reply to the objection raised by the Respondent as stated above was filed on 31st January, 2012. In reply to the objection and argument of the Respondent to the mode of commencement of this suit, Mr. Chino Edmond Obiagwu quoted the provisions of Order 3 Rule 1 of the Federal High Court (Civil Procedure) Rules, 2009, and submitted that the mode of commencement of this action is not alien to the Rules of this Court. He also relied on

Section 20 of the Freedom of Information Act, pursuant to which this suit is brought and argued that Section 20 does not specify the mode for commencement of action under the Act. He submitted that action for judicial review are usually commenced by way of originating motion.

In responding to the ground of objection that this suit is statute barred, the Applicant's counsel submitted that actions commenced under the Freedom of Information Act such as this one, are not subject to rules under limitation of action. So the cases cited by the Respondent are not applicable to this suit, because section 20 of the Act has provided for the extension of time to the applicant who failed to apply to the Court within the 30 days mentioned. He argued that the word "or" used in the section 20 of the Act is disjunctive in order to accommodate an applicant who failed to apply within 30 days of the denial of the Information requested. At the hearing, he also responded to the submissions of Mr. Usman on the issue of leave for judicial review, and he submitted that this suit was not filed pursuant to the Rules of this Court and that Order 34 thereof is not applicable.

My starting point is to determine the objection of the Respondent to the competence of this Suit. In determining whether or not the objection of the Respondent aforementioned has any merit, we have to examine the originating motion filed by the Applicant. It is stated on the face of the originating motion that it is "**Brought Pursuant to Section 1(1) & (3), 2 (6), 7(4), 20 and 25(1) of the Freedom of Information Act, 2011, Order 3 of the Federal High Court (Civil Procedure) Rules, and Inherent Jurisdiction of this Honourable Court."** The Counsel to the Applicant cannot claim in his address that this Application is not brought under the Rules of Procedure of this Court. This is particularly so when the counsel in his reply to the preliminary objection stated that "Apart from the fact that the above Section of the law does not specifically provide for the mode for commencement of action under the Freedom of Information Act, supra, **we submit that action for judicial review are usually commence (sic) by way of originating motion, which is a conventional mode of commencement of action in out Courts**. (underlining provided for emphasis). The application is also brought pursuant to section 20 of the Freedom of Information Act, 2011. That section provides as follows:

> **"Any applicant who has been denied access to information, or a part thereof, may apply to the Court for a review of the matter within 30 days after the public institution denies or is deemed to have denied the application, or within such further time as the Court may either before or after the expiration of the 30 days fix or allow."**

From the wordings of the above section 20, the application envisaged by the legislature is one of judicial review of the denial of the requested information by the public body concerned. I am in agreement with the interpretation of Mr. Obiagwu of this section in his address where he said that this section allows two categories of Applicants. The first one is he who applied within the 30 days of the denial or deemed denial of the information and the second category is the applicant who failed to apply within the 30 days. The latter may still apply to the Court for extension of time to apply for the Court's review of the denial of the information. The last phrase "or within such further time as the Court may either before or after the expiration of the 30 days fix or allow" to my mind, is intended by the law makers to exclude the rules of procedure of the Court regarding ordinary procedure for judicial review, which is the general rule. This is in accordance with the principle of interpretation that where a special provision is made to govern a particular subject matter, it is excluded from the operation of any general provision. This is represented in the Latin maxim, *"generalia specialibus non derogant"*. See the case of **A.G. Fed. Vs. Abubakar (2007) 10 NWLR (Pt. 1040) 1 at 148 paragraph H.** See also the case of **Ehuwa vs. Ondo State INEC (2007) ALL FWLR (Pt. 351) 1415 at 1430 to 1431 G-B**, a case cited by the counsel to the Respondent in his alternative submissions. Therefore, though the Applicant brought this motion pursuant to Order 3 of the Federal High Court Rules, those Rules are not applicable. This intention of the legislature to take the application for the review of the denial of information made pursuant to the Act outside the provisions of the rules of Court is manifested in section 21 of the Act which provides that:

"An application made under section 20 shall be heard and determined summarily."

Summary proceedings are defined in the Black's Law Dictionary, Ninth Edition at page 1324 as **"A nonjury proceedings that settles a controversy or disposes of a case in a relatively prompt and simple manner."** The authors of the Dictionary quoted A.H. Manchester's *"Modern Legal History of England and Wales, 1750 1950"* who said **"Summary proceedings are such as directed by Act of Parliament, there was no jury, and the person accused was acquitted or sentenced only by such person as statute had appointed for his judge…"** Hearing of a matter summarily means disposing of that matter as simply as possible without the usual procedure being followed. For example a summary trial in criminal cases entails non calling of evidence by the prosecution to prove the guilt of an accused person, but he is convicted upon his plea of guilty to the information or charge at the point of arraignment. See the case of **Garba vs. C.O.P. (2007) 16 NWLR (Pt. 1060) 378**. Thus by providing that the application for the review

of the denial of information under the section 20 of the Freedom of Information Act shall be determined "summarily" the law maker intends that such applications should be heard and determined promptly and in a simple manner. This is intended that the Rules of Procedure of the Court regarding the applications for judicial review (mandamus, certiorari etc) where there must be leave sought and obtained from the Court before an applicant can file such applications seeking judicial review will not apply. Making the applicant for review of the denial of information under the Freedom of Information Act to seek and obtain leave before making the application for review will negate the "summary" hearing of the review meant by section 21 of the Act. The mode adopted by the Applicant in this case by filing an originating motion on notice is the procedure contemplated by the section 21 of the Freedom of Information Act quoted above and I so hold. The application is therefore competent, and this Court has the jurisdiction to determine it. The objection of the Respondent on this ground is thus lacking in merit and it is dismissed.

With regards to the objection to the competence of this application on the ground that it is statute barred, this Court had already extended time within which the applicant may file this motion in its ruling delivered on 8th March, 2012. That ruling was on a motion filed by the Applicant seeking extension of time to apply for the review of the denial of information, pursuant to section 20 of the Act under consideration. This ground of objection is also dismissed.

We will proceed to determine the merit of the application. In his response to the Application, the Respondent filed a counter affidavit dated 2nd November, 2011 deposed to by Alih M.Hassan, the Principal Legal Assistant in the Department of legal services of the Respondent. He stated that on receipt of the Applicant's letter of request, he had promptly replied and informed the applicant that the information he requested is now a subject of two suits filed by the Nigeria Bar Association and Mr. Femi Falana. There is a subpoena issued to the Respondent by this Court to produce the details of all salary, emolument and allowances paid to all members of the Respondent's sixth Assembly from 2007-2010. The Respondent had not complied because his counsel has filed a notice of objection to the jurisdiction of this Court to hear those suits. The second reason for the denial of the requested information by the respondent is that the information sought by the applicant is the type of information that the respondent is not permitted to disclose by the Freedom of Information Act (herein after referred to as "the Act"). The respondent stated that the information requested by the Applicant is the type exempted by the Act.

Attached to the counter affidavit are documents marked as exhibits A, B, C and D. Exhibit 'A' is the reply of the Respondent to the Applicant's letter of request. This reply is dated 11th July, 2011, by which the Respondent denied the information requested by the Applicant on two grounds, namely; **that the requested information is subject to litigation in Court, and that the information is among the information exempted by section 14 of the Act.** Exhibit 'B' are the copies of the originating summons, affidavit in support and address filed in suit, **No: FHC/ABJ/CS/599/10**, between the Incorporated Trustees of the Nigerian Bar Association as the Plaintiffs, and the President of the Senate, the Speaker of the House of Representatives, the National Assembly and the Hon. Attorney General of the Federation as the Defendants. By that suit the Incorporated Trustees of the Nigerian Bar Association as the Plaintiff sought for the determination of three legal questions regarding the alteration of the 1999 Constitution of Nigeria by the Defendants under Sections 9 and 58, of the same Constitution. Upon the determination of the three questions, the Plaintiff sought for five declarations on the legality of the Constitutional alteration by the 1st to 4th Defendants without the assent of the President. **Exhibit 'C'** is the subpoena issued to the Clerk of the National Assembly to produce before the Court "**details of quarterly constituency allowances including: bank payments advice, pay slips and other documents in respect of such allowances paid to all the members of the National Assembly since 2007 till date." Exhibit 'D'** attached to the counter affidavit of the Respondent in this case is the notice of objection filed by it and the National Assembly to the suit No 599/10 challenging the locus standi of the Plaintiff to institute that suit. But in a further affidavit dated 24th January, 2012, sworn to by Adah Philips, a lawyer in the law firm representing the Respondent in this case before me, another originating summons filed in this Court is attached as **exhibit 'FOI1'**. This is to replace exhibit 'b' attached to the counter affidavit of Alih M. Hassan. The attached exhibit 'FOI1' is predicated on the salaries and allowances of the members of the Nigeria's Senate and House of Representatives. It was on this suit that the subpoena (exhibit 'D') above was issued. This Originating Summons (exhibit FOI1') challenges the legality/constitutionality of the "constituency allowances of N45 million to members of the senate and N27.5 million for each member of the House of Representatives."

In his alternative submissions in the event that his preliminary objection fails (and it has failed by our finding above), Mr. Usman submitted a single issue for determination. This is **"Whether from the facts of this case and the relevant law, the applicant is entitled to the reliefs sought in the Originating Motion."** While conceding that the applicant has the right under sections 1 and 2 of the Act to request for information from the Respondent, but he contended that the right is not a blanket one. According to the counsel of the Respondent, this right of information is limited by sections 12 and 14 of the same Act.

The Counsel quoted the sections he relied upon and submitted that those sections and exhibits 'B' 'C' and 'D' attached to the counter affidavit of the Respondent have shown the restraint placed on him not to grant the request of the Applicant. Particularly, Mr. Usman submitted that the section 14 of the FOI Act prohibits disclosure of information on personnel files and personal information maintained with respect to employees, appointees or elected officials of any public institution. His contention is that the information requested by the Applicant is the type exempted by the Act. He said that by sections 11, 12, 14, 16, 17 and 19 of the Act, the law makers intended to exclude the information contained therein from being disclosed to the public. He relied on the case of **Ehuwa vs. Ondo State INEC (supra),** to the effect that the expressed mention of one thing in a statutory provision, automatically excludes any other which otherwise would have applied by implication with regard to the same issue. Counsel urged the Court to dismiss this application.

The Applicant filed a reply to the counter affidavit of the Respondent aforementioned. The reply affidavit is dated 31st January, 2012, sworn to by Okorie Godswill, a legal practitioner in the law firm of the counsel to the applicant. He said that the Respondent did not receive the notification of refusal to its request i.e. Exhibit 'A' which the Respondent attached to his counter affidavit. The deponent said the information the Applicant requested is not the same with the subject matter of the suit in exhibits 'B' and 'C' attached to the Respondent's counter affidavit. Finally that the information sought by the Applicant is not exempted by the Act and its disclosure is in line with the public interest.

In his final reply on points of law, filed on 31 January, 2012, counsel to the Applicant, Mr. Obiagwu submitted rightly in my view that the Respondent having stated the reasons for the denial of information to the Applicant in their exhibit 'A', cannot validly rely on other grounds outside that stated in his reply. This is contrary to section 8(1) of the Act which are mandatory according to the Applicant. It is the further submissions of Mr. Obiagwu that the provisions of sections 12 and 14 of the Act relied upon by the Respondent as justification for denying the Applicant the information requested are not applicable to this suit. He said section 12 of the Act deals with the exemption of cases coming under the International Affairs and Defence which is not this case. Section 14 on the other hand deals with training of officials on the right to information and on the effective implementation of the provisions of the Act, and therefore not a ground for exemption. On the claim of the Respondent that the requested information is a subject of litigation as shown on exhibit 'B', Mr. Obiagwu said that exhibit 'B' deals with constituency allowance which is not the same request made by the Applicant and even if this allowances are included in the Applicant's request, the Respondent will be bound to release the other information requested. Relying on sections 13(2) and 15(3) of the Act, counsel to the Applicant submitted that the information sought by the Plaintiff relates to public fund and not personal information. The disclosure of such information will encourage accountability, transparency, good governance and rule of law; ease probity and check tendency to misuse of public fund. He said it help to check against official corruption. He urged this Court to hold that from the evidence presented by the Respondent, he has not justified the grounds of exemption upon which he relied in denying the information the Applicant requested. The learned counsel urged the Court to grant the reliefs the Applicant seeks by his originating motion.

I have reviewed the affidavit evidence and the counsel addresses for and against the application for the review of the denial of information requested by the Applicant from the Respondent. It is to be noted that the Freedom of Information Act, 2011 is a new law enacted by the National Assembly and it came into force barely a year ago, i.e. on 28th May, 2011. But cases under the Act appear simple, in the sense that a request is made to the public institution and when denied then the Courts will examine the grounds of the denial to find if they are justified. Once the applicant has shown that he made a request for information under the Act, and his right to access of such information is established by section 1(1) of the Act, then the onus in this circumstance is on the denying authority to show that it is justified by the Act to deny the information requested. My position for this holding is strengthened by Section 30(2) of the Act provides as follows:

> **"Where the question whether any public record or information is to be made available, where that question arises under this Act, the question shall be determined in accordance with the provision stated herein, unless the otherwise exempted by this Act."**

So what is to be examined by the Court in its review of the denial is the grounds of the denial and for it to make a finding on whether the grounds are tenable within the Act itself. Therefore the issue for me to determine is whether the grounds relied upon for the denial of the Applicant's request for the details of the salary, emolument and allowances paid to all Honourable members of the House of Representatives and Distinguished Senators, both of the 6th Assembly, from June, 2007 to May, 2011 are justified under the Act.

The Respondent in Exhibit 'A', which is his reply to the Plaintiff's requested information state as follows:

"… We acknowledge the receipt of your letter dated 6th July, 2011. We regret to inform you that your request could not be granted because two cases are pending on the subject matter of the salary and emolument of the members of the 6th National Assembly in which the Court ordered subpoena deduces tecum and we are contesting the jurisdiction of the Court to entertain these cases. These cases are: Suit No: FHC/ABJ/CS/599/10 & Suit No: FHC/ABJ/CS/574/10 for Incorporated Trustees of Nigeria Bar Association V. National Assembly and Suit No: FHC/ABJ/CS/603 for Femi Falana V. National Assembly respectively. In view of the above, it will be pre-judicial to these cases to grant your application. Secondly the request cannot be granted in view of the exemption by section 14 of the Act."

By the above letter, Respondent relied on two grounds for denying the Applicant the information requested. The first ground is that two cases are pending in respect of these records in the Court and it will be "pre-judicial" to these cases if the applicant's request is granted. In his paragraph 9 of his counter affidavit, the Respondent stated "That it will be prejudicial to grant the Applicant's request in view of the pending suits." In this paragraph, the word used is "prejudicial", the adjective of "prejudice." What interest of the Respondent will be prejudiced by the release of the information and how is that relevant to these proceedings. The answers to these two questions must be found from the affidavit of the Respondent in support of his grounds for denial of information the Applicant requested. In answer to the first question, the Respondent said in paragraph 7 of his counter affidavit that his counsel has filed "a notice of preliminary objection challenging the jurisdiction of the Court." How is that relevant to these proceedings, especially as the applicant herein is not a party to the suits mentioned. The Respondent did not state the relevance. We cannot speculate. What is relevant to this application is that the objection of the Respondent to this suit on the ground of jurisdiction has been heard and dismissed earlier in this ruling. It is important to note that information from public institution on records is to be issued by way of certification by the officer who has custody of them. Public Records are for the public and cannot be issued in their original form. This is to compliment the provisions of the Evidence Act regarding issuance of public document upon application. See section 30 (1) of the Act where it is stated that the Freedom of Information Act is intended to compliment procedure for issuance of public records and information. So it is not the original records but copies of same that is required to be issued on request. I have not seen the relevance of the two cases quoted by the Respondent as the ground for denying the Applicant the certified copies of the information requested. That ground is not justified by the Act and it is hereby so declared.

(d) information requested of any tax payer in connection with the assessment or collection of any tax disclosure is otherwise requested by the statute; and

(e) information revealing the identity of persons who file complaints with or provide information to administrative, investigative, law enforcement or penal agencies on the commission of any crime.

Let us examine the wordings of these sections as it relates to the personal information of the persons stated therein. Starting with the first group under subsection (a), "clients" of a public institution, such as subscribers to the services of public institutions like for example electricity providers. "Patients" will include, for example those admitted in public hospitals; occupiers of public institution's facilities. Students of course will mean those in the public schools or other public institutions at all levels. Personal information of employees, or appointees or elected officials will include as example, personal data of such employees or appointees which they filled in before or after their employment or appointment as the case may be. Personal information of elected officials will include for example, the personal data required to be filled in by any person seeking election. Information of the tax payer in connection with the assessment of any tax and protection of complainant or informant to law enforcement needs no further interpretation. In all these cases, it is from the type of the information requested that it is determined whether it falls under any of these categories. Each case will be determined upon its peculiar circumstances.

The information requested by the Applicant in this matter relates to salaries, allowances and emolument paid to elected members of the 6th National Assembly. The Applicant did not request any of the personal information relating to the Honourable Members, but simply what was paid to them while they were in service from the public fund. It is my view that this information is not among those exempted by the above quoted section 14 (1) of the Act. It must be noted that even personal information protected by this subsection can still be disclosed in the circumstances stated in sub-section 2 of the section 14 as follows:

(2) "A public institution shall disclose any information that contains personal information if-
(a) the individual to whom it relates consents to the disclosure; or
(b) the information is publicly available.

Still sub-section (3) provides as follows:

"Where disclosure of any information referred to in this section would be in the public interest, and if the public interest in the disclosure of such information clearly outweighs the protection of the privacy of the individual to whom such information relates, the public institution to whom the request for disclosure is made shall disclose such information subject to section 14(2) of the Act."

The above provisions are as clear as the colour purple and hardly needs any interpretation. The Act clearly places the public interest above all else including the personal interest of the individuals. Where the interest of the public is in clash with the individual interest, in deserving cases, the collective interest must be held paramount. Upon all I stated above the information requested by the Applicant in this suit is not exempted under this section as held earlier. The Respondent is not justified by the Act to deny it to the Applicant. The relief sought by the Applicant in this motion are both granted. The Respondent is hereby ordered to disclose to the Applicant within 14 days from today give details information of salary, emolument and allowances paid to all Honourable Members of House of Representatives and Distinguished Senators, both of the 6th Assembly, from June, 2007 to May, 2011.

BALKISU BELLO ALIYU
JUDGE
25TH JUNE, 2012

APPEARANCES:

C. OBIAGWU ESQ. WITH C.N. OBANI ESQ. FOR THE APPLICANT

J.J. USMAN ESQ. WITH HIM A.O. PHILIPS ESQ . FOR THE RESPONDENT.

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON THURSDAY, THE 5TH DAY OF JULY, 2012

BEFORE THE HON. JUSTICE BALKISU BELLO ALIYU (JUDGE)

SUIT NO: FHC/ABJ/CS/1016/2011

IN THE MATTER OF JUDICIAL REVIEW UNDER THE FREEDOM OF INFORMATION ACT, 2011

BETWEEN:

UZOEGWU F.O.C. Esq. …… APPLICANT

AND

1. CENTRAL BANK OF NIGERIA
2. ATTORNEY GENERAL OF THE FEDERATION …….. RESPONDENTS

J U D G M E N T

This judgment is in respect of an Originating Summons dated 15th December, but filed on the 16th of December, 2011 by Uzoegwu F.O.C. Esq., by which he seeks the determination of the following two legal questions:

1. **Whether by the provisions of Sections 2, 5 and 21 of the Freedom of Information Act, 2011, the Applicant is entitled to be furnished with the information in the custody of the 1st Respondent.**
2. **Whether the 1st Respondent is authorized to deny access to the Applicant of information in its custody under the provisions of the Freedom of Information Act, 2011.**

Upon the determination of the above questions, the Applicant seeks the following reliefs:

1. **A DECLARATION that the 1st Respondent's refusal to furnish the applicant with the information in its custody is wrongful.**
2. **AN ORDER compelling the Respondents to comply with the provisions of the Freedom of Information Act and furnish the Applicant with the information applied for.**

This summons is supported by affidavit dated 16th December, 2011 which the Applicant swore to himself. The Applicant in that affidavit described himself as a legal practitioner and a citizen of Nigeria with his address at Abuja. He said that on the 9th November, 2011, he wrote a letter to the 1st Respondent, the Central Bank of Nigeria by which he applied for information pursuant to the Freedom of Information Act 2011, to be informed of the amount payable to the Governor, Deputy Governor and Directors of the Central Bank of Nigeria as monthly salary. But the 1st Respondent did not reply to the Applicant's letter nor furnish him with the information required by him. Attached to the affidavit of the Applicant stating the above facts is the copy of the application through letter (exhibit 'A') made by the Applicant to the 1st Respondent. This letter is dated 9th November, 2011 addressed to its Director of Finance acknowledged the receipt of the letter with his stamp on 11th November, 2011.

In his address attached to this Originating Summons, the Applicant who appear in person for himself being a legal practitioner, quoted the provisions of sections 2, 5, 6, 7 and 8 of the Freedom of Information Act (hereinafter referred to as the Act), and submitted that by section 8(4) of the Act, the 1st Respondent is deemed to have denied the information requested. Thus by the provisions of Section 21 of the Act, the Applicant can apply to this court for the review of refusal. He urged the Court to grant the reliefs he seeks in this Summons.

The Respondents were served with this summons, and the 1st Respondent filed a counter affidavit to the affidavit of the Applicant. The 1st Respondent's counter affidavit is dated 2nd March, 2012 sworn to by Okpetu Samson, the Litigation Secretary in the law firm of Messrs. K.T. Turaki & Co. solicitors to the 1st Respondent. He deposed to this affidavit

from the information he derived from the Director of Legal Services Department of the 1st Respondent. The 1st Respondent's reasons for refusal to supply the information requested by the Applicant are stated in paragraphs 3 (b) to (j), and it is because the information is personal information which was communicated to them upon their appointments.

The 1st Respondent's counsel Mr. Abdulziz Ibrahim filed an address along with the counter affidavit of the 1st Respondent. In that address counsel submitted that there is nothing in sections 2, 5 and 21 of the Act quoted by the Applicant in his address that entitle him to compel the 1st Respondent to furnish him with the information relating to the salaries of the Governor of Central Bank and his Deputies and Directors. According to Mr. Abdulziz, these sections of the Act relied upon by the Applicant **"merely prescribes the general rights of the Plaintiff to have access to available information and procedures for procuring the same."** But the 1st Respondent's counter affidavit has shown, according to counsel, that the information sought by the Applicant is **"official and personal information and contained in the personal files or the Governor, Deputy Governors and Directors of Central Bank of Nigeria maintained by the 1st Defendant.**" This information is protected by section 15(1) read together with section 13(3) of the Act and section 37 of the Constitution of Nigeria, 1999 (as amended). He submitted that the items enumerated by section 15(1) of the Act are not exhaustive because of the use of the word "include" in that section. According to Mr. Abdulziz, the subsection does not exclude other situations or instances which are not expressly mentioned in the section. He urged the Court to read as a whole the Freedom of Information Act and if that is done, the Court will have no difficulty in coming to the conclusion that the information sought by the Plaintiff is the one exempted from disclosure under the Act. The learned counsel relied on the cases of **Nyame Vs. FRN (2010) All FWLR (Pt. 527) 618; Ekpo Vs. Calabar LGC. (1993) 3 NWLR (Pt. 281) 324,** among others to supports his submissions.

The 2nd Respondent, the Attorney General of the Federation filed his counter affidavit dated 7th May, 2012 in opposition to the Originating Summons. The facts relied upon by the 2nd Defendant are same as relied upon by the 1st Defendant in its affidavit. In his address attached to the counter affidavit on behalf of the 2nd Defendant, Mr. H.Z. Mohammed submitted a single issue for determination, that is, **"Whether the 1st Defendant's refusal to provide the information sought for by the Plaintiff is wrong and whether this Honourable Court can compel the 1st Defendant to furnish the said information, the same having been exempted under Section 14(1)(b) of the Freedom of Information Act, 2011."** In his argument in support of this issue, Mr. Mohammed relied on section 14(1)(b) to state the information the Plaintiff requested from the 1st Defendant is personal information and therefore exempted from disclosure. He said the refusal of the Defendant to disclose the information the Plaintiff requested regarding the salary paid to the Governor and Deputy Governors of Central Bank of Nigeria was not wrong in view of section 12(1) (a) of the Act. He also placed reliance on subsection 3 of same section 12 which provides that public institution may deny information that could reasonably be expected to facilitate the commission of an offence. That the offices of the Governor and his deputies and directors of the Central Bank being sensitive offices, the disclosure of their salaries and **allowances "could cause or spark violence due to wrong interpretation and could endanger the lives and properties of the said officials."** Mr. Mohammed urged the Court not to interpret Sections 2, 5, and 21 of the Act relied upon by the Plaintiff in isolation, but the whole Act should be read as a whole to achieve the purpose it is meant to achieve. He relied on the same cases as did the counsel to the 1st Defendant in his address summarized supra.

The Plaintiff filed a reply on points of law to the address of the counsel to the 1st Defendant. His reply is dated 28th March, 2012. In that reply the Plaintiff relied on the definition of personal information exempted from disclosure as defined by the Act to **mean "any official information held about an identifiable person, but does not include information that bears on the public duties of public employees and officials"** it is submitted upon this definition by the Plaintiff that the information the Plaintiff requested is in respect of the offices of the Governor, his Deputies and Directors of the Central Bank and not to them as identifiable persons. In reply to the 1st Defendant's claim that the disclosure of the salary and allowances of the officers requested may facilitate the commission of an offence, the Plaintiff said this is a mere presumption because there is no substantial ground to believe that such disclosure would render them susceptible to attack or facilitate the commission of a crime. Finally, the Plaintiff relied on the provisions of section 3(3)(j) and (4) of the Act which provides that public institution shall publish and ensure the wide dissemination of the information relating to documents containing names, salaries, titles and dates of employment of all employees and officers of the institution. He urged the Court to discountenance the argument of the 1st Defendant and grant the reliefs sought by the Plaintiff.

Above is the summary of the evidence and the legal arguments and submissions presented by each party to this suit. The facts are simple and not contested at all. The suit is simply the interpretation and the application of the provisions of the Freedom of Information Act, 2011 (the Act). It has been stated in plethora of superior judicial authorities and indeed recently by the Supreme Court that, it is settled law that the object of interpreting a statute or the constitution is

to discover the intention of the legislature which intention is usually deduced from the language used in the statute. See the case **of Abubakar Vs. INEC (2012) 49 NSCQR 788 at 821 G-H**.

From the affidavits of the 1st Defendant the reason for the denial of the information to the Plaintiff is based on section 15(1) of the Act. This is contained in the issue for determination submitted by the 1st Defendant's counsel in his address. The 1st Defendant said that this section 15(1) when read together with section 13(3) of the Act will show that the denial of information Plaintiff requested is justified. But I have to point out that Section 13 of the Act has no subsection at all. That section of the Act provides for the training of officials on the right of information. It provides that **"Every government or public institution must ensure that the provision of appropriate training for its officials on the public's right to access to information or records held by the government or public institutions, as provided for in this Act."** This is the only provisions under section 13 of the Act. I don't know from where the counsel of the 1st Defendant, Mr. Abdulaziz Ibrahim found the provisions of "Section 13(3) of the Freedom of Information Act, 2011" which he quoted at page 3 paragraph 3.8 of his address. In fact, even the section "15 (I) (ii)" of the Act which counsel quoted on the same page does not exist. Section 15 (1) of the Act, has subsections (1) (a) to (c) and then subsection (2) to (4). Section 15 (1) of the Act, which the 1st Defendant relied upon provides as follows:

15- (1) "A public institution shall deny an application for information that contains-

a) trade secrets, and commercial or financial information obtained from a person or business where such trade secrets or information are proprietary, privileged or confidential, or where disclosure of such trade secrets or information may cause harm to the interest of the third party provided that nothing contained in this subsection shall be construed as preventing a person or business from consenting to disclosure;

b) information the disclosure of which could reasonably be expected to interfere with the contractual or other negotiations of the third party; and

c) proposal and bids for any contract, grants, or agreement, including information which if it were disclosed would frustrated procurement or give an advantage to any person."

The above section deals with information relating to relating to trade and commercial secrets including contracts which may be entered into by public institutions, including the 1st Defendant. The information the Plaintiff seeks from the 1st Defendant as stated in exhibit 'A' attached to his affidavit is stated as follows:

"We hereby apply to be informed in writing of the amount the monthly Salary and Allowances payable to the governor, Deputy Governors and Directors of the Central Bank of Nigeria. We shall pay the necessary fee as soon as the amount is communicated to us…"

The salaries of the Governor of Central Bank and the Deputy Governors and Directors of the Bank cannot, by any stretch of imagination, be trade secrets contemplated by the section 15(1) quoted above. However, from paragraphs 3 (a) to (j) of the Counter affidavit filed on behalf of the 1st Defendant, the denial of information the Plaintiff requested from the 1st Defendant is in the basis that the information is personal information communicated to them upon their employment.

To appreciate the position of the 1st Defendant better, I will quote the relevant paragraph 3 (a) to (j) of the counter affidavit of Okpetu Samson which he swore to on behalf of the 1st Defendant. He said:

3. "That I have been informed by S. A. ONEKUTU Esq., Director Legal Services Department of the 1st Defendant on Friday the 24th Day of February, 2012 at about 1.00pm while reacting to the Plaintiff's originating Summons dated the 15th day of December, 2011 in a meeting with Abdulzis Ibrahim Esq., of counsel in Messrs K.T. Ruraki & Co., Solicitors to the 1st Defendant herein at the 1st Defendant's office, CBN Towers, Central Business District, Abuja and I verily believe him to be true and correct as follows:

b) That he has read the affidavit of Uzoegwu F.O.C. Esq., in support of the Plaintiff's originating summons dated the 15th day of December, 2011.

c) That the Plaintiff's application seeks for information to wit; monthly salaries and allowances, which are personal information to the Governor, Deputy Governors and Directors of the Central Bank of Nigeria.

d) That information applied for by the Plaintiff is official information held about the Governor, Deputy Governors and Directors of the Central Bank of Nigeria and does not bear on their public

duties as employees, appointees and/or officials of the 1st Defendant.

e) That the information sought being one that contains personal information of the Governor, Deputy Governors and Directors of Central Bank of Nigeria can only be disclosed by the 1st Defendant, if and only if, the said Governor, Deputy Governors and Directors consent to the disclosure.

f) That the information, to wit, monthly salaries and allowances payable to the Governor, Deputy Governors and Directors of the Central Bank of Nigeria is not publicly available.

g) That he knows as a fact that the Plaintiff has not obtained the requisite consent of the Governor, Deputy Governors and Directors of the Central Bank of Nigeria to enable the 1st Defendant avail the Plaintiff of the said information.

h) That he knows as a fact that the disclosure by the 1st Defendant of the information requested by the Plaintiff without the consent of the Governor, Deputy Governors and Directors of the Central Bank of Nigeria, will constitute an invasion of their personal privacy.

i) That he verily believes that the disclosure by the 1st Defendant of the information requested by the Plaintiff could facilitate the commission of an offence by some criminally minded persons and exposes the Governor, Deputy Governors and Directors of Central Bank to harm and injury.

j) That he verily believes that it would not be in the interest of public safety and public order to compel the 1st Defendant to furnish the Plaintiff with the information applied for."

From the above averments of the 1st Defendant, particularly paragraph 3(c) and (d), the claim of the 1st Defendant is that the salaries and allowances of the officers are personal information which has been exempted from disclosure by the Act. It is the Section 14 of the Act that provides for exemption of personal information of officers of public institutions. That section provides as follows:

14-(1) "Subject to subsection (2), a public institution must deny an application for information that contains personal information and information exempted under this subsection includes-

(a) Files and personal information maintained with respect to clients, patients, residents, students, or other individuals receiving social, medical, educational, vocational, financial, supervisory or custodial care or services directly from public institution

(b) Personal files and personal information maintained with respect to employees, appointees, or elected of officials of any public institution or applicants for such positions;

(c) files and personal information maintained with respect to any applicant, registrant, or licensee by any government or public institution cooperating with or engaged in professional or occupational registration, licensure or discipline;

(d) information required of any tax payer in connection with the assessment or collection of any tax disclosure is otherwise requested by the statute; and

(e) information revealing the identity of persons who file complaints with or provide information to administrative, investigative, law enforcement or penal agencies on the commission of any crime."

Note that there is no mention of salaries or allowances of officers of public institution. It has been contended by the Counsel of the 1st Defendant that the list in the above section is not exhaustive because of the word **"include"** used by the legislature. By this argument, it will mean that the salaries and allowance of officers of public institutions are exempted by the Act as personal information. I must say I am not carried along this argument for the simple reason that the salaries and allowances of officers are such intrinsic part of their public employment or appointment that it that if the legislature intended to exempted them as person information to the officers, they will have stated so clearly. So intrinsic are the salaries and allowances of officers of public institutions to their employment that there is a statutory body set to determine such salaries and allowances. This is the National Salaries, Income and Wages Commission established by the National Salaries, Income and Wages Commission Act, CAP. N72 Laws of Federation of Nigeria, 2004. Having not specifically exempted the salaries and allowances of public officers in respect of their employment as such from disclosure, the legislature did not intend that such information is personal information. I have earlier stated that one of the cardinal principles of interpretation of statutes is to discover the intention of the legislature from the words used in that statute, and read the statute as a whole so as not to defeat its intent. The intention of legislature in promulgating the Freedom of Information Act, 2011 as stated on its title is to make public records and information freely available. The first section of the Act established the right of access to public information in the custody of public officials. Another very important basic principle of interpretation of statutes is that the legislature will not be presumed to have given a right in one section and then take away the same right in another. See the case of **A.G Federation Vs. Abubakar (2007) 10 NWLR (Pt. 1041) 1 at 93.**

Perhaps the reason why the legislature did not exempt the salaries and allowances from disclosure is because such salaries and allowances are paid from the public funds through budget allocations. It is not logical to say that the payments of public officers from the public funds for their services to the public is personal information. It should not be and the Act under consideration did not exempt the information from disclosure and I so hold.

On the claim by the Defendants that the disclosure of the information about the salaries and allowances of the Governor, Deputy Governors and Directors of the Central Bank of Nigeria will facilitate the commission of an offence and expose the officers to harm and injury. There is nothing shown by the 1st Defendant to support this contention. Every public official of public institutions as defined in the Act receives remuneration in form of monthly salaries and allowances, otherwise it will be forced or compulsory labour in contravention of Section 34 (1) (c) of the Nigeria's Constitution, 1999 as amended. In that circumstances, the argument that disclosure of the salary of public officials will expose them to criminal attack is rather at large. I have to agree with the Plaintiff that this claim is not substantiated by the Defendant. It is discountenanced.

It must be noted that even personal information protected by this subsection can still be disclosed in the circumstances stated in subsection 2 of section 14 which provides as follows:

> **(2) "A public institution shall disclose any information that contains personal information if-**
> **(a) the individual to whom it relates consents to the disclosure; or**
> **(b) the information is publicly available.**

Still sub-section (3) of section 14 of the Act also provides that:

> **"Where disclosure of any information referred to in this section would be in the public interest, and if the public interest in the disclosure of such information clearly outweighs the protection of the privacy of the individual to whom such information relates, the public institution to whom the request for disclosure is made shall disclose such information subject to section 14(2) of the Act"**.
>
> **"Where disclosure of any information referred to in this section would be in the public interest, and if the public interest in the disclosure of such information clearly outweighs the protection of the privacy of the individual to whom such information relates, the public institution to whom the request for disclosure is made shall disclose such information subject to section 14(2) of the Act."**

By the above provisions, the legislature clearly intended that the public interest is placed above all else including the personal interest of the individuals. Where the interest of the public is in clash with the individual interest, in deserving cases, the collective interest must be held paramount. As judges, our primary duty it to interpret the law as it is intended and we have no jurisdiction to go in search of an interpretation which is convenient to the parties or one party. That will mean re-writing the statute to suit one party or another which is not our duty. See the cases of **Araka Vs. Egbue (2003) 7 S.C. 75 at 85 lines 15-40 and Inakoju Vs. Adeleke (2007) all FWLR (Pt. 353) 3 at 93 para F**.

I therefore hold that the 1st Defendant denial of the information requested by the Plaintiff on the monthly salaries and allowances of the Governor, Deputy Governor and the Directors of Central Bank of Nigeria is not justified by the Freedom of Information Act, the 1st Defendant is hereby ordered, pursuant to section 25(1) of the said Act to furnish the Plaintiff with the information regarding the monthly salaries of the Governor, the Deputy Governors and the Directors of Central Bank of Nigeria within fourteen days from today, subject only to payment of fees for the certification of records of the information if necessary.

BALKISU BELLO ALIYU
JUDGE
5TH JULY, 2012

APPEARANCES:

UZOEGWU F.O. ESQ APPEARING AS PLAINTIFF
A. I. ABBAS ESQ. FOR THE 1ST DEFENDANT
MRS. ADEPEJO BALOGUN-ETTI FOR THE 2ND DEFENDANT.

IN THE FEDERAL HIGH COURT
HOLDEN AT LAGOS, NIGERIA
ON TUESDAY THE 2ND DAY OF OCTOBER, 2012
BEFORE THE HONOURABLE
JUSTICE M.B. IDRIS
JUDGE

SUIT NO: FHC/L/CS/494/2012

BETWEEN

MR BONIFACE OKEZIE ……. PLAINTIFF

AND

THE CENTRAL BANK OF NIGERIA ……. DEFENDANT

JUDGMENT

This is an Originating Summons dated 10th May 2012. The question posed for determination, and the reliefs sought are as follows:-

"QUESTION FOR DETERMINATION

Whether having regard to the provisions of the Freedom of Information Act 2011, the Defendant is not under a duty to make available to the Plaintiff the information requested in the said Plaintiff's letter of 26th January, 2012

RELIEFS SOUGHT

1. AN ORDER of this Honourable Court directing the Defendant to release to the Plaintiff forthwith the following information as demanded by the Plaintiff through his Solicitors in a letter to the Defendant dated 26th January, 2012:

    a. The cost to Central Bank of Nigeria (CBN) and the Government and people of Nigeria so far of the banking reforms instituted by the CBN and particularly;
    b. The amount of legal fees and other fees paid and to be paid to professionals and professional bodies.
    c How much of the amount in (a) above represents fees paid and to be paid to the firms of:
        i. Olaniwun Ajayi LP of The Adunola, Plot 12, 401 Close, Banana Island, Ikoyi, Lagos, and
        ii. Kola Awodein & Co of 6th Floor, UBA House, 57 Marina, Lagos.

    d. What is the total sum paid to the firm of Olaniwun Ajayi LP in respect of the prosecution of Cecilia Ibru, former Managing Director of Oceanic Bank Plc and how much of this sum was in the form of Commissions on the properties recovered from her.
    e. The total cash and value of properties recovered from Cecilia Ibru.
    f. The whereabouts of the money and properties recovered.
    g. What part of this cash and properties has been returned to Oceanic Bank and/or its shareholders.

2. AND for such further or other relief the Honourable Court may deem fit to make in the circumstances of the case."

The application was supported by an affidavit of 7 paragraphs and a written address. In the said affidavit, the following declarations were made:-

"AFFIDAVIT IN SUPPORT OF ORIGINATING SUMMONS

I, Kingsley Isicheli, male, Christian, Nigerian Citizen of Reinsurance House 46, Marina Lagos State, do hereby make oath and states as follows:

1. That I am a Legal Practitioner in the Law firm of Indemnity Partners.
2. That I have the consent of the Plaintiff and that of my employer to depose to this affidavit.
3. That on behalf of the Plaintiff and upon his instruction, the firm wrote the Defendant a letter dated 26th January 2012 wherein we requested of the Defendant of the following information within its custody:
   a. The cost of Central Bank of Nigeria (CBN) and the Government and people of Nigeria so far of the banking reforms instituted by the CBN and particularly;
      (i) The amount of legal fees and other fees paid and to be paid to professionals and professional bodies.
      (ii) How much of the amount in (a) above represents fees paid and to be paid to the firms of:
      (iii) Olaniwun Ajayi LP of The Adunola, Plot L2, 401 Close, Banana Island, Ikoyi, Lagos, and
      (iv) Kola Awodein & Co of 6th Floor, UBA House, 57 Marina, Lagos.
   b. What is the total sum paid to the firm of Olaniwun Ajayi LP in respect of the prosecution of Cecilia Ibru, former Managing Director of Oceanic Bank Plc and how much of this sum was in the form of Commissions on the properties recovered from her.
   c. The total cash and value of properties recovered from Cecelia Ibru.
   d. The whereabouts of the money and properties recovered.
   e. What part of this cash and properties has been returned to Oceanic Bank and/or its shareholders.
4. That the Defendant acknowledged the receipt of the letter on 3rd February 2012. A copy of the letter showing the acknowledgement and of receipt by the Defendant is hereby attached as exhibit A.
5. That the Defendant is a public body, agency or institution of Government created by law.
6. That the Defendant has neglected, refused or failed to make available the requested information to the Plaintiff.
7. That I make this affidavit in good faith believing same to be true and correct and in accordance with the oaths Law of Lagos State."

The Defendant filed a counter affidavit on the 7th of June 2012, and a written address in opposition. In the affidavit, the deponent declared as follows:-

COUNTER AFFIDAVIT IN OPPOSITION TO ORIGINATING SUMMONS

I, CHIAKA IHUARULA SYLVIA MOGAHA, Female, Christian, of Central Bank of Nigeria, Tinubu Square, Lagos do hereby make oath and states as follows:

1. I am a senior legal officer in the employment of the Defendant and as such I am conversant with the facts herein deposed to.
2. I have the consent of my employer to depose to this affidavit.
3. The Defendant was served with the Respondent's Originating Summons dated 10 May 2012 to determine whether the Defendant is not under a duty to make available to the Plaintiff the information requested in the Plaintiff's letter dated 26 January 2012 in compliance with the provisions of the Freedom of Information Act.
4. Attached to the affidavit in support of the said Originating Summons is a letter dated 26th January 2012 requesting for some information and addressed to the Defendant.
5. The said letter dated 26th January 2012 was received by the Defendant.
6. The information requested in the said letter relates primarily to the professional fees paid to two of the firms of lawyers handling various matters for the Defendant.
7. On receipt of the said letter, the Defendant's legal department was requested to look at the propriety of releasing the information sought by the Plaintiff.
8. The Defendant was advised against releasing such information as its release would violate the legal practitioner client privilege.
9. Based on the advice obtained from the Defendant's legal department, the Defendant took the decision to deny the Plaintiff's application for information.
10. Particularly, the Defendant denied the Plaintiff's application for the following reasons inter alia:
   (a) The information sought in the said application relate to the contractual relationship and negotiations between the Defendant and legal practitioners and other professionals engaged by the Defendant for their services to the Defendant.
   (b) The said information sought by the Plaintiff is specifically on the remuneration of the said legal practitioners and other professionals for their services to the Defendant, and if disclosed, would adversely interfere with the contacts and negotiations for services between the Defendant and those professionals.

(c) It is a momentous condition of the service by those professionals to the Defendant that their remuneration shall never be disclosed to any third party.

11. I sincerely believe that it is in the interest of justice to refuse the Plaintiff's application.
12. I make this affidavit in good faith believing the same to be true and correct and in accordance with the Oath Act."

The Plaintiff filed a Reply to counter affidavit and a reply address on points of law on 2nd July 2012. In the reply affidavit, the following declarations were made:-

PLAINTIFF'S REPLY TO THE COUNTER-AFFIDAVIT OF THE DEFENDANT

I BONIFACE OKEZIE, a male Nigerian investor of the Christian Faith and President of the Progressive Shareholders Association of 206, Herbert Macaulay Street, Yaba, Lagos, hereby make oath and state as follows:

1. It is common knowledge that the National Assembly being concerned about the free and non-transparent spending of the present CBN Governor, Mallam Lamido Sanusi, of public funds is now considering a bill to amend the CBN Act in order to curb the powers of the holder of that office over decision making within the institution and subject its budget to appropriation.
2. It is also common knowledge that the CBN Governor has spent several trillions of Naira and well in excess of the national budget in the last three years supposedly in pursuing banking reform although the total exposure of banks in the discount window under his predecessor was a meager N220 billion.
3. I know that hundreds of billions of Naira were said to have been recovered from Mrs. Cecilia Ibru, the former CEO of Oceanic Bank Plc which were said to have been stolen from the bank.
4. I know that the CBN Governor has through his policies forced the shareholders of Oceanic Bank Plc into an acquisition by Ecobank Plc in which they lost about 75% of the value of their shares to the acquiring bank and its shareholders but I am not aware that the hundreds of billions of Naira said to have been recovered from the said Cecilia Ibru was returned to the bank and its shareholders and therefore was taken into account in the valuation of their shares in the acquisition transaction.
5. I am also not aware to what extent the capital injected or to be injected by the said Ecobank Plc, being the advantage it was to bring into the said Oceanic Bank Plc, exceeded the said hundreds of billions of Naira said to have been recovered from the said Mrs. Ibru.
6. I have also heard the rumour amongst the public that the said CBN Governor and his associates within and outside Government have either embezzled, misappropriated or otherwise dissipated the recovered funds and property or otherwise, cannot account for them.
7. I therefore believe that there is strong and compelling public interest in the disclosure of the information sought from the Defendant which would set the records straight concerning its expenditure of public funds and assist the taxpaying public to better assess the cost effectiveness of the self-styled banking reform programme embarked upon by its present Governor, and that this interest outweighs by far the concerns it has expressed in its counter-affidavit.
8. My Solicitor, Chuks Nwachuku, now informs me and I verily believe that it is not the usual practice of lawyers to force their clients, particularly, Government or public institutions into no-disclosure agreement in relation to their fees.
9. I therefore believe that the deposition of the defendant that it has entered into such non-disclosure agreement is an afterthought.

AND I make this oath in honesty believing the same to be true and correct and in accordance with the Oaths Act."

At the hearing, learned Counsel for the Plaintiff adopted the processes filed and urged the Court to grant the reliefs sought in the Originating Summons.

Learned Counsel for the Defendant also relied on the process filed, and adopted the written address.

Learned Counsel urged the Court to discountenance the reply affidavit and the accompanying written address because the reply affidavit contained fresh facts and that the reply address was tied to those facts. That there was no direct nexus between section 16 (a) of the FOI Act and section 192 (1) of the Evidence Act, and that the 2 Acts addressed different situations.

In reply, Learned Counsel for the Plaintiff argued that the reply affidavit was competent. That in interpreting the provisions of the FOI Act, the Court should have recourse to the canons of interpretation. It was contended that

questions not addressed by Counsel should be taken as admitted and reference was made to questions (e), (f) and (g) on the Originating Summons, and the Court was urged to grant the reliefs sought.

In the Plaintiff's written address, the only issue formulated for determination as whether having regard to the provisions of the Freedom of Information Act 2011, the Defendant is not under a duty to make available to the Plaintiff the information requested in the said Plaintiff's letter of 26th January, 2012.

It was argued that the requested information was within the custody of the Defendant, and that it had neglected, refused or failed to release the said information to the Plaintiff or to decline with reasons. The Court was therefore urged to uphold the originating summons and grant a mandatory order as requesting by the Plaintiff.

In the Defendant's written address, the following issue was formulated for determination:-

> Whether having regard to the provisions of the Freedom of Information Act 2011, the Defendant is under a duty to make available to the Plaintiff the information requested in the Plaintiff's letter of 26th January, 2012.

It was argued that the rights under the Acts was not absolute. That on the face of the Plaintiff's letter of 26 January 2012 much of the information requested related to contractual or other negotiations with third parties the disclosure of which could severely prejudice the position of the parties involved, and that the information was mandatory required to be denied by the Defendant.

That the request as it related to amount of legal fees paid to the Defendant's Counsel are products of contractual negotiations between legal practitioners and their clients and that the Plaintiff's request was caught by the provisions of section 15 (1) (b) of the FOI Act.

It was submitted that there was no basis for the Plaintiff's prayer for an order of this Court under section 25 of the FOI Act and the Court was urged to so hold.

In the reply address, it was argued that a public institution could not purport to escape the duty imposed under the FOI Act by entering into an agreement of non-disclosure, and that such an agreement would be null and void.

It was also argued that the legal practitioner-client priviledge was not intended to protect the legal practitioner but the client.

The Court was urged to uphold the originating summons and make the orders for disclosure as sought the information was mandatorily required to be denied by the Defendant.

That the request as it related to amount of legal fees paid to the Defendant's Counsel are products of contractual negotiations between legal practitioners and their clients and that the Plaintiff's request was caught by the provisions of section 15 (1) (b) of the FOI Act.

It was submitted that there was no basis for the Plaintiff's prayer for an order of this Court under section 25 of the FOI Act and the Court was urged to so hold.

In the reply address, it was argued that a public institution could not purported to escape the duty imposed under the FOI Act by entering into an agreement of non-disclosure, and that such an agreement would be null and void.

It was also argued that the legal practitioner-client privilege was not intended to protect the legal practitioner but the client.

The Court was urged to uphold the originating summons and make the orders for disclosure as sought.

I have read the processes filed including the written addresses. I have carefully considered the submissions made in these addresses and those made orally in open Court at the hearing of the case. The question for determination is whether having regard to the provisions of the Freedom of Information Act (FOI Act), the Defendant is not under a duty to make available to the Plaintiff the information requested in the said Plaintiff's letter of 26th January, 2012.

What does this letter of 26th January 2012 contain? The letter provides as follows:-

26th January, 2012.

The Governor
Central Bank of Nigeria
Plot 33, Abubakar Tafawa Balewa Way,
Central Business District
Cadastral Zone, Abuja
Federal Capital Territory, Nigeria

Sir,

REQUEST FOR INFORMATION UNDER THE FREEDOM OF INFORMATION ACT 2011

We act for Mr. Boniface Okezie (hereinafter called our "client") the president of Progressive Shareholders Association which is an association of shareholders of major quoted companies in Nigeria, including banks. We have his instruction to request the following information from you in accordance with the provisions of the Freedom of Information Act.

1. The cost to Central Bank of Nigeria (CBN) and the Government and people of Nigeria so far of the banking reforms instituted by the CBN and particularly;

   (a) The amount of legal fees and other fees paid and to be paid to professionals and professionals bodies.
   (b) How much of the amount in (a) above represents fees paid and to be paid to the firms of:
      (i) Olaniwun Ajayi LP of The Adunola, Plot L2, 401 Close, Banana Island, Ikoyi, Lagos, and
      (ii) Kola Awodein & Co of 6th floor, UBA House, 57, Marina, Lagos.

Our client observes that the two law firms mentioned in (i) and (ii) above have almost completely dominated representation of CBN and its related bodies in the litigations sparked off by the reforms. The same law firms have been engaged by the CBN in other capacities such as advisers to the banks the CBN intervened in and consultants to the CBN and other related bodies and also for the criminal prosecution of the former executives of the said banks.

2. What is the total sum paid to the firm of Olaniwun Ajayi LP in respect of the prosecution of Cecilia Ibru, former Managing Director of Oceanic Bank Plc and how much of this sum was in the properties recovered from her.
3. The total cash and value of properties recovered from Cecilia Ibru.
4. The whereabouts of the money and properties recovered.
5. What part of this cash and properties has been returned to Oceanic Bank and/or its shareholders.

The bases for the above request are that:
(a) It is the tax payer's money that is being used for the prosecution of the ex-bank chiefs and all the reform processes.
(b) Our client also believes that this whole reform process has become a drain pipe on the economy benefiting only a few.

We expect your response to this request within seven (7) days in accordance with the law.

Yours faithfully,
CHUKS NWACHUKU ESQ
Solicitor.

Historically, freedom of information legislation comprises laws that guarantee access by the general public to data held by its government. They establish what is known as a "right to know" legal process by which requests may be made for government held information, to be received freely or at minimal cost, having standard exceptions. Over 90 countries around the World have implemented some form of legislation guaranteeing the right of access to information. Sweden's Freedom of the Press Act 1766 is the oldest of such legislation in the World.

A basic principle behind most freedom of information legislation is that the burden of proof falls on the body asked for information, not on the person asking for it. The person making the request does not usually have to give an explanation for their actions, but if the information is not disclosed a valid reason has to be given.

In Nigeria the House of Representatives passed the bill on the 16th day of February, 2011 and the Senate on the 16th day of March 2011. The harmonized version of the bill was signed into law by the President on the 28th day of May 2011.

The highlights of this law is as follows:-

- ? It guarantees the right of access to information held by public institutions, irrespective of the form in which it is kept and is applicable to private institutions where they utilize public funds, perform public functions or provide public services;
- ? It requires all institutions to proactively disclose basic information about their structure and process and mandates them to build the capacity of their staff to effectively implement and comply with the provisions of the Act;
- ? It provides protection for whistleblowers;
- ? It makes adequate provision for the information needs of illiterate and disabled Applicants;
- ? It recognizes a range of legitimate exemptions and limitations to the public's right to know, but it makes some of these exemptions subject to a public interest test that, in deserving cases, may override such exemptions;
- ? It creates reporting obligations on compliance with the law for all institutions affected by it. These reports are to be provided annually to the Federal Attorney General's Office, which will in turn make them available to both the National Assembly and the public;
- ? It requires the Federal Attorney-General to oversee the effective implementation of the Act and report on execution of this duty to Parliament annually.

There is no doubt that the Freedom of Information Act (FOI Act) is intended to act as a catalyst for change in the way public authorities approach and manage their records.

Under the FOI Act, any individual is able to make a request to a public institution for information. An applicant is entitled to be informed in writing as to whether the information is held and have the information communicated to them. If any of the information is refused, the organization must provide the Applicant with a Notice which clearly states the reasons why it is withholding the information that has been requested.

It must be noted that an Applicant will not be able to get all the information he wants. The Act requires that there will be valid reasons why some kinds of information may be withheld, such as if the release would prejudice National Security or commercial interests. See generally sections 1, 12, 14, 15, 16, 17, 19, 20 and 21 of the FOI Act.

Public institutions are expected to have an information communicated to an Applicant promptly but not later than 7 days after it has received a request. Where a request is refused, the public institution shall give notice to the Applicant and should state the exemption providing the basis for refusal within the FOI Act and why it applies to the information requested. This notice must also be communicated to the Applicant within 7 days.

There are two general categories of exemption: (a) Absolute exemptions:- those where there is no duty to consider the public interest; and (b) qualified exemption:- those where, even though an exemption exists, an authority has a duty to consider whether disclosure is required in the public interest. Briefly, the public interest test requires an authority to determine whether the public interest in withholding the information outweighs the public interest in disclosing it by considering the circumstances of each particular case in the light of the potential exemption which might be claimed. The balance lies in favour of disclosure since withholding outweighs disclosure, imperatively.

The public interest test applies to the exemptions contained in section 15 (1) and 16 of the FOI Act. I shall now deal briefly with the issues of information provided in confidence under section 15 (1) (a); legal professional priviledge under section 16 (a); and information expected to interfere with the contractual or other negotiations of third party under section 15 (1) (b) of the FOI Act.

Section 15 (1) (a) in part provides an exemption to the right of access under the Freedom of Information Act if release would be an actionable breach of confidence.

This exemption qualifies the right of access under Freedom of Information Act by reference to the common law action for 'breach of confidence'. According to that action, if a person who holds information is under a duty to keep that

information confidential (a 'duty of confidence'), there will be a 'breach of confidence' if that person makes an unauthorized disclosure of the information.

The concept of 'breach of confidence' has its roots in the nation that a person who agrees to keep information confidential should be obligated to respect that confidence. However, the law has now extended beyond this: the Courts recognize that a duty of confidence may also arise due to the confidential nature of the information itself or the circumstances in which it was obtained.

The Concept of 'breach of confidence' recognizes that unauthorized disclosure of confidential information may cause substantial harm. For example, the disclosure of a person's medical records could result in a serious invasion of that person's privacy, or the disclosure of commercially sensitive information could result in substantial financial loss.
The law protects these interests by requiring information to be kept confidential: if information is discloses in breach of a duty of confidence, the Courts may award damages (or another remedy) to the person whose interests were protected by the duty.

This exemption only applies if a breach of confidence would be 'actionable'. A breach of confidence will only be 'actionable' if a person could bring a legal action and be successful. The Courts have recognized that a person will not succeed in an action for breach of confidence if the public interest in disclosure outweighs the public interest in keeping the confidence. So although the Act requires no explicit public interest test, an assessment of the public interest must still be made. However, the factors the Courts have considered to date and the weight they give to them are not the same.

If a public authority receives a request for information which it has obtained from another person and that public authority holds the information subject to a duty of confidence, that information will be exempt if providing it to the public would constitute an actionable breach of that confidence.

Whether or not a public authority holds information subject to a duty of confidence depends largely on the circumstances in which it was obtained and whether the public authority expressly agreed to keep it confidential. A duty of confidence may also arise due to the confidential nature of the information itself.

If a request includes information which may fall within this exemption, three questions must be asked. If the answer to any of the questions is 'no', the information will not be exempt under section 15:

- Was the information obtained by the public authority from any other person?
- Is the information held subject to a duty of confidence (express or implied)?
- Would the disclosure of this information to the public, otherwise than under the Freedom of Information Act, constitute an actionable breach of confidence? This will include consideration of whether there would be a defence to an action for breach of confidence.

Each of these questions is examined below.

Was the information obtained by the public authority from any other person?
Section 15 only protects information which was obtained by a public authority from a person (including another public authority). The origin of the information could be an individual, or a group of individuals or an organization.

While this exemption may apply where a duty of confidence is owed by one public authority to another, it will not apply where both of those public authorities are government departments. Although government departments are treated as separate persons for the purposes of freedom of information, a government department cannot claim that the disclosure or any information by it would constitute a breach of confidence actionable by any other government department.
The phrase 'from a person', will usually require the information to have been obtained from outside the department and not from an employee. However, this will not always be the case. Section 15 may apply where disclosure would breach a duty of confidence which a public authority owes to an employee in their private capacity. On the other hand, if the information is disclosed in the course of employment, when an employee is acting on behalf of the public authority and solely in the capacity of employee, there will be no duty of confidentiality for the purposes of section 15.

The person from whom the information was obtained may not be the same person whose confidence is being protected; the information may have passed through the hands of another person before reaching the public authority.

Is the Information held subject to a duty of confidence?

Public authorities routinely hold information which has been obtained from other public bodies, private organizations and individuals to which obligations of confidence are likely to attach. For example: frank exchanges of views with other public authorities, information which is commercially sensitive: and the personal, private information of individuals.

Information will only be held subject to a duty of confidence if it as the 'necessary quality of confidence'. **See COCO VS. AN CLARK (ENGINEERS) LTD (1969) R.P.C. 41**. This means that it must be information which is worthy of protection someone must have an interest in the information being kept confidential. For example, even if a commercial contract states that everything in the contract is 'confidential', any useless or trivial information cannot be confidential and no duty of confidence will arise in relation to that information.

For information to be 'confidential' it must also be 'inaccessible' in the sense of not being in the public domain or a matter of public knowledge. Whether information is in the public domain is a question of degree; it will depend on the circumstances and the extent or public knowledge at the time when disclosure is requested. Information relating to an act which is done in a public place may still be private information and, equally, an activity is not necessarily private simply because it is not done in public.

For example, in **CAMPBELL V. MGN LIMITED (2004) 2 ALL ER 995** the House of Lords found that publication of a photograph of the claimant leaving a narcotics anonymous meeting could be a breach of confidence. Even though the claimant had been in a public place, the photograph enabled the location of the claimant's treatment for her addition to be identified.

The Courts will recognize that a person holds information subject to a duty of confidence in two types of situations.

- ? Where that person expressly agrees or undertakes to keep information confidential: there is an express duty of confidence.
- ? Where the nature of the information of the circumstances in which the information is obtained imply that the information is obtained imply that the person should keep the information confidential: there is an implied duty of confidence.

These two types are discussed below.

Where that person expressly agrees or undertakes to keep information confidential.

Where a public authority expressly agrees to keep information confidential there is an express duty of confidence, provided that the information has the necessary quality of confidence. For example, where a public authority signs a contract which contains a confidentiality clause or agrees in correspondence that, if information is provided, it will be kept confidential.

While it will usually be a question of fact whether a public authority has agreed to or undertaken a duty of confidence, there are important policy considerations involved in the question of whether it is appropriate for a public authority to agree to a duty of confidence. As explained above, public authorities must consider the application of this exemption not only when disclosure of confidential information is requested but also when potentially confidential information is obtained. If information does not need to be kept confidential but a public authority expressly agrees to keep it confidential when it is obtained, this may result in the information being exempt from the Act under section 15. In light of the public interest in open government and freedom of information, public authorities must consider carefully whether it is appropriate to agree to keep information that it receives confidential.

When considering whether to agree to hold information subject to a duty of confidentiality, a public institution should consider:

- ? The nature of the interest which is to be protected and whether it is necessary to hold the information in confidence in order to protect that interest.
- ? Whether it is possible to agree to a limited duty of confidentiality, for example by clearly stating the circumstances in which a public authority would disclose information.
- ? Whether the information will only be provided on the condition that it is kept confidential and, if so, how important the information is in relation to the functions of that public authority.
- ? The nature of the person from whom the information is obtained and whether that person is also a public authority to whom freedom of information and the Code of Practice applies (where the person supplying the

information is also a public authority, departments must be particularly cautions is agreeing to keep the information confidential).

If it is necessary and justifiable for a public authority to agree to keep the information confidential, that public authority should take practical steps to respect the confidential nature of the information. Ensuring that the circulation of confidential information is controlled and that the confidential status of that information is regularly reviewed will assist with responding to future freedom of information requests.

Where the nature of the information or the circumstances in which the information is obtained imply that the information should be kept confidential.

An implied duty of confidence can arise even though a public authority has no pre-existing relationship with the person to whom the duty is owed, or has not agreed to keep the information confidential.

Some information which is obtained by a public authority will be manifestly confidential; by its very nature it will be clear both that substantial harm could be caused by its disclosure and that the public authority should not disclose it to members of the public. For example, a public authority obtains the medical records of an individual; in most circumstances, it will be clear that disclosure of that information to the public could cause substantial harm and offence to that individual. In this type of situation, the law may step in to imply a duty of confidence. The public authority may be obliged, by virtue of the very nature of the information, to keep it confidential. Whether the nature of the information concerned means that it is held subject to a duty of confidence is a question of degree and will, to a certain extent, depend on the circumstances at the time that disclosure is requested.

The circumstances in which information was obtained may impose an implied duty of confidence in relation to information which is not obviously of a confidential nature (i.e. where the public authority may not be immediately aware of its confidential nature). For example, if a public authority has statutory powers of compulsion, that is to say if it can legally oblige people to provide information for certain purposes, a duty of confidentiality will often arise in relation to that information and the public authority may be prohibited from disclosing the information in other contexts.

This may also apply where information is provided under 'threat of compulsion' where a person provides information to a public authority in the knowledge that if they did not do so, the public authority would use its powers to compel disclosure. Additionally, when a public authority obtains information for a particular purpose, a duty of confidentiality may arise which prevents that information being used for a different purpose. For example, confidentiality attaches to information which is given to the Police during the course of a criminal investigation, whether it is given by a suspect under caution or by a potential witness. See **FRANKSON and Others VS. HOME OFFICE, JOHNS VS. OFFICE (2003) 1 WLR 1953, in particular per Scott Baker LJ at 35.**

Other factors which may be relevant to ascertaining whether information is held subject to an implied duty of confidence could include the following:-

- Whether there is alongstanding, consistent and well-known practice on the part of the public authority of protecting similar information against disclosure and the supplier of the information could reasonably have expected this to continue.
- Whether the information is provided gratuitously or for consideration (in the latter case, it is less likely that an obligation of confidence would arise).

Whether an implied duty of confidence arises is essentially a question of law. If a public authority has not expressly agreed to keep information confidential but suspects that a duty of confidence may be implied, it will often be necessary to seek legal advice.

Would the disclosure of this information to the public, otherwise than under the Freedom of Information Act, constitute an actionable breach of confidence?

UNAUTHORISED DISCLOSURE

For a disclosure to breach a duty of confidence it must be unauthorized. Unauthorised disclosure could take place where disclosure runs contrary to the express wishes of the person to whom the duty is owed or where a department does not have the consent of the person concerned. If a person has sanctioned disclosure of the information, for

example if they have expressly consented to disclosure, section 15 will not apply as disclosure would not be a breach of confidence actionable by that person.

PUBLIC INTEREST TEST

The English Courts have recognised that disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential. When considering the application of section 15, departments must consider whether the public interest in disclosure of the confidential information concerned means that it would not constitute an actionable breach of confidence to disclose that information to the public.

The following principles must be applied when conducting this balancing test:

- Where a duty of confidence exists, there is a strong public interest in favour of keeping that confidence.
- There is no general public interest in the disclosure of confidential information in breach of a duty of confidence. If the public interest in keeping the confidence is to be outweighed it will be necessary to identify a specific interest in favour of disclosure
- There is a public interest in ensuring public scrutiny of the activities of public authorities. If disclosure would enhance the scrutiny of the activities of public authorities then this will be a factor in the balancing exercise. However, where the interests of a private person are protected by a duty of confidence (whether an individual or an organization), the general interest in public scrutiny of information held by a public authority is unlikely in itself to override the public interest in keeping the confidence.
- The Freedom of Information Act itself has no influence on the weight which attaches to the public interest in the disclosure of information for the purposes of section 15.
- The English courts have traditionally recognized that the defence to breach of confidence in the public interest applies where disclosure would protect public safety, or where there has been wrongdoing, such as misfeasance, maladministration, negligence or other iniquity on the part of the public authority.
- When considering the balance of interests, public authorities must have regard to the interests of the person to whom the duty of confidence is owed; the public authority's own interests in non-disclosure are not relevant to the application of this exemption.
- No regard may be had to the identity of the person who is requesting the information nor to the purpose to which they will put the information. The question is whether disclosure 'to the public' would be a breach of confidence, and not whether disclosure to particular person requesting the information would be a breach. A request for information from a journalist or pressure group must be treated in the same way as a request from a person who is conducting historical research.

If this exemption is wrongly applied and information is incorrectly withheld, a public authority may face sanctions under the Act for not complying with the duty to provide information. However, if the exemption is wrongly applied and information is incorrectly disclosed, a public authority may, in some circumstances, face an action for breach of confidence. In balancing the relevant public interests, the question to be asked is what conclusion would a Court come to if the information were disclosed to the public and an action for breach of confidence was brought? That is to say:

- If a Court would conclude that the public interest in disclosure to the public outweighed the public interest in keeping the confidence then the information will not be exempt under section 15; unless another exemption applies, the information must be disclosed.
- If a Court would conclude that the public interest in disclosure did not outweigh the public interest in keeping the confidence, the by disclosure at the time the information was obtained has depleted.

Examples of cases where the public interest is unlikely to favour the disclosure of information may include:

- Where disclosure would provoke some risk to public or personal safety.
- Where disclosure would be damaging to effective public administration.
- Where there are contractual obligations in favour of maintaining confidence.
- Where the duty of confidentiality arises out of a professional relationship.
- Where disclosure would affect the continued supply of important information (for example, information provided by whistle-blowers)
- Where information was provided under compulsion. Information will be exempt and the request should be refused on the basis of section 15.

When considering the public interest test, one should not consider the motive for the freedom of information request not the effect which disclosure to that particular requester would have. However, one must consider the effect that disclosure to the public would have. Examples of cases where there may be a public interest in the discloser of confidential information include:

- ? Information revealing misconduct/mismanagement of public funds
- ? Information which shows that a particular public contract is bad value for money.
- ? Where the information would correct untrue statements or misleading acts on the part of public authorities or high-profile individuals.
- ? Where a substantial length of time has passed since the information was obtained and the harm which would have been caused.

These examples are for illustrative purposes only. Decisions on which way the delicate balance of arguments may rest will vary on a case by case basis.

Section 16 (a) applies to information that would be subject to legal professional privilege. Legal professional privilege covers confidential communications between lawyers and clients and certain other information that is created for the purposes of litigation. Section 16 ensures that the confidential relationship between lawyer and client is protected.

Section 16 is subject to a public interest balance. However the English High Court have recognized that there is generally a very substantial public interest in maintaining the confidentiality of legally privileged material, and that as such equally weighty factors in favour of release must be present for the public interest to favour disclosure. See DR. **JOHN PUGH MP VS. INFORMATION COMMINSSIONER AND MINISTRY OF DEFENCE (EA/2007/0055) 17TH DECEMBER, 2007 and DEPT. OF BUSINESS AND REGULATORY REFORM VS. O'BRIEN (2009) EWHC 164 (QB)**

WHAT INFORMATION MAY BE COVERED BY THIS EXEMPTION?

LEGAL PROFESSIONAL PRIVILEGE

Legal Professional Privilege (LPP) is a rule of litigation that protects, in general terms, confidential communications between lawyers and their clients. It may also cover some communications between a lawyer and third parties for the purposes of preparing litigation. Under the litigation rule, if material is subject to LPP, a party generally does not have to disclose it during the course of legal proceedings (see paragraph 11).

The principle of LPP has been established by the Courts in recognition of the fact that there is an important public interest in a person being able to consult his or her lawyer in confidence. The Courts do not distinguish between private litigants and public authorities in the context of LPP. Just as there is public interest in individuals being able to consult lawyers in confidence, there is public interest in public authorities being able to do so.

Section 16 applies to information in respect of which a claim to LPP could be maintained in legal proceedings. It does not require that any legal proceedings are in fact in progress, although it will certainly be of potential relevance where that is the case.

LPP can be waived, both intentionally and unintentionally. As privilege belongs to the client not the lawyer, it is for the client to choose whether to waive privilege. Prior to FOIA, intentional waiver would generally occur in the context of litigation, and based upon the government's assessment of the interests of justice in a particular case. Waiver can also occur in part, where advice is disclosed to a third party under strict conditions. Special rules also apply where legal advice is relied upon in the course of Court proceedings. See **FOREIGN AND COMMONWEALTH OFFICE VS. THE INFORMATION COMMISSIONER (29 APRIL 2008) (EA/2007/0092).**

Waiver may also result from unintentional or erroneous disclosure. For example, revealing the substance of legal advice when explaining a decision may constitute waiver. Where LPP is waived, the advice is no longer privileged and section 16 cannot be relied upon.

What material is subject to LPP?

LPP predominantly attaches to communications with lawyers. This may include communications between a public

authority and:

- External lawyers in private practice (solicitors or counsel),
- Its own salaries in-house legal advisers, including those retained or employed by public authorities such as government departments in their own legal departments, and
- Lawyers employed by other public authorities.

In certain circumstances legal communications with third parties may attract LPP, for example when seeking evidence from an expert for the purposes of litigation. See for example, **ANDERSON VS. BANK OF BRITISH COLUMBIA (1876) 2 CH D 644.**

Just because a document has been to or comes from a lawyer does not necessarily mean it will be protected by LPP. It will need to come within one of the two categories of LPP: advice privilege and litigation privilege.

- *Advice privilege* relates to communications between a person and his lawyer provided they are confidential and written for the purpose of obtaining legal advice or assistance in relation to rights and obligations. The leading judgment is that of the House of Lords in Three Rivers. See **THREE RIVERS DISTRICT COUNCIL & ORS VS. GOVERNOR AND COMPANY OF THE BANK OF ENLAND (2004) UKHL 48**
- *Litigation privilege* attaches to confidential communications that come into existence when litigation is in reasonable prospect or is pending, for the dominant purpose of giving or getting advice in regard to the litigation or collecting evidence for use in the litigation. It applies to communications between the client and his lawyer, whether direct or through an agent, or between any one of them and a third party.

Legal communications must retain a quality of confidence to attract LPP. Communications will be "confidential" if they have place in circumstances where a relationship of confidence is express or can be implied. Both lawyer and client generally expect their communications to be confidential. Indeed, professionally, lawyers owe their clients a duty of confidence. Correspondence between lawyers acting for the same client may also attract LPP.

Information which is protected by LPP may be disclosed to one person on terms that it is to be treated as confidential so that the quality of LPP is not lost.

Within government, the involvement of several departments in such communications will not erode the quality of confidence but if legal advice received by a department is widely shared beyond government and its agencies, consideration will need to be given as to whether it is still confidential for these purposes. Whether or not LPP has been waived, thereby losing the protection of the privilege is a complex question of law which turn on the specific facts of the case.

It should also be remembered that LPP may apply to a summary of legal advice. Even where the source of that summary is not the advising lawyer. In **USP STRATEGIES V. LONDON GENERAL HOLDING LTD (2004) EWHC 373 (CH),** Mr. Justice Mann held that privilege extends to material which 'evidences or reveals the substance of legal advice'. The Tribunal followed this approach in the case of MR. M. SHIPTON V. INFORMATION COMMISSONER AND NATIONAL ASSEMBLY OF WALES (EA/2006/0028), finding that a civil servant's submission to a Minister which summarized the legal advice that had been received was also covered by LPP.

THE PUBLIC INTEREST TEST

Section 16 is subject to a public interest balance. Therefore, if it has been decided that information falls within the terms of section 16, it is necessary to consider whether or not the public interest in withholding the information outweighs the public interest in disclosing it.

The Courts have historically recognized the important public interest in the proper administration of justice, and have noticed the key role LPP plays in maintain this. See **R. VS. DERBY MAGISTRATES' COURT, EX P.B. (1996) AC 487, 507** where Lord Taylor CJ described LPP as "*a fundamental condition on which the administration of justice as a whole rests"*. In Derby Magistrates', Lord Taylor CJ observed that "*The principles that runs through all these cases… is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent"*. See **R. VS. DERBY MAGISTRATES' COURT, EX P B (1996) AC 487, 507**. The consequences of disclosure were noted by Lord Taylor CJ at 508: '… once any exception to the general rule is allowed, the client's confidence is necessarily lost'.

In the case of **MR. CHRISTOPHER BELLAMY V. THE INFORMATION COMMISSIONER AND DTI (EA/2006/0023),** the Tribunal considered the case law on LPP, finding that '… there is strong element of public interest inbuilt into the privilege itself. A least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest'. The Tribunal has consistently followed this approach in further cases. See **MR. T. KITCHENER VS. THE INFORMATION COMM. AND DERBY COUNTY COUNCIL (20 DECEMBER 2006) EA/2006/0044) AND MR. F. ADLAM VS. INFO. COMMISSIONER AND HM TREASURY (5 NOVEMBER 2007) (EA/2006/0079)**. In February 2009, the High Court found in the case of the **DEPARTMENT OF BUSINESS AND REGULATORY REFORM V. O'BRIEN (2009) EWHC 164 (QB)** that the section 42 exemption has two key features: (a) it recognizes the in-built public interest/ the weight with which must be given to LPP itself, and (b) the strength of public interest in-built in to LPP itself.

Therefore, although the exemption in section 16 is qualified and each case must be considered on its own merits, where information is withheld using this exemption it will be by virtue of the strong public interest consideration which is recognized by the English Courts and the Tribunal.

Public interest in protecting legal advice/communication.

It is in the public interest that the decisions taken by government are taken in a fully informed legal context where relevant Government departments therefore need high quality, comprehensive legal communication for the effective conduct of their business. That Communication/advice needs to be given in context, and with a full appreciation of the facts.

The legal adviser needs to be able to present the full picture to his or her departmental clients, which includes not only arguments in support of his or her final conclusions but also the arguments that may be made against them. It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view, weighting up their relative merits. This means that legal advice obtained by a government department will often set out the perceived weaknesses of the department's position.

Without such comprehensive advice/communication the quality of the government's decision making would be much reduced because it would not be fully informed and this would be contrary to the public interest.

Disclosure of legal advice/communication has a high potential to prejudice the government's ability to defend its legal interests both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice/communication having been fully considered and presented without fear or favour. Neither of these is in the public interest. The former could result in serious consequential loss, or at least in a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because decisions themselves may not be taken on a fully informed basis.

There is also a risk that lawyers and clients will avoid making a permanent record of the advice/communication that is sought or given or make only a partial record. This too would be contrary to the public interest. It is in the public interest that the provision of legal advice is fully recorded in writing and that the process of decision making is described accurately and fully. As policy develops or litigation decisions are made it will be important to be able to refer back to advice given along the way.

At worst there may even be a reluctance to seek the advice at all. This could lead to decisions being made that are legally unsound and that attract successful legal challenges, which could otherwise have been avoided. Government's willingness to seek frank legal advice is essential in upholding the rule of the law.

It is likely that legal advice given in one context will be helpful or relevant to subsequent issues. This means not only considering the circumstances in which future legal interests could be prejudiced but also bearing in mind that the public interest in protecting the confidential relationship between lawyer and client is a long term public interest which could be damaged by individual disclosures. The disclosure of legal advice even when no litigation is in prospect may disadvantage the government in future litigation. It is quite possible that legal advice in connection with one department will have wider implications for other departments so it is important that decisions on disclosure are considered in their full context.

Public interest in disclosure of legal advice

In some circumstances the public interest will require the disclosure of LPP material. This is likely to be in those

circumstances where the government would waive its privilege if litigation were in progress.

Consideration will need to be given to other factors which need to be balanced against the public interest in the continuing confidentiality of legal advice. There is a public interest in public authorities being accountable for the quality of their decision making. Ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability. Transparency in the decision making process and access to the information upon which decisions have been made can enhance accountability.

It could be argued that there is a public interest in some cases in knowing whether or not legal advice has been followed. However, the factual position is unlikely to be so simple.

The weights to be attached to these public interest factors will differ according to the case in question. However, given the very substantial public interest in maintaining the confidentiality of LPP material, it is likely to be only in exceptional circumstances that it will give way to the public interest in disclosure.

It is to be understood that the principle of privileged communications embraces two concepts the confidentiality of communications between a legal adviser and client, and the privilege of communications made post litem motam (in contemplation of litigation)

Confidentiality of communications between legal adviser an client:

- The privilege covers communications by solicitors, advocates, solicitor-advocates and advocate-clerks. It probably covers in-house lawyers and lawyers working for one public authority providing advice to another public authority.
- The legal adviser must be acting in his professional capacity and the communications must occur in the context of his professional relationship with his client.
- It is likely that communications are privileged whether or not they relate to pending or contemplated litigation.
- The privilege does not extend to matters known to the legal adviser through sources other than the client or to matter in respect of which there is no reason for secrecy. Communications which are intended to be 'confidential' in a non-legal sense are likely to attract the privilege.
- The privilege does not extend to communications which relate to fraud or the commission of an offence.
- Documents held by the legal adviser but prepared by others are not privileged (including communications between the client and third parties), but legal advice given by the legal adviser to client concerning the same documents is privileged.
- The fact that advice was sought is not necessarily privileged.

Section 15 (1) (b) imposes an obligation on a public institution to deny an application for information whose disclose could reasonably be expected to interfere with the contractual or other negotiations of a third party. It is my view that "a third party" includes a legal practitioner in the context of his professional relationship with his client. What could severely prejudice the function of parties to a contract "could reasonably be expected to interfere with the contractual or other negotiations" of the said parties.

It is the case of the Defendant that the application of the Plaintiff related to the contractual relationship and negotiations between the defendant and legal practitioners and other professionals engaged by the Defendant for their services to the Defendant, and that the said information was specifically on the remuneration of the said legal practitioners and other professionals for their services to the Defendant and that if disclosed it would adversely interfere with the contracts and negotiations for services between the Defendant and those professionals. It is also the case of the Defendant that it is a momentous condition of the services by those professionals to the Defendant that third remuneration shall never be disclosed to any third party.

There is nothing in the Plaintiff's affidavits nothing exceptional that will persuade this Court to give way to the public interest in disclosing the amount of fees paid and to be paid to the two named firms of Lawyers i.e. Olaniwun Ajayi LP of The Adunola, Plot L2 401 Close, Banana Island, Ikoyi, Lagos, and Kola Awodein & Co. of 6th Floor, UBA House, 57 Marina, Lagos where a duty of confidentiality arises out of a professional relationship and where there are contractual obligations in favour of maintaining confidence, court will be reluctant to order disclosure, especially as in this case where there is no hard evidence of misconduct or mismanagement of public funds on the part of the Defendant.

In view of all that I have said above, reliefs 1 (a), (b) (c) and (d) on the Originating summons are hereby refused, and are dismissed.

I have observed, and strongly indeed, that the Defendants did not either in its Counter Affidavit or written address deal with the issues raised in respect of reliefs 1 (e), (f) and (g) respectively. In paragraphs 3,4,5,6 & 7 of the Plaintiff's reply to Counter Affidavit, the Plaintiff stated as follows:

PLAINTIFF'S REPLY TO THE COUNTER-AFFIDAVIT OF THE DEFENDANT

I BONIFACE OKEZIE, a male Nigerian investor of the Christian Faith and President of the Progressive Shareholders Association of 206, Herbert Macaulay Street, Yaba, Lagos, hereby make oath and state as follows:

1. It is common knowledge that the National Assembly being concerned about the free and non-transparent spending of the present CBN Governor, Mallam Lamido Sanusi, of public funds is now considering a bill to amend the CBN Act in order to curb the powers of the holder of that office over decision making within the institution and subject its budget to appropriation.
2. It is also common knowledge that the CBN Governor has spent several trillions of Naira and well in excess of the national budget in the last three years supposedly in pursing banking reform although the total exposure of banks in the discount window under his predecessor was a meager N220 billion.
3. I know that hundreds of billions of Naira were said to have been recovered from Mrs. Cecilia Ibru, the former CEO of Oceanic Bank Plc which were said to have been stolen from the bank.
4. I know that the CBN Governor has through his policies forced the shareholders of Oceanic Bank Plc into an acquisition by Ecobank Plc in which they lost about 75% of the value of their shares to the acquiring bank and its shareholders but I am not aware that the hundreds of billions of Naira said to have been recovered from the said Cecilia Ibru was returned to the bank and its shareholders and therefore was taken into account in the valuation of their shares in the acquisition transaction.
5. I am also not aware to what extent the capital injected or to be injected by the said Ecobank Plc, being the advantage it was to bring into the said Oceanic Bank Plc, exceeded the said hundreds of billions of Naira said to have been recovered from the said Mrs. Ibru.
6. I have also heard the rumour amongst the public that the said CBN Governor and his associates within and outside Government have either embezzled, misappropriated or otherwise dissipated the recovered funds and property or otherwise, cannot account for them.
7. I therefore believe that there is strong and compelling public interest in the disclosure of the information sought from the Defendant which would set the records straight concerning its expenditure of public funds and assist the taxpaying public to better assess the cost effectiveness of the self-styled banking reform programme embarked upon by its present Governor, and that this interest outweighs by far the concerns it has expressed in its counter-affidavit.
8. My Solicitor, Chuks Nwachukwu, now informs me and I verily believe that it is not the usual practice of lawyers to force their clients, particularly, Government or public institutions into non-disclosure agreement in relation to their fees.
9. I therefore believe that the deposition of the defendant that it has entered into such non-disclosure agreement is an afterthought.

AND I make this oath in honesty believing the same to be true and correct and in accordance with the Oaths Act."

I am of the view that on receipt of the Plaintiff's request the Defendant had the duty to respond to same. If it does hold the information, it must supply it within 7 days from receipt of the request. Where a decision to withhold is taken, the Defendant must inform the Plaintiff of its reasons. In respect of these reliefs, the Defendant has kept mute. Let me state that it has no such power under the law.

The Freedom of Information Act is meant to enhance and promote democracy, transparency, justice and development. It is designated to change how government works, because we have all resolved that it will no longer be business as usual. Therefore, all public institutions must ensure that they prepare themselves for the effective implementation of the Freedom of Information Act.

The Judiciary has no choice but to enforce compliance with the Freedom of Information Act. The judiciary cannot shirk its sacred responsibility to the nation to maintain the rule of law. What is done officially must be done in accordance with the law. Obedience to the rule of law by all citizens but more particularly by those who publicly took oath of office to protect and preserve the Constitution is a desideratum to good governance and respect for the rule of law. In a constitutional democratic society, like ours, this is meant to be the norm.

Overall, I am of the view and do hold that this action should and does succeed in part. It is in the in interest of the public that the assets recovered from Cecilia Ibru, and the whereabouts of same be disclosed.

In the circumstances, I hold that reliefs 1 (a) (b) (c) and (d) are refused and struck out. Reliefs 1 (e), (f) and (g) are granted as prayed. The Defendant is therefore hereby directed to release to the Plaintiff, within 72 hours of the making of this order the following information:-
The total cash and value of properties recovered from Cecilia Ibru;

The whereabouts of the money and properties recovered; and
What part of this cash and properties has been returned to Oceanic Bank and/or its shareholders.

M. B. IDRIS
JUDGE
2/10/2012

C. Nwachukwu withT. Uzokwe for the Plaintiff
A. Olawoyin, SAN with E. Osuagwu (Miss) for the Defendant

IN THE HIGH COURT OF BENUE STATE OF NIGERIA
IN THE BENUE STATE JUDICIAL DIVISION
HOLDEN AT VANDEIKYA

SUIT NO: VHC/20/2012

ON WEDNESDAY, THE 31ST DAY OF OCTOBER, 2012

BEFORE HIS LORDSHIP: HON JUSTICE D.M. IGYUSE J-

BETWEEN
MAJOR GEN. INDIA GARBA (RTD) ……. PLAINTIFF

AND
VANDEIKYA LOCAL GOVERNMENT ……. DEFENDANT

An order of mandamus is this day and hereby made against the defendant to furnish the Plaintiff with all the detailed records of all the income and expenditure of all the Federation revenue allocations to the defendant from the month of May, 2007 to June, 2012 within fourteen (14) days from the date of this judgment.

The Plaintiff has established his claim to the effect that the defendant has wrongfully denied him of the said information. The defendant is found guilty and convicted as well as ordered to pay N500,000.00 fine to the Benue State Government as provided by S. 8(5) of the Freedom of Information Act, 2011.

SIGN: D.M. Igyuse J -
31/10/2012

IN THE HIGH COURT OF JUSTICE BENUE STATE OF NIGERIA
IN THE VANDEIKYA JUDICIAL DIVISION
HOLDEN AT VANDEIKYA

SUIT NO: VHC/20/2012

BETWEEN
MAJOR GENERAL INDIA GARBA (RTD) …… PLAINTIFF/APPLICANT

AND

VANDEIKYA LOCAL GOVERNMENT AREA COUNCIL …..…… DEFENDANT

J U D G M E N T

The Plaintiff file this originating summons on 27th July, 2012 under Order 40 Rule 5(1) of the 2007 Civil Procedure Rules of the court claiming against the defendant Local Government for:-

i. A declaration that the refusal, failure and or neglect by the defendant to release the information requested by the Plaintiff dated 29/06/2012, concerning the allocation of revenue to the Vandeikya Local Government Area Council of Benue State of Nigeria from the Federation Accounts from May, 2007 to June, 2012 and expenditure of same amounts to a violation of S. 4 (a) and (b) of the Freedom of Information Act, 2011 and is therefore wrongful, illegal and unconstitutional.
ii. A declaration that the refusal, failure and or neglect by the defendant to release the information requested by the Plaintiff as in para (1) above amounts to a violation of S. 4(a) and (b) of the Freedom of Information Act, 2011.
iii. A declaration that by the true interpretation and construction of S. 4(a) of the Freedom of Information Act, 2011 which shall be hereinafter simply referred to as the Act is obligated to furnish on request by the Plaintiff a comprehensive, just, fair and detailed accounts of the amount of money allocated to the said Vandeikya Local Government Area Council from the period in question and the expenditure of such allocation.
iv. An order of Mandamus directing the defendant including its servant, agents, privies, officials and or cohorts to furnish the Plaintiff with comprehensive and detailed information concerning the allocation of revenue

from the Federation Accounts to the Defendant covering the period as in para. 1 above until judgment is delivered in this case within 14 days of the delivery of judgment.

v. An order of the court directing the Defendant to pay a fine of N500,000.00 for wrongful denial of the Plaintiff the right of access to information sought pursuant to the Plaintiff's application dated the 29th June, 2012.

vi. Cost of this action.

vii. Any further order(s) the court may deem fit and proper to make in the circumstance of the case.

In support of the originating summons are, a 15 para affidavit, a copy of the application to the Defendant requesting for the information in question dated the 29th June, 2012, a written address and a copy of the leave of the court granted to the Plaintiff to file this suit.

In his written address on behalf of the Plaintiff Chief Okoi O. Obono Obla of counsel flamed three issues for determination in this suit as follows:-

1. Whether by a true interpretation and construction of S. 4 (a) of the Act the defendant is not obligated to allow the Plaintiff unfettered access to information concerning the allocation of revenue to the defendant from the Federation Accounts upon the Plaintiff's application within seven (7) days?
2. Whether the refusal or failure of the defendant to grant the application of the Plaintiff as in (1) above amount in an infringement of S. 4 (a) of the Act and
3. Whether by a true interpretation and construction of the provisions of S. 7 (5) of the Act the defendant is not entitled to pay fine of N500,000.00 for wrongful denial of the Plaintiff the right of access of the information sought.

In his written submissions counsel submitted in support of the claim and the issues raised as already reproduced above. By the facts as disclosed in the affidavit in support of originating summons and the written submission of counsel on behalf of the Plaintiff the attached copy of letter requesting for the said information from the defendant is dated the 29th June, 2012 and served on the defendant on the same date. A copy of the letter of 29th June, 2012 requesting for the information is exhibit GAB 1 attached. By paras 7 to 9 of the supporting affidavit exhibit GAB 1 was served on both the caretaker chairman and the secretary of the defendant on the same date of 29th June, 2012.

Paras 10 to 12 of the affidavit in support of the originating summons have stated that the defendant has refused and or neglected to supply the requested information within seven (7) days as required under the law. Para 13 of the affidavit in support of this suit seeks the assistance or order of the court compelling the defendant to comply with exhibit GAB 1. Counsel submitted on issue one and two argued together that the defendant has no powers under the law to refuse to supply the information requested and that non compliance with the request is wrongful. Counsel relied on the supporting affidavit and submitted on issue No. three for determination that the consequence of the refusal to furnish the requested information is that the defendant be fined and compelled to supply the said information as under the Act.

I have gone through all the court processes filed in this suit. I have listened to the argument and submission of Chief Obla for the plaintiff. The defendant was served with the writ of summons as per the return of service on the 08/08/2012 and also served with the hearing date of the suit on 28/09/2012. The defendant was in court, being represented by her legal officer when the suit came up for hearing on the 12/10/2012. The defendant has not entered defense in this suit up to the time of writing and delivery of this judgment inspite of the fact that when the Plaintiff presented his case the court did not deliver judgment there and then but adjourned for judgment for over a period of two weeks till today.

I, therefore, believe that the defendant does not dispute nor intends to defend the action. The defendant has not filed any counter-affidavit to this suit to dispute the averments in the affidavit in support of the summons. There is also no counter written address to that of the plaintiff from the defendant. The receipt of requesting for the information, exhibit GAB 1 is not denied. There is no …… from the defendant contrary from the case of the plaintiff in this suit.

The unchallenged affidavit evidence of the Plaintiff in this suit shall be and duly accepted by me as the truth as stated in the case **of FEDERAL AIRPORT AUTHORITY OF NIG. Vs. WAMAL (2011) 1 SCNJ P. 133/143 L.26-28 Per Ahmed JSC**. It was held thus:-

> *"It is trite that any averment in an affidavit which has not clearly unequivocally and directly been denied is deemed admitted."*

The suit of the Plaintiff is not challenged in which situation the law enjoins the law to accept such as entire suit as the truth and rely on same. See *CAMEROON AIRLINES V. OTUTUIZU (2011) SCNJ P. 961181 L.17-23*. The apex per R. VIVOUR JSC thus:-

> *"The position of the law is well settled that where a party testifies on a material point in this case the loss of $20,000 the appellant ought to XXd him or show that his testimony is untrue. Where, as in this case neither was done, the court would readily conclude that the adverse party, in this case the appellant does not dispute the fact."*

I believe that the defendant has not complied with the provision of S……. of the Act. The Plaintiff is entitled to the information sought from the …… I believe also that the refusal to furnish the requested information sections 4, 5 and 8 (4) and (5) of the Act. The case of the Plaintiff proceeds on all the three issues identified for determination in this suit its counsel. The consequence of the above findings is that an order is hereby made against the defendant to furnish the Plaintiff with the records of all the income and expenditure of all the Federation ….. to the defendant from the month of May, 2007 to June, 2012 within fourteen (14) days from the date of judgment

The Plaintiff has established his claim to the effect that the defendant has ….. him of the said information. The defendant is found guilty as well as ordered to pay N500,000.00 fine to the Benue State provided by S. 8(5) of the Freedom of Information Act, 2011.

SIGN: D.M. Igyuse, J.
31/10/2012

Parties All present.

The Defendant is represented by her Legal Officer, Mrs. Roseline Dumawa.

B.I. Osuaya, Esq
For: *Plaintiff*

SIGN: D.M. Igyuse .J.

31/10/2012

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON THURSDAY THE 29T}1 DAY OF NOVEMBER, 2012
BEFORE HIS LORDSHIP, THE HON. JUSTICE G.O. KOLAWOLE
JUDGE

BETWEEN:

1.	**THE REG. TRUSTEES OF THE SOCIO-ECONOMIC RIGHTS & ACCOUNTABILITY PROJECT**	**]**	
2.	**WOMEN ADVOCATES RESEARCH & DOCUMENTATION CENTER (WARDC)**	**]**	
3.	**ACCESS TO JUSTICE**	**]**	**APPLICANTS**
4.	**COMMITTEE FOR THE DEFENCE OF HUMAN RIGHTS (CDHR)**	**]**	
5.	**HUMAN & ENVIRON. DEV. AGENDA (HEDA)**	**]**	
6.	**PARTNERSHIP FOR JUSTICE**	**]**	

AND

1.	**ATTORNEY GEN. OF THE FEDERATION**	**]**	**RESPONDENTS**
2.	**CENTRAL BANK OF NIGERIA**	**]**	

JUDGMENT

On 8/9/10, by a Motion on Notice dated 6/9/10, the Applicants, six of them originally instituted the instant proceedings against the Respondents. In the course of the proceedings and having regard to an objection raised by the 1st Respondent to the juristic status of the Applicants, the learned Applicants' Counsel, Femi Falana, Esq. now SAN applied to withdraw the 2nd, 4th & 6th Applicants whose juristic status, he conceded was lacking. This was at the proceedings of 8/6/11. The said 2nd, 4th & 6th Applicants were consequently struckout of the action leaving only the 1st, 3rd & 5th Applicants.

By the said Motion on Notice, the Applicants seek for *"an Order for the enforcement of the fundamental rights of Nigerians to information regarding the statement of account on the spending of the $12.4 Billion oil windfall between 1988 and 1994 as documented by the Pius Okigbo Panel Report; and the right of Nigerians to natural wealth and resources in terms of the reliefs sought in the Statement accompanying the Affidavit in support of the application"*.

The next apposite question is: what are the reliefs being sought? They are as pleaded in paragraph 2 of the Statement filed and they are:

A. "A DECLARATION that the Respondents are individuallyand/or collectively required to guarantee to the Applicants and all Nigerians the right to receive information regarding the spending of $12.4 Billion oil windfall documented by the Pius Okigbo panel report; the right to natural wealth and resources; and the right to development, as recognised and guaranteed by Articles 2, 9, 21 and 22 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act".

B. "A DECLARATION that the failure, negligence and/or refusal of the Respondents individually and/or collectively to publicly and urgently release detailed statement of account relating to the spending of $12.4 Billion oil windfall between 1988 and 1994 as documented by the Pius Okigbo panel report is illegal and unlawful as it violates Article 9 of the African Charger on Human and Peoples' Rights (Ratification and Enforcement) Act".

C. "A DECLARATION that the failure and/or refusal of the Respondents individually and/or collectively to provide information regarding the spending of the $12.4 Billion oil windfall between 1988-1994 despite requests by the Applicants is illegal and unlawful as it violates the Applicants'

right to receive information and breaches the fiduciary relationship implied and imposed by Articles 9, 21 and 22 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act".

D. "A DECLARATION that the failure and/or negligence by the Respondents to ensure full transparency and accountability regarding the spending of the $12.4 Billion oil windfall constitutes a fundamental breach of Nigeria's international anticorruption and human rights obligations and commitments as required by Articles 9, 21 and 22 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act; Articles 1, 5, 7, 10 and 13 of the United Nations Convention against Corruption, and Articles 2, and 11 of the International Convention on Economic, Social and Cultural Rights, to which Nigeria is a state party".

E. "AN ORDER OF MANDAMUS compelling the Respondents individually and/or collectively to publish detailed statement of account relating to the spending of $12.4 Billion oil windfall between 1988 and 1994, and to publish in major national newspapers a copy of the statement of account".

F. "AN ORDER directing the Respondents to diligently and effectively bring to justice anyone suspected of corruption and mismanagement of the $12.4 Billion oil windfall between 1988 and 1994".

G. "AN ORDER directing the Respondents to return to the federal account any money which is the subject matter of corruption".

H. "AN ORDER directing the Respondents to provide adequate reparation, which may take the form of restriction, compensation, satisfaction or guarantee of non-repetition to millions of Nigerians that have been denied their human rights as a result of the Respondents' failure and/or negligence to ensure transparence and accountability in the spending $12.4 Billion oil windfall between 1988-1994"

The reliefs are predicated on five (5) main grounds. These are:

(A) "The Applicants are entitled to information as guaranteed by Article 9 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Cap. 49) Laws of the Federation of Nigeria, 2004"

(B) "The refusal of the Respondents to make available to the Applicants the Statement of Account on the spending of $12.4 billion oil windfall between 1988 and 1994 is a violation of Article 9 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Cap A9) Laws of the Federation of Nigeria, 2004".

(C) "In violation of Articles 2, 9, 21 and 22 of the African Charter on Human and Peoples' (Ratification and Enforcement) Act (Cap A9) Laws of the Federation of Nigeria, 2004 the Respondents continue to refuse to publish the statement of account relating to the spending of $12.4 Billion oil windfall between 1988 and 1994 or to ensure full transparency and accountability regarding the spending of the money".

(D) "The Respondents are obligated to promote integrity, transparency, accountability and proper management of public affairs and public property, including the spending of the accrued revenue of $12.4 Billion oil windfall between 1988 and 1994 as documented in dedicated accounts in the Central Bank of Nigeria".

(E) "The Respondents are obliged under international human rights law to ensure the right of access to any information that may be required to assist in the fight against corruption".

The said Motion on Notice was supported by a 12 paragraphed Affidavit. Although the 12th paragraph was erroneously numbered, I believe, as "10" but it was deposed to by Samuel Ogala, a Legal Practitioner in "Falana and Falana's Chambers". Paragraph 7 of the Affidavit has twelve (12) sub-paragraphs listed as (i) -(xii). It was this paragraph that drew the ire of the Respondents' Counsel on the ground that the Applicants, being non-natural persons could not have been able on their own, to "inform" the deponent of the facts deposed in the said sub-paragraphs (i) - (xii) and which the deponent "verily believe".

The Applicants' Counsel also filed a written address of 17 pages. When I read the written address, it's in my view, a classical thesis on international law and conventions on human rights than an address written to argue the issues of facts

and law which are supposed to arise from the facts in the Affidavit filed in support of the Motion on Notice. It confirmed Mr. Falana, SAN as a redoubtable and well-grounded human rights' activist of deep intellectual learning in this area of the law. Learned Counsel should however learn to be less theoretical, perhaps academic in the preparation and presentation of written addresses because, written addresses are intended to present in a concise form, (I refer to a communal reading of Order 22 of the Federal High Court Rules, 2009), possible oral submissions a Counsel would urge to argue an application. By the provision of Order 26 Rule 3 of the Federal High Court (Civil Procedure) Rules, 2009, affidavits are meant to be depositions of facts on oath "setting out the grounds on which a party moving intends to rely" and such written addresses are intended, in practice to collate those facts and apply extant and relevant laws, which also includes judicial decisions to persuade a Court as to why the prayers being sought should be granted. By this, it follows that depositions in an affidavit filed in accordance with the provisions of Order 26 Rule 3 of the Federal High Court Rules, 2009 must be such as would support the prayers an Applicant seeks in a Motion on Notice as in this instance. It is not a good and helpful practice from the judicial point of view, where an address filed significantly as it were, ignored or was not related to the facts deposed in the Affidavit in support of an application. Address of Counsel is nothing but a "meat" and "flesh" to what may appear to be the "dry bones" as depitched in the Affidavit filed. The Applicants' address merely tangentially touched on and considered the affidavit filed.

In the Applicants' written address, two (2) main issues were set down for determination:

(1) "Whether the failure and/or refusal of the Respondents to release information on the Dedicated and Special Accounts at the Central Bank of Nigeria relating to the spending of $12.4 Billion does not constitute a violation of the Applicants' human right to freedom of information guaranteed by Article 9 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act", and

(2) "Whether the mismanagement of the $12.4 Billion oil windfall is not a violation of the human rights of Nigerians to natural wealth and resources and to economic development as guaranteed by Articles 21 and 22 of the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act".

Before I go into the other processes filed, I may just remark that this Act, i.e. the African Charter on Human and Peoples' Rights (Ratification and Enforcement Act) predated the CFRN, 1999 As Amended, because it came into operation on 17/3/83. I am of the view, irrespective of the arguments or submissions that may be canvassed by both parties, that a party who intends to enforce the rights which are prescribed by the said Act, is not required in my respectful view, to invoke the jurisdiction of this Court via the Fundamental Rights (Enforcement Procedure) Rules, 2009 which came into being almost one and a half decade (16 years) after the CFRN, 1999 was promulgated into law.

Although, no specific legislation was made by the National Assembly to seek for the enforcement of the rights created by the Act, I have no doubt that they are nevertheless enforceable even by ordinary action or by a mere Originating Motion or even a Petition. I say so because, some, if not majority of the rights created by the Act would ordinarily fall within the regime of "fundamental objectives and directives principles of State policy" in Chapter II of the CFRN, 1999 and this may account for the reason that Section 46 of the CFRN, 1999 relate only to the "enforceable rights" under Chapter IV of the Constitution. I hope that by this short digression, I have not resolved some of the issues in contention. This analysis is self-evident by the provisions of the respective laws and the Constitution. But the views I have expressed herein, will in the course of this Judgment be contextualised in the determination of some of the issues in dispute between both parties. The Applicants' Motion on Notice was supported by four (4) Exhibits marked as "A"; "B"; "C" and "D" respectively. Exhibit "A" is a Certified True Copy of "The News" magazine of Vol. 24, No. 20 of 23 May, 2005 with a bold headline: "The Okigbo Report Found At last - what it says of Ibrahim Gbadamosi Babangida:" Exhibit "B" is a copy of a letter dated 7/4/10 addressed by the1st Applicant to the 1st Respondent and titled: *"Re: Request to Prosecute General Ibrahim Gbadamosi Babangida (Rtd.) over allegations of mismanagement of $12.4 Billion earned from the site of oil during the Gulf War in 1991";* Exhibit "C" is a copy of a letter dated 16/4/10 addressed by the office of the 1st Respondent to the 1st Applicant. It's a Reply to Exhibit "B". In paragraph 2 of Exhibit "C", the 1st Respondent wrote thus: *"I am further directed to request for a signed copy of the Okigho Report attached to your letter under reference"*. Exhibit "D" is a copy of the 1st Applicant's letter dated 22/8/10 addressed to the 2nd Respondent and titled: "Re Urgent request for the original copy of the Pius Okigbo Panel Report and/or Statement of accounts on the $12.4 Billion oil wind fall (Dedicated Accounts between 1988 and 1994)".

When the Respondents were served with the Applicants' Motion on Notice dated 6/9/10 and filed on 8/9/10, the 2nd Respondent, through one Usman Danbauchi Ibrahim responded by filing a "Counter-Affidavit in opposition to application for the Enforcement of the Applicants' Rights To Information". The said deponent in paragraph 1 of the Counter-Affidavit described himself as "an Assistant Director with the Reserve Management Department of the 2nd Respondent". The said Counter-Affidavit runs into 14 paragraphs and as if in reaction to Exhibit "D", the 2nd

Respondent in paragraphs 10, 11 and 12 of the Counter-Affidavit deposed thus:

10. *"That the 2nd Respondent as the financial adviser to the Federal Government operated some accounts on behalf of and under the instruction of the Federal Government to fund National Priority projects that were determined by the Government at that time";*

11. *"That there was never any Dedicated or Special Account opened and operated by the 2nd Respondent for Ibrahim Babangida for anybody else for the receipt of excess crude oil proceeds between 1988 to 1994 but all oil sales proceeds had always been paid into proper accounts maintained by the Federal Government and managed on its behalf by the 2nd Respondent".*

Paragraph 12 says:

"That the 2nd Respondent has never through its Governor, Board or Management been involved in the mismanagement of any fund kept in its custody including crude oil receipts as any expenditure from any of the account in its management is based on statutory approval and budgetary expenditures".

I have highlighted these depositions in view of what I regard as the crux of the Applicants' request for information into the statement of accounts in "Dedicated and Special Accounts" kept by the 2nd Respondent on behalf of the Federal Government of Nigeria between 1988 and 1994. This is not only borne out in the prayer in the Motion on Notice but also in the reliefs being sought and the Exhibits attached to the Motion on Notice. One of such Exhibits is Exhibit "D" addressed to the 2nd Respondent by the Applicants.

The 2nd Respondent's Counter-Affidavit was supported by a written address undated and unpaged but filed on 27/10/10. In its paragraph 3.0, the 2nd Respondent set down three (3) issues for determination. These are:

(1) *"Whether paragraphs 7, 8, 10 and 11 of the Affidavit in support of the Application do not breach the eloquent, clear and mandatory provisions of Sections 87, 88 and 89 of the Evidence Act, 2004 LFN";*

(2) *"Whether the Affidavit in support of the Application is not incurably defective having been sworn in total non compliance with the Oaths Act, 2004, LFN"; and*

(3) *"Whether the Newspaper publication Annexed to the Affidavit in support of the Application and marked as Exhibit "A" is admissible as an Annexture same having not been made a white paper".*

Whenever I have to deliver a Judgment or Ruling on an application, and the Respondent begins to pick holes in the form or manner of the Affidavit filed, I have always felt that such a Respondent, perhaps have no tangible defence to such application. I have no doubt that the form an affidavit will take is regulated by the provisions of the Evidence Act and there are quite a number of appellate Courts' decisions where Affidavits have been found not properly prepared and that they offend the relevant sections of the **Evidence Act**. See Supreme Court's decision in **BAMAIYI vs. STATE (2001) 8 NWLR (Pt. 715) 270 @ 287-289**; and in **GENERAL AND AVIATION SERVICES LTD.vs. THAHAL (2004) 10 NWLR (Pt. 880) 50 @ 73.** Such affidavits are liable to be struckout or discountenanced. I have often regarded such consideration of the form and style of affidavit as an excursion into a rather austere legal technicalities because, Section 113 of the same **Evidence Act**, supra. Has provided a rather robust and flexible umbrella which except for a fundamental irregularity in the preparation of affidavit, may be over looked by the Courts in order to deal with the substance of the case of the parties on the merit and to do substantial justice. For instance on issue 2 as set down by the 2nd Respondent, I took the liberty in the exercise of my inherent jurisdiction to take cognisance of my record (see the statement of the learned authors of **Halsbury's Laws of England, 4th Ed. Vol. 17 paragraph 102 page 74)** to carefully study the affidavit filed on behalf of the Applicants by Samuel Ogala. The copy in the Court's file, contrary to the arguments canvassed on the said affidavit, was duly signed by the deponent and filed or sworn before a Commissioner for Oaths. Except for its paragraph 12 listed as paragraph 10 where the deponent says: "I make this declaration in good faith" which may be condemned as not meeting the specific guideline or form stated in the Oaths Act, I really do not see how such minor issue can be judicially construed to maul down the entire affidavit. I agree that the Respondents may have a good legal argument in respect of paragraph 7 (i) -(xii) of the Affidavit because, the deponent did not state the name and particulars of his informant as to the facts, but my view is that this case has raised more fundamental issues for adjudication than for the Court's judicial time and resources to be committed in considering such lean and austere technicalities. Issue 3 appears substantial but when the law that regulate it is considered, it's not as "heavy" or recondit as it looks like. I say this because, by the Supreme Court's decision in **ADEJUMO vs. GOV. OF LAGOS STATE & ORS. (1970) 1 All NLR 183 @ 186-187** in respect of

documents attached to affidavit in an application such as this, they are not often opened to objection on issue as to whether they are not originals or are not certified because, they are not being considered as when a document is being *tendered* in ordinary proceedings where *viva voce* evidence of witnesses are being taken: They are not being *tendered* as to require the formalities as to whether they are *primary* or *secondary* documents or *private* or *public* and to be able to stipulate the categories that are admissible. Rather, they are being *produced* to authenticate facts in a deposition which is on oath. In relation to Exhibit "A", I am satisfied that in a limited sense of its being *produced* as evidence that it was *published* in the News magazine is not arguable but if its purpose is to prove the truth of its contents as that of the alleged Okigbo Report, it is clear and I have no doubt whatsoever that it is not only a "second" degree "hear say" if one may so describe it but it can hardly be the basis for the Court to make any judicial findings on the *veracity* of its contents as the alleged "Okigbo Report". The admissible. "Okigbo Report" must not be excerpts published in a news magazine. It must be a Certified True Copy of the actual Report duly signed and received by the Government that set it up. Alternatively, it must be such as may have been published in a Federal Government Gazette or reproduced as part of the *"white paper"* issued therein. Exhibit "A" merely proves a publication of an alleged Okigbo Report. Its contents as presented in Exhibit "A" are nothing but inadmissible hearsay of a Report the Applicants are required to produce. I hope that I have not gone outside my brief but the views I have expressed herein are self-evident proposition of the law in the **Law of Evidence**.

The 2nd Respondent also filed a "Notice by the 2nd Respondent of Intention to Rely upon Preliminary Objection". It's undated but filed on 2/12/10. The grounds of the objection are as follows:

(1) *"The Applicants have not shown or established sufficient interest in their application to be entitled to the reliefs claimed";*
(2) *"The reliefs sought or claimed by the Applicants are not ones that can be brought or sought under the enforcement of* ***Fundamental Rights (Enforcement Procedure) Rules, 2009";***
(3) *"The preamble, Orders 1, 2 (i), 9(ii); 11 of the* ***Fundamental Rights (Enforcement Procedure) Rules, 2009*** *ultra vires the Chief Justice of Nigeria as same were made in breach of Sections 1(1); (3), 6(6) (b), and Chapter IV of the* ***1999 Constitution****"; and*
(4) *"The Court lacks the requisite jurisdiction to hear and determine this application and ought to dismiss same".*

A written address of 11 pages was filed to argue the objection. In paragraph 2.0 of the address, the 2nd Respondent set down three (3) main issues for consideration. These are:

(1) "Whether the Preamble, Orders 1, II (i), IX (ii), XI of the **Fundamental Rights (Enforcement Procedure) Rules,** 2009 were not made by the Chief Justice of-Nigeria in breach of Sections 1(i); (3), 6(6) (B), and Chapter (IV) of the 1999 Constitution";
(2) "Whether the Applicants possess The Requisite locus standi to Bring this action";
(3) "Whether this Court does not lack the requisite jurisdiction to hear and determine this application when the reliefs sought therein were not premised on the provisions of Chapter IV of the **1999 Constitution**",

On its part, the 1st Respondent reacted to the Applicants' Motion on Notice dated 6/9/10 by filing a "Counter-Affidavit of 1st Respondent". It was deposed to by one Queen Nwanozie on 9/11/10.

The said Counter-Affidavit runs into 5 paragraphs and paragraphs 3 have 8 sub-paragraphs listed as (a) - (h). Of particular interest to the Applicants' claims are the depositions in paragraph 3 (e); (f) & (g) which state thus:

(e) *"That the alleged Okigbo Panel Report which Applicants referred to has been discovered to be missing before 24 May, 2005 when Applicants Exhibit A published what is published in the said Exhibit "A";*
(f) *"That the said alleged Okigbo Panel Report was not gazetted in any Federal Government official gazette"; and;*
(g) *"That the 1st Applicant on record forwarded a purported signed copy of the said alleged Okigbo Panel Reports to 1st Respondent and after diligent investigation; search within government custody no official copy was found with which to compare and verify what 1st Applicant forwarded to 1st Applicant" (sic) "15t Respondent".*

The question that bother my mind when I read this deposition was whether Exhibit "A" attached to the Applicants' Motion on Notice was the "purported signed copy of the said alleged Okigbo Reports to 1st Respondent" or was it another Report which the Applicants have not produced? This is because, when the Applicants wrote Exhibit "B"

attached to the Motion on Notice to the 1st Respondent, the 1st Respondent replied by Exhibit "C" attached to the Motion on Notice. In paragraph 2 of Exhibit "C", the 1st Respondent requested for a *"signed copy of the Okigbo Report attached to your letter under reference"*. It does not appear that what the 1st Applicant sent to the 1st Respondent and which the deponent mentioned in paragraph 3 (g) of the Counter- Affidavit of Queen Nwanozie was the same as Exhibit "A" attached to the Applicants' Motion on Notice. So, where is the signed copy of the Okigbo Report sent to the 1st Respondent? As the other parties have done, the 1st Respondent also filed a written address to argue the issues of facts in the Counter-Affidavit.

In paragraph 4.1, the 1st Respondent set down only two (2) issues for determination;

(i) *"Whether there is a competent application validly instituted before the Court for which the Honourable Court can exercise jurisdiction to hear and determine as constituted";*

(ii) *"Whether Applicants have successfully established facts which prove that Respondents committed a violation of Applicants fundamental rights as provided for in Chapter 4 of the* ***1999 Constitution of Federal Republic of Nigeria or the cited articles of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, 2004",***

Each of these issues were argued in the 19 paged written address dated 11/11/10 and filed on 18/11/10.

When the Applicants' Counsel was served with the 2nd Respondents' Preliminary Objection, the Applicants filed a "Response for the 2nd Defendant's Preliminary Objection filed on the 2nd day of December 2010". The said Response which runs into 20 pages is dated 28/1/11 and was filed on 18/2/11. The Applicants' learned Counsel in paragraph 1.05 on page 3 of the said "Response", adopted the three (3) issues formulated by the 2nd Respondent in the written address filed to argue the said Preliminary Objection. I had earlier, reproduced the three (3) issues which the 2nd Respondent's Counsel has set down for determination. The Applicants' Counsel expressed the view that issue one on the 2"d Respondent's address filed to argue the Preliminary Objection does not arise from the reliefs the Applicants seek. Really? The Applicants' Counsel, perhaps overlooked the point that the 2nd Respondent's objection attacked the competence of this action and the jurisdiction of this Court to hear and determine same. He possibly over looked the issue that the Applicants' suit was filed pursuant to the **Fundamental Rights (Enforcement Procedure) Rules, 2009** which by its preamble, set down the categories of "Applicants" that can competently invoke the jurisdiction of this Court in respect of an alleged infraction of any of the provisions of Chapter IV of the Constitution. The 2nd Respondent's attack on the issues of the Hon. The Chief Justice of Nigeria in providing the preamble, which *ipso facto,* accorded the Applicants the legal platform to institute this action was to be linked to the issue of *locus standi* which is the core of issues 1 & 2 which I am of the view were based on grounds 1, 2 and 3 of the objection. Ground 4 of the objection is a broader ground which seems to encapsulate grounds1, 2 and 3 altogether! I am unable to share the view that the said ground one in the written address does not arise from the reliefs being sought by the Applicants. The Applicants must first of all be shown to have *locus standi* before the issues they have submitted for adjudication can be considered. See the Supreme Court's decision in **THOMAS vs. OLUFOSOYE (1986) 1 NWLR (Pt. 18) S.C. 669**. When the Applicants' legal competence is one that is founded on the provisions in the preamble to the Fundamental Rights (Enforcement Procedure) Rules, 2009 - which is itself, the law pursuant to which the jurisdiction of this Court was invoked by the Motion on Notice dated 6/9/10, then it follows in my respectful view, that it is legitimate for the 2nd Respondent to attack as they have done, the constitutional validity of the **said Fundamental Rights (Enforcement Procedure) Rules, 2009**. I do hope that the analysis I have done is clear but it is without prejudice to the decision I will eventually reach on the 2nd Respondent's Preliminary Objection *vis-a-vis* the "Response" of Applicants to the said preliminary Objection.

Apart from the Applicants' "Response" to the 2nd Respondent's Preliminary Objection, the Applicants, through one Paul Ochayi, a Litigation Clerk in the firm of Falana & Falana's Chambers deposed to "Applicants' Further Affidavit in Reply to the 2nd Respondents Counter-Affidavit filed on the 27th day of October, 2010". It was filed on 18/2/11 and runs into 8 paragraphs. It's paragraphs 4, 5 and 6 have four (4); (7) and (4) sub-paragraphs listed in the roman figure as appropriate. I had earlier reproduced the depositions in paragraph 7(e); (f) & (g) of the 1st Respondent's Counter-Affidavit. In paragraph 4 (iv) of the Applicants "Further Affidavit", all Paul Ochayi says about paragraph 7 of the 1st Respondent's Counter-Affidavit was that the depositions therein are "falsehood".On the alleged "Dedicated and Special Accounts" the information of the statement of which the Applicants want the Court to compel the 21'd Respondent to render from 1988-1994 and which Accounts the 2nd Respondent had categorically by its Counter-Affidavit denied its existence, the Applicants "Further Affidavit" in paragraph 6(i) & (ii) of the depositions of Paul Ochayi state thus:

6 (i) "That the 2nd Respondent operated a dedicated and special account to execute among other functions to finance special priority projects like the Ajaokuta Iron & Steel, Itakpe Iron Mining, Shiroro Hydro-electronic projects among them";

(ii) "That the Okigbo Report recommends that the dedication and special accounts be discontinued.

The apposite question one may ask is: Where is the Okigbo Panel Report? Is it Exhibit "A"? Again, one may ask: apart from the *ipse dixit* of Paul Ochayi, a Litigation Clerk in Falana & Falana's Chambers, is there any independent proof of the existence and of the particulars of the alleged "Dedicated and Special Accounts" apart from the contents of Exhibit "A"? I am afraid, these are crucial issues for determination that are bound to impact either way on the Applicants' reliefs as claimed.

On the said "Further Affidavit" to the 2" Respondent's Counter-Affidavit, the Applicants' Counsel filed a written address "On points of law in Response to the 2nd Respondent written address in opposition to the Applicants application for the Enforcement of Fundamental Rights" and in its page 2, adopted the three(3) issues for determination as set down by the 2nd Respondent - these are:

(1) "Whether paragraphs 7, 8, 10 and 11 of the Affidavit in support of the application do not breach(sic) the eloquent clear and mandatory provisions of Sections 87, 88 and 89 of the Evidence Act, 2004 LFN";

(2) (2) "Whether the Affidavit in support of the application is not incredibly defective having been sworn in total non-compliance with the Oath Act, 2004 LFN" and

(3) (3) "Whether the newspaper publication annexed to the Affidavit in support of the application and marked as Exhibit "A" is admissible as an annexture same having not been made white paper?".

When the 2nd Respondent's Counsel was served with the Applicants' "Further Affidavit" and address filed to reply on the Preliminary Objection, the 2nd Respondent on 14/3/11, filed the "2nd Respondent's Reply on Points of law on its Preliminary Objection". The said process was undated but filed on 14/3/11.

The Applicants' Counsel also filed the "Applicants' Reply on points of law to the 1st Respondent written address". It is dated 18/3/11 and filed on 22/3/11. It was contended by the Applicants that the 1st Respondent did not file its written address within the period of5 days prescribed by the provision of Order II Rule 6 of the **Fundamental Rights (Enforcement Procedure) Rules, 2009.**The Court was urged to discountenance the said address. The Applicants also attached three (3) Exhibits to the address. They are Exhibit "A" being a front page copy of the Applicants' Motion *on* Notice in order to show when the 1st Respondent was served, i.e. on 13/10/10; Annexture "B" - being the Registry issued Receipt of filing on 8/9/10; Exhibit "C1" - being the Certificate of Registration of "HEDA RESOURCE CENTRE" - i.e. the 5th Applicant; Annexture "C2" - the Certificate of Registration of 1st Applicant and Anneture "C3" - being the Certificate of Registration by "Access to Justice" - i.e. 3rd Applicant. All of these to establish that the 1st; 3rd & 5th Applicants are juristic persons who can institute legal actions. This issue had been resolved as far back as 8/6/11 when the Applicants' Counsel, Femi Falana, Esq. SAN applied to withdraw the 2nd; 4th; & 6th Applicants as "parties" to the Motion on Notice dated 6/9/10 and filed on 8/9/10. They were struckout on that day and have ceased to be parties in this suit. The Applicants also filed a "Reply to the 1st Respondent's Counter-Affidavit". It was deposed to by Paul Ochayi on 22/3/11. In paragraph 5(ii) & (iii), the deponent avers thus:

5(i): "That the Okigbo's Report which was alleged to be missing has since been found";
5(iii):"That the said Okigbo Report is being in the custody of the 1st Respondent",

The question again is: Where is the Report which the Applicants had avered that it sent its original copy to the 1st Respondent? Is it Exhibit "A"? Apart from Exhibit "A", I have not seen any other Report of the Okigbo Panel in the Court's file. The question is: Is Exhibit "A" admissible proof of the contents of the said Report? I had dealt with this issue a while ago and its production or non-production is bound to have significant effect on the success or otherwise of the Applicants' case as per the reliefs sought in the Motion on Notice dated 6/9/10. In paragraph 5 (iv) of the said "Applicants' Reply to the 1st Respondent Counter-Affidavit", Paul Ochayi who has not produced the Okigbo Report which he had stated in paragraph 5[ii] to have "since been found", now states that "the said Okigbo Report has been publicised in several dailies"! Is this what he meant by the deposition in paragraph 5 (ii) that the said Report "has since been found"? I have kept on asking whether apart from Exhibit "A", if there is any other copy of the Okigbo Report upon which the Applicants' suit is built? I have not found any in my record. These are in the main, the processes filed and exchanged by both parties on the Applicants' Motion on Notice dated 6/9/10 and filed 8/9/10

The adoption of the addresses was heard on 8/6/11. This was the day the Applicants' Counsel applied to withdraw the

2nd; 4th & 6th Applicants whose juristic status could not be established by the production of Certificates of Registration. One question which remains unanswered is that apart from the 1st Applicant who sued through its registered Trustees as is required to do by law, the 3rd & 5th Applicants did not institute this action through their registered trustees but in their own right *eo nomine*. Is it permissible? As the issue was not raised by the Respondents and no Counsel was heard on it, it is better left as it is. It remains undetermined.

When all Counsel were heard on 8/6/11 in respect of the adoption of their respective addresses on the processes filed which I have highlighted, judgment was reserved until 28/7/11. I was unable, having regard to the congestion I have on my cause lists with regard to older cases that had been scheduled for judgments, to prepare the judgment and it was adjourned to 21/10/11. The case essentially had to be fixed for re-adoption since the 90 days period prescribed by Section 294 (1) of the **CFRN, 1999 As Amended** within which Courts are required to deliver judgments had lapsed.

After series of adjournments, much of which were at the Court's instance, the re-adoption was eventually undertaken on 25/9/12 and judgment was re-scheduled till 23/11/12. I was unable to prepare the judgment as I had other matters which took much of my time, attention and energy and I also had to attend to other extra-judicial assignments such as attending capacity building conferences and workshops. I advised both parties at the resumed proceedings on 23/11/12 to return to Court today for the judgment. It was at the proceedings of 23/11/12 that certain processes filed and exchanged by both parties were brought to my attention as additional materials on which the issues raised are being fought by both parties.

The 1st Respondent, through its Counsel filed a "Further Notice of Reliance on and citation of further legal authorities". It's dated and filed on 26/4/12. Reading through this process, it's like the 1st Respondent Counsel re-opened the issue of the juristic status of the Applicants which I assumed, had been resolved at the proceedings of 8/6/11 when the 211d, 4th & 6th Applicants were removed as parties to the instant suit. The 1st Respondent's Counsel also re-argued the issue of admissibility of Exhibit "A" as a Report of the Okigbo Panel.

On their part, the Applicants' Counsel wrote a letter to the Court through the Registrar. It's dated 10/4/12 and titled: *"Request To make Additional Submissions"*. When I read through this letter and the cases cited, my view is that the Applicants' Counsel was unable at the outset in the preparation of their processes, to formulate a defined parameter within which the Applicants' case is to be presented and the main address written in support of the Motion on Notice is in my view, like a legal thesis prepared on international law on human rights rather than an address written to argue issues of facts and of law that can be gleaned from a communal reading of the Affidavit filed in support of the Motion on Notice. It is this lack of a firm grip of the issues that led to the unwieldy manner of presentation that has led to the fresh issues now being raised and additional authorities, almost exceeding the ones already cited now being forwarded to the Court. On page 5 in paragraph 10 of the said letter, the learned. SAN, Femi Falana, Esq. states that: *"It is the case of the Defendants that the Report of the Okigbo Panel cannot be found and that the Federal Government did not issue any White Paper on it"*. The learned Applicants' Counsel then proceeded further and stated thus: *"Assuming without conceding that the Federal Government earned $12.4Billion from 1988-1992 from excess crude oil sales which were warehoused in the Dedicated Accounts maintained and operated at the Central Bank of Nigeria. With or without the Okigbo Panel's Report, it is submitted that the Defendants are duty bound to produce and make available to the Plaintiffs the statements of accounts on the $12.4 Billion"*. When I read this, I asked: Does this not amount to removing the rug under the feet of the Applicants? Is the Applicants suit and reliefs being claimed, not squarely founded on the existence of the said Okigbo Panel's Report? Against the affirmative denial of the 2nd Respondent as to the existence of the alleged Dedicated and Special Accounts, how can the Court order the 2nd Respondent to make available to the Applicants, the statements of accounts that it says it does not have or did not maintain? Have the Applicants produced any concrete and admissible evidence outside the contents of Exhibit "A" to establish the existence of the "Dedicated and Special Accounts"? Has the particulars of any such accounts been given so as to belie the deposition of the 2nd Respondent that it does not keep or maintain any Dedicated and Special Accounts for the Federal Government of Nigeria? The Applicants must by preponderance of evidence and documentary exhibits produced, be able to prove these assertions beyond the contents of Exhibit "A" which as I had earlier remarked, is only admissible for the limited purpose that it published an alleged Report of Okigbo's Panel but in so far as its contents may be used to prove the *truth, veracity* and *authenticity* of the contents of the alleged Report, Exhibit "A" remain in my view, an incorrigible documentary exhibit of doubtful integrity and its contents are best, inadmissible hearsay even as an attached exhibits to an Affidavit deposition. It merely establishes the publication of an alleged Okigbo Panel's Report.

As if the 1st Respondent should not be out done, the 1st Respondent also filed a "Submission of Further Legal Authorities" on 21/11/12. It was argued that the Applicants' suit was not brought within 12 months being the period stipulated in the **Fundamental Rights (Enforcement Procedure) Rules, 1979** which they argued, was the applicable

law as at 2005 or there about when the Applicants' cause of action had accrued.
The Applicants again filed a "Reply To the 1st Respondent submission of further legal authorities". This was filed on 22/11/12. It was a Reply on the issue of whether the Applicants' suit is statute barred. It was argued that the reliefs sought are stated under the **Africa Charter on Human and Peoples Rights (Ratification and Enforcement) Act.** It was argued that the issue of jurisdiction must be resolved on the basis of the Applicants' claims. It was further contended that the reliefs sought by the Applicants "are related to Fundamental Rights as enshrined under the provisions of Chapter IV of the **1999 Constitution of the Federal Republic of Nigeria (Third Alteration) Act (As Amended)** and the **African Charter on Human and Peoples Rights**". On page 3 of the said process, the Applicants' learned Counsel submitted that: *"It is pertinent to note that the cause of action in this case did not arise in 1994 but in April, 2010 when the Defendants refused to make available to the Plaintiffs information on the management of the funds in the dedicated accounts".* Again, I ask: Where is the proof of the said Dedicated Account which the 211d Respondent has denied? Do I take it proved by the contents of Exhibit "A"?

These are the main processes filed and exchanged by both parties. It is obvious that because of the failure of the Applicants' Counsel to have set out or laid out a proper and clearly defined "agenda" of the issues in contention, the filing and service of processes took a topsy-turvy twist and turns and it began to look more, with due respect to the National Assembly, like a "parliamentary debate" under an agenda of "any other matters arising". In the course of the exercise of highlighting the processes filed, I have in the exercise of my undoubted inherent jurisdiction as the "master of the proceedings", raised quite a number of issues and questions which were either not addressed or which were not covered adequately. In the end, my view is that all the issues which both parties by their respective processes have raised and set down for determination as arising from their respective processes and which I have elaborately highlighted, can be collapsed and subsumed under two (2) broad basic issues. Firstly, in relation to the Preliminary Objection raised, and secondly, on the case of the Applicants on the merit.

Firstly, on the objection raised by the 1st and 2nd Respondents to the Applicants' suit *whether this Court has jurisdiction to hear and determine the Applicants' suit for the grounds raised and argued.* In determining this issue, it is the Applicants' case or claims as resented that the Court must consider. See: Supreme Court's decision in **ADEYEMI vs. OPEYORI (1976) 9-10 S.C. 31.**

The second broader issue on the merit of the case, is *whether on the preponderance of evidence, the Applicants had on a balance of probabilities, proved their case as to be entitled to the reliefs they have pleaded in paragraph 2 of the Statement filed to accompany the Motion on Notice.*

I had earlier reproduced the reliefs being claimed by the Applicants. Central to these reliefs is the issue of *providing information on the statement of operation of the alleged Dedicated and Special Accounts between 1988-1994 by the 2nd Respondent on behalf of the Federal Government of Nigeria represented by the 1st Respondent.* By the remarks which I had made on the legal status of Exhibit "A" as an inadmissible evidence to prove the *authenticity, veracity* or the *truth* of the contents of the alleged Okigbo Report, it is to this extent that the Applicants have not established the existence of the alleged "Dedicated and Special Accounts" alluded to in Exhibit "A" the information on the statement of which the Applicants demanded the Respondents to render. The Applicants' reliefs A, B, C & D being *declaratory* reliefs are *equitable* in nature and are by this reason, *discretionary.* They constitute the Applicants' principal reliefs upon which reliefs E, F, G & H are engrafted as *ancillary* reliefs. They are not such reliefs which the Court can grant on the weakness of the Respondents' case but strictly, on the preponderance of evidence on the balance of probabilities of the Applicants' evidence by their documentary exhibits and depositions on oath. See: the English Court of Appeal's decision in **WALTERSTRAINER vs. MOIR (1974) 3 All ER 217@251** which the Court of Appeal in Nigeria followed **in OZOWALA vs. EZEIHESHIE (1991) 1 NWLR (Pt. 170)** 6990706E-F. By my evaluation of the processes filed by the Applicants, I am not satisfied that they have proved the facts alleged with regard to the alleged "Dedicated and Special Accounts" to be entitled to reliefs A, B, C and D being sought. Unless the existence of the alleged "Dedicated and Special Accounts" are by admissible evidence, proved, it is idle to begin to grant the *ancillary* reliefs sought in E, F, G and H in the Statement filed to order the 2nd Respondent to give information on the operation of the said Accounts between 1988-1994. The contents of Exhibit "A" cannot in law be admissible evidence to prove the existence of the alleged "Dedicated and Special Accounts". I had demonstrated this when I reviewed the Affidavit filed by or on behalf of the Applicants on this particular issue. So, on the merit of the case, the Applicants have not proved their claims against the Respondents.

On the objection raised, it is pertinent to assess this from constitutional points of view in relation to the Applicants' Statement and to the **Fundamental Rights (Enforcement Procedure) Rules, 2009**. Firstly, by Section 46(1) of the CFRN, 1999 As Amended which states:

46(1) "Any person who alleges that any of the provisions of this Chapter has been, is being or likely

to be contravened in any State in relation to him may apply to a High Court in that State for redress".

By this provision, the enforcement of fundamental rights is by the clear words of the section, limited to "the provisions of this Chapter". This is Chapter IV of the Constitution. This is because, the provisions of Chapter II of the Constitution which are the *"Fundamental objectives and Directive principles of State Policy"* have by Section 6 (6) (c) of the same Constitution, made non-justiciable. By this, they are not such "rights" as can be enforced by judicial action because, the provisions in this Chapter of the Constitution are intended to set out the *social, economic, foreign policies* and *environmental objectives* of the Federal Republic of Nigeria. These provisions are useful as tools to ascertain and interpret the other provisions of the Constitution as the philosophical bedrock of the Constitution and of the Nigerian State. By Section 46(3) of the **CFRN, 1999** which states that: *"The Chief justice of Nigeria may make rules with respect to the practice and procedure of a High Court for the purposes of this Section". It* is still the same Section 46 (1) of the Constitution which relate to "any. of the provisions of this Chapter". The Chief Justice of Nigeria in the exercise of a *delegated legislative power* conferred on him by Section 46 (3) of the Constitution, made the "**Fundamental Rights (Enforcement Procedure) Rules, 2009"**. Prior to the 2009 Rules, we have the **"Fundamental Human Rights (Enforcement Procedure) Rules, 1979**". The Rules which the Chief Justice of Nigeria has *delegated* Constitutional authority to make are Rules in respect of the provisions of "this chapter", i.e. Chapter IV of the **CFRN, 1999 As Amended.** The question which the 2nd Respondent has raised is whether the preamble to the Rules, i.e. 3 (a) (b) & (e) have not as it were, expanded the clear provisions of Section 46 (1) & (3) of the Constitution. Let me reproduce these preamble to the "Fundamental Rights (Enforcement Procedure) Rules, 2009 for clarity.

3. "The overriding objectives of these Rules are as follows:

(a) "The Constitution, especially Chapter IV, as well as the African Charter, shall be expansively and purposely interpreted and applied, with a view to advancing and realising the rights and freedoms contained in them and affording the protections intended by them".

(b) "For the purpose of advancing but never for the purpose of restricting the Applicant's rights and freedoms, the Court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware, whether these bills constitute instruments in themselves or form parts of larger documents like constitutions. Such bills include";

(i) "The African Charter on Human and Peoples' Rights and other instruments (including protocols) in the African regional human rights system".

(ii) "The Universal Declaration of Human Rights and other instruments (including protocols) in the United Nations human rights system".

(e) "The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus standi in particular, human rights activists, advocates or groups as well as any non-governmental organisations,ay institute human rights application on behalf of any potential Applicant. In human rights litigation, the Applicant may include any of the following:

(i} Anyone acting in his own interest;

(ii) Anyone acting on behalf of another person;

(iii) Anyone acting as a member of or in the interest of a group or class of persons;

(iv) Anyone acting in the public interest, and

(v) Association acting in the interest of its members or other individuals or groups".

These provisions are in my view, a sort of philosophical underpinning meant to guide the Court in the interpretation and application of the new **Fundamental Rights (Enforcement Procedure) Rules, 2009.** Are they enforceable? They are intended to provide a guide as to the approach which the High Court, including the Federal High Court are to adopt when handling cases filed to seek the enforcement of fundamental rights. The question is whether the **Fundamental Rights (Enforcement Procedure) Rules, 2009** have expanded the scope of the provisions in Chapter IV beyond what the drafters have clearly stipulated therein. I have no doubt, as was argued by the 2nd Respondent that when the provision of Section 46(1) of the Constitution is read and construed in its ordinary or literal meaning of the words used, the intention of the drafters of the Constitution is that the Rules which the Chief Justice of Nigeria is constitutionally empowered to make for "the practice and procedure for the High Court" is intended to be for the enforcement of those fundamental rights specifically and exclusively provided for in the said Chapter IV of the Constitution. When the Preamble in clause 3(b) (i) & (ii) go further to include "The African Charter on Human and Peoples' Rights and other instruments (including protocols) in the African regional human rights system" and "The Universal Declaration of Human Rights and other instruments (including protocols) in the United Nations Human Rights System", the Hon. The Chief Justice of Nigeria, by this expansion of the enforceable

rights beyond the provisions in Chapter IV of the **CFRN, 1999 As Amended** had unobtrusively effected an unconstitutional amendments of the provisions of Sections 46 (1) & (3) of the CFRN, 1999 As Amended as a *delegated legislative authority.* I am of the view, with the greatest respect to the person and office of the Chief Justice of Nigeria that in so doing, it had acted *ultra vices* the limited mandate conferred by Section 46(3) which Section 46(1) has clearly and affirmatively limited to the "provisions of this Chapter", i.e. Chapter IV of the Constitution. Likewise, in respect of clause 3(e) of the Preamble to the Fundamental Rights (Enforcement Procedure) Rules, 2009, when one reads and construe the said provisions, it is clear that it has expanded the scope of "Applicants" who can apply to enforce the rights guaranteed by Chapter IV of the Constitution beyond the category of person which the drafters of Section 46(1) of the **CFRN, 1999 As Amended** has provided for. The said provision states that: *"any person who alleges that* any of *the provisions of this chapter* has been, is being or likely to be contravened in any State *in relation to him may apply* to a High *Court in that State for redress".* By this provision, the issue of *locus standi* has been clearly defined, perhaps delimited by the drafters of the Constitution and it is again, my respectful view, that in so far as the Chief Justice of Nigeria in clause 3(e) (i) (v) in the Fundamental Rights (Enforcement Procedure) Rules, 2009 widened the horizon by including such persons and entities or interests which Section 46 (1) of the Constitution has not provided for, it is to that extent that the said provisions are inconsistent with the provision of Section 46 (1) of the Constitution. In this regard, the provision of Section 1(1) and (3) of the Constitution will come into play. The said preamble, I say this with utmost sense of respect to the Office and person of the Chief Justice of Nigeria, is an exercise by which the provision of Section 46 (1) of the Constitution was founded because, the limited legislative mandate of the Chief Justice of Nigeria is clearly to "make rules with respect to the practice and procedure of a High Court for the purposes of this Section". (Underline mine for emphasis). The Rules of practice and procedure cannot be used to create rights beyond the clear and specific provisions of Chapter IV of the Constitution or to vest *locus standi* outside the provision of Section 46(1) of the same Constitution. The ground of objection of the 211d Respondent on this issue is well taken but its success is not to nullify the **"Fundamental Rights (Enforcement Procedure) Rules, 2009.** The implication of the decision I have reached is to declare the affirmative statements made by the Chief Justice of Nigeria in the preamble as the "over-riding objections" of the rules in so far as they relate to these issues I have dealt with, as largely unconstitutional as the Chief Justice of Nigeria was not by the provision of Section 46(3) of the **CFRN, 1999 As Amended** vested with the power to effect amendments by way of expansion to the specific rights created and guaranteed by Chapter IV of the Constitution and of the categories of applicants that may apply to a High Court of a State for redress.

By this finding and the decision I have taken on the applicability of the **Fundamental Rights (Enforcement Procedure) Rules, 2009**, I should not be misunderstood to say that the rights created by the **African Charter On Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. A9, LFN, 2004** are not enforceable in Nigeria. By virtue of Section 315 (1) (a) of the **CFRN, 1999 As Amended**, this Act is an "existing law" which has created enforceable rights in Nigeria. The said Act which had come into operation on 17/3/83 predates the **CFRN, 1999** even in its original text as at 29/5/99. The point I am driving at is that if it had been the intention of the drafters of the Constitution to incorporate rights created by the said Act as part of those that are guaranteed as "fundamental rights" under Chapter IV of the CFRN, 1999, they would have clearly and affirmatively stated so in the said Chapter IV of the Constitution. The bulk of the rights created by the **African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act,** supra. in my view, fall into the categories of such "rights" as expressed in Chapter II of the **CFRN, 1999 As Amended** which as I had earlier remarked, are by Section 6(6) (c) of the same Constitution declared non-justiceable. An Applicant, in my view, who seeks to enforce the rights created under the **African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act**, supra. may not likely be able to use the provisions in the **Fundamental Rights (Enforcement Procedure) Rules, 2009** to invoke the judicial powers of this Court pursuant to Section 6 (6) (a) & (b) of the Constitution to exercise its jurisdiction to do so. An Applicant, such as the Applicants in this suit are not left without a procedure to seek the enforcement of the rights created by the Act. In my view, such Applicant can approach this Court by a Motion on Notice or Originating Motion on Notice and even where possible or appropriate, Originating Summons. By this, all the issues and constraints which I have highlighted by my interpretation of Section 46(1) & (3) of the Constitution may not likely arise. As an "existing law", the Federal High Court has jurisdiction and powers to enforce the provisions of the **African Charter On Peoples' and Human Rights (Ratification and Enforcement) Act,** supra. But as I had stated, the Hon. The Chief Justice of Nigeria cannot in the exercise of the *delegated legislative* powers conferred on him by Section 46 (3) of the **Constitution, 1999 As Amended**, expand the clear and unambiguous provisions of Section 46 (1) of the Constitution which relates to allegation of infraction of any of the provisions "in this chapter", i.e. Chapter IV of the Constitution. Any such exercise, not being a judicial act but legislative and or administrative, is opened to be declared by a Court of first instance whilst acting judicially as unconstitutional in so far as the Rules made pursuant to Section 46 (3) of the Constitution had incorporated such rights, protocols and conventions which are not amongst those guaranteed by the provisions in Chapter IV of the Constitution but in some other enactments albeit, validly made by the National Assembly in the exercise of its constitutional legislative powers.

The success of this ground unarguably questions the legal competence of the Applicants. The Applicants' suit seeks the enforcement of rights which appear to be applicable to all Nigerians and have not stated in any of the processes filed, how the issue of the $12.4 Billion oil windfall that the Country made during the gulf war in 1988/1991, based on the contents of the alleged Pius Okigbo's Report which was found as having been mismanaged had contravened the rights guaranteed in Chapter IV of the Constitution in relation to them. Whilst I agree that the principle of *locus standi* needs to be liberally taken, I am unable to see how the Court can do so outside the clear provisions of Section 6 (6) (b) and Section 36 (1) of the CFRN, 1999 As Amended. The said provisions state: *6. "The judicial powers vested in accordance with the foregoing provisions of this section":*

6(6) (b)"Shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person;" (Underline is mine for emphasis).

Section 36(1) also provides:

36(1) "In the determination of his civil rights and obligations including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a Court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality". (Underline is mine for emphasis).

In Nigeria, unlike in England where the doctrine of *locus standi* is defined by the principles of common law, in relation to public law/interest litigations, it is a constitutional matter. I have no doubt that the Applicants, driven by positive motive to ensure accountability and transparency in the management of the scarce resources of Nigeria, have genuine love and concern for this Country but I find myself unable, by my understanding of the provisions of the Constitution and appellate Courts' decisions thereon, to confer on them the *locus standi* which the drafters of the **CFRN, 1999 As Amended** did not vest on them.

Lastly, on the issue of the Applicants' suit being statute barred, my view upon reading the provisions of Section 6(6) (c) of **the CFRN, 1999 As Amended** which the 1st Respondent's Counsel belatedly smuggled in after this case had been adjourned for judgment, does not avail. Although, my view, based on extant appellate Courts' decisions in this field of the law, is that the Applicants' cause of action had accrued under the defunct "Fundamental Rights (Enforcement Procedure) Rules, 1979". The Applicants ought to have instituted these proceedings within 12 months after the Pius Okigbo's Panel released and or submitted its Report to the Federal Government of Nigeria. The new "Fundamental Rights (Enforcement Procedure) Rules, 2009" which by the provision of its Order III Rule 1 has removed the law of limitation of actions in application for fundamental rights will not be the applicable law. See the detailed analysis of the Supreme Court's decision in **OBIUWEUBI vs. C.B.N. (2011) 2-3 S.C. (Pt. 1) 46 and in OHMS vs. GARBA (2002) 11 NWLR (Pt. 788) 538**.

Let me quickly expatiate a little further on this issue by stating that even if 23rd May, 2005 when Exhibit "A" was published is to be used to ascertain when the cause of action accrued (See the Supreme Court's decision **in EBOIGBE vs. NNPC (1994) 5 NWLR (Pt. 347) S.C. 6490 659)**, my view is that the Applicants' action under the old "**Fundamental Rights (Procedure) Rules, 1979**" should have been instituted within 12 months of the publication of Exhibit "A". The Applicants cannot legally use their own dates when they wrote Exhibits "B" and "D" to the 1st & 2nd Respondents in April and August, 2010 respectively as the dates when the cause of action accrued. To do so would mean that they have disconnected the "cord" of their "cause of action" from the alleged Okigbo Panel's Report which allegedly informed the decision to write Exhibits "B" and "D" to the Respondents and to institute the instant action. See Supreme Court's decision in **BELLO vs. A.G. OYO STATE (1986) 5 NWLR (Pt. 45) 828 @ 876 per Karibi Whyte JSC (Rtd.)**. The Okigbo Panel's Report is not their own personal act but an event which allegedly on the face of the processes filed, "provoked" them to institute this action. The **new "Fundamental Rights (Enforcement Procedure) Rules, 2009**" which has left indefinitely, the period within which competent legal action to seek for redress in respect of an infraction of fundamental rights guaranteed by the provisions in Chapter IV of the **CFRN, 1999 As Amended** does not apply to the Applicants' cause of action.

In summary, the objections raised by the Respondents, in the context of the findings I have made and the decision I have reached, succeed. It is idle, having regard to the fact that the Applicants had joined issues with the 1st Respondent on its address filed to argue the objection it raised as having been filed out of the time prescribed by the Rules to determine the said issue. The purported irregularity appears in my view, to have been waived by the conduct of the Applicants' Counsel on the several other processes I had highlighted filed to controvert the grounds of the said objection.

In conclusion, since the Applicants have not by admissible evidence proved their case on the balance of probabilities,

they are not entitled to any of the reliefs pleaded in the Statement filed to accompany the Motion on Notice. They are all equitable reliefs and are by law, grantable upon the discretionary powers of this Court which it is required to exercise judicially and judiciously. The said reliefs, in the circumstance, are accordingly dismissed. Again, on the issue of *locus standi*, the Applicants have not by any admissible evidence or facts proved or established their *locus standi* to be entitled to a hearing with regard to the reliefs being sought. The action is also held to be statute barred.

Dr. Pius Okigbo has passed on and laid to rest. So, as far as the Federal High Court as a Court of first instance is concerned, the late Dr. Pius Okigbo may be allowed in relation to the Report of his Panel, to have a "short rest" from the hallowed chambers of the Federal High Court. Whether the celebral economist and exemplary son of Africa will be allowed to have a "final rest" is an issue that lay in the more able hands of the Appellate Courts but until the issue of the alleged missing or mismanaged $12.4 Billion oil windfall which the country allegedly raked in as "collateral benefits" from the 1991/94 Gulf War is resolved, Dr. Pius Okigbo's voice may continue to resonate in public discourse in the media.

This shall be the Judgment of this Court. The Applicants' Motion on Notice dated 6/9/10 and filed on 8/9/10 is hereby dismissed. I shall not award any costs against the Applicants even though, I have found that they lacked the *locus standi* to bring this action. It will be uncharitable for anybody to describe or christen them as "busy-bodies". They are not, rather, I see them as patriotic "corporate citizens" of Nigeria who in my view, are driven purely by a desire to use the judicial instruments to effectuate in practical terms, the "fundamental objectives" expressed in Section 14 (1) of **the CFRN, 1999 As Amended** that *"The Federal Republic of Nigeria shall be State based on the principles of democracy and social justice"*. They have by the instant action, sought to pursue the egalitarian, yet political objective expressed in Section 15(5) of the Constitution that: *"The State shall abolish all corrupt practices and abuse of powers"*. Regrettably, lofty and altruistic as these goals are, they have been embedded, by the absolute wisdom of the drafters of the Constitution, in Chapter II of the **CFRN, 1999** which Section 6(6) (c) states that, the judicial powers of the Court: *"Shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental objectives and Directive Principles of State Policy set out in Chapter II of this Constitution;"* has affirmatively made them non-justiceable. These Applicants are not busy-bodies but patriotic corporate citizens(regardless of the status of the 2nd & 3rd applicants who did not sue through their registered trustees) whose courage to bring this action against all odds, must be commended. They have lost the "battle" in the Court of first instance. This shall be my Judgment.

HON. JUSTICE G.O. KOLAWOLE
JUDGE
29/11/2012

COUNSEL'S REPRESENTATION

SOLA EGBEYINKA, ESQ/ with him is MS. OLAKITAN OLATIGBE for the Plaintiff.

F.N. NWOSU, ESQ, with him are **UCHE EMALOGU, ESQ.** and **OBINNA NNABUKO, ESQ. for the 1st Defendant.**
G. U. NWANERI, ESQ. for the 2nd Defendant.

IN THE FEDERAL HIGH COURT
HOLDEN AT LAGOS, NIGERIA
ON FRIDAY THE 22ND DAY OF FEBRUARY 2013
BEFORE THE HONOURABLE JUSTICE
JUSTICE M.B. IDRIS
JUDGE

SUIT NO: FHC/L/CS/514/2012

BETWEEN:

MR.BONIFACE OKEZIE ……..…….. PLAINTIFF

AND

1. ATTORNEY GENERAL OF THE FEDERATION]
2. THE ECONOMIC AND FINANCIAL CRIMES]
COMMISSION] DEFENDANTS

Judgment

This is an Originating Summons dated 15th May 2012 and filed on the same date. The question posed for determination, and the reliefs sought against the Defendants are as follows:-

"**ISSUE FOR DETERMINATION**

Whether having regard to the provisions of the Freedom of Information Act 2011 the Defendant is justified in withholding from (or falling to release to) the Plaintiff the information requested in the Plaintiff's letter of 26th January, 2012 or any part thereof.

RELIEFS SOUGHT

1. AN ORDER directing that the 1st Defendant to disclose to the Plaintiff the following information:

   a. The list of criminal prosecutions being carried out by the Ministry of Justice through private lawyers.
   b. What is the total amount spent by The Ministry of Justice in the course of the said prosecutions and what is the source of funding for such?
   c. How many private lawyers are currently being retained by the Ministry of Justice for the prosecution of crimes and what are the details of the fees to be paid and that have actually been paid to these lawyers on case by case basis.
   d. How much does the Ministry of Justice pay to its own legal officers (prosecutors)? How much did the Ministry of Justice spend in training and equipping its legal officers in the past one year?
   e. What is the reason for abandoning the legal officers in the Ministry of Justice in favour of private lawyers to prosecute offenders.

2 AN ORDER directing that the 2nd Defendant to disclose to the Plaintiff the following information:

   a. The list of Criminal prosecutions being carried out by the Economic and Financial Crimes Commission (EFCC) through private lawyers.
   b. The total amount spent by EFCC in the course of the said prosecutions.
   c. The source of funding all these matters in court by the EFCC.
   d. How much is to be paid and how much has been paid so for the prosecution of ex-bank chiefs and what is the source of the funding for such.
   e. How many lawyers are retained by EFCC in the prosecution of ex-bank chiefs and how much is to be paid and/or has been paid to each of them.
   f. How much does the EFCC pay its own legal officers (prosecutors), what is their number and what are the details of the positions and qualifications they hold.
   g. What is the reason for abandoning EFCC legal officers in favour of private lawyers for criminal

prosecutions.

h. How much has the EFCC spend in training and equipping its legal officers in the past one year.
i. What is the total sum paid to the firm of Olaniwun Ayaji LP in respect of the prosecution of Cecilia Ibru, former Manager Director of Oceanic Bank Plc and how much of this sum was in the form of Commissions on the properties recovered from her
j. The total cash and value of properties recovered from Cecilia Ibru
k. The whereabouts of the money and properties recovered
l. What part of this cash and properties has been returned to Oceanic Bank and/or its shareholders
m. What is the total amount spent by the Ministry of Justice in the course of the said prosecutions an what is the source of funding for such.

3 Such further or other relief/s as the Honourable court may deem fit to make in the circumstances of the suit."

The application was supported by an affidavit and a written address. In the supporting affidavit, it was declared as follows:-

AFFIDAVIT IN SUPPORT

I, TOCHUKWU UZOKWE male, Christian, Nigerian Citizen of Reinsurance House 46, Marina Lagos State, do hereby make oath and states as follows:-

1. That I am Counsel in the Chambers of indemnity Partners and do have the authority of the chambers and the Plaintiff to depose to this affidavit.
2. That on the instruction of the Plaintiff and on his behalf the chambers wrote to each of the Defendants a letter dated 26th January 2012 requesting the following information:-

I. From the 1st Defendant

a. The list of criminal prosecutions being carried out by the Ministry of Justice through private lawyers.
b. What is the total amount spent by the Ministry of Justice in the course of the said prosecutions and what is the source of funding for such?
c. How many private lawyers are currently being retained by the Ministry of Justice for the prosecution of crimes and what are the details of the fees to be paid and that have actually been paid to these lawyers on case by case basis.
d. How much does the Ministry of Justice pay to its own legal officers (Prosecutors)?
e. How much did the Ministry of Justice spend in training and equipping its legal officers in the past one year.
f. What is the reason for abandoning the legal officers in the Ministry of Justice in favour of private lawyers to prosecute offenders.

II. From the 2nd Defendant

a. The list of Criminal prosecutions being carried out by the Economic and Financial Crimes Commission (EFCC) through private lawyers.
b. The total amount spent by EFCC in the course of the said prosecutions
c. The source of funding all these matters in court by the EFCC.
d. How much is to be paid and how much has been paid so for the prosecution of x-bank chiefs and what is the source of the funding for such.
e. How many lawyers are retained by EFCC in the prosecution of ex-bank chiefs and how much is to be paid and/or has been paid to each of them.
f. How much does the EFCC pay its own legal officers (prosecutors), what is their number and what are the details of the positions and qualifications they hold.
g. What is the reason for abandoning EFCC legal officers in favour of private lawyers for criminal prosecutions.
h. How much has the EFCC spent in training and equipping its legal officers in the past one year.
i. What is the total sum paid to the firm of Olaniwun Ayaji LP in respect of the prosecution of Cecilia Ibru, former Managing Director of Oceanic Bank Plc and how much of this sum was in the form of Commissions on the properties recovered from her.
j. The total cash and value of properties recovered from Cecilia Ibru.
k. The whereabouts of the money and properties recovered.

l. What part of this cash and properties has been returned to Oceanic Bank and/or its shareholders. What is the total amount spent by the Ministry of Justice in the course of the said prosecutions and what is the source of funding for such?

3 That both Defendants acknowledged receipt of their respective letters on 3rd February 2012.

A copy of the letter to the 1st Defendant showing the acknowledgment receipt s attached and marked Exhibit 1 while a copy of the letter to the 2nd Defendant also showing the acknowledgement of receipt attached and marked Exhibit 2.

4. That each of the Defendants is a public body, agency or institution of Government created by law.

5. The Information requested from each Defendant is within its custody.

6. That of each Defendant has neglected, refused and/or failed to make available the requested information to the plaintiff

7. That I make this affidavit in good faith believing same to be true and correct and in accordance with the oaths law of Lagos State."

The 1st Defendant filed a Counter Affidavit and a written address in opposition. In the said counter affidavit, the following declarations were made:-

1ST DEFENDANT'S COUNTER AFFIDAVIT IN DEFENCE TO THE PLAINTIFF ORIGINATING SUMMONS DATED 15TH MAY 2012

I, Friday Atu Male, Christian, Nigerian, Civil Servant of the Civil Litigation Department Ministry of Justice, Abuja, do hereby make an oath and state as follows:

1. That I am a litigation clerk in the Civil Litigation Department of Federal Ministry of Justice and by the virtue of my position I am conversant with the facts of this case.
2. That I have the consent and authority of the Honourable Attorney General of the Federation the (1st Defendant) to depose to this affidavit.
3. That the facts deposed to herein are within my personal knowledge except as otherwise stated.
4. That I have been informed by Mbam P.C. Esq, Counsel handling this matter in his office at the Federal Ministry of Justice on the 4th day of July 2012 during official hours 2pm to 3pm and I verily believe him as follows:
   (i) That the Plaintiff seeks access to information under the Freedom of Information Act 2011 relating to the following:
      (a) The list of Criminal Prosecutions being carryout out by the Ministry of Justice through private lawyers.
      (b) The total amount spent by the Ministry of Justice in the course of the source of funding for such.
      (c) The number of private Lawyers currently being retained by the Ministry of Justice for the prosecution of crime and what are the details of the fees to be paid and that have actually been paid to these Lawyers on case by case basis.
      (d) The amount the Ministry of Justice pay its own legal officers (Prosecutors)? The amount the Ministry of Justice spends in training and equipping its legal officer in the past one year.
      (e) The reason for abandoning the legal officers in the Ministry of Justice in favour of Private Lawyers to prosecute offenders.
   ii That the Ministry received the Plaintiff letter dated 26/1/2012.
   iii. The 1st Defendant denies paragraph 6 of the Plaintiff.
   iv. That the request by the Plaintiff is being processed, and due to the classified nature of the request, the Ministry needs to collate the data relating to financial issues from finance department and the other department handling training matters.
   v. That the same will be forwarded to the Plaintiff on conclusion of the exercise.
5. That I depose to this affidavit solemnly and conscientiously believing same to be true, correct and in accordance with the Oath Act 2004.

The 2nd Defendant did not file a Counter Affidavit in opposition, but filed a Notice of Preliminary Objection which was

struck out on the 20th day of December 2012 for want of diligent prosecution.

At the hearing Learned Counsel for the Plaintiff and the 2nd Defendant addressed the Court. Counsel for the Plaintiff relied on the processes filed and adopted his written address.

In the address it was argued that the Plaintiff had the right to request information from the Defendants under the Freedom of Information Act 2011 (FOI Act). That the Defendants had neglected, refused and/or failed to release the information to the Plaintiff and had declined to give reasons. The court was urged to uphold the Originating Summons and grant the mandatory orders requested by the Plaintiff.

In the 1st Defendant's written address it was argued that the Defendant did not deliberately refuse to furnish the Plaintiff with the information he requested, but that the 1st Defendant was working on the request and would furnish the information. The Court was urged to grant the 1st Defendant more time to be able to do collation of the information and to furnish same at the end of the exercise.

In the 2nd Defendant's counsel oral submission, it was argued that the cause of action arose in Abuja, and that the head office of the EFCC was in Abuja, and that for this reason, this Court lacked territorial jurisdiction to entertain this action.

It was also argued that the Plaintiff had no locus standi to institute this action, that the nature of the information would infringe on state security, and the right of the lawyers in relation to client and solicitor relationship.

It was also contended that the letter to the 2nd Defendant was not certified and was therefore inadmissible. That the action was statute barred under Section 20 of the Freedom of Information Act.

The Court was urged to dismiss the case, and reliance was placed on the following authorities:-

(1) **IBORI VS. FRN (2009) 3 NWLR (PT. 1128) 283**
(2) **THEOBROS AUTO LINK LTD VS BIAE CO. LTD (2013) 2 NWLR (PT. 1338) 337.**
(3) **GANI VS. IGP (2002) 7 NWLR (PT. 665) 481**
(4) **OSAHON VS. IGP (2006) 2 SC (PT. 11)1**
(5) **SECTION 45 (1) CONSTITUTION**
(6) **FEDERAL HIGH COURT (CIVIL PROCEDURE) RULES.**
(7) **FREEDOM OF INFORMATION ACT.**

In response, Learned Counsel for the Plaintiff argued that the Court was functus officio in respect of whether or not the suit was statute barred having granted extension to time, and that the Defendant carried on substantial business in Lagos.

It was argued that the Applicant need not show interest to have locus standi, and that the letter attached to the affidavit was a private document and therefore admissible in evidence.

The Court was urged to grant the Plaintiff's reliefs.

I have read the processes filed and I have carefully considered the submissions made in the written addresses filed. The only issue that arises for determination is whether having regard to the provisions of the Freedom of Information Act, 2011, the Defendant were justified in withholding from (or failing to release to) the Plaintiff the information requested in the Plaintiff's letter of 26th January 2012, or any part thereof.

The 1st Defendant does not appear to me to be contesting this case on the merits. The 1st Defendant appear to be willing to provide the information requested for, but have pleaded for time to be able to collate the requested information and furnish same to the plaintiff.

Before delving into the jurisdictional issues raised by learned counsel for the 2nd Defendant, I wish to trace the historical development of what this nation has as the Freedom of Information Act.

Historically, freedom of information legislation comprises laws that guarantee access by the general public to data held by its government. The establish what is known as a “right to know” legal process by which requests may be made for government held information, to be received freely or at minimal cost, having standard exceptions. Over 90 Countries around the World have implemented some form of legislation guaranteeing the right of access to information. Sweden's

Freedom of the Press Act 1766 is the oldest of such legislation in the world.

A basic principle behind most freedom of information legislation is that the burden of proof falls on the body asked for information, not on the person asking for it. The person making the request does not usually have to give an explanation for their actions, but if the information is not disclosed a valid reason has to be given.

In Nigeria, the House of Representatives passed the bill on the 16th day of February, 2011 and the Senate on the 16th day of March 2011. The harmonized version of the bill was signed into law by the President on the 28th day of May 2011.

The highlights of this law is as follows:-

- ? It guarantees the right of access to information held by public institutions, irrespective of the form in which it is kept and is applicable to private institutions where they utilize public funds, perform public functions or provide public services;
- ? It requires all institutions to proactively disclose basic information about their structure and processes and mandates them to build the capacity of their staff to effectively implement and comply with the provisions of the Act;
- ? It provides protection for whistleblowers
- ? It makes adequate provision for the information needs of illiterate and disabled Applicants;
- ? It recognizes a range of legitimate exemptions and limitations to the public's right to know but it makes some of these exemptions subject to a public interest test that in deserving cases, may overide such exemptions;
- ? It creates reporting obligations on compliance with the law for all institutions affected by it. These reports are to be provided annually to the Federal Attorney General's Office, which will in turn make them available to both the National Assembly and the public;
- ? It requires the Federal Attorney-General to oversee the effective implementation of the Act and report on execution of this duty to Parliament annually.

There is no doubt that the Freedom of Information Act (FOI Act) is intended to act as a catalyst for change in the way public authorities approach and manage their records.

Under the FOI Act, any individual is able to make a request to a public institution for information. An Applicant is entitled to be informed in writing as to whether the information is held and have the information communicated to them. If any of the information is refused, the organization must provide the Applicant with a Notice which clearly states the reasons why it is withholding the information that has been requested.

It must be noted that an Applicant will not be able to get all the information he wants. The Act requires that there will be valid reasons why some kinds of information may be withheld, such as if the release would prejudice National Security or commercial interests. See generally sections 1, 12, 14, 15, 16, 17, 19, 20 and 21 of the FOI Act.

Public institutions are expected to have an information communicated to an Applicant promptly but not later than 7 days after it has received a request. Where a request is refused, the public institution shall give notice to the Applicant and should state the exemption providing the basis for refusal within the FOI Act and why it applies to the information requested. This notice must also be communicated to the Applicant within 7 days.

There are two general categories of exemption: (a) absolute exemptions: - those where there is no duty to consider the public interest; and (b) qualified exemptions:- those where, even though an exemption exists, an authority has a duty to consider whether disclosure is required in the public interest. Briefly, the public interest test requires an authority to determine whether the public interest in withholding the information outweighs the public interest in disclosing it by considering the circumstances of each particular case in the light of the potential exemption which might be claimed. The balance lies in favour of disclosure since withholding outweighs disclosure, imperatively.

Has the Plaintiff the locus Stand to institute this action? Locus standi devolves the right of a party to bring an action or to be heart in court. Citizens derive locus standi from the constitution, the statues, customary law or voluntary arrangement in an organization. See **ODENEYE VS. EFUNUGA (1990) 7 NWLR (PT. 164) 618.**

Under the Freedom of Information Act, the Plaintiff is conferred with the right to institute this proceeding by the provision of section 2 and 3 of the Act, The Plaintiff needs not demonstrate any specific interest in the information being applied for. The Plaintiff is entitled as a Citizen of this great country to institute this proceeding to compel the Defendant's herein to comply with the provisions of the Freedom of Information Act.

Interestingly, a tax payer has locus standi to approach the Court to enfore the law and ensure that his tax money is utilized by the Government frugally or prudently. See **FAWEHINMI VS. PRESIDENT FRN (2007) 14 NWLR (PT. 1054) 275.** I hold that the Plaintiff has the necessary standing to sue the Defendants herein.

On the 20th day of December 2012 this Court granted to the Plaintiff extension of time within which to bring this action, and deemed the action already filed as being properly brought before the court. The Court exercise its powers under the Rules of Court and its inherent jurisdiction. This action cannot therefore be said to be stature barred. See **KOLAWOLE VS. ALBERTO (2002) FWLR (PT 130) 176.**

The 2nd Defendant has relied on the provision of Order 2 Rule 1 (9) to argue that the Court has no territorial jurisdiction to entertain this suit. Order 2 Rule 1 (9) provides as follows:-

Order 2 Rule 1:

"subject to the provisions of any law with respect to transfer to suits or to specific subject matter, the place for the trial of any suit or matter shall be provided in this order.

Order 2 Rule 1(9)

All other suits shall be commenced and determined in the Judicial Division in which the Defendant resides or carries on substantial part of his business or in which the cause of action arose"

Let me state that unlike in criminal cases where the issue of jurisdiction or place for the institution of suits is determined territorially, it is not the same when an action is a civil action.
In Civil suit, the provisions of the Rules of Court apply. In the circumstances, the decision of the Court of Appeal in **IBORI VS. FRN (2009) 3 NWLR (PT 1128) 283** is inapplicable to the facts and circumstances of this case.

The provision Order 2 Rule 1 of the Federal High Court (Civil Procedure) Rules 2009 is not mandatory, but directory, See **OGIGIE VS. OBIYAN (1997) 10 NWLR (PT. 524) 179.**

It is a known fact that the 2nd Defendant carries on substantial part of its business here in Lagos as is evident even from the address to Counsel for the Defendant who is its member. Staff. It is trite that there is only one Federal High Court in Nigeria with different Judicial Division for the purpose of administrative convenience. See Section 249 of the Constitution of the Federal Republic of Nigeria 1999 as amended and Section 19 of the Federal High Court Act 1973 as amended. The Federal High Court Lagos Division has jurisdiction to entertain this matter.

Territorially, the jurisdiction of the Federal High Court is nationwide. It is not confined to the territory of any State in the Federation. See section 19 of the Federal High Court Act and section 250 of the 1999 Constitution.

Historically, the Federal High Court was first established as the Federal Revenue Court by the Federal Revenue Decree 1973 (No. 13 of 1973) and came into existence on 13th April, 1973. The Court started with a President and four Judges. The establishment of the Court was in response to the need for a High Court with competence over Federal Revenue matters, as is customary with Federal System of Government. On 1st October, 1979 the Court was renamed Federal High Court by section 230(2) of the Constitution of the Federal Republic of Nigeria 1979. The Federal Revenue Court Decree was later adapted as the Federal High Court Act and retained in the body of Nigeria statutes as currently contained in the Laws of the Federation of Nigeria, 2004.

The scope of the Court's jurisdiction was a subject matter of controversy from inception. There were laudable attempts to resolve the issue judicially in landmark cases like **BRONIK MOTORS LTD VS. PAN ATLANTIC SHIPPING & TRANSPORT AGENCIES LTD (1987) 1 NWLR (PART 49) 212.** It however took the promulgation of the Federal High Court (Amendment) Decree No. 60 of 1991 to finally stem the tide over the issue. Section 2 of the Decree amended section 7 of the Federal High Court act by expanding and making exclusive the jurisdiction conferred on the Court under the section. This provision later assumed constitutional important with the Constitution (Suspension and Modification) Decree 1993 (No. 107 of 1993) incorporated the Amendment as part of the 1979 Constitution at present, the provision is contained in section 251 of the Constitution of the Federal Republic of Nigeria 1999. The Federal High Court has exclusive original Jurisdiction over the subject matter listed in that section.

In the face of the enormous jurisdiction vested in the Court, some writers argued that that the Court cannot manage manpower issue, and the advocated the need to increase the number of personnel in the court and create more judicial divisions to allow the common man reasonable access to the Courts. Writing on this issue, the Learned authors of the book **INTRODUCTION TO CIVIL PROCEDURE (THIRD EDITION) Ernest Ojukwu** and **C.N. Ojukwu**

wrote on pages 59 to 60 as follows:

"Without reviewing the substantive defects, it must be stated that the Federal High Court as presently constituted cannot manage manpower wise in the face of the enormous jurisdiction granted to it. There are about thirty serving judges of the Court in very few judicial divisions; the result of this is that the few available Courts would definitely be over-worked when the civil and criminal prosecutions are taken under eh court's wide jurisdiction.

The consequence of this over-crowding of cases will fall on the citizen. It may also be difficult for litigants to seek a redress appropriately considering the present location of the Courts on zone basis.

Before the 1999 Constitution came into force many people called for the amelioration of this problem by the introduction of concurrent jurisdiction between the State High Courts and the Federal High Court on the matters specifically reserved for the Federal High Court, Mohammed, J.C.A. in Ali V. C.B.N associated himself with this call when he said:-

" I entirely share the view of the learned Senior Counsel for the appellant that this amendment is likely to have adverse effects on the smooth administration of justice in the Country, while the amendment is likely to be oppressive on the part of some litigants, particularly the servants or employees of the Federal Government and its agencies, like the appellant in some States of the Federation that do not have a Federal High Court, it also most certainly would result in the increase of burden of the cost of litigation. This is because it would compel those litigants in the State that do not have a Federal High Court to travel to other Stats that have such Courts in search of justice, no doubt at greater expense thereby jeopardizing the much publicized government policy of taking justice nearer to the people.
Therefore, having regard to the undoubted presence of the Federal Government and its agencies in every States of the Federation and in some cases in the remotest part of such States, the need to have a second look at this amendment to section 230 of the 1979 Constitution by Decree No. 107 of 1993 with a view of conferring concurrent jurisdiction on the State High Courts and the Federal High Courts in matters specified therein cannot be over emphasized."

Unfortunately, this call was not heeded and the 1999 Constitution went ahead to re-affirm the existing position under Decree 107 of 1993.

Since constitutional amendment is very rigorous and love unlikely in the nearest future, there is, therefore the need to increase the number of personnel in the Federal High Court and create more judicial divisions. For now it is suggested that at least two Judges be appointed to operate in the state of the Federation. Only by allowing the common man reasonable access to the Courts shall we be fulfilling the tenets of justice."

Judicial Divisions of the Court were therefore created in several States of the Federation in order to allow everyone access to the Courts in aid of justice. The creation of these Divisions did not alter section 19 of the Federal High Court Act or section 250 of the Constitution.

There exists only one Federal High Court in the Federal Republic of Nigeria. For this reason, the Federal High Court holding in Lagos, Benin, or any other State within the Federation has a single jurisdiction. In the case of **CHIEF ALHAJI MOSHOOD KASHIMAWO OLAWALE ABIOLA VS. FRN (1995) 3 NWLR (PT. 382) 201,** the Court held as follows:

"*It is therefore not in dispute that the Federal High Court whose jurisdiction by virtue of section 19(1) Federal High Court Act extends through the Federation*… (emphasis mine)

I have carefully perused exhibit 2 attached to the affidavit in support of this section. It is the acknowledged copy of the Plaintiff's letter to the 2nd Defendant dated 26th January, 2012. This document is a private document and needs no certification. See section 102, 103 and 104 of the Nigerian Evidence Act Cap E14 2011. A document purporting to be a public document under the Act must strictly form or constitute the acts or records of Government, the executive, legislative and judiciary, its agencies, parastatals, and or its officers in relation to their functions. The document annexed to the affidavit in support cannot therefore be described as a public document. See **BISICHI TIN CO. LTD VS COP (1963) ALL NLR 476; ANATOGU VS. IWEKA II (1995) 8 NWLR (PT. 415) 547; ONYEANWUSI VS. OKPUKPARA (1953) 14 WACA 311; AYENI VS. DADA (1978) 3 SC 35.**

It must be mentioned that whether there exists a confidentiality agreement between the 2nd Defendant and third parties in respect of some information, is an issue of fact. The defence of client/lawyer relationship should have been out in

affidavit form by the 2nd Defendant. The nature of the relationship should have been clearly stated in affidavit form to enable the Court decide whether the defence will avail the 2nd Defendant in the circumstances of this case.

It is clear that the 2nd Defendant is entitled to protect records or information complied for law enforcement purposes the release of which could reasonably be expected to interfere with enforcement proceedings, or deprive a person of a right to fair trial or an impartial adjudication, or constitute an unwarranted invasion of the personal privacy of a third party, or disclose the identity of confidential sources, or disclose techniques and procedure for law enforcement investigations or prosecutions, or endanger the life of physical safety of an individual. Examples of information covered under the above include records pertaining to an open law enforcement investigation, information that could potentially contaminate a court proceeding, identifying information of individuals associated with a law enforcement proceeding i.e law enforcement officers names, witnesses names, identifying information of confidential informants, law enforcement manuals and watch lists, and identifying information of law enforcement officers.

The 2nd Defendant is also entitled to protect information that is properly classified in the interest of national security. Examples of these kind of information are information pertaining to actual potential or threatened interference with, attack on, compromise of, or incapacitation of critical infrastructure or protected systems by either physical or computer based attack or other similar conduct that violates local laws, or threatens public health or safety.

In my view, same of the information requested by the Plaintiff from the 2nd Defendant threatens and the national security of the State. The 2nd Defendant has not shown that it is protecting trade secrets and ceremonial or financial information which could harm the competitive posture or business interests of a company, which information is not customarily released to the public entity from whom the information is obtained. The 2nd Defendant has not shown that it is protecting the integrity of the deliberative or policy-making processes within the agency by exempting from mandatory disclosure opinion, conclusions and recommendations included within their agency or intera agency memoranda or letters. The 2nd Defendant has not also shown that it is trying to protect information that would constitute a clearly unwarranted invasion of personal privacy of individuals in the agency.

In short, the 2nd Defendant has failed to file a counter affidavit to explain why it failed to supply the information requested for by the Plaintiff. In the absence of a counter affidavit, averments in an affidavit in support are generally admissible. In other words, unchallenged or uncontradicted averments in an affidavit are admissible in law and Court of law is entitled to give full weight and value to such averments. See **NICN VS. PIECO. LTD (1986) 1 NWLR (PT. 14) 1; AZEEZ VS. STATE (1986) 2 NWLR (PT 23) 541; EGBUNA VS. EGBUNA (1989) 2 NWLR (PT. 106) 773.**

I am of the view that on receipt of the Plaintiff's request the Defendants had the duty to respond to same. It they do hold the information, they must apply it within 7 days from receipt of the request. Where a decision to withhold is taken, the Defendants must inform the Plaintiff of their reasons. In respect of these reliefs, the Defendants kept mute. Let me state that they have no such power under the law.

The Freedom of Information Act is meant to enhance and promote democracy, transparency, justice and development. It is designed to change how government works, because we have all resolved that it will no longer be business as usual. Therefore, all public institutions must ensure that they prepare themselves for the effective implementation of the Freedom of Information Act.

The judiciary has no choice but to enforce compliance with the Freedom of Information Act. The judiciary cannot shirk its sacred responsibility to the nation to maintain the rule of law. What is done officially must be one in accordance with the law. Obedience to the rule of law by all citizens but more particularly by those who public took oath of office to protect and preserve the Constitution is a desideratum to good governance and respect for the rule of law. In a constitutional democratic society, like ours, this is meant to be the norm.

In suit No. FHC/L/CS/494/2012, this Court held in relation to the request by this same Plaintiff made to the Central Bank of Nigeria pertaining to information on details of external Solicitors that prosecuted banks executives including Mrs. Cecilia Ibru as follows:-

> *"Section 15 (1) (b) imposes an obligation on a public institution to deny an application for information whose disclosure could reasonably be expected to interfere with contractual or other negotiations of a third party. It is my view that "a third party" includes a legal practitioner in the context of his professional relationship with his client. What could severely prejudice the function of parties to a contract "could reasonably be expected to interfere with the contractual or other negotiations" of the said parties.*

It is the case of the Defendant that the application of the Plaintiff related to the contractual relationship and negotiations between the Defendant and legal practitioners and other professionals engaged by the Defendant for their services to the Defendant, and that the said information was specifically on the remuneration of the said legal practitioners and other professionals for their services to the Defendant and that if disclosed it would adversely interfere with the contracts and negotiations for services between the Defendant and those professionals. It is also the case of the Defendant that is in a momentous condition of the services by those professionals to the Defendant that their remuneration shall never be disclosed to any third party.

There is nothing in the Plaintiff's affidavit nothing exceptional that will persuade this Court to give way to the public interest in disclosing the amount of fees paid and to be paid to the two named firms of Lawyers i.e Olaniwun Ajayi LP of The Adunola, Plot L2 401 Close, Banana Island, Ikoyi, Lagos, and Kola Awodein & Co. of 6th Floor, UBA House, 57 Marina, Lagos where a duty of confidentiality arises out of a professional relationship and where there are contractual obligations in favour of maintain confidence, a court will be reluctant to order disclosure, especially as in this case where there is no hard evidence of misconduct or mismanagement of public funds on the parts of the Defendants.

In view of all that I have said above, reliefs 1 (a), (b), (c) and (d) on the originating summons are hereby refused, and are dismissed."

In view of the nature of the contractual nature of the relationship between the same law firms and the Central Bank of Nigeria in the above mention suit, in respect of the same prosecution that is the prosecution of Cecilia Ibru, the former Managing Director of Oceanic Bank Plc, I do not intend to give way again to the public interest in directing the disclosure of the fees paid to the firm of Olaniwun Ajayi LP in the prosecution of Cecilia Ibru.

By section 2 of the Freedom of Information Act, the Defendants shall ensure that they keep records and information about their activities, operations, and businesses. That must ensure the proper organization and maintenance of all information in their custody in a manner that will facilitate public access to such information. They are excepted to publish, disseminate and make readily available to members of the public, including the Plaintiff herein, through various means including print, electronic and online sources, and at their offices documents containing substantive rules of the institutions, statements and interpretation of policy which have been adopted by them, final planning policies, recommendations, and decisions, information relating to receipt or expenditure of public or other funds of the institution, and the names, salaries, titles and data of employment of all employees and officers of their institutions, amongst others.

In view of the above, I am of the view that this action should succeed in part. The Plaintiff in no doubt entitled to some of the reliefs sought in this application. According to Samuel Johnson, *"the law is the last result of human wisdom acting upon human experience for the benefit of the public."* It is the principle of public policy to protect public interest. The Courts would never sanction what is injurious to the public walefare or against public good. See **TOTAL NIG. PLC VS AJAYI (2004) ALL FWLR (PT. 218) 887; OKONKWO VS. OKAGBUE (1994) 9 NWLR (368) 301.**

The nation has in the Freedom of Information Act a law to make government accountable, to make governance easy, to make public records and information more freely available to the governed. It was Abraham Lincoln who said in 1854 that "*no man is good enough to govern another man without the other consent."* By the Freedom of Information Act, we as a nation have decided to govern and stir the ship of state together and collectively. The application of the law is no doubt a sacred trust and the method of upholding the law is a corollary of the sanctity of the law that the Courts are willing and ready to ensure. We all insist that ours shall be a government of laws, and not of men.

In view of all that I have said above, reliefs 1(a), (b), (c), (d) and (e) are granted as prayed. Reliefs 2 (a), (b), (c), (d), (e), (f), (g), (h), (j), (k), (l) and (m) are granted as prayed Relief 2 (i) is refused.

The Defendants are hereby directed to provide the said information to the Plaintiff within 72 hours of the making of this order.

M. B. IDRIS
JUDGE
22/2/2013.

T. Uzokwe holding the brief of C. Nwachukwu for the Plaintiff
M.W. Bawa for the 2nd Defendant.

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON FRIDAY THE 1ST DAY OF MARCH, 2013
BEFORE HIS LORDSHIP HON. JUSTICE A.F.A ADEMOLA
JUDGE

SUIT NO: FHC/ABJ/CS/582/2012

BETWEEN:

PUBLIC & PRIVATE DEVELOPMENT CENTRE LTD/GT)
(PPDC) (For itself and on behalf of the Nigeria Contract) …….. APPLICANT
Monitoring Coalition))

AND

1. POWER HOLDING COMPANY OF NIGERIA)
(PHCN) PLC) …… RESPONDENTS
2. HON. ATTORNEY GENERAL OF THE FEDERATION)

J U D G M E N T

A. SUMMARY OF THE FACTS

The Applicant in this suit brought by Motion on Notice dated 14/12/2012 pursuant to Order 34 Rules 5 & 6 Federal High Court (Civil Procedure) Rules 2009, **Sections 1, 2(6) 20**, of the Freedom of Information Act, 2011 and the inherent powers of this Honourable Court, prays for the following Reliefs:

i. A DECLARATION that the failure of the 1st Respondents to furnish Applicant with the documents/information sought vide Applicant's letter of 30th August, 2012 amounts to a wrongful denial of information under the Act.
ii. ORDER of the Honourable Court COMPELLING the Respondents to forthwith furnish the Applicant with the information and Copies of the documents set out in the Schedule hereto.

SCHEDULE

A) The procurement plan.
b) The NEEDS assessment document (if separate from the procurement plan).
c) Documentation on design and specification requirement which are not contained in the standard bidding documents
d) Documentation on the scope of the procurement
e) Bidding documents issued to all bidders in respect of the procurement
f) A list of all contractors that submitted bids in respect of the procurement
g) Copy of the bid evaluation report of the technical subcommittee of the Tenders' Board for the procurement
h) Minutes of the Tenders' Board approving the winning bids.
i) Copies of the letters of award of contract and final contract award documents for the award of the contract for this procurement
j) Documentation on the current status of the procurement project
k) Document showing the procurement contract sum, conditions of the procurement contract and payment terms and schedule.

I) Name and addresses of all Distribution Companies on whose behalf the procurement was undertaken and which will subsequently be responsible for the utilization and management of the goods and works procured.

It is supported by an amended statement with names of Applicant, Description of Applicant, Reliefs sought, grounds which reliefs are sought; facts relied upon, affidavit with **EXHIBITS A E** and a written address.

The Respondent filed a Counter-Affidavit of 5 paragraphs sworn to by Kemi Iyunade, Litigation Clerk in the Messrs Joseph Ochuko Tobi & Co, Counsel to the 1st Respondent with Exhibits A & B, a written address prior to paying default fees under Order 34, Rules 5(3) & (4) of the Federal High Court (Civil Procedure) Rules, 2009.

Upon service i.e., Applicant Counsel, G.N. Chigbu filed a reply on points of Law to 1st Respondent's address dated 28/01/2013. This suit commenced in this Court on 23/10/2012 but delayed by several interlocutory applications of Counsel till 8th day of February 2013 when G.N. Chigbu, Applicant's Counsel and Edna Ejikeme for 1st Respondent proffered oral argument and adopted their written address in court. The 2nd Respondent though served, never entered appearance or file papers. Accordingly this suit was reserved for judgment by the court.

B) STATEMENT OF ISSUES ARISING FROM THE FACTS

Applicants counsel in this application for an order of mandamus submits one issue for determination in his written address dated 14/12/2012 to wit:

> Whether Applicant has proved its entitlement to the relief sought herein
>
> 1st Respondent in his written address 15/01/2013 and filed on 8/01/2013 adopted the Applicant's issue as the only issue arising for determination.
>
> This Court hereby formulates the said issue for determination in this Judgment.

C) DETERMINATION OF ISSUES BY AN APPLICATION OF LAW TO FACTS

Applicant's Counsel submitted pursuant to leave of this Court granted on 29/10/2012, the substantive motion on notice for mandamus dated 14/12/2012 was filed on the same day.

Power Holding Company of Nigeria hereinafter referred to as the 1st Respondent, sometime in the year 2011, through its Project Management Unit (PMU) conducted a Public Procurement exercise involving the award of contract for supply and installation of 300 No. 11 KV, 500A on Load sectionalizers at Karu, LUTH, Ogba, Agege, and Challenge Ibadan High Voltage distribution system **(HVDS**) 4 Network.

The Applicant pursuant to the right conferred on it to obtain public records and information from public institutions pursuant to the Freedom of Information Act, 2011 applied to the 1st Respondent through its *PMU* for the copies of the document and information set out in the schedule to this application. The 1st Respondent refused to furnish it with the said documents and information.

Therefore Applicant sought the leave of the Honourable court to bring this application to enforce Applicant's right under the Freedom of Information Act, 2011 and same was granted on 29th October, 2012.

The 1st Respondent in response to the application for procurement information on the installation of 300 No. 1/KV 500A on load sectionalizers at the said locations wrote a letter dated 9/11/2012 annexing this documents/information required to the Applicant except the documents in paragraph 'g' of the Schedule herein before attached to the motion on notice dated 14/12/2012 i.e. copy of the bid evaluation Report of the Technical Sub-Committee of the Tenders Board for the procurement.

Applicant's Counsel submitted that it has complied with Section 1, (2) subsection 2(6) & (7), 4 and 7(a) of the Freedom of Information Act, 2011and satisfied the conditions precedent for the issuance of an order of mandamus from this court. He cited the following cases:

i. **GANI FAWEHINMI V IGP (2007) NWLR (PT. 767) 606**
ii. **ATUNGWU V OCHEKWU (2000) 1 NWLR (Pt. 641) 507**
iii. **INYANG V EBONG (2002) 2 NWLR (Pt. 751) 284 and**

Finally Applicant's Counsel urged the Court to grant this application in the interest of justice and observance of the Rule of Law.

1st Respondent's Counsel opposed its grant based on 15(1) (b) of the Act submitting the information and documents sought for by the Applicant is a copy of the bid evaluation report of the technical subcommittee of the Tender's Board for the procurement involved a third party the winner of the bid, **CROWN RESOURCES DEVELOPMENT CO. LTD**., hereinafter referred to as the Contractor.

He argued further that the intention of the section has its origins in the privity of contract doctrine in the Law of

Contract, submitting the Release of Information to a third party, i.e. Applicant, would affect the contractual relationship between parties to the contact.

In the present case the contractor has contractual relationship with 1st Respondent and not the Applicant whilst 1st Respondent cannot be required to disclose ore release information or documents between her and the contractor to the Applicant who is not privy to the contract since it would be contrary to Law.

Section 15(1)(b) of the Freedom of Information Act provides thus:

A public institution shall deny an application for information that contains:

> "information the disclosure of which could reasonably be expected to interfere with the contractual or other negotiations of a third party."

He urged the Court to dismiss the relief of the Applicant as it affects paragraphs of the Schedule of the said application as its grant would cause injustice to the Contractor who is not a party to this suit resulting in a Breach of the **PRIVITY OF CONTRACT DOCTRINE**.

A scrutiny of **Section 15(1)(b) of Freedom of Information Act, 2011** states the circumstances a public institution shall deny an application an application for information to a person;

A) the Transaction must still be at the negotiation stage
b) a third party must be involved; and
c) the disclosure of the information could reasonably be expected to interfere with the contractual or other negotiations of a third party.

This court agrees with Applicant Counsel's submissions in his reply on points of Law for a public institution to be justified in denying information under the said section of the Law, the above mentioned conditions must exist concurrently. The uncontroverted Evidence before the Court states unequivocally the negotiations were concluded and the contract awarded since 30th November, 2011 with the contract effective from 26/3/2012. See 1st Respondent's **EXHIBIT B**, paragraph one Annexture VII in these civil proceedings.

The Applicant's averments of the affidavit in support of the substantive motion was not contradicted by 1st & 2nd Respondents. They are deemed as true having being admitted by the opposing party i.e. the 1st & 2nd Respondents. **See OGOEJEFOR V OGOEJEOFO (2006)1 S.C. (Pt. 1) 157.**

This principle of Law also applies to paragraph 7 of the said affidavit requesting inter alia for the documents in issue on 30/8/2012, several months after conclusion of negotiations between the 1st Respondent and the Contractor i.e. the third party. I cannot agree more with Applicant counsel's arguments in his reply on points of Law that negotiations have been concluded and the contract awarded, the disclosure of the information sought by the Applicant cannot by any stretch of the imagination reasonably be expected to interfere with any contractual or other negotiations of the Contractor, i.e. third party.

As rightly argued by Counsel in his well researched address and brilliant reply on point of Law, the 1st Respondent has failed to satisfy conditions (a) and (c) of **Section 15(1) (b)** of the Freedom of Information Act, 2011 and not entitled to the exemption stated herein.

1st Respondent's processes and written arguments lack substance, frivolous, time wasting and an abuse of this Court process as they have no justification in denying the Applicant the documents sought

Accordingly prayers 1 & 2 of the Applicant's Motion on Notice dated 14/12/2012 are hereby granted particularly in respect of item "g" in the Schedule herein.

Costs of N20,000:00 are awarded jointly and/or severally against 1st & 2nd Respondents in favour of the Applicant.

A.F.A ADEMOLA
JUDGE
01/03/2013

PARTIES - absent
APPEARANCES: **G.N. CHIGBU** for Applicant
No representation for Respondents.

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON WEDNESDAY THE 19TH DAY JUNE, 2013
BEFORE HIS LORDSHIP HON. JUSTICE A.F.A. ADEMOLA
JUDGE

SUIT NO. FHC/ABJ/CS/766/2012

BETWEEN
CONGRESS FOR PROGRESSIVE CHANGE (CPC) …… PLAINTIFF

AND

INDEPENDENT NATIONAL ELECTORAL
COMMISSION (INEC) …..... DEFENDANT

JUDGMENT

A) STATEMENT OF FACTS

This is an Originating Summons by way of judicial Relief filed by Congress for Progressive Change (CPC) through their Counsel Obono, Obono and Associates of Trinity House 2nd floor Mabushi, Abuja FCT, seeking the following reliefs: hereinafter and for the determination of the following questions:-

1. Whether by a true interpretation and construction of Section 5(a) of the Freedom of Information Act, 2011, the Defendant is not obligated to allow the Plaintiff unfettered access to information concerning the

    i. NATIONAL BIOMETRIC DATA BASE OF VOTERS REGISTER BY INEC IN THE COUNTRY USED FOR THE GENERAL ELECTIONS OF APRIL 2011;
    ii. A DETAILED, COMPREHENSIVE & FAIR STATEMENT OF ACCOUNTS OF EXPENDITURE INCURRED BY INEC FOR THE CONDUCT OF GENERAL ELECTIONS OF APRIL, 2011;
    iii. A LIST OF CONTRACTORS AWARDED CONTRACTS CONCERNING PRINTING OF BALLOT PAPERS; VOTERS CARD AND OTHER DOCUMENTS CONCERNING THE 2011 GENERAL ELECTIONS, UPON THE PLAINTIFF'S APPLICATION within 7 (seven) days?

2. Whether the refusal or failure of the Defendants to grant the application of the Plaintiff for access to information concerning the:

    i. NATIONAL BIOMETRIC DATA BASE OF VOTERS REGISTER BY INEC IN THE COUNTRY FOR THE APRIL, 2011, GENERAL ELECTIONS.
    ii. A DETAILED, COMPREHENSIVE & FAIR STATEMENT OF ACCOUNTS OF EXPENDITURE INCURRED BY INEC FOR THE CONDUCT OF ELECTION.
    iii. A LIST OF CONTRACTORS AWARDED CONTRACTS CONCERNING PRINTING OF BALLOT PAPERS; VOTERS CARD AND OTHER DOCUMENTS CONCERNING THE 2011 GENERAL ELECTIONS within seven (7) days of the receipt of same does not amount to an infringement of the provisions of Sections 4 (a) and 7(1) of the Freedom of Information Act (supra)?

3. Whether by a true interpretation and construction of the provisions of Section 7 (5) of the Freedom of Information Act (supra) the Defendant is not entitled to pay a fine of N500,000.00 (five Hundred Thousand Naira) for the wrongful denial of the Plaintiff the right of access to information sought?

The Plaintiff claims against the Defendant as follows:

1. *A Declaration* that the refusal, failure and or neglect by the Defendant to release the information requested by the Plaintiff concerning:- i NATIONAL BIOMETRIC DATA BASE OF VOTERS REGISTER BY INEC IN THE COUNTRY FOR THE APRIL, 2011 GENERAL ELECTIONS
2. A DETAILED, COMPREHENSIVE & FAIR STATEMENT OF ACCOUNTS OF EXPENDITURE INCURRED BY INEC FOR THE CONDUCT OF ELECTION iii. A LIST OF CONTRACTORS

AWARDED CONTRACTS CONCERNING PRINTING OF BALLOT PAPERS; VOTERS CARD AND OTHER DOCUMENTS CONCERNING THE APRIL 2011 GENERAL ELECTIONS same amounts to a violation of Section 7(1) of the Freedom of Information Act (supra) and therefore is wrongful, illegal and unconstitutional.

3. *A DECLARATION* that the refusal, failure and or neglect by the Defendant to release the information requested by the Plaintiff concerning the:- i. NATIONAL BIOMETRIC DATA BASE OF VOTERS REGISTER BY INEC IN THE COUNTRY FOR THE APRIL, 2011 GENERAL ELECTIONS. ii. A DETAILED, COMPREHENSIVE & FAIR STATEMENT OF ACCOUNTS OF EXPENDITURE INCURRED BY INEC FOR THE CONDUCT OF ELECTIONS. iii. A LIST OF CONTRACTORS AWARDED CONTRACTS CONCERNING PRINTING OF BALLOT PAPERS; VOTERS CARD AND OTHER DOCUMENTS CONCERNING THE 2011 GENERAL ELECTIONS amount to a violation of the provisions of Section 4 (a) of the Freedom of Information Act, 2011.
4. *A DECLARATION* that by the true interpretation and construction of Defendant as a Public Institution within the meaning of Section 7 and 31 of the Freedom of Information Act (supra) is obligated to furnish on request by the Plaintiff: i. NATIONAL BIOMETRIC DATA BASE OF VOTERS REGISTER BY INEC IN THE COUNTRY. ii. A DETAILED, COMPREHENSIVE & FAIR STATEMENT OF ACCOUNTS OF EXPENDITURE INCURRED BY INEC FOR THE CONDUCT OF ELECTION. iii. LIST OF CONTRACTORS AWARDED CONTRACTS CONCERNING PRINTING OF BALLOT PAPERS; VOTERS CARD AND OTHER DOCUMENTS CONCERNING THE APRIL, 2011 GENERAL ELECTIONS.
5. *An Order of Mandamus* directing the Defendant including its servants, agents, privies, officials and or cohorts to furnish the Plaintiff with a comprehensive and detailed information concerning: i. NATIONAL BIOMETRIC DATA BASE OF VOTERS REGISTER BY INEC IN THE COUNTRY FOR THE APRIL, 2011 GENERAL ELECTIONS. ii. A DETAILED, COMPREHENSIVE & FAIR STATEMENT OF ACCOUNTS EXPENDITURE INCURRED BY INEC FOR THE CONDUCT OF ELECTION. iii. A LIST OF CONTRACTORS AWARDED CONTRACTS CONCERNING PRINTING OF BALLOT PAPERS; VOTERS CARD AND OTHER DOCUMENTS CONCERNING THE APRIL, 2011 GENERAL ELECTIONS case within seven (7) days of the delivery of Judgment.
6. ***An Order*** of this Honourable Court directing the Defendant to pay a fine of N500,000.00 (Five Hundred Thousand Naira) for the wrongful denial of the Plaintiff the right of access to the information sought.
7. The costs of this Action.
8. Any further *Order (s)* as the Court may deem fit and proper to make in the circumstances of this case.

The Originating Summons dated 21st day of December, 2012 is accompanied by a 17 paragraphs affidavit deposed to by ***Efa Otu Oka***, Legal Practitioner in the Law firm of ***Obono-Obono & Associates*** with ***Exhibit AA*** and a written address.

Upon Services, the Defendant's Counsel, Ahmed Raji SAN, of ***AHMED RAJI & CO***, 3B Lake Kariba Close Off Mississippi Street, Abuja, filed on 25/01/2013 a Memorandum of Conditional Appearance, notice of preliminary objection dated 23rd January 2013, urging this Honourable Court to strike out this suit on behalf of Plaintiff for lack of jurisdiction supported with a 12 paragraph affidavit, deposed to by *Oziegbe Omo-Egharevba* a Legal Practitioner in the Law firm of *Ahmed Raji & Co*., on 25/01/2013 and a written address. The grounds of the said objection are hereinafter reproduced:

That the Honourable Court cannot grant the Reliefs sought by the Plaintiff.

1. The Reliefs/Information sought by the Plaintiff predate the enactment of the Freedom of Information Act, 2011 and the Freedom of Information Act cannot be made to operate retrospectively. ***ALEWA V SSIEC (2007) 15 NWLR (pt. 1057) 285 CA; OBIEWEUBI V CBN (2011) 7 NWLR (Pt. 1247) 565 SC.***
2. By reason of Paragraphs 1 & 2 above, the Plaintiff has no locus standi to institute this proceeding; hence, the Honourable Court lacks jurisdiction to entertain the Reliefs herein.
3. The instant suit is an abuse of court process.
4. The appropriate Order to grant is an Order of striking out when the Court has no jurisdiction to entertain a suit.

The Defendant's Counsel urged the Court to strike out this suit. On the 28/01/2013 the Plaintiff's Counsel filed a written address opposing the Defendant's preliminary objection, urging the Court to enter Judgment in their favour. The Defendant's Counter also on 4/02/2013 filed a 21 paragraph counter affidavit with ***EXHIBIT NS***, in opposition to the originating summons. It was deposed to by ***Zekeri Garuba***, a Legal Practitioner in the Law Firm of *Ahmed Raji*

and Co., and supported with a written address.

On the 6th February, 2013, the Plaintiff's Counsel filed a reply address to the Defendant's written address opposing the Plaintiff's originating summons to which the Defendant's Counsel responded with a reply on points of Law dated 11th day of February, 2013.

On 26/03/2013, *Ahmed Raji, SAN* and *Chief Obon-Obla* adopted their court processes proffering Legal arguments in support of their respective positions.

After a close perusal of the written arguments of Counsel, this Court adopts the following questions for determination.

i. Whether this Honouable Court can assume jurisdiction over the suit and cause the Freedom of Information *(FOI) Act 2011* to apply retrospectively, having regard to *EXHIBIT AA* in Plaintiff's originating summons and the reliefs sought herein.
ii. If the answer to question one (1) is in the affirmative, is the Plaintiff entitled to its 7 claims upon a determination of the questions set only in its originating summons of 21/12/2012.

C) The Defendant Counsel's Notice of Preliminary Objection herein before reproduced with five grounds is supported with a written address, advancing legal arguments on the applicability or otherwise of the Freedom of Information (FOI) Act retrospectively based on the following cases;

i. ALEWA V SSIEC (2007) 15 NWLR (Pt. 1057) 285 CA
ii. OBIUWUEBI V CBN (2011) 7 NWLR (Pt. 1247) 565 SC

Jurisdiction is the authority which the Court has to decide matters that are litigated before it or take cognizance of the matters presented in a formal way for it's decision.
See *(I) AGBOGUNLERI V DEPO & 3 ORS (2008) 12 SC. (PHI) 249*

It is the life line of every trial for where there is any defect in its competence, it is fatal to the proceedings and makes it a nullity however well conducted or decided.

See ***i) ADEMOLA V ADETAYO (2010) 15 NWLR (pt. 1215) 156.***
ii) IBAKU V EBENI (2010) 17 NWLR (pt. 1222) 286 CA
Iii) N.U.E.E V B.P.E (2010) 7 NWLR (pt. 1194) pg. 538 SC
iv) SKEN CONSULT V UKEY & ANOR. (1981) 1 S.C PG. 6

Defendant/Applicant's Counsel submitted that statutes are designed to operate from date of commencement. In other words statutes are meant to operate prospectively and not retrospectively. He cited the cases of;

i. ANIYI V AROYEHUN (1991) 5 NWLR (pt. 1057) 285
ii. OJOKOLOBO V ALAMU (9187) 3 NWLR (Pt. 61) 377

He contended it is a fundamental rule of statutory interpretation that no Law shall be construed to have retrospective effect. However, where the legislature contemplates a retrospective application of a stature, it must be expressly provided for in a clause in the statute thereto. He cited the following cases.

i. NZE BERNARD CHIGBU V TONIMAS (2006) LPFELR 11924 (CA)
ii. ALEWA V SSIEC (2007) 15 NWLR (Pt. 1057) 285 CA
iii. OBUIWUEBI V CBN (2011) 7 NWLR (Pt. 1247) 565 S.C
iv. GOLDMARK (NIG) LTD. V IBAFON CO. LTD. (2012) 10 NWLR (Pt. 1308) 291

In conclusion, Defendant/Applicant's Counsel submitted the Freedom of Information Act, 2011 signed into Law by the President of the Federal Republic of Nigeria on 31st May 2011 does not apply to information created before 31st May 2011 when the Act was enacted. The Freedom of Information ***(FOI) Act*** he argued contains no provision in express terms for the purpose of retrospective application. As Plaintiff's claims in respect of information created before May 31st 2011 are not cognizable under the Freedom of Information Act, it lacks the Locus Standi to bring this suit which ought to be struck out by the Court.

Chief Obono-Obla in his written address opposed the preliminary objection by Defendant's solicitors in the following grounds:

i. The affidavit in support of the preliminary objection was sworn to by Oziegbe Omo-Egharevba, a Legal Practitioner to Defendant as it is professionally undesirable and procedurally wrong for a Counsel to descend into the Arena of the duel between parties and give evidence on behalf of his Client.
ii. It is anathema and indeed procedurally wrong for an objection on points of Law or jurisdiction to be supported with an Affidavit.

He urged the Court to discountenance the affidavit in support of the notice of Preliminary objection and strike out same as it is not relevant to resolution of the Plaintiff's Locus Standi to institute this case.

A Court of Law has to only peruse the Plaintiff originating summons and supporting affidavit in ascertaining whether or not the Plaintiff has the Locus Standi to institute a suit.

On the Plaintiff's 1st ground, it is the Court's opinion there is nothing illegal or wrong for a counsel to a party in a suit to swear to an affidavit.

It is only advisable that Counsel to a party in a suit should not in certain circumstances that may warrant him to give evidence as well as conduct his Client's case or likely to be contentious.

See i) IBE Vs ONUORAH (1999) 14 NWLR (PT. 638) 340
ii) SODIPO Vs HEMMINKAUMEN O. (supra)
iii) IBWA Vs IMANO NIG. LTD (1988) 3 NWLR (Pt. 85) 633

Furthermore, on the Plaintiff's Counsel's second ground there is nothing wrong for an objection on points of Law on jurisdiction to be accompanied with an affidavit in support.

See i) ***FAWEHINMI V ABACHA (1996) 9 NWLR (pt> 475) 710***
ii) ORDER 29 RULE 4(b) of the Federal High Court (Civil Procedure) Rules 2009.

The Plaintiff Counsel's two grounds of objection to the Defendant's affidavit deposed to by Oziegbe Omo-Egharevba, a Legal Practitioner are misconceived, frivolous and hereby dismissed by the Court.

On this main issue of the Plaintiff/Respondent's Locus Standi to seek the Reliefs contained in its originating summons, Plaintiff's counsel submitted the grounds in the preliminary objection do not raise jurisdictional issues or questions and therefore are not grounds on which a preliminary objection can be raised. He submitted further whether the Freedom of Information *(FOI) Act* can operate retrospectively or not is not a jurisdictional issue but at best a points of Law in defense to the suit. The Defendant, he contended has not demonstrated what defects or features in the suit divest the Court of jurisdiction to hear the case.

Plaintiff's Counsel submitted it has the Locus Standi to institute this suit in the light of *Sections 1(1) (2) & (3)*, and 20 of the Freedom of Information Act, 2011 and its originating processes having disclosed sufficient interest thereof. He referred to (i) *OWODUNI V REGISTERED TRUSTEES OF C.C.C.* and submitted it is trite that the Law or statute in force when the cause of action arose is the applicable Law i.e. Freedom of Information *(FOI) Act* 2011 and any change or changes of the Law will not affect the accrued rights and obligations unless made retrospectively. He argued the Plaintiff's cause of action accrued on 22/11/2012 and Freedom of Information *(FOI) Act 2011* is applicable in the circumstances. Plaintiff's Counsel further submitted that public information or record in existence before the enactment of the Freedom of Information *(FOI) Act* is contemplated by virtue of *Section 31 of the Freedom of Information Act.*

Finally, he urged the Court to overrule the objection on the ground of Plaintiff's lack of Locus Standi as it has Locus Standi from its originating summons and affidavit with *EXHIBIT AA* as well as the provisions of *Sections 1 and 20* of the Freedom of Information Act, 2011.

This Court has examined the provisions of the Freedom of Information *(FOI) Act* signed into Law by the President of the Federal Republic of Nigeria, *DR. GOODLUCK EBELE JONATHAN* on 31st May 2011 the commencement date, and finds no express provisions giving retrospective effect to it. Neither will a Court of Law read into a statute what is not there when construing it.
See - *A.G. KANO STATE V N. RABIU. (1980) 8-11 SC 130 at 149*
The facts of the Plaintiff's case can be gleaned from its originating summons, affidavit and *EXHIBIT AA.* They relate to

(i) Natural Biometric Data Base of Voters Register by INEC to the Contrary used for the April, 2011 General Election (ii) A detailed Comprehensive and Fair Statement of Accounts of Expenditure incurred by INEC for the conduct of April, 2011 General Election (iii) List of Contractors awarded contracts concerning Printing of Ballot Papers; Voters Card and other Documents concerning the 2011 General Elections and Expenditure of the *Eighty-Seven Billion Naira* given to INEC to conduct the April, 2011 General Elections. (Underlinings mine)

The information sought by the Plaintiff through it's solicitor predates 31st May, 2011 (Underlinings mine) when the President signed the Freedom of Information (FOI) Act into Law as rightly submitted by Defendant's counsel, *Ahmed Raji, SAN*.
In the circumstances the Plaintiff lacks the Locus Standi or standing to institute this Civil suit, based on the Freedom of Information *(FOI) Act 2011*. The well researched & lucid arguments of the Learned *Silk, A.C. Raji SAN*, are unassailable intellectually and tenable in Law and hereby upheld by this Court.

It appears from the Plaintiff's written address dated 28/01/2013 and Letter of 18/02/2013 as well as oral submissions, Plaintiff's Counsel has misconstrued, or confused about the doctrines of prospectively and or retrospectively in the interpretation of statutes. This Court's agrees with the contents of Defendant Counsel's letter of 01/03/2013 on this point and has nothing more to add.

From the foregoing paragraphs of this ruling, the Plaintiff's claims are not cognizable under Freedom of Information *(FOI) Act, 2011* and lacks the Locus Standi to institute this suit. Plaintiff's, questions 1 is answered in the negative. Accordingly originating summons dated and filed on 21/12/2012 with accompanying affidavit in support and *EXHIBIT AA* is hereby struck out with *N20,000.00 Cost* to the Defendant.

Notwithstanding the negative answer to question 1 assuming the Court has the requisite jurisdiction, I shall now proceed to determine the Plaintiff's seven claims on its originating summons on its merits. The Defendant, filed a Counter-Affidavit of 21 paragraphs in opposition to Plaintiff's processes with *EXHIBIT NS* and a written address. The Plaintiff's written address contain three issues for determination while the Defendant raised two issues for determination in his written address.

Subsequently, Plaintiff's Counsel on 07/02/2013 filed a reply address which he adopted and submitted on the Defendant's two issues for determination by this Court to wit:

1. Whether the Plaintiff will be entitled to the Information sought in *EXHIBIT AA* having regard to the combined provisions of Section 12(i), (iv) (v) 13(3), 16 of the FOI Act, 2011 and EXHIBIT "NS".
2. Whether the Plaintiff is entitled to the Relief sought in prayer 5 of the originating summons. Again Plaintiff's Counsel
3. Urged the Court to strike out paras. *10 11, 15, 16, 17, 18, 19 & 20* of the Defendants Counter-Affidavit because they are either Legal arguments or Legal conclusions which are at variance with the provisions of *Section 115(1) 4 of the Evidence Act, 2011*.

This Court has examined the said paragraphs in detail and opine they contain material facts, not at variance with *S. 115 (1) (4) of the Evidence Act, 2011*. Plaintiff's Counsel objections to paragraphs of Defendant's Counter-Affidavit are overruled in the circumstances being misconceived and lacking in substance.

It is also the Court's opinion on the substantive suit, that Plaintiff's arguments on Defendant's issues 1 & 2 fail to answer the brilliant arguments of Defendant's counsel in their written address. Their arguments on issue 1 is basically repetition of the arguments on interpretation of statutes in its Notice of preliminary objection. The Plaintiff has also failed to answer the defences of natural security, privacy, International affairs Defence, third party information raised by Defendant's Counsel.

Neither are its arguments on *EXHIBIT NS*, the Court of Appeal Judgment in *CA/A/EPC/PRES/1/2011: CPC V INEC & 4 ORS*. Comprehendable to the Court. *EXHIBIT NS* constitutes issue Estoppel between the Plaintiff and Defendants in the suit *See A.G. RIVERS Vs A.G. FEDERATION & ORS. SC 250/2009*.

In accordance with the rule of stare decisis, this Court is bound to follow it, i.e. *EXHIBIT NS* a Court of Appeal Judgment. To do otherwise, will be tantamount to judicial rascality by this Court. This Court agrees with the submissions of the Learned *Silk, Ahmed Raji* who must be commended for his Industry and Research and erudite submissions in this suit. Without much ado, *Issues 1 & 2* are also answered in the negative whilst the originating

summons is dismissed in its entirety being frivolous, vexatious, abuse of Court process and bereft of intellectual research. The Costs of *N20,000.00* is awarded to the Defendant against the Plaintiff.

HON. JUSTICE A.F.A. ADEMOLA
JUDGE
19/06/2013

PARTIES - absent

APPEARACANCES - Mrs. J.O. Obono-Obla with B. Abebe Ms.
- For Plaintiff, Adeola Adedipe with N.I.
- Zarmi, Z. Garuba, O. Omo-Egharevba
- (Ms), Peter Nwatu for the Defendant.

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON WEDNESDAY THE 3RD DAY OF JULY, 2013
BEFORE HIS LORDSHIP, THE HON. JUSTICE G.O. KOLAWOLE
JUDGE

SUIT NO: FHC/ABJ/CS/402/2013

BETWEEN:

IN THE MATTER OF PARADIGM INITIATIVE NIGERIA) …… APPLICANT

AND

DR. REUBEN ABATI) …… RESPONDENT

R U L I N G

On 26/6/13, I listened to the oral submissions of the Applicant's Counsel, K. Nnajiaka, Esq, on a Motion *Ex-parte* dated 5/6/13.

The Motion *Ex-parte* seeks for "leave to apply" for "an Order of Mandamus compelling the Respondent to make available to the Applicant detailed information of the contract set out in the Statement setting out the Name and Description of the Applicant, the Reliefs sought and the Grounds on which they are sought".

In the Statement filed pursuant to Order 34 Rule 3(2) of the Federal High Court (Civil Procedure) Rules, 2009, the Applicant who describes itself as a "a Nigerian Civil Society Organisation registered with the Corporate Affairs Commission" seeks two (2) declaratory reliefs and an Order of Mandamus as an ancillary order in furtherance of the substantive declaratory reliefs which are sought pursuant to the provisions of the Freedom of Information Act, 2011. This is a new legislation in Nigeria which in my view, forms part of the government's policy as a response to the yearnings of Nigerians and such groups as the Applicant herein to entrench transparency in public administration, and perhaps as a follow up to such other new legislations like the Public Procurement Act or the Fiscal Responsibility Act. All of these are incidental to the practice of democratic governance to facilitate accountability in the spirit and letters of the provisions of Section 14(1) & (2) (a); (b) & (c) of the CFRN, 1999 As Amended.

The Applicant's Counsel drew the Court's attend to the processes filed and adopted the written address filed in its support.

In the written address filed, the Applicant's Counsel referred to the provisions of Order 34 Rule 3(1) of the Federal High Court (Civil Procedure) Rules, 2009 and submitted that under the Freedom of Information Act, an Applicant "needs not demonstrate any specific interest in the information being applied for". The Applicant's Counsel was however silent on the status or position of the Respondent to make him amenable to an order of mandamus in the event that leave sought is granted.

In the light of the novel nature of the rights that the Freedom of Information Act, supra ha created in every citizen, notwithstanding the provision of Section 45(1) (a) & (b) of the CFRN, 1999 As Amended, I adjourned the Ruling till today so as to study the processes filed vis-à-vis the provisions of the Act which is yet to garner sufficient judicial decisions on its provisions.

Let me digress a little by saying that unless adequate statutory safe guards are embedded in the Freedom of Information Act, the underlaying intention of the government when it enacted it may be undermined or subverted as irate individuals or busy bodies will abuse the rights which it has created with regard to information on public administration. I should not be seen as an advocate for a restrictive or secretive process in public administration, but I do not think that there is any country in the world, where access to all forms of public records are thrown open even to an Applicant who is not required to show any specific interest in the information requested from a public body. It was in recognition of this obvious fact, that the drafters of the CFRN, 1999 As Amended, conscious of such legislation as

the Official Secret Act, made provision as enacted in Section 45(1) (a) (b) which I had earlier adverted to. The United States of America, that prides itself as the leader of the "free world" and the champion of "electoral democracy" is currently engaged in a battle of wit with one or her citizens, one Mr. Edward Snowden who had without authority, leaked confidential NSA security information on surveillance the United States allegedly conducted on security issues of some of its allies, including European Union countries. The point I am trying to make is that the responsibility to use the Act by Nigerians responsibly as an instrument to ensure transparency in governance should not be left so loose and at large without any form of checks and perhaps, balances. The checks or safeguards may be legislative in nature or judicial in form as was the case in the provision of Order 34 Rule 3(4) of the Federal High Court (Civil Procedure) Rules, 2009 which requires an Applicant for any of the prerogative orders for judicial review to demonstrate that he has "*sufficient interest in the subject matter to which the application for leave relates"*. That safety valve as a judicial instrument to prevent abuse of a resort to the provision of Order 34 of the Federal High Court (Civil Procedure) Rules, 2009 has been exempted from the operation of the Freedom of Information Act! I believe in transparency with regard to the processes of governance, whether it is legislative, administrative or judicial.. but, it is my view, that it is also part of transparency, that rights created by enactments such as the Freedom of Information Act, 2011 are themselves not abused by irate litigants or those one may describe as "busy bodies". I really cannot see any logic in terms of correlative duties and of jural relations between an Act that creates and vets a right in a person on the one hand, and the same Act, on the other, states that such person does not have to demonstrate any specific interest in the information being applied for! The Act has created legal rights without a corresponding legal duty. This is to create a situation where scarce public resources, time and energy are permitted to be squandered in attending to a request for information which the person applying for it need not show that he needs it if he is excused by the Act from showing that he has any specific interest in the information being applied for. It is time that the National Assembly undertakes a review of the Act so as to ensure that access to information is only made available to such Applicants who genuinely need it for specific purpose(s). I am done on this issue.

When I read through the processes filed, the Applicant, who in paragraph (iii) of the Statement filed, merely states that the Respondent is the "Special Adviser to the President on Media and Publicity" did not state that the Respondent in that capacity was being sued as one who awarded the contract in issue. Is it sufficient that by his being a "Special Adviser" to the President on Media and Publicity, was he by any extant law, involved in the award of the contact on which information, the particulars of which were stated in paragraph (iv) 1 (a) (h) and 2(a) & (b) f the Statement is requested? Is it the case, that even as "an officer of the Federal Government in charge of information", he was involved in the award of the alleged contract even though, on the face of the processes filed, he was sued *eonomine* as a "private citizen"? I am not aware of any legislation by which the "Office of a Special Adviser to the President on Media and Publicity" was created a to make the Respondent as sued in the Motion *Ex-parte* to be seen as a public body, authority or officer who is *prima facie* amendable to prerogative orders of mandamus which are judicial instruments to enforce the performance of public duties. My reason for expressing this view is based on my understanding of a community reading of the Act which is the fulcrum of the right being sought by the Applicant to enforce by way of any order of mandamus. Reading through the Act, my view is that it is essentially enacted to create an enforceable rights against public institutions and bodies established by law and not against private individuals as citizens. Who is Dr. Reuben Abati? The initiating processes, except paragraph (iii) of the Statement filed, which enjoys similar status as a pleading in proceedings initiated by a Writ of Summons where Statement of Claim is filed, was silent on the capacity in which he was sued as a Respondent. It will be an injudicious exercise of my discretion, pursuant to the provisions of Order 34 of the Federal High Court (Civil Procedure) Rules, 2009 to proceed by granting leave to the Applicant to apply for an order of mandamus against a Respondent who has not been sued o shown to be a public institution or authority, and even as an "officer of the Federal Government in charge of information", that has not been shown to have awarded any contract and to be amendable to the issuance of prerogative writs of mandamus to compel the performance of a public duty after a refusal to do so has been established. To do otherwise, s to authorize the Applicant to initiate a legal action against a presumably private citizen and to be required to make available to the Applicant, information on award of a contract that has not been shown to have been awarded by a public body, institution or authority. It is for these reasons, that I am unable to accede to the Applicant's Motion *Ex-parte* dated and filed on 5/6/13 which is refused. The said Motion *Ex-parte* is accordingly struck out. This shall be the Ruling of this Court which I deferred till today when the Motion *Ex-parte* was argued by Counsel on 26/6/13. It is struck out.

HON. JUSTICE G.O. KOLAWOLE
JUDGE
3/7/2013

COUNSEL'S REPERSENTATION

K. NNAJIAKA, ESQ. holds brief for K. AMOLE, ESQ for the Applicant.

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION HOLDEN AT ABUJA
ON FRIDAY THE 12TH DAY OF JULY, 2013
BEFORE HIS LORDSHIP HON. JUSTICE A.F.A ADEMOLA
JUDGE

SUIT NO. FHC/ABJ/CS/219/2013

BETWEEN

OLUDARE OLADEJI …….. PLAINTIFF

AND

1. THE REGISTRAR GENERAL CORPORATE }
AFFAIRS COMMISSION (CAC) ABUJA } DEFENDANTS
2. CORPORATE AFFAIRS COMMISSION (CAC) ABUJA}

JUDGMENT

This is an application brought by a Motion on Notice dated 30th April 2013, pursuant to *Sections 7 & 20* of the Freedom of Information Act 2011 and Order 34 of the Federal High court (Civil Procedure) Rules 2009 and under the inherent jurisdiction of this Honourable court praying for the following Orders hereinafter reproduced;

1. *An order* of mandamus directing and or compelling the Defendants whether by themselves and/or their agents to disclose to and or make available to the Plaintiff the information requested as contained in a letter dated 5th March 2013 addressed to the Registrar general, Corporate Affairs commission, Abuja.
2. *An Order* compelling the Defendants to pay the statutory fine of N500,000:00 (Five Hundred Thousand Naira) only each for wrongful denial of access to information.
3. *An Order* compelling the Defendants to jointly and severally pay the cost of prosecuting this action calculated at *N1,500,000:00* (One Million Five Hundred Thousand Naira) only.
4. *And for Such Further Order or Other Orders* as the Honourable Court may deem fit to make in the circumstances.

It is supported by a statement, with names of Applicant, description of Applicant's relief sought, grounds upon which reliefs are sought, facts relied upon, affidavit with E*xhibits PE4, PA1, PA2, PA5* and a written address. The 1st & 2nd Respondent's Counsel - Femi Ogunlade filed a counter- affidavit of 15 paragraphs sworn to by Muftau Bello, A Public Servant of Plot 420 Tigris Crescent Maitama Abuja, Manager in the Payroll of the 2nd Defendant with *Exhibits CAC 1-4* respectively and a written address.

Upon Service, the Applicant's Counsel Bob Olukoya filed a reply on points of Law to the Respondent Counsels written address filed 14th May, 2013.

On the 17th day May 2013 the Applicant's Counsel Miss Yetunde Atanda, withdrew prayer 1 of the reliefs in their Motion Paper since the defendants had furnished Applicant with the requisite information in the interim.

On the 27th June 2013, Counsels proffered Oral arguments and adopted their processes filed in this suit. Accordingly ruling was reserved for 10th July 2013.

After a careful perusal of the processes filed by parties in this suit the Court adopts the following 2 questions as issues for determination in this suit;

Whether the Registrar General Corporate Affairs Commission (CAC) Abuja and Corporate Affairs Commission (CAC) Abuja, are juristic personalities and proper before the Court.

Whether the Defendant have by their conduct hid any information from the Plaintiff, which could be deemed to have violated the provisions of the Freedom of information Act or any Law to warrant this suit.

ISSUE 1

1) Whether the Registrar General Corporate Affairs Commission (CAC) Abuja and Corporate Affairs Commission (CAC) Abuja, are juristic personalities and proper before the Court.

The 1st & 2nd Defendants / Respondents Counsel raised this issue in this address supporting his counter-affidavit contending the parties referred to as Defendants, i.e. Registrar General, Corporate Affairs Commission (CAC) Abuja and Corporate Affairs Commission (CAC) Abuja, are non -Juristic Persons. The 2nd Corporate Affairs is created by the CAMA as a Regulatory Body with powers of a Corporate personality, perpetual succession as well as own Land in the name under *Section 1* and therefore the Name Corporate Affairs Commission (CAC) Abuja is unknown to the Law that created it. Also the 1st Defendant, Registrar General Abuja cannot be sued as it is not a Legal entity. He cited the following cases in support;

i. AGBONMADE BANK LTD V GENERAL MANAGER, GB OLIVANT LTD & ANOR. ALL NLR 1961 (pg. 125)
ii. ATEGUBA & CO. V GURA NIG. LTD. (2005) 8 NWLR (pt.927) 429

He urged the Court to strikeout the Plaintiffs/ Applicants application on this ground. The Plaintiffs/ Applicants Counsel argued to the contrary in his reply on points of Law, submitting that *Part A, Part 1 Section 1(2)(a) and (6)* of the Companies and Allied Matters Act provides that the Head office shall be situated in Abuja and there is the abbreviation CAC on the Logo of the Commission. Also *Part A, Part 1, Section 8(1), (2) & (3)* of the Companies and Allied Matters Act provides that the appointment of the Registrar General which in their opinion is a clear distinct legal entity.

It is trite, only juristic persons have a right or power to sue and be sued in their name in other words non- Legal persons or entities may neither sue or be sued except where such right to sue and be sued is created and/or vested by or under statute. The categories of natural and artificial persons who qualify as juristic persons that can sue and be sued are referred to in several decided cases including;

I. IYKE MEDICAL MERCHANDISE V PFIZER INC & ANOR (2001) 10 NWLR (pt.722)
ii. FAWEHINMI V NBA 2 (1989) 2 NWLR (pt. 108) pages 555- 556 para. H- B.

Naming a non -juristic person as a Defendant is not a Misnomer and cannot be amended and substituted with a juristic person.

SEE *(i) AGBONMAGBE BANK LTD V G.B OLLIVANT & ANOR. ALL NLR 116 (1961) ANLR 125*
(ii) EMECHETA V OGUERI (1996) 5 NWLR (pt. 447)
(iii) MANAGER SCOA BENIN CITY V MOMODU (Unreported) Suit No. SC 23/164 delivered on 17/11/1964

It is settled Law, such a party to a suit ought to be struck out as rightly submitted by Defendants/ Respondent's Counsel, Femi Ogunlade, that the 1st Respondent as sued in this suit is unknown to the Companies and Allied Matters Act and the 2nd Respondent is not a Legal entity. It is the Court's opinion they are both non- Juristic Persons, and where either party is not a Legal person the action is liable to be struck out as being incompetent.
SEE (i) ATEGUBA & CO. GURA. NIG LTD. (2005) 8 NWLR (pt. 927) 429.

ISSUE 2

2) Whether the Defendant have by their conduct hid any information from the Plaintiff, which could be deemed to have violated the provisions of the Freedom of information Act or any Law to warrant this suit.

From the foregoing paragraph of this ruling and the determination of issue 1 in favour of the Defendants, that there exists no proper parties before the Court. It is unnecessary and academic to resolve Issue 2. Accordingly this suit is hereby struck out upon a determination of issue 1 hereinbefore with no order as to Cost.

HON. JUSTIC A.F.A ADEMOLA
JUDGE
12/07/2013

PARTIES - absent

APPEARANCES - B. Olukoya with Y. Atanda Ms. For Paintiff, Gbenga Olaleye for Defendants.

IN THE HIGH COURT OF JUSTICE OF BENUE STATE OF NIGERIA
IN THE BENUE STATE JUDICIAL DIVISION
HODLEN AT MAKURDI

15-7-2013

SUIT NO: MHC/137/2013

BEFORE HIS LORDSHIP, HONOURABLE JUSTICE A.O. ONUM JUDGE

BETWEEN:

ROMMY MOM …….. PLAINTIFF

AND

1. THE EXECUTIVE SECRETARY BENUE STATE EMERGENCY MANAGEMENT AGENCY) DEFENDANTS
2. THE ATTORNEY GNERAL & COMMISSIONER FOR JUSTICE, BENUE STATE)

J U D G M E N T

This process filed on 18-4-2013 at the instance of Rommy Mom (hereinafter referred to as "the Applicant") of No. 71 NUJ House Ankpa Quarters Road, Makurdi against the Executive Secretary of the Benue State Emergency Management Agency and the Attorney General of Benue State is essentially for an compelling the Executive Secretary to release information under his custody to the Applicant pursuant to the provisions of the Freedom of Information Act, 2011. It is also for the determination of the question whether or not the Executive Secretary, being a public servant, is entitled to deny the Applicant access to the information that he has requested for. The reliefs sought are couched in exactly the following words:

A. "AN ORDER compelling the Respondents to provide the Applicant with information/records of the total monies collected by the 1st Respondent from the Federal Government, State Government, Local Government, Private Organisations, Donor Agencies as aid to flood victims as a result of last year's flooding that affected Benue State.
B. AN ORDER directing the 1st Respondent to disclose how the monies collected have been or being allocated clearly showing the expenditure heads and the exact amounts thereto.
C. AN ORDER directing the 1st Respondent to provide the Applicant with the records showing the persons monies were paid to and the amounts paid to them and other relevant details
D. ANY FURTHER ORDER OR OTHERS as the Honourable Court may deem fit to make in the circumstances of this application".

The grounds upon which the reliefs re sought are stated on the fact of the process as follows:

1. "On the 27/3/2013 the Applicant wrote a letter to the 1st Respondent demanding for information and records from the Respondents on how much monies they got and how they spent these monies on the flood victims, and records of such expenditures.
2. Since that date, the 1st Respondent has refused or neglected to provide the Applicant with the said information
3. That the Applicant has therefore resorted to Court to compel the 1st Respondent to provide him with this information, under the Freedom of Information Act, 2011".

The Supporting Affidavit of one Benedict Asan Gabin, the Litigation Secretary in the Law Chambers of the Applicant, is simply as follows in its relevant part:

3. That I was informed by the Applicant at our office at No. 71 Ankpa Quarters Road Makurdi, during his interview with is Lawyer T.K. Agba Injo of Counsel on the 16/4/2013 at about 2.30pm and I verily believe him as follows:

   i. That on the 27/3/2013 he wrote a letter to the 1st Respondent asking for the information/records

of the total monies that the State Emergency Management Agency had collected from the Federal Government, State Government, Local Government, Private Organisation, and Donor Agencies as aid to flood victims as a result of last year's flooding. That the letter is attached and marked Exhibits T.K. 1.

ii. That the letter was delivered to them on 28/3/2013, and up till now there has being no response from the 1st Respondent.

iii. That the period of seven days has lapsed".

As against these facts, including he supporting affidavit evidence, paragraph 4(a) (e) of the counter-affidavit deposed to by one Agbo Ella, the Principal Litigation Registra in Benue State Ministry of Justice, on behalf of the Respondents reads as follows:

"(a) That the State Emergency Management Agency has not collected any monies from the Federal Government, State Government, Local Government, Private Organisation and Donor Agencies as aid to flood victims as result of last year's flooding in the State.

(b) That the relief committee has not operated account for the purpose and is yet to incur direct expenditure.

(c) That the 1st Respondent only makes recommendations to the State Government concerning approval and release of relief to victims of flood and other natural disasters.

(d) That the Respondent is not in custody or control of the information sought by the Applicant via his letter dated 27th March, 2013 hence their lack of response thereto.

(E) That the 1st Respondent is not the proper agency to furnish the information sought by the Applicant

This process puts the provisions of the Freedom of Information Act, 2011 regarding the right to source for and obtain information to test. The particular provisions of the Act called to attention are Sections 1, 2, 4, 20 and 25. I have looked at the provisions and it is without doubt that by their combined effect, anybody who desires information about the activities of any public institution is generally at liberty to promptly access it without any hindrance, whether or not hr has any special interest in the subject-matter for which he demands the information. I have used the word "generally" here in conscious recognition of the fact that there are exemptions to the general rule. Section 2 of the Act particularly imposes a duty on every public institution to keep account for its stewardship and so to ensure that the records of all its activities, operations and businesses are properly available for purposes of meeting prospective demands of those who may seek for such information. The Act is indeed a piece of legislation that should be the envy of democratic setting. Be that as it may, the provisions clearly anticipate only such information as are real and available to either the person from whom they are required or to some other person within his knowledge to whom he could re-direct the request of the person whom seeks for the information. In exercising jurisdiction to enforce the right to information the Court is therefore entitled to ensure that it does not just draw conclusions from unverified accounts, even if rumours of such accounts abound in the public domain. This is to say that the request for information must be based on concrete facts so that any order compelling the Respondent to supply same is not directed into a vacuum, with the concomitant result of bringing such order to ridicule. This is more importantly so because the Freedom of Information Act, supra, can certainly not be intended to provide an avenue for chasing shadows or be used as an instrument form witch-hunting.

In the instant process it is quite clear from the affidavits evidence filed and exchanged between the parties that while the parties may not have made any issue of the occurrence of the flood disaster in Benue State, leaving victims in its wake, the statements of facts and the affidavit in verification of the facts are merely built around the figment of the Applicant's imagination that certain amounts of money were donated to the 1st Respondent by Government and other donors towards the management of the disaster. It has been alleged in the counter-affidavit that no monies were received by the 1st Respondent on account of the flood, which denial raises the important point of whether or not the information required is available within the domain of the 1st Respondent or to any other person within his knowledge to whom he could re-direct the request for information. The law is clear on the point that a Court is not expected to be speculative in deciding conflicts in affidavits evidence either way, and, generally, that such conflicts can only be resolved by recourse to oral evidence or some other facts in evidence that render either side more credible as against the other. See the case of *F.S.B International Bank Limited v. Imano Nigeria Limited (2000)* FWLR (Pt. 19) 392 at 408 paras F G where Achike, JSC said on the need to resolve conflicts in affidavits evidence before a decision can be based thereon:

"Conflicts in affidavits on fundamental issues to the matter in controversy must be attended to and not just glossed over. A Court of law, be it trial or appellate, is not imbued with divine or magical powers in the state that it can divinely or marginally resolve conflicts in factual matters which may only be done, in certain circumstances, by dispassionate and painstaking evaluation of the facts or evidence placed before it."

The known exceptions to this general rule include instances where:

1. Some documentary evidence attached to either of the affidavits makes it more probable that the case of either side to the conflict is more authentic see *Okere v. Nlem* (1992) 4 NWLR (Pt. 234) 132.
2. The conflict only touches on some flimsy or immaterial aspects of the substantive matter in controversy between the parties, in which case the conflicts may be ignored see *First Bank of Nigeria Plc v. May Medicine Clinics and Diagnostic Centre Limited* (2001) 4 SCNJ 1 at 12.
3. The facts in conflict are inadmissible in evidence see *Yusuf v. Cooperative Bank Ltd.* (1989) 6 SCNJ (Pt. 1) 108.
4. One of the parties has filed affidavits that are self-contradictory, in which case the advantage of the other's see *Arjay Limited v. Airline Management Support Limited*(2003) FWLR (Pt. 156) 943 at 969 paras F H
5. Where the issue before the Court is interlocutory and the conflict touches on some point of importance on the main case, in which case the Court must exercise its discretion in a matter that will avoid a pre-judgment on the conflict see *Anyaegbunam v. Attorney-General of Anambra State (*1995) 9 NWLR (Pt. 417) 97 at 108 para B; *Obeya Memorial Specialist Hospital Limited v Attorney-General of the Federation* (1987) 3 NWLR (Pt. 60) 325.

I have assiduously perused the processes filed and exchange in the instant process and I do not see the Applicant's case to come within any of these known exceptions. Of course the Applicant is also entitled, by dint of the some relevant provisions of this same Freedom of Information Act, to demand information from some relevant officers of the Federal, State or Local Government on the important question whether or not either tier of government made any funds available to the 1st Respondent following the flood disaster that is in the focus of the instant process. If the Applicant had been provided with any such information before filling the suit then he has not equipped this Court with such information to enable me exercise my judicial powers in line with the substantive prayer in the suit. In the same light the question posed whether or not the 1st Respondent could deny the Applicant the information he seeks is only hypothetical.

In conclusion, after considering he processes filed and exchanged, I see no substance in the substance of the suit and it is hereby dismissed.

A.O. ONUM. J.
15.7.2013

IN THE HIGH COURT OF JUSTICE
OYO STATE OF NIGERIA
IN THE IBADAN JUDICIAL DIVISION
HOLDEN AT IBADAN

BEFORE THE HONOURABLE JUSTICE S.A. AKINTEYE *JUDGE*
THIS THURSDAY THE 31ST DAY OF OCTOBER 2013

COURT NO. 5
SUIT NO: M/332/12

BETWEEN:

YOMI OGUNLOLA & 1 OR ……. CLAIMANTS

AND

SPEAKER, OYO STATE HOUSE
OF ASSEMBLY & 3 ORS ……. DEFENDANTS

Parties are absent

Mrs. F.B. Segun-Olakojo, Director, Legal Drafting & Parliamentary Counseling with Mr. O.S. Thomas, Director, Legal Services, House of Assembly, Mrs N.I. Shittu, State Counsel and Mr. A.T. Ogundare, State Counsel for the Defendants.
No legal representation for the Claimants.

J U D G M E N T

By a ruling delivered on the preliminary objection raised to this originating summons on the 28th of March 2013, the questions for determination in this suit are as follows:-

1. "Whether ANY ACT OF THE NATIONAL ASSEMBLY, made in furtherance of its powers under Section 4(2) and 4(4) (b) of the 1999 Constitution (as amended) to make laws for the peace, order good government of the Federation or any part thereof REQUIRES STATES' DOMESTICATION to be applicable in the respective states of the Federation?
2. Whether the FREEDOM OF INFORMATION (FOI) ACT 2011 intended to ease access inter alia to Public Records and Information SHOULD BE CONSTRUED RESRICTIVELY as applicable only to Federal Government Institutions?
3. Whether in construing Section 2(1) of the Freedom of Information Act, 2011 the 3rd Respondent is right to hold that the Freedom of Information Act 2011 is inapplicable to Oyo State same not having been domesticated.

If the ANSWERS to the above issues are in the negative, then the Applicants seek the following reliefs:

1. Declaration that the powers granted to the National Assembly under Section 4(2) of the 1999 constitution (as amended) to make laws for the peace, order and good government of the Federation or any part thereof is made absolute by the provisions of Section 4(5) of the 1999 Constitution (as amended) albeit prejudice to the provisions of Section 4(7) thereof.
2. Declaration that Section 12 of the 1999 Constitution (as amended) which is in furtherance of item 31 on the Exclusive Legislative list intended for implementing international treaties has no domestic equivalent under the Constitution or any other law empowering states to domesticate Acts of the National Assembly for applicability in the respective states.
3. Declaration that Section 2(1) and 3(7) of the Freedom of Information (FOI) Act, 2011 are not restrictive but of general application to all tiers of government i.e. Federal, State and Local Government, their officials, agencies or institutions howsoever described.

The originating summons is supported by an 18 paragraph affidavit deposed to by one Ola Bada, a legal practitioner and 2nd Claimant to this suit.

In his written address dated 29th August 2012 to the originating summons, learned counsel for the claimants who is the 1st claimant referred to the questions for determination in the originating summons and submitted as follows:

On the 1st question, counsel referred to Sections 4(2) and 4(3) of the 1999 Constitution of Nigeria (as amended) and submitted that the National Assembly's competence to legislate thereon to the exclusion of any other law making body in the Federation is not in doubt. He said the constitution did not confer upon the states powers which the houses of Assembly do not otherwise possess. He said in the absence of provisions in the concurrent legislative list empowering Houses of Assembly to domesticate Acts for their applicability in the component states, the states cannot arrogate to themselves such power.

Counsel also referred to Section 4(4) and 4(5) of the 1999 Constitution of Nigeria and submitted that the National Assembly and the Houses of Assembly of states have concurrent powers to make laws on matters within the concurrent Legislative list but the laws made by the National Assembly on the concurrent list have supremacy over states legislation on the same matters and where so made, they become applicable without more.

He further submitted that by virtue of Section 4(5) of the constitution (supra) which voids state law on the ground of inconsistency, a state law can also be void by applying the doctrine of covering the field. He said where identical legislation on the same subject matter were validly made by the state and the Federation, and where the Federal Act is intended to cover the entire field and provide what the law on a subject should be for the entire Federation, that over law will be void. He cited A-G Ogun State Vs. Aberuagba (2002) 2 WRN at 57.

He further submitted that were such laws are made by the National Assembly, they become of immediate application as though they were on the Exclusive Legislative List, irrespective of the provisions of any state law to the contrary.
He also stated that it is not out of place for states to re-enact Federal Law, there is no compulsion by law to do so and the rule of inconsistency is always acting as a check on the choice. He cited A-G for Ontario Vs. A-G for the Dominion (1896) AC 348.

(2) A.G. Ogun State Vs. A-G Federation (1982) 1-2 SC at 95-96
(3) Lakanmi Vs. A-G. Western Region (1974) EGSLR 713 at 722

Counsel submitted further that where matters have real and substantial relation to the National interest, and they are outside both the Exclusive and the Concurrent Legislative lists as contained in the 1999 Constitution of Nigeria (as amended), they can be dealt with at the National level by legislation in accordance with the supplementary powers of the National Assembly under Section 4 (4) (b), even if doing so will amount to interference with activities within a State or States, provided it is to the attainment of a legitimate end. He said when it is so addressed by Legislation, such law becomes applicable without the need for further enactment into law by the respective component States of the Federation. See A-G Ogun State Vs. A-G Federation (Supra).

(2) A-G Ondo State Vs. A-G Federation (2002) Vol. 22 WRN 1

He also referred to Section 12(1) of the 1999 Constitution (as amended) and stated that the provision has no comparable provision under domestic law requiring that an Act of the National Assembly be first domesticated for its applicability in the component units of the Federation.

He said Section 15 of the interpretation Law Cap. 65 Laws of Oyo State 2000 is not the same as Section 12(1) of the Constitution.

He said the provision is for mere administrative convenience and is incapable of suspending or delaying the applicability or abrogating an Act validly made by the National Assembly in the absence of non-compliance with the said Section 15 of the Interpretation Law. He urged me to resolve the 1st issue in the negative.

Counsel argued the 2nd & 3rd questions together.

He submitted that following the Supreme Court decision in A-G Ondo State Vs. A.G. Federation (Supra) that Sections 4(2) 15 (5) and items 60(a), 67 and 68 of the Exclusive Legislative list of the 1999 Constitution not only impose a duty on the Federal Government to abolish all corrupt practices and abuse of power but also impose the duty of making law through the National Assembly for that purpose.

He further submitted that information is neither in the Exclusive nor Concurrent Legislative lists, but where matters

have real and substantial relation to the national interest and they are outside both the Exclusive and the Concurrent lists as contained in the 1999 Constitution (as amended), they can be dealt with at national level by legislation in accordance with the supplementary powers of the National Assembly under Section 4 (4) (b), even if doing so will amount to interference with activities within a state or states, provided it is to the attainment of a legitimate end.

See A-G Ogun State Vs. A-G Federation (Supra)

Counsel submitted further that while it is not of place for states to re-enact Federal laws as has been the usual practice in Lagos State for instance, there is no compulsion by law to do so and the rule of inconsistency is always acting as a check on the choice. He said it is utter flummery to hold that in the absence of such re-enactment by States, Federal Law is inapplicable to states and referred to Section 21(1) of the Freedom of Information Act 2011. He also referred to Section 32 of the Freedom of Information Act for the definition of "Public Institution"

He further stated that the definition of "Public Institution" is not restricted to any level of government and should therefore not be construed restrictively.

Counsel contended that the words "Act" "Law" and "Regulation" as used in Section 2(1) of the Freedom of Information Act, 2011 express the intendment of the drafters of the law to cover the entire field without more and that it is trite that when the words in an Act are clear and unambiguous, they should be given their ordinary meaning. He cited Akinola Vs. Adegbenro (1963) AC 614

(2) Awolowo Vs. Shagari & Ors. (1979) 9-9 SC 31
(3) PDP & Ors Vs INEC SC (Pt. 2) at 30

He referred to Section 12(1) of the 1999 Constitution (as amended) and stated that the provision has no comparable provision under our domestic jurisprudence requiring that an Act of the National Assembly be first domesticated in the component units of the Federation. He said that Section 15 of the Interpretation Law Cap. 65 Laws of Oyo State is not the same as Section 12(1) of the Constitution referred to and cannot be a ground for postponing or delaying the applicability of or indeed abrogate a Federal Act in the absence of such modifications.

In view of this, counsel contended that the Defendants cannot be right in holding that the Freedom of Information Act 2011 is inapplicable to Oyo State, same having not been domesticated.

He urged me to resolve the 2nd & 3rd issues in the negative and grant all reliefs sought in the originating summons.

In her written address in opposition to the originating summons. Learned Counsel to the Defendants, Mrs. F.B. Segun Olakojo, Director, Civil litigation and Advisory Services 1, identified 2 issues for determination as follows:

1. Whether an act of the National Assembly enacted on a subject matter which is not in the exclusive legislative list of the 2nd schedule of the constitution of the Federal Republic of Nigeria 1999 automatically becomes applicable in Oyo State of Nigeria.
2. Whether the FOI (Freedom of Information Act, 2011) an Act of the National Assembly enacted pursuant to item 4 of the concurrent list in the second schedule of the 1999 Constitution of the Federal Republic of Nigeria automatically applies in Oyo State considering the provisions of item 5 on the same list.

On the 1st issue, counsel submitted that Nigeria operates a Federal system of government and that powers are vested in the National Assembly and the Houses of Assembly of the 36 States by the Constitution of Nigeria.

She said Section 4 of the 1999 Constitution of Nigeria empowers the National Assembly to enact laws for the Federation subject to the provisions of Section 4(2) and (3) of the Constitution. She also referred to Section 4(4) (a) & (b) of the Constitution which confers on the National Assembly the power to legislate on any matter in the concurrent legislative list set out in the first column of part II of the second schedule.

She submitted that the golden rule of interpretation of the constitution must prima facie be given their ordinary meaning. See Ekpenkhio Vs. Egbadon (1993) 7 NWLR (Pt. 308) 717 at 739 (Par. F-H

(2) NNPC & Anor Vs. Famfa Oil Ltd. (2012) 5 SC (Pt. 11) 38 at Pg 49
She said it can be deducted that the National Assembly can only enact laws on matters within the exclusive and concurrent lists to the extent prescribed by the Constitution.

Counsel also referred to Sections 4(6) and 4(7) of the Constitution (Supra) and stated that the houses of Assembly of states are also vested with powers to make laws for the states in accordance with the provisions of the Constitution. She said this power has not been eroded, diminished or abolished in any form.

She said it is not true that once the National Assembly enacts laws, such laws become of automatic application throughout the component States of the Federation and urged me to so hold and discountenance claimant's argument.

On the 2nd issue, counsel submitted that the Freedom of Information Act is not based on any item in the Exclusive Legislative list which would have ousted the jurisdiction of any other body in making its own laws concerning the subject matter. She said the explanatory memorandum of the Act explains that the Act is to make public records and information freely available and that archives and public records are items contained in the concurrent legislative list in part II of the second schedule of the 1999 Constitution.

She said the National Assembly and the State House of Assembly can legitimately legislate on these items as admitted by the claimants.

Counsel referred to items 4 & 5 of the concurrent list and stated that the intention of the Constitution is to have the National Assembly enact laws on this subject matter in relation to Archives and public records of the Federation while the State House of Assembly enacts its own laws in respect of archives and public records of Oyo State. However, she said the vital point on this is that whatever law is passed by Oyo State House of Assembly on this subject matter must not be inconsistent with the Act of the National Assembly already enacted. She said each state of the Federation has its own peculiarity and that is the spirit behind the Constitution in putting these items in the concurrent list and not in the Exclusive Legislative list.

Counsel further submitted that Section 4(5) of the Constitution is not applicable because Oyo State has not passed any law that is inconsistent with the Freedom of Information Act.

On the issued of covering the field as canvassed by the claimants, she submitted that the case of A-g Ogun State Vs. Aberuagba (Supra) is not on all fours with the present one.

She said what the house of Assembly of Oyo State is saying is that it has to enact its own law to adopt the provisions of the Act for it to become applicable in Oyo State. She said this is not the first time this will be done and gave some examples such as 'Public Officers' Protection Law, "State Universal Basic Education Law", Child Right Laws", Oyo State Independent Electoral Law" and "Criminal Law". She said these laws were legitimately enacted by the State Legislature despite the fact that there are Federal Government Acts enacted on the same subject matter. However, she said such laws must not be inconsistent with the provisions of the Federal Acts.

Counsel further submitted that in order to adopt the FOI Act in Oyo State, it is necessary to enact a law which is not inconsistent with the Act and will reflect all formal alterations as provided in Section 15 of the Interpretation Law Cap. 65 Laws of Oyo State 2000.

She further stated that the intention of the Federal Legislature in enacting the Act was not to make its provisions of automatic application throughout the component states of the Federation of which Oyo State is one and referred to Section 31 of the Act where Minister is defined and there is no reference to "Commissioner" as provided for the states of the Federation."

Also, she stated that the definition of government in S. 29 of the Act shows that the FOI Act is only applicable to Federal Government institutions as opposed to that of the government of Oyo State.

Furthermore, she said Section 29(1) of the Act refers to the Attorney-General of the Federation who is a Federal Government officer and not that of the state.

Counsel finally submitted that the provisions of the FOI Act is not intended to have immediate and automatic application in Oyo State until it is adopted and enacted by the Oyo State House of Assembly which is constitutionally empowered to do so.

She urged me to dismiss Claimants' claim.

I have read and considered the originating summons as well as the written addresses of both counsel.

I wish to take the questions for determination in this suit one after the other as listed by the Claimants.

The 1st question is this:-

> "Whether any act of the National Assembly, made an furtherance on its powers under Section 4(2) and 4(4)(b) of the 1999 Constitution (as amended) to make laws for the peace, order and good government of the Federation or any part thereof requires states domestication to be applicable in the respective states of the Federation.

It will be pertinent to set out here, some sections of the 1999 Constitution of Nigeria (as amended). They are sections 4(2), (3), 4(4), (a) & (b) & (5). They state as follows:-

4(2). "The National Assembly shall have power to make laws for the peace , order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative list set out in Part 1 of the Second schedule to this Constitution.

(3). The power of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List shall, save as otherwise provided in this constitution, be to the exclusion of the House of Assembly of states.

(4) In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say:-

- (a) any matter in the concurrent Legislative List set out in the first column of Part II of the second schedule to this constitution to the extent prescribed in the second column opposite thereto; and
- (b) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this constitution

(5). If any law enacted by the House of Assembly of a state is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other law shall to the extent of the inconsistency be void.

There is no doubt that Nigeria is a federation with component number of states and the Federal Capital Territory. The 1999 Constitution (as amended) has spelt out matters within the legislative competence of the National Assembly and that of the component states House of Assembly. It has also given powers to both the National Assembly and states Houses of Assembly to legislate on matters spelt out in the concurrent list of part 2 of the 2nd schedule with a provision that a state law must not be inconsistent with a law validly made by the National Assembly.

Claimants' counsel had strenuously argued that the National Assembly can legislate not only on matters specified in the Exclusive legislative and concurrent lists, but can also legislate on matters not covered in both lists for the peace, order and good government of Nigeria or any part thereof.

On the other hand, Defendants' counsel argued that Nigeria being a Federation, the National Assembly cannot legislate on matters not specified in both the Exclusive and concurrent lists because of the peculiarities in each state. She also posited that for such a law made by the National Assembly to be applicable, it has to be adopted by the state House of Assembly.

It is my respectful view that the National Assembly by virtue of Section 4(2) (3), 4(4) and 4(5) of the Constitution of Nigeria (supra) earlier referred to has the competence to male laws for the peace, order and good government of the Federation or any part thereof not only o matters specified in both the Exclusive and concurrent lists of the Constitution but on all other matters to which it is empowered to make laws.

The issue of whether the National Assembly can make law for the peace, order and good government of Nigeria came up for consideration by the Supreme Court in the case of A-G Ondo State Vs. A-G Federation & Ors (2002) 9 NWLR (Pt. 772) Pg. 222. The case is on the legality of the corrupt practices and other Related Offences Act, 2000 as it is applicable to Ondo state.

In the said judgment, his lordship, Hon. Justice Uwaifo J.S.C at Pg 417 paras D-H stated as follow:-

> "It would seem right to conclude that where a subject mater in its manifestation spreads across the states and even over the borders of Nigeria and is such that is best suited for legislation by the National Assembly upon a liberal construction of all relevant provisions of the Constitution, a legislation thus made cannot be said to be an interference with the affairs of the states just because it is made applicable to all over the Federation. The purpose and mission of the Act are clear. The Act is meant to make

justiciable by legislation a declared state policy to abolish corrupt practices and abuse of power"…….

From the authority above, it could be seen that the National Assembly has the legislative competence to make laws for the peace, order and good government of Nigeria that is applicable to all states of Nigeria without infringing on the autonomy of the states if such a legislation is designed to correct a malaise plaguing the country.

It is not true as canvased by learned counsel to the Defendants that such a legislation has to be adopted by the states of the Federation to be applicable in their states. I will say more on this later on in this judgment.

I will therefore resolve the 1st issue in the negative.
I will consider questions 2 and 3 together.
The 2nd question is this:-

"Whether the Freedom of Information (FOI) Act, 2011 intended to ease access inter alia to Public Records and information should be construed Restrictively as applicable only to Federal Government Institutions?

The 3rd question is:-

Whether in construing Section 2(1) of the Freedom of Information Act, 2011, the 3rd Respondent is right to hold that the Freedom of Information Act, 2011 is inapplicable to Oyo State same not having been domesticated."

Claimants had argued that the FOI Act is applicable throughout Nigeria, including the states. He contended that although it is not included in either the exclusive or concurrent lists of the 1999 Constitution (as amended), nevertheless, the National Assembly made it applicable to both the Federal Government and State Governments and their agencies.

On the other hand, it was the contention of the Respondents that the FOI Act is not applicable to Oyo State as the issue of public records is on the concurrent list of 1999 Constitution (as amended) and that Oyo State House of Assembly has not adopted it.

The Freedom of Information (FOI) Act is "An Act 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 protection of personal privacy ……." That is the intendment of the law.

To answer this question, I have to refer to some sections of the law. In this wise, I wish to refer to Section 2(1) and 31(3) of the FOI Act (supra) for the definition of Public Institution.

Section 2(1) states as follows:-

"A public institution shall ensure the proper organization and maintenance of all information in its custody in a manner that facilitates public access to such information."

Section 31(3) on "Public Institution"

Public Institution means any legislative, executive, judicial, administrative or advisory body of the government, including boards, bureau, committees or commissions of the state and any subsidiary body of those bodies including but not limited to committees and subcommittees which are supported in whole or in part by public fund or which expends public fund and private bodies providing public services….., performing public functions or utilizing public funds."

Section 39(1) of the 1999 Constitution (as amended) provides as follows:-

"Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference."

It is a cardinal principle of interpretation of statutes that where the words used are plain and unambiguous, they should be given their ordinary and plain meaning.

See Egbe Vs. Yusuf (1992) NWLR (Pt. 245) 1.
(2) Nwakire CS. C.O.P (1992) NWLR (Pt. 241) 289
(3) Okotie Eboh Vs. Manager (2004) 18 NWLR (Pt. 905) 242.

Also, it has been said that where the definition section has defined a particular word or expression, the meaning so

given to the word, unless the context otherwise requires, shall be used throughout the statute. See Kalu Vs. Odili (1992) 6 SCNJ 76.

A careful reading of that Constitutional provision and the FOI Act will reveal that the Act is aimed at fulfilling the fundamental right provision to "receive information without interference."

It is my respectful view that information is not within the Exclusive or concurrent lists of the 1999 Constitution (as amended). Nevertheless, the Act is of great application to both the Federal and State Governments as defined in "Public Institution" which refers to any legislative, executive, judicial, administrative or advising body of the government including boards, bureau, committees or commissions of the state and any subsidiary bodies of those bodies……..

Defendants have argues that the FOI Acts was enacted by the National Assembly pursuant to item 4 of the concurrent list in the 2nd schedule of the 1999 Constitution (as amended) and that it is item 5 of the concurrent list that grants power to Oyo State House of Assembly to enact its own law.

For ease of reference, I will refer to items 4 and 5 of the con concurrent list.
Item 4 provides as follows:-

> "The National Assembly may make laws for the Federation or any part thereof with respect to the archives and public records of the Federation."

Items 5 provides as follows:-

> "A House of Assembly may, subject to paragraph 4 hereto, make laws for that state of any part thereof with respect to archives ad public records of the Government of the state."

A careful perusal of the provisions above will reveal that what is in the concurrent list relates to "archives and public records of the Federation and the Government of the state. In other words, both the National Assembly and State Houses of Assembly can legislate on "archives and public records" of the Federation and Governments of the states respectively.

I wish to state that legislating on "archives and records" of the Federation and Government of the state is quite different from the legislating on Freedom of Information Act. The FOI Act deals with public records and information on public institutions as defined in the Act.

I wish to further state that if a state government legislates on archives and records which is inconsistent with that of the National Assembly, the legislation by the state shall be void to the extent of the inconsistency. See Sec. 4(5) of the 1999 Constitution (as amended).

It is therefore quite clear that the FOI Act was enacted by the National Assembly pursuant to section 4(4)(b) of the 1999 Constitution (as amended) in order to bring into effect the provision of Section 39(1) of the same constitution which guarantees fundamental right "to receive and impart ideas and information without interference."

It is my further view that National Assembly has enacted the FOI Act to be operational throughout the country in the interest of the common good and national interest. See the case of A G Ondo State Vs. A G Federation (supra).

It has been argued by the Defendants that in order to adopt the FOI Act in Oyo State, it is necessary to enact a law that is not inconsistent with the Act and will reflect all formal alternations as provided for in Section 15 of the Interpretation Law, Cap. 65. Laws of Oyo State, 2000.

With respect to learned counsel, for the Act to be applicable, it is not necessary for it to be adopted in Oyo State. The FOI Act as stated earlier is of general application to both the Federal and State Governments in Nigeria. Section 15 of the Interpretation Law of Oyo state has provision in it where the Act shall be read with such formal alternations as to names, localities, offices, persons etc as to make it applicable to our circumstances.

At this juncture, I wish to note that the FOI Act is not the first law enacted by the National Assembly that covers the whole Federation of Nigeria. There is also the Economic and Financial Crimes Commission (EFCC) Act as well as Independent Corrupt Practices Commission Act (ICPC) which covers the whole country. Officials of States, Local Governments and Federal Government are being arraigned in court or investigated for various offences under these

laws passed by the National Assembly and without the State Governments having adopted the EFCC and ICPC Acts in their various states.

I wish to state that there is no section in the 1999 Constitution (as amended) which prescribes that a law enacted by the National Assembly has to be adopted by the State House of Assembly to make that law applicable to the state.

It is my respectful view that it is unnecessary for state governments to adopt the FOI Act in their respective states before being applicable there.

I therefore also resolve the 2nd question in the negative.

On the issue of domestication of law enacted by the National Assembly before being applicable in Oyo State. I wish to say that domestication of law belongs to the realm of International Law. Item 31 of the Exclusive Legislative list in the 2nd Schedule Part 1 of the 1999 Constitution of Nigeria (as amended) confers jurisdiction as regards treaties on the National Assembly. It is the National Assembly under Section 12 of the 1999 Constitution (supra) that can pass such treaties into law before they are applicable in Nigeria. This function of the National Assembly is referred to as the domestication of law.

Furthermore, as argued by the Defendant assuming (without so deciding) that the Freedom of Information (FOI) Act falls within the concurrent list meaning that both the National Assembly and Oyo State House of Assembly have the legislative competence to legislate on it and there is no legislation yet on this by Oyo State House of Assembly, then the FOI Act passed by the National Assembly will be operational in Oyo State. This is because even if there is such a law passed by the House of Assembly of Oyo State, it cannot be inconsistent with the FOI Act, meaning that the FOI Act still prevails over any law passed by Oyo state House of Assembly over the same subject matter.

See A-G Ogun State Vs. A-G Federation
It is therefore my respectful view that the 3rd Respondent is wrong to hold that the FOI Act is not applicable to Oyo state.

Having said all these, it is my respectful view that questions 2 and 3 have to be resolved in the negative.

Accordingly, it is hereby declared as follows:-

1. That the powers granted to the National Assembly under Section 4(2) of the 1999 Constitution (as amended) to make laws for the peace, order and good government of the Federation or any part thereof is made absolute by the Provisions of Section 4(5) of the 1999 Constitution (as amended) without prejudice to the provisions of Section 4(7) thereof.
2. That section 12 of the 1999 Constitution (as amended) which is in furtherance of item 31 on the Exclusive Legislative list does not empower states to domesticate Acts of the National Assembly for applicability in the respective states.
3. That Sections 2(1) and 31 (3) of the Freedom of Information (FOI) Act, 2011 are not restrictive but of general application to all tiers of government i.e. Federal, State and Local Government, their officials, agencies or institutions howsoever described.

That shall be my judgment in this case.

HON. JUSTICE S.A. AKINTEYE
31ST OCTOBER 2013
JUDGE

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON MONDAY THE 23RD DAY OF DECEMBER, 2013
BEFORE HIS LORDSHIP, HON. JUSTICE A.R. MOHAMMED
JUDGE

SUIT NO: FHC/ABJ/CS/278/2013

BETWEEN:

PUBLIC & PRIVATE DEVELOPMENT CENTRE LTD/GTE (PPDC) ……APPLICANT

AND

1. NIGERIAN NATIONAL PETROLEUM CORPORATION (NNPC)
2. THE GROUP MANAGING DIRECTOR NNPC …… RESPONDENTS

JUDGMENT

By a Motion on Notice for order of mandamus dated 30/5/13 but filed on 31/5/13, the Applicant seeks for:-

1. A DECLARATION that the failure of the 1st and 2nd Defendants to furnish Applicant with the procurement sought vide Applicant's letter of 21st March, 2013 amounts to a wrongful denial of information under the Freedom of Information Act, 2011
2. ORDER of the Court compelling the Respondents jointly and severally, within seven days of the judgment herein, to furnish Applicant with information and copies of documents sought vide Applicant's letter of 21st March, 2013 which information and documents are set out in the schedule hereto.

In the schedule to the application, the documents sought by the Applicant were listed as follows:-

1. Copies of the procurement plans and information, including needs assessment and evaluation, identification of goods and works required for the bid.
2. Copies of advertisements of invitation for bids published in at least two national dailies and the Federal Tenders Journal.
3. Evidence of the advertisement on NNPC website and notice board.
4. Copies of bid submission register and duplicate copies of receipts issued to bidders on submission of bids.
5. Minutes of public bid opening for technical and financial proposals.
6. Copies of standard bidding documents issued to bidders in respect of the procurement.
7. Copies of Bid Evaluation Report by the Technical Sub-Committee of the Tenders Board.
8. Copy of the minutes of the meeting of the Tenders Board approving the winning bidder.
9. Copies of rejection letters or notices (if any)
10. Copies of notices of acceptance of bids issued by the procuring entity (NNPC) to the successful bidder immediately a winner was selected (if any).
11. Letter of notification of award of contract (if any)
12. Signed contract document (if any).
13. Copy of formal by bidders (protest letters) and the decision in such complaints/appeals (if any).
14. Copy of summary of details of contract published by NNPC or BPP (if any).

The application is supported by a statement which contained the name and description of the Applicant, the reliefs sought and the grounds upon which the reliefs are sought. The application is also accompanied with affidavit in support and exhibits marked "A", B and B^1 respectively. The application is also supported with a 12 paragraphs affidavit deposed to by Ilo Nkemdilim, the Applicant's procurement officer. There is also Applicant's written address dated 30/5/13 but filed on 31/5/13.

The Respondents reacted to the application with a counter affidavit filed on 14/6/13 and deposed to by Victor Omoluabi, a Manager in the legal department of the Respondents. The Respondents' counter affidavit is also

accompanied with a written address.
The Applicant then filed a Reply on points of law to the written addresses of the Respondents.

The Respondents in addition brought a notice of preliminary objection dated 5/6/13 but filed on 2/7/13 with an affidavit in support and a written address. The Applicant then filed in opposition to the Respondents' preliminary objection. The Respondents then filed Reply on points of law to the Applicant's written address against the preliminary objection.

In the Applicant's written address, this issue was formulated for determination:

> "Whether the Applicant has met the conditions for the grant of this application?"

In his argument, learned counsel for the Applicant referred to the cases of FAWEHINMI VS. IGP (2002) 7 NWLR PART 767 606 AT 674, 686, 694 and 697-698 and ATUNGWU VS. OCHEKWU (200) 1 NWLR PART 641 507 on the conditions that must exist for the grant of order of mandamus. Reference was also made to Sections 1, 2(6) and (7) of the Freedom of Information Act, to the effect that any person has the right to access or request for information which is in the custody of any public official, agency or institution howsoever called without showing any specific interest in the information applied for. That any person entitled to the right to information under the Freedom of Information Act shall have the right to institute proceedings in a Court to compel any public institution to comply with the provisions of the Act. It was submitted that the 1st and 2nd Respondents are public institutions and officer respectively by the provisions of Section 2(7) of the Freedom of Information Act. That the Applicant has done all that it is required to do by the Act on the information and documents requested from the Respondents, but the Respondents without any reason have refused to provide the Applicant with the documents in breach of his right under the Freedom of Information Act. That by Section 4 of the Freedom of Information Act, the Respondents have a legal duty to provide the Applicant with the requested document and information within 7 days of the receipt of the receipt. It was then contended that the Courts have the duty to enforce the mandatory provisions of the law. Reference was made to the case of INYANG VS. EBONG (2002) 2 NWLR PART 751 284 at 331. The Court was urged to grant the application.

In the Respondents' written address in support of their counter affidavit this issue was formulated for determination:

> "Whether in the absence of compliance with the condition precedent for the grant of an order of mandamus, the application of the Applicant is not liable to be struck out and dismissed for lack of merit?"

Arguing the issue, learned Respondent's counsel stated that the Court must be satisfied that the Applicant has complied with all the conditions precedent to the grant of order of mandamus and that there is no other remedy available to him. Reference was made to the cases of FAWEHINMI VS. IGP supra at pages 697-698 and LAYANJU VS. ARAOYE (1959) 1 NSCC 143 AT 146, to the effect that as a discretionary order, the Court will decline to grant it if there are other remedies available and effective, and that an Applicant has sufficient interest and the Respondent has a duty of a public nature to perform and he has refused to perform on demand to perform it. It was then submitted that in the instant case, the Applicant has failed to show that he has made a demand of the documents referred to in it's motion, as there is no evidence of receipt of the latter exhibited by the Applicant by the Respondents. That the person who signed as Kingsley O. is not a person known to or in the employ of the Respondents as neither does the document bear the stamp of the Respondents as is the practice of the Respondent in respect of documents received by it. That the Applicant has failed to show that there was every any publication made by the Respondents inviting bids for the procurement of an Insurance broker for the insurance of the NNPC Oil and Aviation Assets for the year 2013/2014. That the Applicant only succeeded in exhibiting a document showing a publication made via "Tenders in Nigeria" www.tenders.nigeria/invitation - for qualification, website which the Respondent's counsel said is unknown to the Respondents and does not bear the logo of the Respondents. It was further submitted that failure to fulfill a condition precedent to instituting an action has the effect of robbing the Court of jurisdiction to hear the matter. Reference was made to the case of ORAKUL RESOUCES LTD VS. N.C. (2007) 16 NWLR PART (1060) 270 at 278. It was finally submitted that as the Applicant has failed to comply with a condition precedent for order of mandamus against the Respondents, the application is incompetent and liable to be struck out.

In the Applicant's written Reply on points of law, it was stated that the Applicant deposed specifically in paragraph 3 of the supporting affidavit that in December, 2012 the Respondents commenced the process for the procurement of an Insurance broker for the 1st Respondent's Oil and aviation assets. That in paragraph 5 of the supporting affidavit, Applicant deposed to specific date for the closing of bids in respect of the procurement. That none of these facts were specifically denied. That what the Respondents did was to deny in paragraphs 5 (a c) of their counter affidavit publishing the invitation for bids on the website of Tenders Nigeria. That having not denied the conduct of procurement for the engagement of an Insurance broker, the Court was urged to hold that the Respondents have admitted those facts. Reference was made to the case of OGUNSOLA VS. USMAN (2002) 14 NWLR PART 788, 637

at 657. On the absence of Respondent's official stamp on exhibit cite any law which says that an acknowledgement copy of a letter delivered to the Respondent must bear their official stamp on exhibit "B" to the Applicant's affidavit, it was stated that the Respondent did not cite any law which says that an acknowledgement copy of a letter delivered to the Respondent must bear their official stamp or else it would amount to a non-delivery. The Applicant has also filed a Further Affidavit on 2/7/13 deposed to by one Mr. Ada Obaje, a staff of Neuron Express deliveries Ltd., who stated therein that when he took the Applicant's letter, that is, exhibit B to the office of the Group Managing Director of the NNPC, he was directed to Kingsley O. who said it was his work schedule to receive letters meant for the 2nd Respondent. That when the said Kingsley O. was asked to write his position and stamp on the acknowledgement copy of the letter, the said Kingsley O. stated that it was the practice of the Respondents to acknowledge letters in the manner shown on exhibit "B". that the deponent of the Further Affidavit further deposed to having been introduced to Kingsley O., he has no right to insist on any mode of acknowledgement of receipt of mails.

In the Respondents' preliminary objection, the Court was urged to strike out this suit on the ground that a condition precedent to the institution of this suit has not been satisfied, in that the Applicant did not issue or serve the statutory pre-action notice on the 1st Respondent. That the action is wholly speculative, vexatious and abuse of the Court process. That this suit is fundamentally defective an incurably incompetent.

In the Respondent's written address in support of preliminary objection, two issues were formulated as follows:-

1. Having regard to the fact that the requisite Pre-Action Notice was not served on the 1st Respondent prior to the institution of this suit, whether the suit is not altogether fundamentally defective and incurably incompetent.
2. Whether this Court has the jurisdiction to entertain this suit.

On the first issue formulated above, learned Respondents' counsel referred to paragraph 4(iii) of the affidavit in support of the preliminary objection, where it was deposed that no pre-action has been served on the Respondents. That by Section 12(2) of the NNPC Act Cap N123 LFN 2004, it is mandatory on anyone who intends to commence an action against the 1st Respondent in a Court of law, to first issue and serve on it a pre-action notice, that the requirement of a pre-action notice is a condition precedent which Respondents' counsel said must be fulfilled before any legal proceedings can be initiated against the 1st Respondent. That failure on the part of the Plaintiff to issue and serve a pre-action notice before this suit was commenced renders the suit incompetent. Reference was made to the following cases MOBIL (NIG) LTD VS. LASEPA (2002) 18 NWLR PART 798 at page 30; GAMBARI VS. GAMBARI (1990) 5 NWLR PART 152; UMUKORO VS. NPA (1997) 4 NWLR PART 502, 656; ATOLAGBE VS. AWUNI (1997) 9 NWLR PART 522, Page 536 and AMADI VS. NNPC (2000) 10 NWLR PART 674 76.

On the second ground of the objection, learned Respondents' counsel referred to paragraph C of the Applicant's Grounds for the application for mandamus and paragraph 3 also of the Applicant's supporting affidavit and contended that the action of the Applicant is based on conjectures, assumptions and imagination. That Courts of law do not act on academic postulations. Reference was made to the case of A.G. ANAMBRA VS. A.G. FEDERATION (2005) 9 NWLR PART 931, 572 at 610.

In the Applicant's Reply written address in opposition to the Respondents' preliminary objection, this question was posed:

> "Considering the provisions of the Freedom of Information Act, 2011, (the Act), does the Legislature intend the pre-action Notice of the month to be served on the Respondent herein before an action could be commenced against them under the Freedom of Information Act, 2011?"

It was stated by the learned Applicant's Counsel that the NNPC Act was enacted in 1973, while the Freedom of Information Act was enacted in 2011. It was then submitted that the Freedom of Information Act 2011 is the later of the two Acts and that in making the Freedom of Information Act, 2011, the legislature would have been taken into consideration the provisions of the NNPC Act, 1973. Learned Applicant's counsel then referred to Section 4 of the Freedom of Information Act, 2011 which is to the effect that a public institution to which a request is made for information must furnish the Applicant with the said information within seven days of the receipt of the request. That by Section 7 of the Freedom of Information Act, where the institution to which request for information is made fails to furnish an Applicant with the requested information within seven days; the institution is deemed to have denied the Applicant of the Information so required. That by Section 20 of the Freedom of Information Act, any person who was denied access to information upon request made under the Freedom of Information Act, 2011 may seek redress from the Court within 30 days of such denial or deemed denial. It was then contended that the application of Section 12(2) of the NNPC Act will operate to deny an Applicant of the right of access to Court because by the time the duration of the pre-action notice prescribed by the NNPC Act would have elapsed, the time allowed an Applicant under the Freedom of Information Act to seek redress would also have elapsed. Learned counsel further submitted that it is a well

established principle of interpretation of statutes that there is a presumption against unreasonable and inconvenient result, or a presumption against intending what is inconvenient and unreasonable. It was also submitted that it is a well established principle of interpretation that the construction most agreeable to justice and reason must be adopted. The Court was referred to the case of IBRAHIM VS. SHERIFF (2004) 14 NWLR PART 892, 43 at 65-66. Reference was further made to Section 1(1) of the Freedom of Information Act, 2011 to the effect that right of access to information pursuant to the Act is guaranteed and is not subject to the provisions of any Act or law including the NNPC Act. It was therefore submitted that the Respondents are not entitled to any pre-action notice from the Applicant before the institution of this suit.

On the contention of the Respondents that this suit speculative and an academic postulation, it was stated that the Respondents have not denied the averment in the Applicant's affidavit that they procured an Insurance broker for the 1st Respondent's Oil and Aviation Assets for the year 2013/2014. That exhibit B attached to the Applicant's affidavit is a document which forms part of the affidavit and is therefore relevant for the determination of the issue. That exhibit B is not speculative.

In the Respondents' Written Reply on points of law, it was stated that from the submission of the Applicant's counsel, it was conceded that no pre-action notice was served or issued on the 1st Respondent as required by law. On the argument of the Applicant's counsel that the legislature never intended that the requirement of pre-action notice under any circumstance, relying on Sections 1(1), 4, 7(4) and 20 of the Freedom of Information Act, 2011, learned Respondent's counsel submitted that Section 12(2) of the NNPC Act contains provision specifying that pre-action notice must be served on the 1st Respondent. That Section 12(2) of the NNPC Act is a specific legislation as against the general provisions of Freedom of Information Act, 2011. Reference was made to the case of A.B.S. U VS. OTOSI (2011) 1 NWLR PART 1229, 605. On the case of IBRAHIM VS. SHERIFF, Respondents' counsel stated that the case is not on all fours with the case at hand, because IBRAHIM VS. SHERIFF was an interpretation of the Electoral Act, 2002 on the requirement of pre-action notice is not a denial of the Applicant's right but a condition precedent which the law considers very essential given the character of the Respondents. That if the Legislature under the Freedom of Information Act, 2011 had intended that no pre-action notice would be applicable, it would have expressly and specifically stated so. The Court was urged not to exclude the provision of statute which has specifically dealt with a subject in contention. That Section 1(1) of the Freedom of Information Act guarantees right of access to Court as it pertains the NNPC by creating a condition precedent. That Section 12(2) of the NNPC Act cannot be subjected to or be subservient to the provisions of section of the Freedom of Information Act, because the two provisions, counsel said, are mutually exclusive.

I have reviewed the argument of learned counsel for the parties on the substantive suit and the Respondents' preliminary objection. The position is that where the Court has taken argument on issue of jurisdiction together with the substantive suit, the Court must first of all express it's views on the issue of jurisdiction. If the issue of jurisdiction succeeds, the Court should terminate the proceedings at that stage. Where, however, the issue of jurisdiction fails, the Court would then proceed to determine the merit of the substantive suit. In the present case, the first ground of the objection is to the effect that the Applicant has not issued or served the 1st Respondent (NNPC) in this suit with a pre-action notice as required by Section 12(2) of the NNPC Act. That the provision of Section 12(2) of the NNPC is a condition precedent to the institution of any action against the 1st Respondent. Learned Applicant's counsel is however of the view that in view of the provisions of Sections 1(1), 4, 7(4) and 20 of the Freedom of Information Act, the Legislature never intended that pre-action notice shall apply to matters brought under the Freedom of Information Act, 2011. In the determination of this issue, recourse must be had to the provision of Section 12(2) of the NNPC Act. Section 12(2) provides thus:

> *"No suit shall be commenced against the corporation before the expiration of a period of one month after a written notice of intention to commence the suit shall have been served upon the corporation by the intending Plaintiff or his agent; and the notice shall clearly and explicitly state the cause of action, the particulars of the claim, the name and place of abode of the intending Plaintiff and the relief which he claims."*

A careful reading of Section 12(2) of the NNPC Act reproduced above would show that it is a specific provision which places a duty on any intending Plaintiff that wishes to institute legal proceedings against the 1st Respondent herein (NNPC) to first of all issue and serve pre-action notice on it. The general trend in the wordings and intendment of statutes is for the Legislature to make specific provisions on certain subject matter so that the issue is not left to speculation. A little illustration would help to drive the point home. In the Fundamental Rights Enforcement Procedure Rules, 2009, requirement of pre-action notices and provisions of statute of limitation have been specifically provided not to apply to actions or suits brought under the Fundamental Rights Enforcement Procedure Rules, 1979 did not have a similar provision ousting the application of pre-action notice and limitation period. One the other hand,

I have read the provisions of Sections 1(1), 4, 7(4) and 20 of the Freedom of Information Act, 2011 relied upon by the Applicant's counsel, but I understand the Sections to be on right to information and right to access to Court when such information, requested is denied. In my humble view, Sections 1(1), 4, 7(4) and 20 simple guaranteed the right to request for information and where it is denied, an Applicant may approach the Court to seek for redress. Now, where in the exercise of right to approach the Court for redress, if there is another legislation that places some conditions before one can ignite the Court's jurisdiction, such requirement cannot by any stretch of imagination be regarded as impeding right of access to Court. In the case of AMADI VS. NNPC (2000) 10 NWLR PART 674, Page 76 at page 113, the Supreme Court held as follows:-

> *"It is instructive therefore that compliance with the provisions of Section 11(2) Act 1977 is a condition precedent to instituting a suit against the Respondent. Cases constantly occur in which, although everything has happened which would at common law prima facie entitle a man to a certain sum of money or vest in him a certain right of action, there is yet something more which must happen, in the particular case, before he is entitled to sue, either by reason of the provisions of some statute or because the parties have expressly so agreed. This is something called a condition precedent. It is not the essence of such a cause of action, but it is essential. It is an additional formality superimposed on the law."*

See also the case of BAKARE VS. NRC (2007) NWLR PART 1064, 606 at 636, 656.

From the above pronouncement by the apex Court reproduced above, it is crystal clear that provisions in statutes regarding pre-action notices are held to be proper. As the Applicant has not shown this Court that it has issued and served a pre-action notice on the 1st Respondent in this suit in accordance with the mandatory requirement of Section 12(2) of the NNPC Act, a condition precedent to the institution of this action has not been fulfilled. The failure has consequently rendered this suit incompetent and by extension robbed the Court with jurisdiction to entertain this suit.

In consequence of the above finding, this suit is hereby struck out for being incompetent.

No order as to cost.

HON. JUSTICE A.R. MOHAMMED
JUDGE
23/12/2013

COUNSEL:

G.N. CHIGBU ESQ for the Applicant.

A.A. MALIK ESQ with A.A. ODIA (MRS) ESQ., C.A. MORDI (MISS) ESQ., and **C.P. ANINWOYA ESQ.** for the Respondents**.**

IN THE COURT OF FEDERAL CAPITAL TERRITORY
HOLDEN AT JABI - ABUJA
THIS TUESDAY, THE 21ST DAY OF JANUARY, 2014
BEFORE: HON. JUSTICE UGOCHUKWU A. OGAKWU JUDGE

MOTION NO: FCT/HC/M/34/2013

BETWEEN:

OKOI OBONO-OBLA …… PLAINTIFF

AND

CCEC NIGERIA LIMITED ……. DEFENDANT

IN RE: CCEC NIGERIA LIMITED ……. APPLICANT

R U L I N G

The Plaintiff, desirous of getting information on the contract for the rehabilitation of the Calabar-Ugep-Katsina-Ala Road wrote to the Defendant pursuant to the Freedom of Information Act to supply it with information on the said road rehabilitation contract. At the expiration of the time to supply the said information and the Defendant having failed to make available the information to the Plaintiff, the Plaintiff applied to Court pursuant to Section 20 of the Freedom of Information Act for a judicial review of the matter.

On 5th June 2013 the Court granted the Plaintiff leave to apply for judicial review by originating motion in accordance with the stipulations of the High Court of the Federal Capital Territory, Abuja (*Civil Procedure*) Rules, 2004 (HCR). Pursuant to the said leave of Court, the Plaintiff filed a motion on notice on 14th June 2013 claiming sundry declarations, orders and damages against the Defendant.

Upon being served with the said motion on notice, the Defendant entered a conditional appearance, filed a counter affidavit and further a notice of preliminary objection where it sought the order of the Court to set aside the leave granted to the Plaintiff to seek judicial review and dismiss the suit for want of jurisdiction. This ruling is in respect of the said preliminary objection which is dated and filed on 17th September, 2013.

The preliminary objection is predicated on four grounds, namely:

1. That the Plaintiff's suit is frivolous, vexatious and an abuse of court process thereby robbing the Honourable Court of the jurisdiction to entertain same.
2. CCECC is a private company and not an administrative body or tribunal that is subject to judicial review.
3. That the instant suit is incompetent for being commenced by a motion on notice and not an originating motion as stipulated by the Rule of the Court.
4. The suit is bad for misjoinder of party.

The preliminary objection is supported by an affidavit of six paragraphs with one exhibit attached thereto. The Defendant also filed a written address in support of the preliminary objection wherein issues were distilled as arising for determination as follows:

1. Whether CCECC is subject to judicial review
2. If answer in issue one is in the negative, whether the Plaintiff's suit is not incompetent, vexatious, scandalous and an abuse of the process of the Court.
3. Whether the Honourable Court has the power to set aside the order granting leave to the Plaintiff to seek judicial review.

On 25th September, 2013, the Plaintiff filed a Reply to the Defendant's preliminary objection. The Plaintiff did not formulate any issues in his said reply. He however tacitly adopted the issues as distilled by the Defendant by proffering seriatim submissions on the said issues formulated by the Defendant.

At the hearing of the preliminary objection on 6th November, 2013, *Mutiu Akinrinmade Esq*, of counsel for the Defendant referred to the order sought in the preliminary objection and the grounds on which the said preliminary objection is predicated. He relied on the paragraphs of the supporting affidavit and the exhibit attached thereto. Adopting the submissions in the written address in support of the preliminary objection, he posited that when the Defendant is paid for a job which it does for the government, the Defendant is not thereby utilizing public funds. He maintained that Defendant by carrying out a contract awarded to it was not providing public service or performing public function. He urged the Court to uphold the objection.

In opposition to the preliminary objection, Mrs. J. O. Obono-Obla, learned counsel for the plaintiff adopted the submissions in the Plaintiff's Reply dated 24th September 2013 but filed on 25th September 2013 and which was settled by Mrs. V. Igiede, of counsel. She urged the Court to dismiss the preliminary objection.

I have insightfully considered the processes filed in respect of this preliminary objection and the submissions of learned counsel on both sides of the divide. The issues for determination as distilled by the Defendant and tacitly adopted by the Plaintiff clearly bring out the pith of the questions to be agitated in a resolution of this preliminary objection. It is therefore on the basis of the said issues that I will now resolve the preliminary objection.

ISSUE NUMBER ONE

WHETHER CCECC IS SUBJECT TO JUDICIAL REVIEW

The contention of the Defendant is that the Court in exercise of its supervisory function can judicially review the actions and decisions of inferior tribunals and administrative bodies, and that the Defendant not being an inferior tribunal or administrative body but rather a privately owned company was not subject to judicial review within the purview of Order 42 Rule 1 HCR.

In his reply, the Plaintiff concedes that the Defendant is a private company but maintains that the basis of the action was in respect of information requested for in respect of a contract awarded to the Defendant which information can be sought for under the Freedom of Information Act since the Defendant is a public institution within the meaning of the Freedom of Information Act.

Now, the Long Title to the Freedom of Information Act provides that the Act is for purposes of making public records and information more freely available and for providing public access to public records and information. Section 1 of the Freedom of Information Act establishes the right of any person to access or request information which is in the custody or possession of any public official, agency or institution. Section 4 of the Freedom of Information Act stipulated that any information applied for shall be made available to the applicant within seven days of the application or where the application is to be denied, the applicant is to be informed in writing within seven days. Section 20 of the Freedom of Information Act, then gives an applicant the right to seek judicial redress where access to the information sought is denied. The said Section gives an applicant the right to seek judicial review in respect of such a denial within thirty days after the denial or the application is deemed to have been denied.

At the outset of this Ruling, I stated that it was consequent upon the refusal or failure to give the Plaintiff the information he requested for that this action for judicial review was commenced. There is therefore backing in the Freedom of Information Act for the Plaintiff to commence this action to seek for judicial review in respect of the refusal or failure to give him the information requested for. Accordingly, I am unable to agree with the Defendant that it is not subject to judicial review since Section 20 of the Freedom of Information Act has expressly given an applicant the right to approach the Court for judicial review. We will however still find out in the course of this Ruling if the Defendant is a public institution within the meaning of the Freedom of Information Act. This issue number one is consequently resolved against the Defendant.

ISSUE NUMBER TWO

IF ANWSER IN ISSUE ONE IS IN THE NEGATIVE, WHETHER THE PLAINTIFF'S SUIT IS NOT INCOMPENTENT, VEXATIOUS, SCANDALOUS AND AN ABUSE OF PROCESS OF THE COURT?

The contention of the Defendant on this issue is that it is not a public institution within the meaning of the Freedom of Information Act since it is a private company in which the government does not have the controlling interest and also it does not utilize public funds, provide public services or perform public functions. The Defendant contends that any

moneys paid to it in respect of services it rendered to the government is a mere consideration for services rendered by it and that they are not public funds.

The Plaintiff in his Reply maintains that the Defendant is a public institution within the meaning of the Freedom of Information Act because the Defendant is a private body utilizing public funds by way of the contract awarded to it by the Federal Government to construct the Calabar-Ugep-Katsina-Ala Road.

Under the provisions of the Freedom of Information Act, an application is for access to or request for information which is in the custody or possession of any public official, agency or public institution. Without a doubt the Defendant is neither a public official nor a public agency, but is it a public institution? Section 31 of the Freedom of Information Act states that a public institution, inter alia, means private bodies providing public services, performing public functions or utilizes public funds. Now, the Defendant is a private body. Where it provides public services or utilities public funds it will qualify as a public institution within the meaning of the Freedom of Information Act.

The Defendant in contending that it does not provide public service relies on the definition of public service in the Black's Law Dictionary, 6th Edition to the effect that it arises where a private body is given an appropriate franchise from the State to provide for a necessity or convenience of the general public. It therefore contended that since it does not have any franchise from the government, to provide any service or function and did not come within the ambit of the Freedom of Information Act.

The Defendant has raised relied on the definition of public service in the Black's Law Dictionary, 7th Edition has however defined public service as:

"Public Service: 1. A service provided for facilitated by the government for the general public's convenience and benefit. Government employment; work performed for or on behalf of the government."

See Black's Law Dictionary, 7th Edition page 1246.

The Defendant was given a contract by the Federal Government to construct or rehabilitate the Calabar-Ugep-Katsina-Ala Road. Doubtless, the road is for the public convenience and benefit. The Defendant in its written address agrees that consideration will be paid to it for the construction work. So the government is facilitating the construction of the road for the general public's convenience and benefit. The Defendant has not argued that the government did not award it a contract for the road construction work. Clearly therefore, the Defendant was doing the work for or on behalf of the government. Therefore it seems to me that it cannot be seriously argued that the Defendant is not performing a public service in respect of the contract awarded to it by the Federal Government for the Calabar-Ugep-Katsina-Ala Road.

In words and phrases legally defined, 3rd Edition page 472, public service is inter alia defined to include any service which would supply wants felt by the public or which the public might be reasonably desirous of having on its own behalf. It is stating the obvious to say that the generality of the public would want a good highway on the Calabar-Ugep-Katsina-Ala Road. Another angle to the Defendant's contention is that the moneys paid to it by government for the construction work are mere consideration for services rendered and are not public funds. It has to be remembered that the definition of a public institution includes a private body such as the Defendant utilizing public funds. While it is correct that moneys paid to the Defendant by the Federal Government is consideration for services rendered. I am unable to agree with the Defendant that such moneys which come from government coffers are not public funds.

Section 80 of the 1999 Constitution (as amended) makes provisions in respect of power and control over public funds, and indeed payments to the Defendant for the road construction work cannot be made unless the moneys have been duly authorized by an *Appropriation Act* of the *National Assembly*. Accordingly, it seems to me to be misleading for the Defendant to argue that moneys paid to it from the government coffers in respect of a contract awarded to it does not amount to utilization of public funds. In all therefore, I must resolve this issue in favour of the Plaintiff. The action is neither incompetent, vexatious, scandalous nor an abuse of the process of court, because the Defendant is a public institution within the meaning of this Freedom of Information Act

In paragraph 4 of the affidavit in support of the preliminary objection, it is deposed that CCECC is an entirely different legal entity from CCEC and has no relationship whatsoever with CCEC. In paragraph 1 of the said supporting affidavit, the deponent deposed that he is in the employment of CCECC Nigeria Ltd. which has been sued as CCEC Nigeria Ltd.

From the processes filed by the Plaintiff, it is clear that the entity which has been sued is CCEC Nigeria Ltd and not CCECC Nigeria Ltd. It seems clear from the submissions in the Plaintiff's Reply that the entity which has a contract with the Federal Government in respect of the road construction work and which he intended to sue is CCECC Nigeria Ltd. The Plaintiff therefore submitted that the error or mix-up in the abbreviation of the company name of the Defendant is a harmless one and has not misled the Defendant as to the party which he intended to sue and did in fact sue.

It seems to me that the contention of the Defendant in this regard as set out in ground 4 of the grounds of objection is that there has been a misjoinder of party since CCEC which has been sued is a total stranger to the contract in respect of which the Plaintiff requests for information under the Freedom of Information Act. The entire contention of the Defendant seems to me to relate to nothing other than a misnomer.

Now, misnomer simply means a wrong use of a name; or 'a mistake in naming a person, place or thing, especially in a legal instrument'. See Black's Law Dictionary (7th Edition), page 1015. Where there is a misnomer or misdescription I the title or caption of any proceedings, what the court will consider in order to nullify such proceedings are:
Whether the misdescription in title has substantially misled the parties; and
Whether a miscarriage of justice was thereby occasioned.

See BAYO VS. NJIDDA (2004) 8 NWLR (Pt. 876) 544; AJADI VS. AJIBOLA (2004) 16 NWLR (Pt. 898) 91 and BAJOGA Vs. GOVERNMENT OF THE FEDERAL REPUBLIC OF NIGERIA (2007) ALL FWLR (PT 394) 273 at 311 C E.

In the context of litigation, a misnomer occurs where the entity suing or intended to be sued exists, but a wrong name is used to describe that entity. See MAERSK LINE VS. ADDIDE INVESTMENT LIMITED (2002) 11 MJSC 157 at 179 & 196-197. In order words, a misnomer is said to occur in legal proceedings when the correct person comes or is brought to court under a wrong name but not when the wrong person sues or is sued in an action. See EMESPO J. CONTINENTAL LTD Vs. CORONA S. MBH & Co. (2006) 11 NWLR (PT. 991) 365 at 378 (per Mukhtar, JSC). The test which has been applied by the Courts to ascertain if the title of a party shown on the writ of summons is a misnomer is well settled. One factor that operates on the mind of the recipient of a document (writ) is whether there is or is not another entity to which the description on the document (writ) might refer. The test therefore is: *How will a reasonable person receiving the document take it?* If in all circumstances of the case and looking at the document as a whole, he would say to himself, 'of course it must mean me, but they have got my name wrong', then there is a case of mere misnomer." If, on the other hand, he would say, "I cannot tell from the document whether they mean me or not and I shall have to make inquiries", this has gotten beyond the realm of misnomer. See DAVIES V. ELSBY BROTHERS LTD (1960) 3 ALL ER 672 at 676, MAILAFIA V. VERITAS INSURANCE (1986) 4 NWLR (PT 38) 802 at 812 and NWABUEZE V. NIPOST (2006) 8 NWLR (PT 983) 480 at 526 527.

Applying the above test, I reiterate that in paragraph 1 of the affidavit in support of the preliminary objection, the Defendant deposed that it has been sued as CCEC Nigeria Ltd. So, there is no doubt whatsoever that the Defendant was not mistaken that it was the one that had been sued. Furthermore, in the Memorandum of conditional Appearance dated and filed on 5th August 2013 appearance was entered for CCECC Nigeria Ltd sued as the Defendant in the action. Therefore CCECC Nigeria Ltd is not in any doubt whatsoever that it is the entity which has been sued as CCEC Nigeria Limited.

Howbeit, the law is that where there has been a misnomer, an application to amend the misnomer will readily be granted almost as a matter of course. See JESSICA TRADING CO. LTD Vs. BENDEL INSURANCE CO. LIMITED (1993) 1 SCNJ 240 and ADEKANYE Vs. GRAND SERVICES LTD. (2007) ALL FWLR (PT 387) 855 at 866 867. Order 46 Rule 1 HCR confers a discretionary power on the Court to make such orders as it considers necessary for the purpose of doing justice irrespective of whether the order has been expressly sought by the party entitled to the benefit. In MAESK LINE Vs. ADDIE INVESTMENT LIMITED (supra), the Supreme Court held inter alia that the power of a trial court to make amendment *suo motu* at any stage of the proceedings before judgment could be exercised by the Court without any party applying for it. Therefore, in exercise of discretion pursuant to Order 46 Rule 1 HCR and being satisfied that the mistake in the name of the Defendant on record is a mere misnomer, it is hereby ordered that the misnomer be corrected by the addition of the missing alphabet 'C' in the name of the Defendant in the title of the action such that the Defendant on record will read CCECC Nigeria Limited.

It has to be remembered that the object of the Court is to decide the rights of the parties and not to punish them for mistakes which they make in the conduct of their cases by deciding otherwise than in accordance with their rights. This is because the Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy.

See CROPPER Vs. SMITH (1884) 26 Ch. D 700 at 710 711 and NWABUEZE Vs. NIPOST (supra) at 528G-H. This being so, I do not think it will be appropriate to punish the Plaintiff by acceding to the submission of Defendant's counsel as the law is clear that the mistake made by the Plaintiff in the spelling of the name of the Defendant in the title of the action is such that can be cured by an amendment since it is a mere misnomer. See MAILAFIA Vs. VERITAS INSURANCE (supra) at 812H. Accordingly, the Plaintiff is given seven (7) days from today to effect the necessary amendment in the processes filed.

In ground 4 of the Notice of Preliminary Objection, the Defendant raised the issue that the action was commenced by a *Motion on Notice* as opposed to an Originating Motion as stipulated by the HCR. It was therefore posited that the action having been commenced by an invalid originating process is null and void. The Plaintiff in his Reply submits that the form of an Originating Motion is not specified in the HCR. The court was therefore urged to pay attention to the substance rather than the form in order to do substantial justice.

In the prolegomenon of this Ruling, I stated that leave was granted to the Plaintiff to apply for judicial review. In the said order granting leave, the Plaintiff was ordered to make the application for judicial review by Originating Motion in accordance with the stipulations of Order 42 Rule 5 HCR. The process filed by the Plaintiff pursuant to the grant of leave is titled Motion on Notice as opposed to Originating Motion. The contention of the Defendant is that on account of this, the action had not been commenced as stipulated in the Rules of Court. Now, is this a failing on the basis of which the Court should shut out the Plaintiff?

The modern approach to adjudication is to avoid preference of technicality to the principal duty of the Court to do justice. It needs to be emphasized that justice is not a fencing game in which the parties engage themselves in a whirligig of technicalities to the detriment of the substantial issues before them. The need to do substantial justice should always supersede where adherence to technicality will inhibit or hinder justice. To allow the mere fact that the process filed by the Plaintiff after grant of leave is headed Motion on Notice as opposed to Originating Motion or Notice of Notion to forestall proceedings would be to lean on the side of technicalities. The attainment of justice is generally no longer allowed or tolerated to be controlled by strict adherence to technicalities but rather to substance. See EGOLUM Vs. OBASANJO (2004) 1 WRN 87 at 164; AFOLABI Vs. ADEKUNLE (2004) 2 SCNLR 141 at 150 and KANO TEXTILE PRINTERS PLC Vs. GLOEDE & HOFF NIG. LTD (2002) 7 WRN 78 at 114.

In NNEJI Vs. CHUKWU (1988) 3 NWLR (PT 81) 184, *Oputa, JSC* quoted with approval the dictum of *Lord Penzance* in GOMBE Vs. EDWARDS (1878) L. R. 3 P. D. 142 as follows:

> *"The spirit of justice does not reside in formalities, or words, nor in the triumph of its administration to be found in successfully picking a way between the pitfalls of technicality. After all, the Law is, or ought to be, the handmaid of justice, and inflexibility, which is the most becoming robe of law, often serves to render justice grotesque…*
>
> *….If the choice is between legal technicality and justice, one ought to cast one's lot with justice. But it is not all that simple for justice in our courts is, or ought to be, justice according to law …I will at anytime, anywhere cast my lot for truth and justice rather than for mere formal objections.*
>
> *….Technicalities deal with legal forms but not necessarily with substance. The Courts exist to do substantial justice, not formal and technical justice. Rules of court dealing with technical mode of procedure should be subservient to the dictates of justice. If therefore, observance of any rule will produce an obvious injustice, a court of justice will naturally prefer justice to the technicalities the rule imposes…"*

On my part, I will equally cast my lot on the side of justice. A court has a duty to discover the true intents of the law and do substantial justice accordingly, not formal or technical justice. A court in its quest for justice must act within the dictates of reason. The manner in which a court is to be approached in an application for judicial review is by a motion. The fact that originating or notice of is not prefixed before the word "motion" or the fact that "on notice" is suffixed after the word "motion" as in the instant action should not operate to prevent the Court from doing substantial justice especially when the Defendant has not in any way been prejudiced or embarrassed by the way the originating process was titled. See BAJOGA Vs. GOVERNMENT FRN (2008) 1 NWLR (PT 1067) 85 at 115B-C and 123C-H. in pursuit of substantial justice therefore, I do not agree with the Defendant that the action is incompetent on account of this.

ISSUE NUMBER THREE

WHETHER THE HONOURABLE COURT HAS THE POWER TO SET ASIDE THE ORDER GRANTING LEAVE

TO THE PLAINTIFF TO SEEK JUDICIAL REVIEW?

This issue as distilled restates the obvious since the law is trite that the Court has the competent to set aside its order which is a nullity: ACB PLC Vs. LOSADA (1995) 7 NWLR (PT 405) 26 at 45. However, in the peculiar circumstances of this preliminary objection, this power of the Court cannot be exercised in favour of the Defendant since from the totality of what I have said thus far, it is evidently manifest that there is no basis for the Court to exercise this power by setting aside the order granted to the Plaintiff to apply for judicial review as the said order is not a nullity.

Therefore, in a summation and from the totality of the foregoing, I find no merit whatsoever in the Notice of Preliminary Objection. The same fails and it is hereby dismissed. The Plaintiff is given seven (7) days from today to correct the misnomer in the name of the Defendant as it appears in the title of the action.

UGOCHUKWU ANTHONY OGAKWU
PRESIDING JUDGE

Appearances:

Mrs. J. O. Obono-Obla (with Mrs. V. I. Igiede) - *for the Plaintiff*

Mutiu Akinrinmade, Esq (with Ahmed Oyegbami, Esq) - *for the Defendant.*

IN THE COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON THURSDAY 30TH JANUARY 2014
BEFORE HIS LORDSHIP: HON JUSTICE O.A. ADENIYI
SITTING AT COURT NO. 25 APO ABUJA

SUIT NO: FCT/HC/CV/M/3057/13

BETWEEN:
PUBLIC & PRIVATE DEVELOPMENT CENTRE LIMITED/GT ……. APPLICANT

AND

THE HON. MINISTER OF THE FCT
THE SECRETARY, FCT TRANSPORT SECRETARIAT ……. RESPONDENTS

R U L I N G

The instant application was filed by the Applicant on 24/04/2013, pursuant to the grant of leave by this Court on 17/04/2013, to bring an application for judicial review by way of mandamus against the Respondents. The application seeks two reliefs, namely:

1. A declaration that the failure of the 1st and 2nd Respondents to furnish the Applicant with the documents/information sought vide Applicant's letter of 13th December, 2012, amounts to a wrongful denial of information under the Freedom of Information Act, 2011 (the Act).
2. Order of the Honourable Court compelling the Respondents jointly and severally to forthwith furnish the Applicant with the information and copies of documents set out in the schedule to this application.

The Applicant further set out the information/documents sought from the Respondents in a schedule to the Application. They are as follows:-

i. How many companies did the FCTA engage for the purpose of this controlled parking/collection of parking tolls or fees?
ii. What are the names of the companies and their address?
iii. What are the terms of the engagement of each of these companies?
iv. How much has each of the companies remitted to the FCTA since inception of their respective engagement?
v. Copy of the contract of engagement between the FCTA and each of the companies;
vi. Statement of account showing remittances made by each of the companies from inception of their engagements to date.

i How many companies did the FCTA engage for the purpose of this controlled parking/collecting of parking tolls or fees?
ii. What are the names of the companies and their addresses?
iii. What are the terms of the engagement of each of these companies
iv. How much has each of the companies remitted to the FCTA since inception of their respective engagement
v. Copy of the contract of engagement between the FCTA and each of the companies
vi. Statement of account showing remittances made by each of the companies from inception of their engagements to date.

To support the Application, the Applicant further filed a Statement, pursuant to the provision of Order 42 Rule 3 (2) of the Rules to this Court; an affidavit containing 11 paragraphs, to which three (3) documents were attached as exhibits; and a Further Affidavit of 4 paragraphs.

To oppose the application, the Respondents filed a Joint Counter Affidavit of 5 paragraphs.

I have proceeded to examine the totality of the processes filed by the parties on record. I have also given a careful consideration to the written and oral arguments advanced by learned counsel on both sides, to back up their respective contentions.

It is not in dispute between the parties that sometime in 2011, the 1st Respondent commenced a controlled parking scheme and collection of parking tolls from motorists within some parts of the Federal Capital Territory; and that to undertake this assignment, the Respondents engaged the services of some private companies.

It is also not in dispute between the parties that the proceeds of this scheme form part of the internally generated revenue of the FCT Ministry.

It is further undisputed that, pursuant to the provisions of sections 1 and 2 of the Freedom of Information Act, 2011, the Applicant, as it is entitled, applied to the Respondents to obtain information relating to the activities of the said controlled parking system, as set out in the foregoing, vide letters attached to the application as Exhibits A and B.

It has also been resolved that, in filling the instant application, the Applicant complied with the provision of section 20 of the Act that states any applicant who has been denied access to information, or a part thereof, may apply to the Court for a review of the matter within 30 days after the public institution denies or is deemed to have denied the application, or within such further time as the Court may either before or after the expiration of the 30 days fix or allow.

Now, the case of the Applicant is that upon writing the letters, Exhibits A and B to the Respondents respectively on 13/12/2012, the 1st Respondent failed to respond thereto; whilst the 2nd Respondent, by letter dated 20/12/2012, copy of which is attached to the application as Exhibit C, informed the Applicant that he was liaising with some other bodies to gather the information requested and that the same shall be turned over to the Applicant as soon as the same were delivered to him.

The Applicant further alleged that the Respondents have failed and refused to deliver the information it requested in spite of the undertaking given by the 2nd Respondent to deliver the same.

The Applicant's learned counsel had argued that by the provision of section 4 of the Freedom of Information [F.O.I] Act, the Respondents were duty bound to provide the information requested vide Exhibits A and B, within seven (7) days of receipt of the said letters; and that having failed to supply the information within the prescribed period, the Respondents are deemed by the provision of section 7 (4) of the Act to have refused access to the information required.

Mr. Chigbu of counsel for the Applicant, further argued that in view of the failure of the Respondents to provide the requested information, the Applicant is entitled in law to approach this Court, as it had done, to compel the Respondents to provide the information requested, by virtue of the provision of section 1 (iii) of the F.O.I. Act.

The position of the Respondents however is that they were willing to provide some of the information the Applicant had requested for but that it failed to fulfill a condition precedent which is payment of the requisite fees before the documents could be handed over to it.

The Respondents further contended, on the other hand, that some of the documents requested for by the Applicant are exempted from disclosure under the provision of section 15 (1) (a) of the Act. Specifically, the Respondents contended that the statement of account required under item (f) in Exhibits A and B, form part of such documents the Respondents, by section 15 (1) (a) of the Act, are not under obligation to disclose or exempted from disclosing to the Applicant.

Firstly, although it is correct that in certain instances, the Respondents are entitled to charge fees for documents sought from them, as permitted by section 8 of the Act; however, as correctly submitted by Mr. Chigbu, there is no material before the court to show that the Respondents informed the Applicant of such requirement to pay fees for information required under items (a) (e) of Exhibits A and B. all that the 2nd Respondent said, in his letter Exhibit C, in response of Exhibit B, was to inform the Applicant that he was sourcing for the information required from other institutions and that as soon as the information are procured, he shall turn the same over to the Applicant.

It is therefore clear, that the excuse as to payment of fees, as contended by the Respondents, is nothing but an afterthought, and I so hold.

Moreover, by the provision of section 4 of the Act, the Respondents are under obligation to formally communicate to the Applicant, within seven (7) days of receiving its request, where they consider that the request of the Applicant, or

any part thereof, should be denied. The written communication must also state the reason for denying access to information required.

In the instant case, no such formal communication was made by the Respondents to the Applicant; neither did they give notice of extension of time to the Applicant, a required by section 6 of the Act, stating the reasons for unavailability of the information required within the time prescribed.

Now, with respect to the contention of the Respondents that the information required in item (vi) of the schedule is such that is exempted by virtue of section 15 (1) of the Act, the said section provides as follows:

"15. (1) A public institution shall deny an application that contain:
Trade secrets and commercial or financial information obtained from a person or business where such trade secrets or information are proprietary, privileged or confidential, or where disclosure of such trade secrets or information may cause harm to the interests of the third party. Provided that nothing contained in this subsection shall be construed as preventing a person or business from consenting to disclosure;

Information, the disclosure of which could reasonably be expected to interfere with the contractual or other negotiations of a third party; and

Proposal and bids for any contract, grants, or agreement, including information which if it were disclosed would frustrate procurement or give an advantage to any person.

Learned Respondents counsel had argued that, by virtue of the afore stated provision of the Act, the Respondents have been exempted from providing information on the statement of account relating to third parties, as required by the Applicant, when the information required thereby is likely to cause harm to the interest of such third parties. Learned counsel further argued that the provision of section 15 (1) (a) of the Act is very clear and unambiguous and as such urged the Court to so hold in favour of the Respondents that the information requested for in item (vi) of the schedule is such that they are exempted by law not to supply to the Applicant.

I have examined the information requested by item (vi) of the schedule to this application. The Applicant, thereby, simply requests the Respondents to supply it with statement of account showing remittances made by each of the companies from inception of their engagements to the date of the application.

By my understanding what the Applicant here requests for is not financial statements of third parties, but such that are kept by the Respondents, in whatever nomenclature or names, that show monies remitted to them by the companies they engaged to collect tools on their behalves since the inception of the controlled parking scheme in the Federal Capital Territory.

I agree with Mr. Chigbu, that the Respondents' learned counsel grossly misconceived the clear provision and intendment of section 15 (1) (a) of the Act. By no stretch of interpretation could it be said that the provision covers or exempts the kind of information the Applicant had requested in item (vi) of the schedule. I so hold.

As correctly contended by Mr. Chigbu, in order to establish that the information requested for in item (vi), are such that the Respondents are exempted from supplying to the Applicant, they must show that the information contain trade secrets or commercial and financial information which must be proprietary, privileged or confidential; that the information is in the possession of a third party and that the disclosure of such information may cause harm to the interest of the third party.

By the provision of section 24 of the Act, the burden of establishing that a public institution is authorized to deny an application for information or part thereof shall be on the public institution concerned. In the instant case, the Respondents have failed to discharge this burden.

As such, I am satisfied that this application is meritorious and the same is hereby granted as prayed. Accordingly, it is hereby declared that the failure of the Respondents to grant the Applicant access to the information and/or documents sought by letters written to the Respondents respectively on 13/12/2012, amounts to wrongful and unlawful denial of information under the Freedom of Information Act, 2011.

Pursuant to the provision of section 25 of the Act, the Respondents are hereby further ordered and compelled, jointly and or severally, within twenty one (21) days from the date thereof, to grant the Applicant access to all the information

and/or documents sought as specified in the schedule to the Application already set out in the foregoing. I make no orders as to costs.

OLUKAYODE A. ADENIYI
(Presiding Judge)
30/01/2014

Legal Representation:

G. N. Chigbu, Esq. - *for the Applicant*

R.J. Goyol, Esq. - *for the Respondents*

IN THE FEDERAL HIGH COURT
HOLDEN AT ABUJA NIGERIA
ON TUESDAY THE 25TH DAY OF FEBRUARY, 2014
BEFORE THE HONOURABLE
JUSTICE A. ABDU-KAFARATI
JUDGE

SUIT NO: FHC/ABJ/CS/301/2013

IN THE MATTER OF AN APPLICATION BY CENTRE FOR SOCIAL JUSTICE FOR AN ORDER FOR MANDAMUS

AND

IN THE MATTER OF CENTRE FOR SOCIAL JUSTICE ……. APPLICANT

AND

HONOURABLE MINISTER OF FINANCE …… RESPONDENT

JUDGMENT

This is an application pursuant to Section 2(1) (2) and (3) of the Freedom of Information Act 2011.

The said Section 2 provides:

Section 2:

(1) Notwithstanding anything contained in any other Act, Law or Regulation, the Right to any person to access or request information whether or not contained in any written form which is in the custody or possession or any public official agency or institution however described, is established.

(2) An Applicant under this Act needs not demonstrate any specific interest in the information being applied for.

(3) Any person entitled to the right to information under this Act shall have the right to institute proceedings in the Court to compel any public institution to comply with the provision of this Act.

The applicant has approached this court by way of an application for a writ of mandamus.

In the case of Layanju vs Araoye 1959 NSCC page 143 the Supreme Court held as per Brett F.J that "As I have already pointed out, it is well settled that an application for a writ of mandamus the Court be satisfied, first that the Respondent has a duty of a public nature to perform and secondly that he has refused on demand to perform it.:

See also the case of Odunsi vs Odunsi 1979 12 NSCC page 50.

The Applicant herein has satisfied the Court that they applied for the information from the Respondent which information was refused. It is not in dispute that the information in the custody or possession of the Respondent in his capacity as a public official.

It is therefore my opinion that the applicant has satisfied the requirements for the grant of this application. Accordingly the Applicant's Originating Motion dated 5th June, 2013 is granted as prayed as regard prayers A D. Prayer E which is for general damages is refused.

That is the Judgment of this Court.

ABDU-KAFARATI
JUDGE
25/02/14

Mr. Kingsley Nnajika for the Applicant (with the brief Kelechi Amale, Esq.)

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ENUGU JUDICIAL DIVISION
HOLDEN AT ENUGU
ON MONDAY THE 31ST DAY OF MARCH, 2014
BEFORE THE HONOURABLE JUSTICE D.V. AGISHI
JUDGE

SUIT NO. FHC/EN/M/263/2011

BETWEEN:
CIVIL LIBERTIES ORGANISATION ……. APPLICANT

AND

COMMISSIONER FOR HEALTH, ENUGU STATE ……..... RESPONDENT

R U L I N G

Sequel to the leave obtained on 6th March, 2012 by Omotayo, this motion on notice is filed praying the Court for the following orders:-

1. AN ORDER of Mandamus directed at the commissioner for Health, Enugu State to supply to the Applicant records and documents in respect of the contract awarded for the building and completion of the Diagnostics Center, Trade Fair Complex, Enugu.
2. A DECLARATION that the failure of the Respondent to supply to the Applicant records and documents in respect of the contract awarded for the building and completion of the Diagnostics Center, Trade Fair complex, Enugu is wrongful and contrary to the provisions of Clause 2, 4, & 8(5) of the Freedom of Information Act 2011.
3. And for such other order(s) as the Honourable Court may deem fit to make in the circumstances.

This motion is brought pursuant to order 34 Rule 1(1) (a) and rule 3 of the rules of this Court 2009, clause 21 of the Freedom of Information Act 2011 and under the inherent jurisdiction of this Court. The motion is supported by an affidavit of 5 paragraphs deposed to by Omotayo Esq., the zonal director of the Applicant's office.

Also filed is a statement which contains the name and description of the Applicant the reliefs sought and the grounds for the relief, as well as a verifying affidavit and the Applicant's written address. Attached to the affidavit are annextures A and B.

THE GROUNDS FOR THE RELIEFS ARE:-

1) The Applicant is a Non-Governmental Organization and the First Non-Governmental Human Rights Organization in Nigeria, with head office at 26, Adebowale Street, Off Aina Street, Isheri Road, Ojodu Lagos, and its Southeast Zonal office at 22, Edinburgh Road, Ogui New Layout, Enugu.
2) The Applicant carries out its' human rights activities throughout the country.
3) The Applicant through its' Zonal Director (southeast) Olu Omotayo Esq. wrote a letter dated the 27th October 2011, to the Respondent demanding for records and documents in respect of the contract awarded for the building and completion of the Diagnostics Center, Trade Fair Complex, Enugu.
4) The said letter was delivered to the office of the Respondent by EMS speed post courier service and the delivery to the office of the Respondent was acknowledged in the proof of delivery delivered to the Applicant by the Courier Company.
5) That the Applicant's Zonal Director (Southeast) afterwards made a visit to the Respondent office but could not see him.
6) That the Diagnostics Center, Trade Fair Complex, Enugu is a center which contract had been awarded and public funds made available for that purpose but the funds diverted for personal use hence the reason for non-completion and the abandon of the project till date.
7) That the Respondent has bluntly and persistently refused to supply the records and documents in respect of the project to the Applicant after the said letter of demand was served on his office.
8) That the project if completed would have solved various health needs of the citizen of Enugu State in particular and Nigeria as a whole.

This application has been objected to by the Respondent with a counter affidavit of 5 paragraphs and a written address. Apart from the counter affidavit and written address filed by the Respondent and her counsel, the counsel further filed a notice of preliminary objection. The said notice of preliminary objection is supported by a written address of counsel.

In reply to the preliminary objection, the Respondent filed their reply address. The law is trite that where the preliminary objection and the main application are taken together, the Court has to rule on the preliminary objection first. In this case too I am going to follow same pattern.

The notice of preliminary objection prays this court to strike out the application to hear and determine the application on ground that this Court lacks the jurisdiction to do so.

The particulars of objection are:-

1) The Federal High Court has no jurisdiction except such as is vested there upon by the express provision of the Constitution or an Act of the National Assembly.
2) The Suit as presently constituted is not such that the Federal High Court has jurisdiction to entertain under; Section 251 (1) of the 1999 Constitution of the Federal Republic of Nigeria or any other law currently in force in Nigeria.

C.M. Agboola of counsel has raised an issue for determination as follows:-

> ***Whether the Federal High Court is possessed of jurisdiction to entertain this matter as presently constituted.***

Submitting, this Court is urged to hold that, this matter concerns the subject of public records and information, a subject which according to counsel is not mentioned under section 251 of the 1999 Constitution. That, the subject matter of the application is not within the jurisdiction of the Court.

Replying to the Respondent's preliminary objection Omotayo submitted that this Honourable Court has the jurisdiction to entertain this matter by virtue of section 251(1) of the Constitution. According to counsel, section 251(1) of the Constitution gives this Court power to exercise jurisdiction in respect of matters stated under section 251 of the Constitution and also exercise additional jurisdiction as may be conferred on it by an act of the National Assembly. It is therefore, submitted that Freedom of Information Act 2011 is an Act of the National Assembly which pursuant to the provisions of section 251(1) confers additional jurisdiction on this Honourable Court under clause 21 of the Freedom of Information Act 2011. It is also submitted that nothing in the interpretation clause robbed this Court of its jurisdiction under the FOI Act 2011.

Again, it is argued that the only way to bring an action under FOI Act is by way of judicial review. That the FOI Act 2011 is applicable to both federal and state public institutions and so also to public records or documents in possession of federal and state public institutions or private bodies.

Submitting further Omotayo stated that the fact that Enugu State government has not made any declaration to the effect that it has adopted the FOI Act, and its state assembly has not passed a freedom of information law for Enugu State does not affect the applicability of the FOI Act in Enugu State. According to counsel FOI Act is a complete statement of the law from the Federal Legislature and does not need a state law to be operative in any state in Nigeria. Reliance here is placed on the case of

> ***Attorney General Abia State vs Attorney General Federation (2002) 6 NWLR (Part 763) 264 ratios 31 and 33.***

The fact is that the Federal High Court has no jurisdiction except as vested upon it by the express provision of the Constitution or an Act of the National Assembly. Section 251 of the Constitution is the section of the Constitution which has conferred jurisdiction on the Federal High Court. Section 251(1) of the 1999 Constitution as amended provides:

> ***"Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other Court in civil cases and matter":-***

Furthermore section 20 of Freedom of Information Act (FOI Act) also stated:-

> ***"Any Applicant who has been denied access to information or, a part thereof may apply to the Court for a review of the matter within 30 days after the public institution denies or is deemed to have denied the application, or within such further time as the Court may either before or after the expiration of the 30 days fix or allow."***

Again, section 31 of the FOI Act which is the interpretation section defines Court in the Act to mean a High Court or Federal High Court respectively.

The question is in view of all the above does the Federal High Court has the jurisdiction to hear this suit? The answer obviously is a positive yes. This is because the FOI is an Act of the National Assembly as defined in section 251(1) of the Constitution. There is also no doubt to the fact that additional jurisdiction has been conferred on this Court by such Act of the National Assembly in view of section 20 and 31 of the FOI Act afore cited.

The argument by the Respondents counsel that section 251 of the Constitution does not cover the subject matter of public records and information is of no moment. As I said before section 251(1) of the Constitution has already taken care of that, I have also looked at the dictionary definition of the word *"respectively"* in the Act in reference to a High Court of state and Federal High Court respectively. There are a lot of dictionary definitions as can be found today but the common meaning of the word *"respectively"* means correspondingly, separately, or individually or applying to in a parallel or sequential way. It is however important to note that nothing in the interpretation clause robbed this Court of its jurisdiction under the FOI Act 2011.

The argument of the Respondent that neither the Applicant or the Respondent is an agency of the Federal Government and that this application ought not to have been brought before this Court is also of no moment. I have already stated the FOI Act 2011 is applicable to both Federal and State public institutions and also to public records or documents in possession of Federal and State public institutions or even private bodies.

Section 31 of FOI Act defines public institution as any legislative, executive, judicial administrative or advisory body of the government, including boards, bureau, committees or commissions of the state and any subsidiary body of those including but not limited to committees and sub-committees which are supported in whole or in part by public fund or which expends fund and private bodies providing public services performing public functions or utilizing public funds.

Again section 31 has defined public record or document as:-

> ***"a record in any form having been prepared, or having been or being used, received, possessed or under the control of any public or private bodies relating to matters of public interest and includes:-***

A) Writing on any material,
b) Information recorded or stored or other devices, and any material subsequently derived from information so recorded or stored
c) Label, marking or other writing that identifies or describes anything of which it forms part, or to which it is attached by any meas.
d) Book, card, map, plan, graph or drawing.
e) Photograph, film, negative, microfilm, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced.

I am in complete agreement with Mr. Adebayo that by virtue of the foregoing, public officers in all the states of the Federation including Enugu State are under obligation to provide information under the FOI Act 2011. Suffice to also state here that there is nothing wrong in bringing this application under order 34 of the rules of this Court 2009. The Applicant to my mind has also followed the right procedure in applying for order of mandamus.

As has rightly been observed, the subject matter under discuss is also within the jurisdiction of this Honourable Court. The case of *F. M. C. T. vs Eze (2006) 2 NWLR (Part 964) 221* at *244* cited by Agboola is inapplicable to the facts of this case. Notice of preliminary objection is hereby dismissed.

We shall now proceed to look at the substantive application. The facts of the application are simply that the Applicant a non-governmental organization which also carries out human rights activities through its zonal director (South-East) wrote a letter to the Respondent dated 27th October, 2011 demanding for records and documents in respect of the

contract awarded for the building and completion of the Diagnostics Center, Trade Fair Complex Enugu. Exhibit "A" is a copy of the proof of delivery issued by EMS speed post to the Applicant evidencing delivery of the letter to the Respondent's office.

Diagnostic Center, Trade Fair Complex, Enugu is said to be a center which contract had been awarded and public funds made available for that purpose but allegedly diverted for personal use hence reason for this application. The said project is said to have been uncompleted and abandoned till date. The Applicant maintained that they have approached the Respondent severally but that the later has bluntly refused to supply the records/documents in respect to the project thus the reason for this application. It has also been canvassed that this project if, completed would have solved various health problems home and abroad.

In opposition to the application the Respondent filed a counter affidavit of 5 paragraphs deposed to by Mr. Charles Udeh, a litigation officer in the employ of the State Ministry of Justice. It is followed by Respondents written address in opposition to the Applicants motion. It is the contention of the Respondent that she is not under any obligation under the Freedom of Information Act or any other law in force in Nigeria to supply information or records to the Applicant or any other person except as may be expressly permitted by the Governor of Enugu State.

Two issues have been raised for determination by Miss Agboola on behalf of the Respondent as follows:-

1. Whether a public officer or any official of the Enugu State Government is under any obligation to provide information under the Freedom of Information (FOI) Act.
2. Whether the Applicant is entitled to the order of mandamus sought in the circumstances.

Responding on the 1st issue above Agboola C.M. submitted that the 1999 Constitution defines the extent of Federal and State legislative powers. According to her the legislative powers of the National Assembly and the state House of Assembly on the subject of public records and archives are contained in paragraphs (4) and (5) of concurrent legislative list in part 11 of 2nd schedule to the 1999 Constitution respectively.

Paragraph 4 states that:-

> ***The National Assembly may make laws for the Federation or any part thereof with respect to the archives and public records of the Federation while***

Paragraph 5 states:-

> ***A House of Assembly may, subject to paragraph 4 thereof make laws for that state or may part thereof with respect to the archives and public records of the government of the state.***

According to counsel, the powers of the National Assembly to make laws with respect to archives and public record are limited to the archives and public records of the Federation any may not make laws for the state as regards archives and public records of the state as stated in the above paragraphs (4) and (5).

Counsel however, argued that where the National Assembly makes laws to regulate archives and public record of the Federation within the territory of a state the said state may not need to make a law that is incompatible where the National Assembly has covered the field on a legislative subject. Here reliance is placed on.

> ***O. S. I. E. C. vs A. C. (2010) 19 NWLR (Part 1226) 273 at 351*** *where definition of doctrine of covering the field is made.*

Reliance is also made to:-

> ***Attorney General Abia State vs Attorney General of the Federation (2002) 6 NWLR (Part 763) 264***

It is sternly argued that the National Assembly cannot validly legislate let alone "*Cover the field"* on the subject of records information or archives of a state, the item not being within its legislative competence continuing his submission counsel stated that there is no reference in FOI Act to state or state government. There is defined boundaries of legislative competence as regards public records and archives according to counsel. It is also argued that even though the President of the Federation has signed the FOI Act into law, the said Act does not on bind on the states which are yet to adopt same into law through their states houses of Assembly, Enugu State being one of such states.

The 2nd issue for determination is whether the Applicant is entitled to the order of mandamus sought in the circumstance. Here again it has been submitted by Miss Agboola that order of mandamus upon an application for

judicial review is not granted as a matter of course. According to her certain conditions must be fulfilled for its grant especially where it is shown.

a) There is an imperative duty on the official or the body sought to be compelled
b) A distinct demand for performance of the duty has been made
c) There is no other recourse opened to the Applicant

Reliance is here placed on:-

Fawehinmi vs Akilu (1987) 4 NWLR (Part 67) 797.

It is counsel's further submission that there is no duty placed on the Respondent to provide information form the public records or archives of the state under the FOI Act, the subject matter as above being outside the legislative competence of the National Assembly.

The Applicant through his counsel Mr. Adebayo in reply submitted that the Applicant is entitled under the Freedom of Information Act 2011 to be given the records and documents in respect of contract awarded for the building complex of the Diagnostic Center, Trade Fair Complex, Enugu. According to him, it is a public project which if completed would have solved various health needs of citizens of Enugu state in particular and Nigeria as a whole.

Sections 2, 4 and 8(5) of FOI Act are the relevant laws upon which the Applicant has lodged his application. I want to restate those provisions for clarity. Section 2 provides:-

1. Notwithstanding contained in any other Act, Law or Regulation, the right to any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is hereby established.
2. An Applicant herein need not demonstrate any specific interest in the information being applied for.
3. Any person entitled to the right to information under this Bill, shall have the right to institute proceedings in a Court to compel any public institution to comply with the provisions of this Act.

Again section 4(1) of the same Act also provides:-

An application for access to a record or information under this Act shall be made in accordance with section 2 of this Act.

Looking at this FOI Act carefully, there is no doubt to the fact that, it is an Act of the National Assembly. I think learned Respondent's counsel is getting it wrong altogether by thinking that the said law/Act is inapplicable to the various states of the Federation. To say that a public officer or any official of Enugu State Government is not under any obligation to provide information under FOI Act will be to completely misconstrue the intention of the law makers.

FOI Act to my mind covers the whole Nigerian States just like Economic and Financial Crimes Commission (Establishment) Act 2004, Advance Fee Fraud and other Fraud Related offences Act, 2006, money laundering (prohibition) Act 2004 etc, promulgated by the National Assembly and which are applicable to the entire Nigerian state including the Federal Capital Territory Abuja. There has not been any special adoption anywhere by any individual state House of Assembly passing it into law. I think the most important thing with these Acts of the National Assembly is for the Court to look at the issue of jurisdiction once jurisdiction is conferred on an individual Court be it State High Courts or Federal High Court, such Courts are free to hear such matters brought to them. FOI Act is a new law which came into force in 2011. I think the aim is to encourage accountability transparency, good governance, rule of law and the need to check misuse of public funds official corruption.

I have actually examined the grounds of denial to avail the Applicant with the information sought from the Respondent. The reasons adduced as I have tried to explain are not cogent. It would have been different however if the information sought does fall within any of provisions under section 14(1) (a) (e). The said law is here under reproduced as follows:-

Section 14(1) Subject to subsection (2), a public institution must deny an application for information that contains personal information and information exempted under this subsection includes:-

A) Files and personal information maintained with respect to clients patients, residents, students, or other individuals receiving social, medical, educational, vocational, financial, supervisory or custodial care or services directly or indirectly from public institutions;

b) Personal files and personal information maintained with respect to employees, appointees or elected officials or any public institution or Applicants for such positions;
c) Files and personal information maintained with respect to any Applicant, registrant or licensee by any government or public institution cooperation with or engaged in professional or occupational registration, licensure of discipline;
d) Information required of any tax payer in connection with the assessment or collection of any tax unless disclosure is otherwise requested by the statute; and
e) Information revealing the identity of persons who file complaints with or provide information to administrative, investigative, law enforcement or penal agencies on the commission of any crime.

It has to be noted that even personal information protected by this sub-section can still be disclosed in the circumstances stated in sub-section 2 of section 14. It states as follows:-

2) A public institution shall disclose any information that contains personal information if:-
   a) The individual to whom it relates consents to the disclosure;
      or
   b) The information is publicly available.

The beauty of this Act is that it places public interest above personal individual interest. I have even discovered that the doctrine of "covering the field" defined in *O. S. I. E. C vs A. C.* (supra) by Tabai Justice Supreme Court cited by Respondent's Counsel even supports the case of the Applicant better. It provides "By the doctrine of covering the field;

> ***"Where the National Assembly has enacted a law on a particular subject, a state House of Assembly may not enact a law on the same subject which is in conflict or inconsistent with the provisions of the enactment of the National Assembly. And where there is such an inconsistency between the provisions of any law enacted by the National Assembly and that enacted by the House of Assembly of a state, the law enacted by the National Assembly shall prevail and the law enacted by the House of Assembly of a state shall to the extent of the inconsistently, be null and void."***

Under this doctrine of *"covering the field"* if it appears from the terms, the nature or subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights duties, then for a state law to regulate or apply to same matter is regarded as a detraction from the full operation of the Federal law and so is inconsistent. The case of *Attorney General Abia State vs Attorney General of Federation* supra is apposite here especially rations 31 and 33.

I completely agree with Omotayo that FOI Act is a complete statement of the law from the Federal legislature and does not need a state law to be operative in any state in Nigeria including Enugu State. The Respondent is therefore not justified to deny the application of the Applicant to it. For that reason the reliefs sought by the Applicant are granted.

Respondent is hereby ordered to within 21 days starting from today supply to the Applicant records and documents in respect of the contract awarded for the building and completion of the Diagnostic Center, Trade Fair Complex, Enugu.

D.V. AGISHI
JUDGE
31/03/2014

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON WEDNESDAY, THE 30TH DAY OF APRIL, 2014
BEFORE HIS LORDSHIP, HON. JUSTICE A.R. MOHAMMED
JUDGE

SUIT NO: FHC/ABJ/CS/222/2013

BETWEEN:

IN THE MATTER OF AN APPLICATION BY CENTRE FOR SOCIAL JUSTICE FOR AN ORDER FOR MANDAMUS

AND

IN THE MATTER OF CENTRE FOR SOCIAL JUSTICE ……. APPLICANT

AND

SECRETARY TO THE GOVERNMENT OF THE FEDERATION …….. RESPONDENT

J U D G M E N T

By a motion on notice dated 21st May, 2013, the Applicant seeks for the following reliefs:-

1. A DECLARATION that denying the Applicant access to copies of Presidential Reports constitutes an infringement of the Applicant's right guaranteed and protected by Section 1 of the Freedom of Information Act, 2011. The Presidential Reports sought by the Applicant are:-

   (i) Report of the Presidential Committee on the Rationalisation and Restructing of Federal Government Parastatals, Commissions and Agencies; also known as Oronsaye Report.
   (ii) Report of the Federal Government Expenditure Review Committee (ERC) otherwise called Anya O. Anya Report.
   (iii) Report of the Presidential Project Assessment Committee (PPAC) otherwise called Report on Abandoned Projects.
   (iv) Report on Gen. T.Y. Danjuma Presidential Advisory Committee.

B. A DECLARATION that the continued refusal of the Respondent to grant to the Applicant access to the copies of the Presidential Reports without a reason cognizable as an exemption under the Freedom of Information Act, violates Section 4 of the Freedom of Information Act, 2011.

C. AN ORDER OF MANDAMUS compelling the Respondent to grant to the Applicant access to the copies of the Presidential Report aforementioned.

The grounds for the application were given as follows:-

(i) The Freedom of Information Act in Section 1 entitles all Nigerians to a right of access to information in the custody or possession of any public official, agency or institution howsoever described and grants a right of access to the Courts for the enforcement of this right. An Applicant under the Freedom of Information Act need not demonstrate any specific interest in the information being applied.
(ii) Section 4 of the Freedom of Information Act sets out the time line of 7 days for public institutions to accede to requests for information while Section 20 prescribes that applications for judicial review should be filed within 30 days after the public institutions denies or is deemed to have denied the application, or within such further time as the Court may either before or after the expiration of the 30 days fix or allowed.
(iii) The Respondent is the Secretary to the Government of the Federation in charge of keeping all governments records and reports.

(iv) The Applicant by a letter dated the 15th of March, 2013 and received inn the Respondent's office on the same day applied to the Respondent to grant it access to the copies of the aforesaid Presidential Reports to wit…
(a) Report of the Presidential Committee on the Rationalistion and Restructuring of Federal Government Parastatals, Commissions and Agencies; also known as Oronsaye Report.
(b) Report of the Federal Government Expenditure Review Committee (ERC) otherwise called Anya O. Anya Report.
(c) Report of the Presidential Project Assessment Committee (PPAC) otherwise called Report on Abandoned Projects
(d) Report of Gen. T.Y. Danjuma, Presidential Advisory Committee.

(v) The time allowed by the law for the Respondent to provide to the Applicant the copies of the aforementioned Presidential Reports has elapsed and the Respondent by a letter dated April 4, 2013 and served on the Applicant on April 5, 2013 indicated that the reports "are not readily available" and that "same are at various stages of consideration by the Government". The foregoing explanations by the Respondent are not exemptions cognizable under the Freedom of Information Act.

(Vi) The Respondent has a legal obligation to provide the information requested by the Applicant or in the alternative to state exemptions cognizance by law as reasons informing the withholding of the requested information.

(Vii) The Respondent has violated the Applicant's right of access to the said Presidential Reports and the Applicant seeks the protection of the Court to vindicate its right.

The application is supported by a 9 paragraphs affidavit deposed to by Omale Omachi Samuel, the programme support officer of the Applicant. Attached to the application are two exhibits marked 1 and 2 respectively. The application is also accompanied with a written address dated and filed on 21/5/13.

The Respondent reacted to the application dated 21/5/13 with a counter affidavit of 20 paragraphs deposed to by Abdullahi Ahmad, an Assistant legal Adviser in the office of the Respondent. The Respondent's counter affidavit is also accompanied with a written address.

The Applicant then filed a Further Affidavit in response to the counter affidavit. The Further Affidavit is accompanied with a Reply Written Address.

In the Applicant's written address, this issue was formulated for determination.

> "Whether the Applicant is entitled to order of mandamus compelling the Respondent to grant to the Applicant access to the copies of the Presidential Reports aforementioned."

In his argument, learned Applicant's counsel submitted that this Court has the power to grant to the Applicant an order of mandamus, and he referred to the provisions of order 34 Rule 3 (1) and (4) of the Federal High Court Rules, 2009. Reference was also made to the provisions of Act. It was also submitted that by the use of the word "shall" in Sections of the Freedom of Information Act, should be construed strictly to mean a command or mandate, and there is no discretion. Reference was made to the cases of NIGERIA LNG LTD VS. AFRICA DEV. INSURANCE CO. LTD (1995) 8 NWLR PART 597, 139 and UGWU VS. ARARUME (2007) SC PT. 1, 88 The Court was urged to grant the order of mandamus sought by the Applicant.

In the Respondent's written address, the following issues were formulated for determination:-

i. Whether the Applicant is entitled to access Presidential Reports of Government without a white paper being issued/gazette by the Government on same.
ii. Whether the Freedom of Information Act 2011 envisaged the release of various Governmental reports of committees without first releasing a Government white paper on same
iii. Whether reports of various Government Committees set up, without a white paper release on same, can be considered as public documents to allow access to the Applicant.

On the first issue, it was the Respondent's submission that the Presidential Reports of Committees forwarded to the Government are not released to the public until the Government considers the various recommendations as contained in the reports, and thereafter releasing a white paper on same, that until white paper is released, the document cannot be accessed by the public. That the Applicant requested for the reports of the various committees as against a Government white paper on same, which counsel said, is a public document/record. It was then contended that the request of the

Applicant does not fall under the information to the released to the Applicant under the Freedom of Information Act, 2011. The Court was referred to Section 20 (1), (2) (3) (4) of the Freedom of Information Act.

On the second issue, it was submitted for the Respondent that what the Freedom of Information Act envisage is the record and information that emanates from the Government as it's own Act. That Acts of Government emanates after the Government must have issued a white paper on reports submitted to it, for consideration. That reports submitted to the Government of the day does not form part of it's record until a white paper is issued in respect thereof.

On the third issue it was stated that reports of Committees work submitted to Government is not a public document until same is considered by the Government and a white paper released thereon, before it can be referred to as public document. The Court was referred to Section 102 (a) (i) (ii) (iii) of the Evidence Act, 2011. It was also submitted that the Applicant is only entitled to the release of Information that is of a public nature which is a gazette information or a white paper of the said reports but not the report of the Committee. That the Applicant's application for the aforementioned reports is totally misconceived. It was further contended that Section 12 (1), (3) and (4) of the Freedom of Information Act, 2011 exempt the Respondent of any liability for denying the Applicant access to the information applied for.

Learned Report's counsel to order 34 rule 6 (1) of the Federal High Court Rules, 2009 under which the Applicant's application is brought, and he submitted that the provision require that copies of the statement in support of application for leave under rule 3 shall be served with the Notice of Motion or summons, but that the Applicant has failed to comply with this cardinal provision for judicial review, thereby making the application incompetent in this suit. On the need to obey Rules of Court, the Court was referred to the case of AFRICAN PETROLEUM VS. OWODUNNI (1 LCI.

In the Applicant's Reply address, it was stated that on order 34 rule (1) of the Federal High Court (Civil Procedure) rules, and for not complying with it, Applicant's counsel submitted that the Court ignore such argument as misleading. The Court was referred to the proof of service on record to show that the bailiff of this Court duly served the Respondent the entire documents required by law. On the issue of gazette and government white paper, it was submitted that it was never part of the Respondent's reason in refusing to make available the information via exhibit 2. That the issue of gazette and Government paper is an afterthought.

I have reviewed the argument of the learned counsel for the parties in this matter. The starting point in the consideration of this application s to resolve the issue of competence of the application itself as raised by the Respondent. Learned Respondent's counsel has relied on order 34 rule 6 (1) of the Rules of this Court to contend that the Applicant has not complied with the said provision which requires that copies of the statement in support of the application for leave be served along with the Notice of Motion or summons. The Applicant, however, contended that all document required by law to be served have been served by a bailiff of this Court. I have checked the "PROCESS FILE" in this suit, (that is the file containing the proof and affidavits of all processes served by the bailiff). What I saw is that the bailiff has filed an "Affidavit of Service" showing that he has served motion on Notice dated 21/5/13 (that is the Applicant's application under review). A careful reading of the said motion on notice dated 21/5/13 would show that it is not accompanied with a statement in support of application for leave. What the motion on Notice dated 21/5/13 contained are:-

i. Affidavit in support,
ii. Two exhibits marked A and B
iii. A written address as argument on the application dated 21/5/13.

I could not find the referred "statement" in the motion on Notice. Now, order 34 rule 6 (1) of the Federal High Court Rules, 2009 provides as follows:

> 6-(1) "*Copies of the statement in support of an application for leave under rule 3 shall be served with the notice on motion or summons and subject to sub-rule w, no ground shall be relied upon or any relief sought at the hearing except the grounds and reliefs set out in the statement*".

It can be seen that the requirement of serving the "statement" with the notice on motion is entrenched in the rules of Court. Although, rule 6 (1) is made subject to sub-rule 2 of the same Rule 6, sub Rule 2 is a provision empowering the Judge hearing the motion o summons to allow the Applicant to amend his statement either to specify different or additional grounds or reliefs. It is thus clear that the requirement of order 34 Rule 6(1) has not been complied with by the Applicant in the instant matter. Although, I am not unmindful of the fact that the default being considered is as to the Rules of Court, but I want to believe that since the matter was commenced by way of "Judicial Review for order of

Mandamus", then it leaves the realms of actions or matters that comes before the Court vide the usual writ of summons, originating summons or similar originating processes. Applications for Judicial review, of mandamus, certiorari, quo-warranto and the like are proceedings seeking to challenge or question administrative actions or decisions. The proceedings are therefore sui generis, hence, specific provisions have been made in the rules to guide their application in Judicial proceedings. Where, therefore an Applicant has not complied with a provision like order 34 rule 6(1) of the Rules in serving his notice of motion or summons, the failure will definitely affect the competence of the motion on notice. This is because, the motion on notice or summons, as the case may be, would have become an "incomplete process" for the purpose of the application for order of mandamus. Based on this ground alone, the application dated 2/5/13 is incompetent and ought to be struck out.

However, and in case I am wrong on my conclusion on the state of law as regards the provision of order 34 Rule 6(1) of the Federal High Court Rules, 2009, let me endeavour to consider the Applicant's application on the merit.

The crux of the Applicant's case as can be deduced from it's affidavit in support are as contained in the grounds upon which the application is brought. I have earlier in the beginning of this Judgment set out in detail the grounds for the application. However, and at the risk of repetition, the Applicant has applied to the respondent to grant it access to the copies of the presidential Reports of the various committees earlier mentioned as contained in the grounds for the application. The respondent replied the applicant that the documents requested by the applicant were not readily available at the moment as the said documents were at various stages of consideration by the Government, and that copies of the reports will be made available and forwarded to the applicant in due course. See exhibits 1 and 2 attached to the applicant's affidavit in support of the application dated 21/5/13. See also paragraphs 4, 5, 6, 7, and 8 of the affidavit in support of the application. See also paragraphs 5, 6, 7, 8, 9, 10, 11, 13, and 14 of the respondent's counter affidavit. The respondent further deposed in paragraph 12 of his counter affidavit that a report yet to be gazetted is not a public document as is presently constituted under the Freedom of Information Act. See paragraph 12 of respondent's counter affidavit.

As far as this Court is concerned, the issues to be resolved in this matter are:

i. Whether or not, a document requested pursuant to the provision of Freedom of Information Act, 2011 is a public document?
ii. Whether or not, report(s) of committees set up by Government are public documents within the provisions of the Freedom of Information Act?

On the first issue formulated, (that is, whether or not, a document requested pursuant to the provision of Freedom of Information Act, 2011 is a public document), recourse must be had to the Freedom of Information Act for the resolution of this issue. The Applicant's contention is that by the provision of section 1 (1) of the Freedom of Information Act, right of access to record is established and guaranteed. Section 1 (1) of the Act provides thus:

> *"Notwithstanding anything contained in any Act, Law or regulation the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established"* underlining mine.

From the wordings of section 1(1) of the Freedom of Information Act, there is no doubt that right of access to information and documents in the custody of public officials, agencies and institutions are guaranteed. Now, the deliberate and specific use of the words "information, whether or not contained in any written Form, which is in the custody of any Public official, agency or institution"… can only mean that documents or information requested pursuant to the Freedom of Information Act are "public document and/or information. In fact, Section 31 of the Freedom of Information Act, which is the interpretation section defined "public record or document" to mean" a record in any form having been prepared, or having been used, received, possessed or under the control of any public bodies relating to matters of public interest"

This therefore means that the document or information referred to in section 1 (1) of the Freedom of Information Act can mean no other document than a public document. The first issue formulated is therefore answered in the affirmative.

On the second issue, (that is whether reports of committees set up by Government are public document within the provisions of the Freedom of Information, 2011). I have earlier reproduced the meaning ascribed to "Public document" in Section 31 of the Freedom of Information Act, 2011. The question is, does a committee report fits into the interpretation or definition of "Public documents" given in Section 31 of the Freedom of Information? I must at

once answer this question in the negative. This is because, as had been seen, for a document to qualify as "Public document" as provided in Section 31 of the Act, the document must have been "prepared", "used" "received" "possessed" or "under the control of any public or private bodies relating to matters of public interest", there is no doubt that a committee report simpliciter, which formed the opinion of the committee members cannot be described as a "public document" until the same has been received, used and possessed by the Government that set up the committee. As is with practice, Government received or accepts reports of committees by issuance of "white paper" or "Gazetting", Government position on the Report. It should be borne in mind that Government has no obligation to implement a particular Report submitted by a committee set up for that purpose. If, therefore government has the discretion to accept any Report, the said Report cannot by any stretch of imagination be described as "public document".

Now, since it has been shown by Section 31 of the Freedom of Information Act that a Committee Report is not among the documents described as public documents, then the Reports of the various committees requested by the Applicant are not public documents. If the said Reports are not public documents, it then means that no right of access can inure in favour of the Applicant under Section 1(1) of the Freedom of Information Act, 2011.

As no right exist for the Applicant to demand for the Reports of the various committees set up by Government, (by virtue of the said Reports not being public documents) the Applicant action clearly lacks merit and cannot stand. In consequence of the above, this suit be and is hereby dismissed.

No order as to cost.

HON. JUSTICE A.R. MOHAMMED
JUDGE
30/4/14

COUNSEL:

KINGSLEY NNAJIAKA ESQ. FOR THE APPLICANT
ABDULLAHI AHMAD ESQ. FOR THE RESPONDENT.

IN THE HIGH COURT OF JUSTICE OF BENUE STATE OF NIGERIA
IN THE BENUE STATE JUDICIAL DIVISION
HOLDEN AT MAKURDI

MOTION NO. MHC/2564m/12
MOTION NO: MHC/811m/14

ON THE MONDAY 26TH DAY OF MAY, 2014

BEFORE: HIS LORDSHIP HON. JUSTICE S.O. ITODO - JUDGE

BETWEEN

MAJOR GEN. INDIA GARBA (RTD) …… PLAINTIFF

AND

ACCOUNTANT GENERAL OF BENUE
STATE OF NIGERIA …… DEFENDANT

R U L I N G

The Plaintiff filed suit No. MHC/2564/12 on the 26:09:12 seeking various reliefs against the defendant, who is the accountant general of Benue State.

Further to that, he went on, on the same date to file two other actions, Viz: Suits No. MHC/2565/12 and MHC/2566/12 against the Special Adviser Local Government Affairs and the Commissioner for Finance respectively.

The subject matter in all the action are all the same and impair material. Consequent, upon the above facts, the defendant herein is aggrieved, on the basis that the procedure and processes of the court have been improperly employed, hence the present application charging the plaintiff with abuse of court process, and for an order striking out this action for being incompetent, vexatious and lacking in merit.

The 5 paragraphs affidavit filed in support of the application shows broadly that the application is hinged on the fact that the Freedom of Information Act is not yet domesticated in Benue State and that in addition to the present suit two other actions by the plaintiff on the same subject matter are pending. These other actions are set out in the affidavit.

The plaintiff in reaction filed a counter-affidavit of 9 paragraphs, while each of the parties filed their respective addresses which they adopted in argument.

I am satisfied from an examination of the law and the authority of the decisions of our courts, that the National Assembly is vested with the power to enact law and Legislations, including the Freedom of Information Act under Section 4 of the 1999 Constitution (as altered). I am also satisfied that until set aside pronounced upon to the contrary and / or abrogated such laws apply throughout the country. The question of the Applicability of the law under review is not directly in issue in this application; and even if it is; to the extent that no pronouncement has been made on it and/or same abrogated, it remains in operation and application throughout the country. The decision in A.G. Abia State Vs. A.G. Federation & ors (2006) 28 NSCQR 161 cited by the defendant was upon an issue which was raised and pronounced upon by the court. There is no similar pronouncement shown to have been made on the Freedom of Information Act, and until the contrary be proved, it remains in force.

Also, it matters little or of no consequence, if a man who is entitled to a relief approach the court under the wrong premises or law or under no law at all. The decision in Falobi Vs Falobi (1976) NMLR 169, 177 cited by the plaintiff and Ulegede Vs Milad (2000) FWLR (Pt. 22) 981 at 993, refers.

The complaint that the action is an abuse of process however merit a closer probe. With the assistance of the various decisions cited by the parties as a guide, it is evident that, for an action to be declared frivolous, vexatious oppressive

and an abuse of court process, it must be shown quite clearly that there are two or more actions between the same parties in respect of the same subject matter in one or more courts at the same time. See Ikine Vs. Egberode (2001)9 LRCN 3288, 3307, per Ejiwunmi, JSC, cited by the defendant. As correctly pointed out by the defence in its address, it contemplates or at its bedrock is the existence of multiple actions between the same parties, which it further explained through the decision in Umeh Vs Iwu (2008) 34 NSCQR (Pt. 11) 1133, 1152 as the co-existence of (a) a multiplicity of actions (b) between the same parties (c) on the same subject matter and/or (d) issues.

The operative phrase for the purpose of the decision in this ruling is whether the parties and subject matter and/or issues are the same. While the latter is capable of being a long drawn analysis, the same cannot be said of the parties. Whereas, the plaintiff is the same person in all the actions, the defendants are different functionaries of Government. There is no agreement between the parties as to their real functions, until evidence is led, it is presumed that their functions are what the plaintiff present them to be.

I should think that the decisions cited by the defendant on this issue which is in accord with the following decisions of the same court, to wit; 7up Bottling Co. Vs Aboila (2001) 88 LRCN 2214, 2239 per Ugundare, JSC that:

> *"if there were cases pending between the same parties on the same or substantially the same cause of action, it would be abuse of process of court for the plaintiff to institute yet another action in the same court against the same defendant while these other cases were still pending."*

And per Tobi JSC, in

African Reinsurance Corporation VS JDP (2003) 106 LRCN 539 AT 559, that;

> *"There is said to be an abuse of the process of the court when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent such as instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues……"*

It is clear from these decisions of the court that the underlying fact that must exist to constituted an abuse of the process of the court is that the parties to all the actions, amongst other factors must be the same.

That is not so in the three cases filed by the plaintiff as all the defendants are different. The objection therefore fails and it is dismissed.

Justice S.O. Itodo
26:05:14

Plaintiff present
Defendant absent
Chief O.O Obono-Obla, Esq for plaintiff
No appearance for defendant

Court: Ruling read out in court. Preliminary objection is dismissed.

IN THE FEDERAL HIGH COURT
IN THE LAGOS JUDICIAL DIVISION
HOLDEN AT LAGOS, NIGERIA
ON MONDAY THE 27TH DAY OF OCTOBER, 2014
BEFORE THE HONOURABLE
JUSTICE I.N. BUBA
JUDGE

SUIT NO: FHC/L/CS/1689/2013

BETWEEN:

1.	INCORPORATED TRUSTEES OF MEDIA RIGHTS AGENDA	))	……. APPLICANTS/
2.	INCORPORATED TRUSTEES OF PUBLIC AND PRIVATE DEVELOPMENT	))	RESPONDENTS

AND

1.	THE NIGERIAN CIVIL AVIATION AUTHORITY	)	…… RESPONDENTS/
2.	THE ATTORNEY GENERAL OF THE FEDERATION	)	APPLICANTS

R U L I N G

The court read the motion of the Applicants seeking:

1. A declaration that the disclosure of the information requested by the Applicants in their letters dated 21st October, 2013 will not interfere with pending or actual and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency.
2. A Declaration that the disclosure of the information requested by the Applicants in their letters dated letter 21st October, 2013 will not interfere with pending administrative enforcement proceedings conducted by any public institution.
3. A declaration that the disclosure of the information requested from the Respondents by the Applicants will not in any way obstruct any ongoing criminal investigation.
4. A declaration that the budgetary allocation for the procured vehicles is neither contained in the 2013 budget of the NCAA, approved nor published as part of the 2013 Budget of the Federal Republic of Nigeria and as such cannot be the basis for the refusal to provide the information requested by the Applicants in one of their letters.
5. A declaration that the public interest to disclose the requested information outweights whatever injury the disclosure of the information to the Applicants may cause under Section 12 (2) of the Freedom of Information Act.
6. An Order of Mandamus compelling the 1st Respondent to disclose or make available to the Applicants all the information requested by the Applicants in their letters dated 21st October, 2013 which was duly delivered to the 1st Respondent, namely:

(a) The procurement records for the purchase by the Nigerian Civil Aviation Authority (NCAA) of two BMW 760 LI Vehicles with chasis number WBAHP41050DW68032 and BBAHP41010W68044
(b) Evidence of budgetary allocation for the referred procurement process;
(c) The procurement plan for the procurement of the referred procurement;
(d) The evidence of advertisement in various newspapers as well as in the NCAA website, the procurement journal, international publication etc, soliciting for bids or inviting prospective bidders to submit bids for the procurement.
(e) A list of all bids tendered for this procurement, from when it was advertised till the closure of the bid advertisement;
(f) Minutes of the bid opening meeting;
(g) Attendance list of all individuals and the organization they represent at the bid opening session;
(h) The NEEDS assessment document, if it is in a separate document from the procurement plan;
(i) Standard bidding documents that were issued to all the bidders

(j) Documentation on the scope of the referred procurement process;
(k) Copies of the minutes of bid evaluation meetings, records of bid evaluation, recommendation of bid evaluation committee and minutes of meeting to the tenders board awarding the contract to the successful companies;
(l) A copy of the certificate of no objection from the Bureau f Public Procurement (BPP);
(m) Signed copies of letter of award and final contract award documents for the award of this contract and any subsequent amendment or modification, if applicable;
(n) Proforma invoice of those documents; and
(o) Documents showing delivery of procured vehicles.
(p) The annual budget and the public procurement plans of the Nigerian Civil Aviation Authority

(7) An ORDER compelling the 2nd Respondent to initiate criminal proceedings against the 1st Respondent for the offence of wrongful denial of access to information under Section 7 (5) of the Freedom of Information Act, 2011.

This court read all the process filed in the instant application.

Indeed this court on the 7/3/2014 granted the Applicants leave to apply for judicial review and adjourned the matter to 8/5/2014 for return.

Learned counsel to the 1st Respondent, the Nigerian Civil Aviation Authority, Mr. Emeka Okpoko filed a notice of Preliminary Objection to the effect that no pre-action of notice was issued. The court lacks jurisdiction. The application have no locus standi et. Al. amongst other things. The 2nd Defendant, the Attorney General, though based through Lagos Liaison Office did not react.

Objection on that ground is dismissed with a wave of the hand.

On the issue of extension of time because the Applicants did not come within 30 days. I need say apart from the fact that the Applicants were granted leave by this court to say whatever it will infringing or wrongly the notice is closed. On the issue of locus standi the answer is also very simple. Under the guidelines on the implementation of the F.O.I Act, 2011 revised edition 2013 paragraph 1.3 1.6. The Applicant under FOI does not need to make it in writing.

An Applicant does not need to demonstrate any specific interest or motive in the information applied in that regard the issue of locus standi is also of no moment. Accordingly the issue is also dismissed in the preliminary objection with a wave of the hand.

In sum even though the Application was brought outside 30 days. I agree with the Applicants learned counsel's submission that there is a provision for extension of time as true. But same was not applied for either orally or at any time. Thus this court notes that the by dint of Section 1 (1) of the FOI Act 2011.

Notwithstanding anything contained in any other Act law or regulation, the right of any person to access or request information whether or not contained in any written from which is in custody or possession of any public official agency or institution however described is established.

Therefore from the above provision and interpretation notwithstanding anything in any other Act. This provision will not be in conflict with Section 24 of NCA Act. The FOI Act, 2011 being a later legislation. The National Assembly is deemed to have taken all other laws raised or entry into account before passing the FOI Act.

In sum the Preliminary Objection only has merits on the applicants failure to apply within 30 days or giving an extension of time. It will then show therefore the Preliminary Objection succeeds only in part as to the trip of the application which this court is entitled will have been called upon to strike out. But is this court not funtus officio on the issue having granted leave outside 30 days rightly or wrongly.

This situation is akin to the old Fundamental Rights Enforcement Procedure Rules where leave has to be sought within 12 months but once the action is filed outside 12 months and leave is granted by the court wrongly it will appear to me that the issue is one of Appeal. Though it can be raised during the argument of the motion on notice. See the cases of ANIGBORO Vs SEA TRUCKS NIGERIA CA. and SEA TRUCK V ANIGBORO. The Supreme Court decision where issue 3 as to the granting of leave after 12 months in the Fundamental Rights Enforcement Procedure under

1979 was raised. Though not considered by the Supreme Court after finding the Appeal on other grounds.

Consequently it will seem to me if I am to remit the issue of 30 days having expired then this court will uphold the Preliminary Objection only on that point. However if this court having granted leave will not remit it then the Preliminary Objection will have failed.

However I am inclined to holding that the issue by of law and not fact. I am not foreclosed here the Preliminary Objection will succeed only on that point and the only effect is the application will be struck out having been filed out of time contract and application for extension of time on the Preliminary Objection case will be struck out.

On the merits of the application the court again read the entire process filed and the Counter Affidavit the F.O.I Act, 2011 is new legislation in Nigeria undergoing interpretation and application by our court. This court is also therefore guided by judicial decision of courts of superior jurisdiction and courts of coordinate jurisdictional and other legal literature. Indeed there is now a guideline on the implementation of FOI 2011 revised Edition of 2013 to which none of the learned Counsel before me referred the court to. The guideline was issued by the office of the Hon. Attorney General of the Federation and Minister of Justice on 27/2/2013 who incidentally as stated elsewhere in this judgment, is the 2nd Respondent in this application and who also did not react to the process filed though served in the Lagos Liaison Office on 30/6/2014. This Court has carefully considered other decision as stated elsewhere in this ruling. See also a presentation titled understanding the F.O.I 2011 and its implications for the Federal High Court as an arm of the judiciary which is a public institution made at the recent 30th Federal High Court Judge Annual, Federal High Court Judges Conference at Owerri:

"Public and Private Development Centre LTD/GTE (for itself and on behalf of the NIGERIAN CONTRACT MONITORING COALITION V POWER HOLDING COMPANY OF NIGERIA (PHCN) PLC and the Hon. Attorney General of the Federation (FHC/AB/CS/582/2012), where-in the court held that; Disclosure of information about an already-awarded contract, that is one that is no longer in the stages of negotiations, does not interfere with the rights of the third party contractor.

UZOEGWU F.O.C. V CENTRAL BANK OF NIGERIA & ATTORNEY GENERAL OF THE FEDERATION (FHC/AB/1016/2011), where-in the court held that the salaries of the senior officials of the Central Bank of Nigeria, including the Governor, His Deputies and Directors of the CBN being payment made from the public treasury funded with tax payers money, did not amount to personal information and so should be disclosed under the FOI Act.

Applying the same premise stated above, the court in Legal Defence and ASSISTANT PROJECT (GTE) LIMITED V CLERK OF THE NATIONAL ASSEMBLY OF NIGERIA (FHC/L/ABJ/CS/805/2011), also held that the salaries of Members of Parliament did not amount to personal information and so should be disclosed to request made under the FOI Act.

PPDC V THE HON. MINISTER OF THE FCT and the Secretary, FCT Transport Secretariat, Federal High Court of Nigeria - Abuja, case FCT/HC/CV/M/305/13, 30 January 2014. In this action for information regarding the Abuja public parking scheme, the court granted the application's request because the defendants failed to satisfy the burden of proof required to deny the request. The court held that the exemption applied by the defendants, to the effect that release of the requested information could harm a third party did not apply, especially because what was requested by the applicant, was an account of public monies paid to each third party company engaged by the FCTA, to carry out the public parking Scheme. It further held that the Public bodies must inform a requester of any fee requirement before imposing such fee and that any denial of an FOI request must state the reasons for the denial, which must be formally communicated to the applicant within 7 days of the application being made.

In BONIFACE OKEZIE V ATTORNEY GENERAL of the Federation and the Economic and Financial Crimes Commission, Federal High Court of Nigeria, Suit FHC/L/CS/514/2012, 22 February 2013, the Federal High Court sitting in Lagos, held that Public institutions must comply with requests for information within seven days. If they refuse to comply, they must supply specific bases for the refusal under the FOI Act in a notice to the applicant within seven days of the request being made by applicant. The further held that a public body must respond to a request for information even if the information requested is properly classified in the interest of national security.

In YOMI OGUNLOLA & ANOR V SPEAKER OYO STATE HOUSE OF ASSEMBLY & 3 ORS, Suit No: M/332/12, where the bone of contention was whether the FOI Act applied to the states, the court held that the Act applied. The court specifically stated that:

> **"It is quite clear that the FOI Act was enacted by the National Assembly pursuant to Section 4 (4) (b) of the 1999 Constitution (as amended) in order to bring into effect the provision of Section 39 (1) of the same constitution which guarantees fundamental right to "receive ad impact ideas and information without interference. It is my further view that the National Assembly has enacted the FOI Act to be operational throughout the country in the interest of the common good and national interest. See ATTORNEY GENERAL OF ONDO STATE AND ATTORNEY GENERAL OF FEDERATION (SUPRA)"**

On the vexed issue of "domestication" of the Act at the State level, an expression that I consider anomalous for obvious reasons. The court further held that:

> **"It is not necessary for it to be adopted in Oyo State. The FOI Act as stated earlier is of general application to both Federal and State Governments in Nigeria. Section 15 of the Interpretation Law of Oyo State has provision in it where the Act shall be read with such formal alterations as to names, localities, offices, persons, etc, as to make it applicable to our circumstances".**

In Suit NO: FHC/ABJ/CS/301/2013: In the matter of CENTRE FOR SOCIAL JUSTICE V HON. MINISTER OF FINANCE; the court in deciding in favour of the applicant, held that: "That a declaration is hereby granted , that denying the Applicant access to the details of the statutory transfers in the 2012 Appropriation Act by the Respondent without explanation constitutes an infringement of the Applicant's right guaranteed and protected by Section 1 (1) of the Freedom of Information Act 2011.

That a declaration is hereby granted that the continued refusal of the Respondent to grant to the Applicant access to the details of statutory transfer in the 2013 Appropriation Act despite Applicant's demand violates Section 4 of the Freedom of Information Act 2011.

That a declaration is hereby granted that the continued refusal of the Respondent to grant access to the Applicant of the details of the statutory transfers in the 2013 Appropriation Act without explanation constitutes an infringement of the Applicant's right guaranteed and protected by Section 48 of the Fiscal Responsibility Act 2007.

That an order of mandamus is granted compelling the Respondent to grant to the Applicant access to the details of the statutory transfers in the 2013 Appropriation Act specifically, the details of the transfers to the National Judicial Council, Niger-Delta Development Commission, Universal Basic Education, National Assembly, Independent National Electoral Commission and National Rights Commission.

In S.P. GUPTA V UNION OF INDIA (1982) AIR (SC) 149 at 232, a case involving government's refusal to release intra-agency correspondence regarding transfers and dismissals of judges, the Indian Supreme Court while affirming the existence of the right to information in the absence of express constitutional or statutory provision at the time, stated thus: "where a society has chosen to accept.
In CONRAD STEFAANS BRUMMER V THE MINISTER OF SOCIAL DEVELOPMENT AND OTHERS, SOUTH AFRICA CONSTITUTIONAL COURT, CCT 25/09, 13 August 2009, the court held that a thirty-day time limit for parties who wish to challenge a denial of a request for information in court is inadequate; until the legislature passes a law setting a fair time limit, requesters will have 180 days in which to file.

MITTALSTEEL SOUTH AFRICA LIMITED (FORMERLY ISCOR LIMITED V HLATSHWAYO, SOUTH AFRICA Supreme Court, Case No.326/05, 31 August, 2006, the court held that the definition of a "public body" subject to disclosure under the Promotion of Access to Information Act (PAIA) includes companies that perform a government function and are under the control of the state, even if indirectly, consequently Mittalsteel South Africa Limited, a former state-owned iron company was directed to release records of meetings to the requester.

SOUTH LANARKSHIRE COUNCIL V SCOTTISH INFORMATION COMMISSIONER, UK Supreme Court (2013) UKSC 55, 29 July 2013. The Scottish Information Commissioner was correct in ordering a local council to disclose the pay scales of its employees: the information requested would not enable the public to discover the identity of employees and accordingly, disclosure would not violate the Data Protection Act.

In PHINJO GOMBU V TOM MITCHINSON, ASSISTANT COMMISSIONER et al., Superior Court of Justice, Ontario, Canada (2002) O.J. NO. 3309, 3 September, 2002, the court held that refusal to disclose information about campaign contributions, including names addresses and phone numbers of contributors, in electronic format was unreasonable given the importance of furthering the democratic process through public scrutiny and the minimal

intrusion on privacy.

In NAVARRO GUTLERREZ V LIZANO FAIT, Judgment of the Constitutional Chamber of the Supreme Court of Costa Rica of April 2nd, 2002, as translated in the 2003 Report of the Special Rapporteur for Freedom of Expression, 161, the Central Bank refused to disclose a report of the International Monetary Fund, requested by a newspaper. The Constitutional Chamber of the Supreme Court of Costa Rica, while affirming the existence of the right of access to information, stated thus:

> **"The State must guarantee that information of a public character and importance is made known to the citizens, and, in order for this to be achieved, the State must encourage a climate of freedom of information…. In this way, the State… is the first to have an obligation to facilitate not only access to this information, but also its adequate disclosure and dissemination, and towards this aim, the State has the obligation to offer the necessary facilities and eliminate existing obstacles to its attainment." The court stated further "the right to information…implicates the citizens' participation in collective decision-making, which, to the extent that freedom of information is protected, guarantees the formation and existence of a free public opinion, which is the very pillar of a free and democratic society."**

In conclusion, it is useful to restate the United Nations General Assembly Resolution 59 (1) adopted on 14 December, 1946 wherein they stated that "Freedom of Information is a fundamental human right and the touch stone of all freedoms to which the United Nation is consecrated".

This was further substantiated by Mr. Abid Hussain, the then UN Special Rapporteur on Freedom of Opinion & Expression in his 1995 report to the UN Commission on Human Rights, wherein in they stated that "Freedom would be bereft of all effectiveness, if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked."

The court having carefully considered all the process has found as a fact the deposition in the Counter Affidavit i.e. paragraphs 3 (xiv) (a) (f) that the information requested for is in Exhibit D falls under the exemptions in Section 12 (1), (a), (i), (ii) and (vi) and 26 (a) of the FOI and that the disclosure will interfere with pending or actual law enforcement proceedings conducted by law enforcement agency.

To this averment there is no reply by the Applicant. Therefore the averment is deemed to be true in the absence of no contradiction or evidence to the contrary. The FOI to this court is a piece of a legislation that seems to give with the right hand and take away with the left hand with said exemption going through the piece of legislation. The law is replete with exemption whilst the Applicant seek to evoke the provision of the Act they must also come to term with the reality of the exemptions and answer all issues otherwise the application will be a futile exercise.

In sum this court will strike out the application as incompetent. The application is struck out not dismissed.

HON. JUSTICE I.N. BUBA
JUDGE
27/10/2014

Ruling read and delivered in open court.

APPEARANCES
Parties absent
M.T. Oladapo Esq. Counsel for the Applicant
Mr. Emeka Okpoko Counsel for the 1st Respondent

HON. JUSTICE I.N. BUBA
JUDGE
27/10/2014

Court: No order as to costs.
HON. JUSTICE I.N. BUBA
JUDGE
27/10/2014

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON TUESDAY, THE 18TH DAY OF NOVEMBER, 2014
BEFORE HIS LORDSHIP, THE HON JUSTICE G.O. KOLAWOLE
JUDGE

SUIT NO: FHC/ABJ/CS/189/2013

BETWEEN:

HON. ENGR. IKENNA V. EJEZIE …….. PLAINIFF

AND

ECONOMIC & FINANCIAL CRIMES COMMISSION (EFCC) ……. DEFENDANT

JUDGMENT

By a "Motion *Ex parte"* dated 22/3/13, the Plaintiff sought for leave of this Court to bring an application to enable him to apply for review of the action, perhaps inaction of the Defendant on a request which the Plaintiff made for access to certain information in the Defendant's custody. The said "Motion *Ex parte*" was heard and granted on 9/7/13 and the Plaintiff was granted leave to bring the said application.

The Plaintiff, consequent upon the leave granted, filed his "Originating Summons" pursuant to Order 34(5) of the Federal High (sic) Civil Procedure Rules, 2009, and in it, sets down two (2) questions for determination. The said questions are:

1. *"Whether by a true interpretation and construction of Section 5(a) of the Freedom of Information Act, 2011 the Defendant is not obligated to allow the Plaintiff unfettered access to information concerning up to date information on budgetary expenses and how it utilized her 2012 Appropriation as stated in Plaintiff's letter dated February 27 2013?"*
2. *"Whether the refusal or failure of the Defendant to grant to application of the Plaintiff for access to information concerning up to date information on budgetary expenses and how it utilized her 2012 Appropriation within seven (7) days of the receipt of same does not amount to an infringement of the provisions of Sections 5(a) and 8(1) of the Freedom of Information Act (supra)?"*

In the event that the two (2) questions are answered in the way and manner that will be favourable to the Plaintiff, the Plaintiff seeks five (5) reliefs. The reliefs as highlighted on the face of the "Originating Summons" are:

(i) *A DECLARATION that the refusal, failure and or neglect by the Defendant to release the information req*
` *uested by the Plaintiff concerning the up to date information on budgetary expenses and how it utilized her 2012 Appropriation amounts to a violation of Section 4(a) of the Freedom of Information Act (supra) and therefore is wrongful, illegal and unconstitutional."*

(ii) *"AN ORDER OF MANDAMUS directing the Defendant including her servants, agents, privies, officials and or cohorts to furnish the Plaintiff with comprehensive and detailed information concerning the up to date information and budgetary expenses and how it utilized her 2012 Appropriation until Judgment is delivered in this case within 14 days of delivery of Judgment."*

(iii) *" AN ORDER of this Honourable directing the Defendant to pay a fine of N500,000 (Five Hundred Thousand Naira) Pursuant to Section 7(5) Freedom of Information Act (supra) for wrongful denial of the Plaintiff the right of access to information sought."*

(iv) *"The cost of this Action."*

(v) *S"Any further order(s) as the Court may deem fit and proper to make in the circumstances of this case."*

The "Originating Summons" was supported by a 19 paragraphed Affidavit which the Plaintiff personally deposed to and has one documentary exhibit attached to it.

The Exhibit, marked as "A" was a copy of the letter of demand dated 27/2/13 which the Plaintiff's Counsel had

addressed to the Defendant wherein he requested to be granted access into certain information in relation to the Defendant's Budget Expenditures" for 2012. Part of the issues in relation to which the Plaintiff also wanted information relate to events which predated the enactment of the Freedom of Information Act, 2011 which I dare say, has no *retrospective* provision as to create a right in the Plaintiff and or a duty in the Defendant with regard to information on such events with effect from 2003 when the Defendant was created by an Act of the National Assembly. These events cover items 1 3 in Exhibit "A" attached to the Plaintiff's Affidavit.

The Plaintiff's Counsel filed a 12 paged written address and in paragraph 3.0 on page 9, set down only one issue for determination. The said issue is: *"Whether by virtue of the provision of Section 4(A) of the Freedom of Information Act, 2011, the Defendant is under an obligation to provide the Plaintiff with the information requested."* In the said address, the Plaintiff's Counsel referred to several provisions of the Freedom of Information Act, supra. To marshal arguments and submissions that were meant to sustain the sole issue for determination which has been set down for determination.

When the Defendant was served with the Plaintiff's "Originating Summons," it filed a "*Counter Affidavit in Opposition to the Plaintiff's Affidavit in Support of Originating Summons dated 14th October, 2013."* It was an 8 paragraphed "Counter-Affidavit" deposed to by one Oluwatosin Bello, a Legal Practitioner in the "Legal and Prosecution Department" of the Defendant.

The Defendant's Counsel also filed an unpaged written address but which was divided into paragraphs to argue the issues of facts and law in the "Counter-Affidavit" of Oluwatosin Bello. The Defendant's Counsel in paragraph 3.1 of the unpaged written address, set down two (2) issues for determination. These are:

(a) *"Whether the Plaintiff's action is not incompetent in view of same having been commenced over 30 days from the accrual of the cause of action without the Plaintiff obtaining an order of Court extending the said 30 days period in violation of Section 21 of the Freedom of Information Act, 2011."*

(b) *"Whether the Plaintiff's suit is not statute barred in view of the clear provisions of Section 2(a) of the Public Officers Protection Act, 2004."*

Reading the "Counter-Affidavit" of the Defendant, two (2) primary issues were the thrust of its defence to the Plaintiff's "Originating Summons". Firstly, that the information which the Plaintiff requires and demanded for by his Solicitor's letter dated 27/2/13 attached as Exhibit "A" are all contained in the Defendant's website. Is this a good defence to an application made pursuant to the provision of the Freedom of Information Act? The second issue is in relation to the competence of the Plaintiff's suit on account of two (2) separate provisions One is Section 21 of the Freedom of Information Act, supra, and the other is based on Section 2(a) of the Public Officer's Protection Act, 2004. The submissions of the Defendant's Counsel dwell on these issues as to the competency of the Plaintiff's action which were argued in paragraphs 4.1 4.6 in relation to the provision of Section 21 of the Freedom of Information Act, supra., and in paragraphs 5.1 5.6 of the address.

Before I proceed with the consideration of the submissions made by both parties, let me quickly reproduce the provisions of Section 20 and not Section 21 of the Freedom of Information Act, 2011 and Section 2(a) of the Public Officers Protection Act, 2004.

Section 20 of the Freedom of Information Act provides:

> *"Any Applicant who has been denied access to information or a part thereof, may apply to the Court for a review of the matter within 30 days after the public institution denies or is deemed to have denied the application, or within such further time as the Court may either before or after the expiration of the 30 days fix or allow."*

and Section 2(a) of the Public Officer's Protection Act, supra, on its part, provides:

(2) *"Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act r Law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, Law, duty or authority, the following provisions shall have effect*

(a) *Limitation of time the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of, or in case of a continuance of damage or injury, within three months next after the ceasing thereof:*
Provided that if the action, prosecution or proceeding be at the instance of any person for cause arising while such person was a convict prisoner, it may be commenced within three months after the discharge of such person from prison.

On 29/9/14, the parties through their Counsel, were heard on the adoption of their respective written addresses. On the

issue as to the competence of the Plaintiff's action raised by the Defendant's Counsel, the Plaintiff's Counsel argued that the Public Officers Protection Act, supra, does not apply to the instant suit because, the *"facts on which it was (sic) anchored was false"*. It was submitted that the Plaintiff filed a "Motion Ex parte" dated 22/3/13 for leave to bring an application for "Judicial Review". The "Motion *Ex parte"* was granted on 9/10/13".

When I read these submissions, my view is that having regard to the fundamental nature of the issues raised by the Defendant which border on jurisdiction, it is better that the issue be resolved first. As I had remarked, the Defendant's Counsel anchored the objection on two (2) different provisions based on the primary legislation that found and established the Plaintiff's cause of action against the Defendant, i.e. the Freedom of Information Act, supra and a secondary legislation, which is a Statute of general application, i.e. the Public Officers' Protection Act, 2004 which provides s "statutory refuge" to all public authorities, persons or institutions created by law. For instance, the Defendant created pursuant to the EFCC (Establishment) Act, 2004 and which by the often cited Supreme Court's decision in IBRAHIM V. J.S.C., KADUNA STATE (1998) 14 NWLR (Pt. 584) S.C.I is a "public officer" who is entitled to the *limitation of action* provision in Section 2(a) of the Public Officers Protection Act.

When I read the "Originating Summons" filed by the Plaintiff on 14/10/13, the question is: Was this action filed within three (3) months when the *cause of action* accrued? This is because, by the Supreme Court's aforesaid decision, the question whether or not the Defendant is entitled to seek "refuge" under Section 2(a) of the Public Officer's protection Act, supra is no longer *debatable* because the Defendant is a "public Officer". The question which one may ask is: When did the Plaintiff's *cause of action accrue*? By the Plaintiff's own showing, Plaintiff's letter of demand for certain information from the Defendant's record is dated 27/2/13. The copy of the letter attached as "Exhibit "A" to the Plaintiff's Affidavit did not clearly (the Exhibit was somehow illegible) show what date the Defendant received Exhibit "A", which in an application for *an order of mandamus*", the Plaintiff is required to show, and perhaps prove, not only the demand made to the Defendant, but that it was received and it was denied or refused. This is because, the *prerogative order of mandamus* is one of the most efficient public law remedies to seek the performance of a public duty by a public body, institution or officer where it is proved that there is a demand on the part of the public body or institution to perform such a public duty and which it has refused to perform. See Court of Appeal's decision in C.B.N. v. SYSTEMS APPLICATION PRODUCTS (NIG.) LTD. (2005) 3 NWLR (Pt. 911) 152 @ 180-181, 200-201.

So, it is crucial to institute a competent action for *prerogative remedy of mandamus*, for the Applicant such as the Plaintiff herein, not only to show evidence of a demand, but a *corollary proof* of receipt of the letter of demand and then, a refusal by the Defendant which may be express or can be implied in the context of Section 20 of the Freedom of Information Act, supra. In view of the contents of the Defendant's "Counter-Affidavit", it does not appear that the Defendant is disputing receiving the Plaintiff's Exhibit "A". it is therefore convenient, for my judiciary enquiry in order to ascertain when the Plaintiff's *cause of action* accrued, applying the Supreme Court's decision in EBOIGBE v. NNPC (1994) 5 NWLR (Pt. 347) S.C 649 in order to determine whether the Plaintiff's suit as at when he filed his "Originating Summons" on 14/10/13 was or was not *statute barred* to accept 27/2/13 being the date on Exhibit "A" as the date when the Defendant received the said letter of demand. By the provision of Section 4 of the Freedom of information Act, supra, the Defendant has seven (7) days within which to give the information requested for by the Plaintiff. The information was not given within seven (7) days. When one uses the Gregorian Calendar for 2013 to calculate the relevant period within the provisions of the Acts, it seems that by 6/3/13, the Plaintiff already had a *cause of action fully crystallized* by the refusal Defendant to oblige the information requested for in Exhibit "A". but when one reads the provision of Section 20 of the Freedom of Information Act, the Plaintiff is required within 30 days of the refusal or when it can be deemed that the Defendant has refused to oblige him with the information, to apply to a Court of competent jurisdiction to seek for *orders of mandamus* to compel the Defendant to give the information. The 30 days as stipulated by Section 20 of Freedom of Information Act, supra. should begin to count from 7/3/13. This will invariably, by my arithmetic, end on 5/4/13.

In the Plaintiff's counsel's reply to this issue, he argued that the Plaintiff had as far back as 22/3/13, filed a "Motion *Ex parte"* wherein he seeks leave to bring an application to seek *orders of mandamus*. The said application was only granted on 9/10/13 and the Plaintiff filed his "Originating Summons" on 14/10/13. This argument, on the face of it, seems so perfect but the Plaintiff's Counsel appears to have ignored two (2) fundamental issues: firstly, that an *Ex parte* application to seek for leave to bring an action to seek for *prerogative orders of mandamus*, was not only and *Ex parte* proceedings which did not involve the Defendant as a *"party"*, but was only a step the Plaintiff took to institute a competent legal action. I am not in any doubt, that a "Motion *Ex parte"* may or not be granted when the provisions of Order 34 of the Federal High Court (Civil Procedure) Rules, 2009 are read generally. It does not by itself, commence a legal action or proceedings against the Defendant but a step to do so. When it is filed, it is not the law, that it will automatically be granted. See: Court of Appeal's decision in EREKORO v. GOVT. OF CROSS RIVERS STATE (1991) 4 NWLR (Pt. 185) C.A. 322 @ 338. So, for all *intents* and *purposes*, the Plaintiff's action in this matter was not

commenced unit 14/10/13 when he filed his "Originating Summons". Was he within or out of time" I will answer this question when I consider the second issue which the Plaintiff's Counsel seemed to have overlooked. It is whether having regard to the provisions of Section 20 of the Freedom of Information Act, supra, which is the principal legislation which *guides* and *regulate* the Plaintiff's *cause of action*, there was any need for the Plaintiff to seek for leave of Court before he can bring an application *"for a review of the matter within thirty days after the public institution denied or is deemed to have been denied the application"*. The part "B" arm of the provision even talks of the possibility of the Court extending the time to do so where the 30 days may have lapsed. It says: *"or within such further times as the Court may either before or after the expiration of the thirty (30 days fix or allow*". My understanding of this provision, being the specific and primary legislation that defines the Plaintiff's *cause of action* based on Exhibit "A', the Plaintiff's Counsel really had no business in making a recourse to the Federal High Court (Civil Procedure) Rules, 2009 pursuant to its Order 34 provisions which deal with *"Applications for Judicial Review"*. This is because, when one reads the provision of Section 20 of the Freedom of Information Act, supra, an Application seeking for any information from a public body or institution, with the exemption provided for in Sections 15, 16, 17 and 19, is not required to show any interest in the information being requested for, whereas in Order 34 Rule 3(4) of the Federal High Court (Civil Procedure) Rules, 2009, an applicant is required to show that he has *"sufficient interest in the subject matter to which the application relates"*. This provision has been interpreted over the ages as a requirement for *"locus standi"*. Whereas, the Freedom of Information Act, supra, has dispensed with the need for an Applicant to show any interest in the information he or she seeks to obtain from a public body or institution. So, when the Plaintiff's Counsel veered into the Federal High Court (Civil Procedure) Rules, 2009, he had unwittingly assumed a greater burden and obligation which the Freedom of Information Act, supra had by Section 20 dispensed with. When one reads Section 21 of the Act, the application to be filed pursuant to Section 20 of the Act is to be *"heard and determined summarily*". This in my view, underscored the intention of the National Assembly to make access to such public records or information much more easy and without the judicial restraints as to *locus standi* which the provisions of Order 34 Rule 3(4) of the Federal High Court (Civil Procedure) Rules, 2009¸have embedded in all applications for "Judicial Review" pursuant to the Federal High Court Rules, 2009. The Freedom of Information Act, supra, has dispensed with this requirement of *"sufficient interest"* to be shown by an Applicant.

The Plaintiff's Motion *Ex parte*" dated 22/3/13 did not have any prayer, in the context of Part 'B' of Section 20 of the Freedom of Information Act, supra, for an extension of time. In any event, the said "Motion *Ex parte"* was brought principally under Order 34 of the Federal High Court (Civil Procedure) Rules, 2009 which I dare say, makes no provision for extension of time to bring an application for "Judicial Review" that was not filed within three (3) months of the accrual of the *cause of action*. I refer to Order 34 Rule 4 of the Federal High Court (Civil Procedure) Rules, 2009. My view is that the Plaintiff who has been refused or denied access to information he has applied for from a public body or statutory commission such as the Defendant herein, has no business to bring any application for ;eave in order to seek any *order of mandamus*. By Section 20 of the Freedom of Information Act, supra, he is entitled to file an application to seek the Court's intervention whilst exercising its supervisory jurisdiction, to review the decision of the Defendant who by its conduct, may have refused to oblige the information requested for. All the time which the Plaintiff expended in filing an application for leave, I dare say was a needless and avoidable waste of his time because, by the provision of Section 20 of the Freedom of Information Act supra, he does not require leave to bring the application, and the real action without the judicial restraints as to *locus standi* which the provisions of Order 34 Rule 3(4) of the Federal High Court (Civil Procedure) Rules, 2009 have embedded in all applications for "Judicial Review" pursuant to the Federal High Court Rules, 2009. The Freedom of Information Act, supra, has dispensed with this requirement of "*sufficient interest´* to be shown by an Applicant.

The Plaintiff's "Motion *Ex parte"* dated 22/3/13 did not have any prayer, in the context of Part 'B' of Section 20 of the Freedom of Information Act, supra, for a an extension of time. In any event, the said "Motion *"Ex parte"* was brought principally under Order 34 of the Federal High Court (Civil Procedure) Rules, 2009 which I dare say, makes no provision for extension of time to bring an application for " Judicial Review" that was not filed within three (3) months of the accrual of the *cause of action*. I refer to Order 34 Rule 4 of the Federal High Court (Civil Procedure) Rule, 2009. My view is that the Plaintiff who has been refused or denied access to information he has applied for from a public body or statutory commission such as the Defendant herein, has no business to bring any application for leaver in order to seek any *order of mandamus*. By Section 20 of the Freedom of Information Act, supra he is entitled to file an application to seek the Court's intervention whilst exercising its supervisory jurisdiction, to review the decision of the Defendant who by its conduct, may have refused to oblige the information requested for. All the time which the Plaintiff expended in filing an application for leave, I dare say was a needless and avoidable waste of his time because, by the provision of Section 20 of the Freedom of Information Act, supra, he does not require leave to bring the application, and the real action in which the Defendant was involved as a *"party"*, was not commenced until when he filed his "Originating Summons" on 14/10/13. Although, leave was granted on 9/10/13 but he did not utilise the order granted until 14/10/13 when the "Originating Summons" was filed in the Registry. When the 30 days within which he

is obliged by the provision of Section 20 of the Freedom of Information Act, supra, is calculated vis-à-vis the date when the "Originating Summons" was filed, i.e. 5/4/13 to 14/10/13, it is obvious that the Plaintiff's action was filed outside the 30 days which the National Assembly has prescribed for the bringing of an application where access to information has been denied. The same analysis and reasoning will apply, *mutatis mutandis*, to the issue raised on the provision of Section 2(a) of the Public Officers Protection Act, supra, because, an *Ex parte* application to seek leave, was merely a procedural step to bring a proper and competent legal action against the Defendant as a "party". The action is only instituted when the application which is meant to be *inter parte* is filed. Whatever happens between when the "Motion *Ex parte*" was filed and when it was granted, which although was not the fault of the Plaintiff but his Counsel, is of no moment because, the Plaintiff was not required in the first place, by the provision of the specific, primary legislation which defines and constitutes his *cause of action*, i.e. Section 20 of the Freedom of Information Act, supra, to seek leave of Court. Even when he is required to seek for the leave of Court, my understanding of the jurisprudence in such circumstances is that the leave and the substantive application, all must be done and accomplished within the limitation period prescribed by law. If the Plaintiff's Counsel was really conscious of these issues, his "Motion *Ex parte"* I would have had an "*Affidavit of Urgency"* filed along with it to appraise the Court of the need to have the hearing heard and concluded within the period stipulated by either Section 20 of the Freedom of Information Act, supra, or by Section 2(a) of the Public Officers Protection Act, supra. In either or both legislations, the Plaintiff's action was caught by *statute of limitations.*

In the light of the conclusion which I have reached on the threshold issues as to the *competence* of the Plaintiff's action, I really do not see any need to go into the merit of the case. My only observation is to say that, the Defendant's repeated references to its website where the information being requested for can be obtained is not a credible response to a request made pursuant to the Freedom of Information Act. This is because, if the information is on the Defendant's website, the Defendant can still oblige the Plaintiff without directing his attention to its website the address of which the "Counter-Affidavit" of Olutosin Bello did not give. Information which are on the Defendant's website can and should be released to any Applicant except such part of the information that may have been exempted by the provisions of Sections 15, 16, 17 and 19 of the Freedom of Information Act and the address of the website should be fully disclosed.

Let me go a little further on this issue by saying that even where the Defendant intends, for *genuine* and *bonafide* reasons, to refer the Plaintiff or any Applicant exercising his right pursuant to the provisions of Freedom of Information Act, supra, to its website, the Defendant must not only state the website, but has an obligation in line with the letters and spirit of the Act, to reply to the Plaintiff's demand and to advise the Plaintiff in its reply, of the existence of its website. The Defendant, may in addition, as part of the larger efforts at ensuring transparency in governance [even though the Plaintiff in this case has not disclosed what he himself does for a living to enable the Court to ascertain whether he is a taxpayer, who is entitled to make a request for information as to how to Defendant's budgetary allocation for 2012-13 was expended and to be "qualified" so to say, to demand for transparency in the financial administration of the Defendant I am not oblivious of the fact that an Applicant does not, by the provision of the Act, have to show any "interest" in the information being requested to have access to or any other pre-conditions. But, I dare say, by way of *obiter,* that the Freedom of Information Act, supra, is possibly one of the rare legislations I have ever seen which creates rights in persons but does not extract corresponding duty for the enforcement or effectuation of such rights] and the Defendant needs to go the extra mile, in order to show that it has nothing to hide, by downloading the required information from its website and forward same to the Plaintiff's solicitors as is required by the Act. It is my view, that despite the reservations I have often expressed in relation to the loose and open ended nature of the legislation which creates rights and fails to impose duty on an Applicant in the context of the provisions of Order 34 Rule 3(4) of the Federal High Court, (Civil Procedure), 2009, that it is not enough, in a "Counter-Affidavit" filed in an application made to Court for a review of the Defendant's decision refusing to oblige the information requested for, to merely mention and harp on the existence of its website, the detailed particulars of which the Defendant never gave even in the said "Counter-Affidavit" filed, if only to prove to the Court, the existence and unrestricted access to such website.

In conclusion, having regard to the analysis which I have made, the only order I can make, applying the *dictum* of the Supreme Court's decision in IBRAHIM v. J.S.C. KADUNA STATE supra, is an order dismissing the Plaintiff's "Originating Summons". The said "Originating Summons" is accordingly dismissed as it was caught by *limitation of action* provisions in both the Freedom of Information Act, supra, and the Public Officers Protection Act, supra. Where the provision of Order 34 Rule 4 of the Federal High Court (Civil Procedure) Rules, 2009 is applied, it may also have been caught by the said provision which requires an application for "Judicial Review" to be made within three (3) months of the accrual of the *cause of action.*

This suit is dismissed. There shall be no order as to costs.

HON. JUSTICE G.O. KOLAWOLE
JUDGE
18/11/2014

COUNSEL'S REPRESENTATION:

1. **O. UGOCHUKWU ESQ, for the PLAINTIFF**
2. **MRS. RITA OGAR for the DEFENDANT.**

FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON MONDAY THE 15TH DAY OF DECEMBER, 2014
BEFORE HIS LORDSHIP, HON. JUSTICE A.F.A. ADEMOLA
JUDGE

SUIT NO: FHC/ABJ/CS/856/13

BETWEEN:
PUBLIC & PRIVATE DEVELOPMENT
CENTRE LTD/GTE (PPDC) ……. APPLICANT

AND

1. FEDERAL MINISTRY OF FINANCE
2. THE HON. MINISTER, FEDERAL MINISTRY OF FINANCE …… RESPONDENTS

R U L I N G

A. SUMMARY OF FACT

The application in this suit is brought by G.N. Chigbu of A and E law partnership. It is a Motion on Notice dated 11/12/2013 pursuant to Order 34 rules 5 and 6 of the Federal High Court Civil Procedure Rules 2009 and sections 1, 2 (6) and 20 of the Freedom of Information Act and under the inherent jurisdiction of this Honourable Court praying the following reliefs

i. A DECLARATRION that the failure of the 1st and 2nd Respondents, to furnish Applicant with the information and documents sought vide Applicant's letter of 30th October, 2013 amount to a wrongful denial of information under Freedom of Information Act, 2011.
ii. AN ORDER of the Honourable Court compelling the Respondents, jointly and severally, within seven days of the judgment herein, to furnish Applicant with information and copies of documents sought vide Applicant's letter of 30th October, 2013 ad which information and documents are set out in the schedule hereto.
iii. AND FOR such other order or other orders as the Honourable Court may deem fit to make in the circumstance.
It is supported by a statement pursuant to Order 34 Rule 3 (2) of the Federal High Court Civil Procedure Rules containing the name of Applicant, description of Applicant, Relief sought, grounds upon which relief are sought, facts relied upon, 12 paragraph affidavit deposed to by Seember Nyager and also a Written Address with an annexture marked Exhibit A.

Upon service on the Respondent, the 1 and 2 Respondent filed in response a 3 paragraph affidavit sworn to by Enyiazu David Nwokoma, a civil servant in the employment of the 1st Respondent, it is accompanied by a Written Address. Both affidavit and address are dated 3rd February, 2014 and filed by Olusegun Omotola of the legal unit of the 1st Respondent.

The Applicant replied on points of law. The reply was dated 10th and filed 11th February, 2014.

On the 3/4/2014 this matter was adjourned to 20th May 2014 for hearing. On the said day, G.N. Chigbu for the Applicant and Udo Archibong for the respondents in Court, adopted all their processes filed as their arguments in this suit.

In the course of arguments, G.N. Chigbu for the Applicant urged the court to order for and peruse the documents in possession of the Respondent which the Respondents sought to be exempted, to ascertain if the documents should be exempted or not.

Further praying the court to grant their reliefs as prayed.

The court having listened to the submissions of Counsel as well as perused the Counter Affidavit of E.D. Nwokoma for Respondent's particularly paragraph 3 ordered the Respondents to produce a copy of the agreement to the court within a period of 14 days from the 20/5/2014, whilst judgment was reserved in this suit.

On the 27th October, 2014 G.N. Chigbu for Applicant was in court for re-adoption of his processes. However the Defendant Counsel S. Omotola was absent but sent a letter giving reason for her absence, and applying for the matter to be adjourned to 30 or 31st of October for re-adoption. With no objection from G.N. Chigbu, for the Applicant, the Court adjourned the matter to 30th October for re-adoption.

On the 30/10/2014, G.N. Chigbu was in court for the Applicant. The Respondents were not represented.

G.N. Chigbu urged the court to adopt their papers in line with Order 22 Rule 9 of the Federal High Court Civil Procedure Rules.

G.N. Chigbu adopted his processes and that of the Respondent were deemed adopted pursuant to Order 22 Rule 9 of the Federal High Court Civil Procedure Rules whilst judgment was fixed for 1/2/2015.

B. STATEMENT OF ISSUES ARISING FROM FACTS

The Respondent in his Written Address in opposition of the Applicants Motion on Notice dated 11th December, 2013, raised the issue for determination which the Court adopts.

Whether on the basis of the Affidavit evidence of the Applicant evidence of the Applicant and Respondents the court should exercise it's discretion in favour of the Applicant and grant the orders sought in the circumstance.

It is the Respondent's argument they do not have any document that matches the date stated by the Applicant. However, the document in their possession which is a loan agreement executed between the Federal Government of the Federal Republic of Nigeria and the Chinese Exim Bank on the execution and completion of the Abuja Light Rail Project in the custody of the Respondent contains trade secrets of the Chinese Exim Bank which ought not to be disclosed, this is disposed to in paragraph 3 v,vi, vii and viii of the affidavit.

In the applicant's reply on points of law, he argued on whether the Respondent successfully denied the existence of the agreement executed between Nigeria and Chinese Exim Bank relating to financing the Abuja light Rail project.

The Respondent did not outrightly deny possession of the document requested by the Applicant however they deposed in paragraph 3 (ii-iv) of their affidavit that the agreement they have in that same description was not entered on or about the 11th September but "executed far beyond the said date" (underlining mine).

The Applicants Counsel in his reply submitted, the law is to effectively deny a fact deposed to in an affidavit it is not enough for an opposing party to make a sweeping denial of facts in his counter affidavit. To succeed, he must go further to depose to the facts he wants the court to believe. In this case the deponent has failed to controvert the facts deposed to in the Applicants affidavit.

The Respondent merely denied the date stated by the Applicant and not being possession of said agreement. The Court cannot agree more that a mere difference in the dates of the agreement should vitiate the Applicant's access to the agreement.

On exemption from disclosure, the Respondents submitted the document contains trade secrets of the Chinese Exim Bank as earlier stated in paragraph 3 v, vi, vii and viii, ix, x, xi, of the respondent's affidavit. The Respondent further submitted that disclosure may cause harm to the interest of the Chinese Exim Bank relying on section 5(1) a of the FOI Act and paragraph 3 v-ix of their affidavit.

Section 15 (1)(a) is herein reproduced FOI Act

(a) Trade secrets and commercial or financial information obtained from a person or business where such trade secrets or information are proprietary, privileged or confidential, or where disclosure of such trade secrets or information may cause harm to the interests of the third party provided that nothing contained in this subsection shall be construed as preventing a person or business from consenting to disclosure;

Also stating that section 15(4) gives Court the discretion to disclose information if it is in the interest of the public, and what constitutes public interest is left to the opinion of the court.

The Applicants Counsel in their reply on points of law submitted by section 24 of the FOI Act, the burden is on the Respondent seeking to deny the Applicant access to information to establish the act authorizes it to do so. However, the Respondents failed to depose to such facts in their affidavit.

However, assuming without conceding the Applicant depose to such facts, the court is vested with the power to examine the said agreement pursuant to section 22 and 25 of the FOI Act to determine which portions if any that contains trade secrets which if exposed by giving out the document would harm the business interest of the Chinese Exim Bank.

Sections 22 and 23 are herein reproduced for clarity.

Section 22
Notwithstanding anything contrary contained in the course of any proceeding before it arising from an application under section20 of this Act, examine any information to which this Act applies, that is under the control of a public institution, and no such information may be withheld from the Court on any ground.

Section 23
In any proceeding before the Court arising from an application under 20, the Court shall take precaution, including when appropriate, receiving representations Exparte and conducting hearings in camera to avoid the disclosure by the Court or any person of any information or other material on a basis of which any public institution will be authorized to disclose the information applied for.

Where the court finds information that should be exempted, pursuant to section 18 of the FOI, the Court can shed the area off and furnish the Applicant with the agreement.

The Court has perused the document in question which was submitted by the Respondent to the Courts, pursuant to section 22 of the FOI Act, and opines the document is a simple loan agreement made between the Federal Government of Nigeria and the Chinese Exim Bank.

The court does not find any trade secrets, Commercial or Financial Information belonging to the Chinese Exim Bank which are privilege proprietary and confidential as submitted by the Respondent.

Consequently, this document does not fall under the exemptions stated in sec 15 (1)(a) of the FOI Act.

(a) Trade secrets and commercial or financial information obtained from a person or business where such trade secrets or information are proprietary, privileged or confidential, or where disclosure of such trade secrets or information may cause harm to the interests of the third party provided that nothing contained in this subsection shall be construed as preventing a person or business from consenting to disclosure;

Therefore disclosure of this document cannot cause any harm to the interest of a third party which in this case is the Chinese Exim Bank.

The Respondents argument lacks substance, are frivolous and a waste of the courts time as they have no justification in denying the Applicant the documents sought.

Accordingly, prayer 1 and 2 of the Applicant's Motion on Notice dated 11/12/2013 are hereby granted in respect of schedule 1-5.

HON. JUSTICE A.F.A ADEMOLA
JUDGE
15/12/2014

PARTIES - Absent

APPEARANCES - G.N. Chigbu for Applicant, Respondent

FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON MONDAY THE 15TH DAY OF DECEMBER, 2014
BEFORE HIS LORDSHIP, HON. JUSTICE A.F.A. ADEMOLA
JUDGE

SUIT NO: FHC/ABJ/CS/760/13

BETWEEN
PUBLIC & PRIVATE DEVELOPMENT
CENTRE LTD/GTE (PPDC) …….. APPLICANT

AND

1. NATIONAL AGENCY FOR FOOD AND DRUG
ADMINISTRATION AND CONTROL (NAFDAC) ……..... RESPONDENTS

2. THE DIRECTOR GENERAL NAFDAC

R U L I N G

A. SUMMARY OF FACT

The application in this suit is brought by G.N. Chigbu of A and E law partnership. It is a Motion of Notice dated 11/12/2013 pursuant to Order 34 rules 5 and 6 of the Federal High court Civil Procedure Rules 2009 and sections 1, 2 (6) and 20 of the Freedom of Information Act and under the inherent jurisdiction of this Honourable Court praying the following reliefs

(i) A DECLARATION that the failure of the 1st and 2nd Respondents, to furnish Applicant with the information and documents sought vide Applicant's letter of 30th October, 2013 amount to a wrongful denial of information under Freedom of Information Act, 2011.

(ii) AN ORDER of the Honourable Court compelling the Respondents, jointly and severally, within seven days of the judgment herein, to furnish Applicant with Information and copies of documents sught vide Applicant's letter of 30th October, 2013 and which information and documents are set out in the schedule hereto.

SCHEDULE

1. Copies of Financial Evaluation Report by the tender's Board approving the winning Bidders.
2. Copies of letters of notification of award of contract and the contract sum
3. Copies of contract document showing effective (start) date of the contract and the end date of the contract, the conditions of the contract, etc
4. Project status report indicating current level of progress made on the project
5. Schedule of payments for the projects
6. Copies of request by the tender's Board for certificate of No objection.
7. BPP certificate of No objection
8. Copies of summary details of contracts published by your agency or BPP
9. Copies of bid rejection notices, if any.

It is supported by a statement pursuant to Order 34 Rules 3 (2) of the Federal High Court Civil Procedure Rules containing name of Applicant, description of applicant, Relief sought, grounds upon which reliefs are sought, facts relied upon, a 12 paragraph affidavit deposed to by Seember Nyager and a Written Address with Exhibit A.

The Respondents, Represented by the law firm of St. Hon, SAN filed a memorandum of conditional appearance dated 27/1/14 and a Motion on Notice dated 5/2/2014 reading as follows

1. An order extending time within which the Respondents/Applicants will raise objection to this Suit.

2. An Order deeming this present Application urging a striking out of this Suit as having been properly filed and served, filing, default and service fees having been paid for same.
3. An order striking out the name of the 2nd Respondent on the non-issuance of pre-action notice.
4. An order striking out the name of the 2nd Respondent on the ground that it is not a party to be sued under the Freedom of Information (FOI) Act, 2011.
5. Consequently an order of this Honourable Court striking out/dismissing this suit against the Respondents for want of jurisdiction.
6. Such other order(s) as this Honourable Court may deem fit to make in the circumstances.

It is supported by an 8 paragraph affidavit deposed to by Mrs. Nneka Offiah Esq a senior Legal Officer in the Legal department of NAFDAC and a Written Address, prior to payment of default fees and an affidavit evidencing payment under Order 34 Rule 5 (3) and (4) of the Federal High court Procedure Rules 2009.

Upon service, Applicant's/Respondents counsel G.N. Chigbu filed a reply in opposition to Respondents Preliminary Objections dated 10/4/2014 filed 11/4/2014.

The Defendant/Applicants filed a reply on …….. Plaintiff's reply on 11/2/2014. It is dated 18/2/2014 and filed on same day.

After several adjournments in this suit, on the 3/4/2014 G.N. Chigbu for the Applicant and S.T. Hon. SAN for the Respondents proffered oral arguments and adopted their filed processes in this suit.

The Applicants G.N. Chigbu further applied for leave to make response to Respondent's submission on section 20 of the FOI Act (Respondent paragraph 1-1.3.)

Leave was granted accordingly, Counsel made his submissions and ruling was reserved in this suit.

B. STATEMENT OF ISSUES ARISING FROM THE FACTS

After a careful perusal of the processes filed herein by both Counsels to parties, this court adopts the following questions for determination.

1. Whether the Applicant's failure to fulfill the condition precedent set down in section 27 of NAFDAC Act, 2004 robs the court of it's jurisdiction to entertain this suit.
2. Whether the 2nd Respondent is a party to this suit under the Freedom of Information Act.
3. Whether by the express provisions of section 20 of the FOI Act 2011, action can be maintained against the 2nd Respondent in this suit.

C. DETERMINATION OF ISSUES BY AN APPLICATION OF LAW TO FACTS

ISSUE ONE
Whether the Applicant's failure to fulfill the condition precedent set down in section 27 of NAFDAC Act, 2004 robs the court of it's jurisdiction to entertain this suit.

The Applicants Counsel filed this Motion for mandamus on 11/12/2013 pursuant to leave granted by this court on 5/12/2013 NAFDAC, herein after referred to as the 1st Respondent, sometime in the year 2012 conducted a procurement proceeding and awarded the contracts for PLOT NO 1 COMPLETION OF NAFDAC EXISTING BUILDING AT NO 1 ISOLO INDUSTRIAL ESTATE, APAPA EXPRESS WAY LAGOS AND PLOT NO 2 COMPLETION OF EXERNAL WORKS AT NAFDAC EXISTING BUILDING AT NO 1 ISOLO INDUSTRIAL ESTATE, APAPA EXPRESS WAY, LAGOS.

The Applicant, pursuant to the right conferred in it to obtain public records and information from Public institutions pursuant to the Freedom of Information Act applied to the 1st Respondent through the 2nd Respondent her Director General by it letter dated 8/10/2013, for copies of the documents and information set out in the schedule to this application. The 1st Respondent refused to furnish the Applicant with the said documents and information.

Therefore Applicant sought the leave of the Honourable Court to bring this application to enforce Applicant's right under FOI Act 2011 and same was granted on 4/12/2013.

The Respondent's Counsel replied to the Applicants Motion on Notice, urging the Court to strike out this suit based on two grounds, all on jurisdiction. One of which is the failure of the Applicant to fulfill a condition precedent i.e. Non service of pre-action Notice on the Defendants as required by Section 27 of the NAFDAC Act 2004. He cited

1. NNPC Vs EVIDORI (2007) All FWLR (Pt 369) 324 @ 1340 D
2. Niger Care Development Co Ltd. Vs Adamawa State Water Board (2008) 9 NWLR (Pt 1093) 498 @ 526H 527B sc
3. Ugwuanyi Vs Nicon Insurance Plc (2005) All NWLR (Pt 140) 1710 sc

Finally, the Respondents Counsel S.T. Hon, SAN urged the court to strike out this suit for want of jurisdiction.

The Applicant's Counsel G.N. Chigbu in his reply submitted section 18 of the interpretation act CAP 23 LFN 2004 defines month as "a calendar month reckoned according to Gregorian calendar" Black's Law Dictionary 9th Edition defines a calendar month as "any time period approximating 30 days" it went ahead to differentiate a lunar month which is a period of 28 days and a calendar month which is 30 days.

Furthermore that from the above explanation, sec 27 (1) NAFDAC Act means a period of 30 days which if the Applicant complies with would loose all the days granted it by the FOI Act for redress, therefore loose it's right under the Act.

He also cited Ibrahim Vs Sheriff a judgment of the Court of Appeal.

He finally referred the Court to Section 1 (1) of the FOI Act which reads as follows

Section 1(1)
Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established.

Further submitting that based on the highlighted portion of section 1 of FOI Act, access to information is granted and not subject to section 27 (1) of the NAFDAC Act of any other Act and urged the Court to hold that the legislator of the FOI Act does not contemplate a month's pre-action for the institution of this suit.

The Defendant/Applicant submitted in their reply on points of law that the Defendants argument is an attempt to escape the one month mandatory time stipulated by the NAFDAC Act as these is room for extension of time under the FOI Act and none under the NAFDAC Act.

He further submitted that where the provisions of the law are clear and unambiguous, they should be applied as they are relying on:

1. **FBN Vs Maidawa (2013) 5 NWLR (Pt 13487444 @ 483 sc**
2. **Knight Frank Ruley (Nig) Vs AG Kano 1998 7 NWLR (Pt 556)**
3. **Kraus Thompson Organisation Vs NIPSS (2004) All FWLR (Pt 218) 797 @ 809F GSC**
4. **Ndoma Egba Vs Chukwuogor 2004 All FWLR (Pt 217) 735 @ 755 G HSC**
5. **Tanko Vs State 20094 WWLR (Pt 113) 430 sc** and many others.

Also, the Applicants submission are completely out of time with settled principle of interpretation as section 1 relied on by Applicants contemplates access to records held by agencies not access to Courts.

Jurisdiction is the authority which the Court has to decide matters that they are litigated before it or take cognizance of the matters presented in a formal way for its decision.

See: (1) Agbogunleri Vs Depo & 3 ors (2008) 12 sc (PH) 240

It is the life line of every trial, for where there is any defect in its competence, it is fatal to the proceeding and makes it a nullity however well conducted or decided.

See: **(1) Ademola Vs Adetayo (2010) 15 NWLR (Pt 1215) 156**

(2) IBAKU Vs EBENI (2010) 17 NWLR (Pt 1222) 286 CA
(3) NUEE Vs BPE (2010) 7 NWLR (Pt 1194) Pg 538 sc
(4) SKEN CONSULT Vs UKEY & anor (198) ISC P6

It is the Defendant Counsels argument as stated above that this Court lacks jurisdiction to entertain this suit.

This Court has examined the provisions of the Freedom of Information (FOI) Act and NAFDAC Act particularly sections 1 and 20 of the FOI Act and 27 of the NAFDAC Act which is reproduced herein for clarity and opines that section 1 of the FOI Act as rightly argued by the Defendant, contemplates access of records held by agencies and not access to the law courts.

However on the provisions of section 20 of the FOI Act against section 27 NAFDAC Act the court agrees with the Applicants Counsel especially on the definition of a calendar month and further agrees that a pre-action notice in this case would operate to deny the Applicants of the right of access to court as the time of 30 days duration would have elapsed and the time allowed an Applicant under the FOI Act to seek redress would have elapsed, the same day causing the Applicant to loose his right of action under the FOI Act.

The court further opines that the principle of generalitus derogant (special things derogate from general things) should apply in this circumstance.

This is to say the specific legislation of the Freedom of Information Act over rides any other general law including the NAFDAC Act.

See: **(1) Madu mere Vs Okwara 2013 LPELR 1 @ 15-17**
(2) A.G. Ogun Vs A.G. Federation 2003 FWLR (Pt 143) 206 @ 246
(3) Edet Akpan Vs State 1986 3 NWLR (Pt 27) 25

Furthermore, on interpretation of statute in the 11th Edition of Maxell at page 164 it is stated that where a general intention is expressed (as in 30 days pre-action notice stipulated in the NAFDAC Act) and also a particular intention which is incompatible with the general intention of the law (as in the Freedom of Information Act requiring an action to be commenced in 30 days) the particular intention is considered an exception to the general rule

See: Aqua Ltd Vs Ondo State Sports Council 1988 4 NWLR (Pt 91) 622

From the forgoing paragraphs, issue 1 is resolved in favour of the Applicant, as the arguments of the Defendant are untenable in law. The court shall proceed to the next issue.

ISSUES 2
Whether the 2nd Respondent is a party to this suit under the Freedom of Information Act.

It is the Defendants argument that this suit cannot be maintained against the 2nd Defendant who is the DG of NAFDAC Act.

The Defendants Counsel has based his argument on Section 20 and 31 of the FOI Act.

The Plaintiff Counsel argue that by section 9 (1 and 2) of the Act, the Director General is the keeper of books and records for the agency so should be a party in this suit.

This Honourable Court agrees with the arguments of the Defendants Counsel on this issue as the 2nd Defendant is an officer of the 1st Defendant therefore suing the first Defendant suffices.

The Defendants Counsel has rightly relied on the community reading of section 20 and 31 of the FOI Act 2011 which reads as follows

Section 20
Any Applicant who has been denied access to information, or a part thereof, may apply to the Court for a review of the matter within 30 days after the public institution denies or is deemed to have denied the application, or within such

further time as the Court may either before or after the expiration of the 30 days fix or allow.

Section 31
"Public institution" means any Legislative, Executive, Judicial, Administrative or advisory body of the government, including boards bureau, committees or commissions of the State, and any subsidiary body of those bodies including but not limited to committees and sub-committees which are supported in whole or in part by public fund or which expends public fund and private bodies providing public services, performing public functions or utilizing public funds:

The word public institution in section 20 refers to the institution in question and not its officers.

Going by the above paragraphs the 2nd Defendant is hereby struck out as not being a correct party in this suit.

ISSUE 3
Whether Applicant has met the conditions for the grant of the reliefs sought for in this application.

The Defence Counsel did not file a defence to the substantive suit and averments or facts uncontroverted in law are deemed true see Ogoejeofor Vs Ogoejeofor (2006) 1 Sc (Pt 1) 157 (supra). The court has read through the provision of the FOI Act especially section 15 of the Freedom of Information sought by the Plaintiff, and opines in the present circumstance Defendant does not fall under the exception in the FOI Act.

Accordingly, prayer 1 and 2 of the Applicant's motion dated 11/12/2013 are hereby granted in respect of all the items in the schedule.

HON. JUSICE A.F.A. ADEMOLA
JUDGE
15/12/2014

PARTIES - Absent

APPEARANCES - **G.N.Chigbu** for Applicant

No Representative Respondent

IN THE FEDERAL HIGH COURT
HOLDEN AT ABUJA NIGERIA
ON TUESDAY THE 3RD DAY OF FEBRAURY, 2015
BEFORE THE HONOURABLE
JUSTICE A. ABDU-KAFARATI
JUDGE

SUIT NO: FHC/ABJ/CS/336/2013

BETWEEN

LEGAL DEFENCE AND ASSISTANCE
PROJECT LTD/GTE …….. PLAINTIFF

AND

CLERK OF NATIONAL ASSEMBLY ……. DEFENDANT

JUDGMENT

By Originating summons dated 16th May, 2013 the Plaintiff claims the following reliefs against the Defendant.

(1) A declaration that the defendant is under obligation to furnish the Plaintiff with the information requested pursuant to section 2 of the Freedom of Information Act, 2011
(2) An Order compelling the defendant to forward to the plaintiff within 7 days of the order, detailed information as requested in the plaintiff's letter to the defendant dated 8th March, 2013 acknowledged by the defendant on 26th April, 2013, made pursuant to section 2 of the Freedom of Information Act, 2011 requesting detailed information on the budget allocations on constituency projects from 2011 2013 particularly:-
(a) The details of National Assembly constituencies in Nigeria
(b) The details of every project earned for each constituency from 2011 2013
(c) The details of all budgetary allocations made in respect of each constituency project.
(d) The details of stages of each project.

The plaintiff is praying the Court to determine two questions to wit:-

(a) Whether by the provisions of the Freedom of Information Act 2011 the defendant is under obligation to furnish the plaintiff with the information sought in its letter to the defendant dated 8th March, 2013 received by the defendant on 26th April, 2013.
(b) Whether this Court can issue an order compelling the disclosure of the said information.

In support of the originating summons is an affidavit of eleven (11) paragraphs. Attached to the affidavit in support are Exhibits A and B. Also in support is a written address dated the same 16th May, 2013.

In opposing the originating summons the defendant filed a counter-affidavit of six paragraphs and a written address. The defendant also filed a further counter-affidavit of eight paragraphs.

The plaintiff filed a reply affidavit of nine paragraphs. It also filed a written reply on points of law.

I have considered the facts of this case, the submissions of learned counsel and the authorities cited by them.

The action is brought pursuant to the Freedom of Information Act 2011.

By section 2 of the above said Act (1) A public Institution shall ensure that it records and keeps information about all its activities, operations and business.

Section 1 of the Act has given right to access to information to any person upon request and it denial such a person can approach the court.
The said section 1 provides:

"(a) Notwithstanding anything contained in any other Act law or regulation, the right of any person to access or request information, whether or not contained in any written form which is in the custody or possession of any public official, agency or institution howsoever described as established.
(b) An Applicant under this Act needs not demonstrate any specific interest in the information being applied for
(c) Any person entitled to the right to information under this Act shall have the right to institute proceedings in the court to compel any public institution to comply with the provisions of this Act".

From the originating summons the plaintiff is asking for an order compelling the defendant to forward to the plaintiff within 7 days of the order detailed information as requested in the plaintiff's letter to the defendant dated 8th March, 2013, acknowledged by the Defendant on 26th April, 2013.

The information required is as per paragraphs 5(a) (d) are as follows:
a) The details of all National Assembly constituencies in Nigeria
b) The details of every project marked for each constituency from 2011 to 2013
c) The details of all budgetary allocations made in respect of each constituency project
d) The details of the stages of each project.

In his defence the defendant through his counsel denied that the information requested for is not within his knowledge or power. That the request is directed to a wrong person.

In paragraph 4 (b) (c) (d) and (e) of the defendants counter-affidavit it was deposed to as follows

a) "4(b) That the information requested by the plaintiff from the defendant does not fall within the categories of information envisaged under the Freedom of Information Act 2011.
b) That information relating to the constituencies of the National Assembly is contained in the relevant Laws of the Federation.
c) That details of budgetary allocations for constituencies projects of the National Assembly are contained in the Appropriation Acts of the particulars specified in the plaintiff's letter of 8th March, 2013.

Having considered the case of the plaintiff and the defendant as contained on their affidavits it is my considered view that the details of the National Assembly constituencies in Nigeria can only be obtained from the Independent National Electoral Commission (INEC) because it was the one that created and delineated them. I am therefore of the opinion that the information on the details National Assembly constituencies in Nigeria is within the purview of INEC. The request for such information should have be directed to Independent National Electoral Commission (INEC).

However, I do not agree with the defence that information regarding items b-d of paragraph 5 of the affidavit in support of the originating are not within purview or authority of the defendant.

In view of this the two reliefs of the plaintiff are granted except as regard relief (ii)(a). Reliefs in respect of (ii)(b)-(d) are granted.

For the avoidance of doubt an order compelling the defendant to forward to the plaintiff within 7 days of this order:-
(b) The details of every constituency earmarked for each constituency from 2011 - 2013
(c) The details of all budgetary allocations made in respect of each constituency project
(d) The details of the stages of each project is hereby granted.

The defendant is ordered to comply within 7 days and that is the judgment of this Court.

Delivered in open Court.

ABDU-KAFARATI
JUDGE
3/02/15

Mr Obinna Amouha for the Plaintiff

Mr Tony I. Esesbe (with him Chukwunonso Nwadike Esq) for the Defendant.

IN THE FEDERAL HIGH COURT
HOLDEN AT LAGOS, NIGERIA
ON MONDAY THE 3RD DAY OF MARCH, 2015
BEFORE THE HONOURABLE JUSTICE SALIU SAIDU
JUDGE

SUIT NO: FHC/L/CS/57/14

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 2011

BETWEEN:

THE REGISTERED TRUSTEES OF THE SOCIO-ECONOMIC
RIGHTS AND ACCOUNTABILITY PROJECT (SERAP) ……. PLAINTIFF

AND

THE EXECUTIVE GOVERNOR OF LAGOS STATE
THE ATTORNEY GENERAL OF LAGOS STATE …….. DEFENDANTS

R U L I N G

The Plaintiff, by an Originating Summons dated 16/1/2014 and filed on the same day asking the court for the determination of the following question:-

Whether by virtue of the provision of section 4(a) of the Freedom of Information Act 2011, the 1st Defendant is under an obligation to provide the Plaintiff with the information requested for:

The accompanying claims against the Defendants are as follows:-

A declaration for an order of Mandamus.

A Declaration that by virtue of the provisions of section 4 (a) of the Freedom of Information Act 2011, the 1st Defendant is under a binding legal obligation to provide the Plaintiff with up to date information relating to the following:

1. Spending for the past five years on the furniture in public schools in the state including Ewutuntun Grammar School in Mafoluku Area of Oshodi; Ikeja Grammar School; Iloro Grammar School in Agege and Fagba Junior Grammar School, Iju Road.
2. The Sending of the World Bank loan of $90 million to improve education in the 639 public secondary schools in the state.
3. Details of projects carried out to improve infrastructure and facilities across primary and education in Lagos State

AN ORDER OF MANDAMUS directing and/or compelling the 1st Defendant to rescind the suspension of anyone including principals of any of the schools mentioned above for blowing the whistle or allowing journalists to cover the decay infrastructures across primary and secondary schools in Lagos State.

In support of the Originating Summons is an affidavit of 18 paragraph with exhibits attached and written address in argument of the application.

The Defendants filed a counter-affidavit of 12 paragraphs and written address in opposition to the Plaintiff's Originating Summons.

The Plaintiff filed further-affidavit in support of the Originating Summons and a reply on point of law.

The Defendant later filed a notice of preliminary objection with written address as argument of the preliminary objection, to which the Plaintiff's filed written address in opposition to the Notice of Preliminary Objection and the Defendant filing a reply on point of law to the Plaintiff written address in opposition to Defendant's preliminary objection.

The preliminary objection is on the jurisdiction of this court to determine this suit as presently constituted and in consequence thereof, the suit ought to be struck down in limine.

The grounds upon which this preliminary objection is brought are as follows:-

i. The Plaintiff/Respondent's claims are not within the contemplation of section 251 of the constitution of the Federal Republic of Nigeria.

ii. The substance of the case of the Plaintiff is not constitutionally contained in the exclusive legislative list under the 2nd schedule of the 1999 Nigeria Constitution to confer exclusive power on the Federal Government to make the law for the Federation.

iii. The grievance of the Plaintiff is against the Lagos State Government which is not an agency of the Federal Government.

The Defendant/Objector raised a sole issue for determination which is:

Whether the Honourable Court, having regard to the claims of the Plaintiff and the relevant Constitutional and Statutory Provisions, has the requisite jurisdiction to entertain the Plaintiffs action as constituted.

It is submitted that the jurisdiction to dismiss an action on this ground cannot be exercised by scrutinizing documents and facts to see whether or not there is a cause of action. Therefore, an application to strike out the statement of claim must accept the facts as averred and the court must determine the issue on the statement of claim alone. Citing the cases of Menlock Vs. Moloney (1965) WLRP 38 and Ibrahim Vs. Osim (1988) 3 NWLR (Pt. 82) 257.

It is settled that it is claim of the Plaintiff that determines the jurisdiction of the court. Placing reliance on the cases of A. G. Federation Vs. A. G. Abia State (2001) 11 NWLR (Pt. 625) 689 at 740 C D, Madukolu Vs. Nkemdilim (1962) 2 SCNLR 341 and Supreme Court. In Anya Vs. Slyavi (193) 7 NWLR (Pt. 305) 290.
A perusal of the averments and reliefs contained in the Plaintiff originating summons reveals that the substratum of the claim of the Plaintiff is a challenge to the legislative competence and executive actions of the Lagos State Government. The question then is whether a suit challenging the actions of a State Government comes within the statutory jurisdiction of this court. The jurisdiction of court is conferred by statutes. Relying on the cases of Mudiaga-Erhueh Vs. INEC & Ors (2003) 7 NWLR 95 and Tukur Vs. Government of Gongola State (Supra) at 549.

It is submitted further that the jurisdiction of the Federal High Court is as constitutionally provided for by section 251 of the Constitution.

Jurisdiction is exclusive but limited.

It is their contention that for the Federal High Court to have jurisdiction in this case, the reliefs must be traceable to the provisions of section 251 of the Constitution. The claim of the Plaintiff are outside the statutory jurisdiction of this court.

The power granted under paragraph "C" of the Concurrent legislative list relating to archives and public records exclusive to both the Federal and State Government in their respective jurisdictions. This is underscored by the use of the expression "--- public records of the Federal and "--- public records of the Government of the State" in items 4 and 5 respectively.

The court is enjoined to peruse the reliefs of the Plaintiff as endorsed on their originating summons.

Jurisdiction is the cornerstone of proceeding of this Honourable Court without which the proceedings are bound to fall like a pack of cards. Citing the case of State Vs. Onagoruwa (1992) 2 NWLR (Pt. 221) 33 at 48.

The Court is urge to strike out this case. Citing the case of Gombe Vs. P.W. (Nig.) Ltd (1995) 6 NWLR (Pt. 402) at 418.

The Plaintiff adopted the sole issue raised by the Defendant/Objector in response to the application and submitted that the substance of the claim of the Plaintiff is not challenge on the legislative competence and executive actions of the Government of Lagos State rather the suit of the Plaintiff is requesting information under the Freedom of Information Act.

The issues at stake here is what the extent of the legislative competence of the states and the Federal Governments in a Federation like Nigeria? And where there is an overlap of legislative competence of both State and Federal

Governments, who prevails in situation of conflict.

The extent of legislative competence is one that is defined and described by the Constitution in section 4 (4) a.

The exclusive list in the second schedule, part 1 of the Constitution is reserved exclusively for the Federal Government.
There is nothing in it, that has any relationship with information or record.

There anything pertaining to it is not within the exclusive legislative competence of the Federal Government.

The concurrent legislative list did not fare better as there is no express mention of information as an item under the list, there is a mention of archives under item C and sections 4 and 5 of the constitution are particularly instructive here.

The sections of the constitution shows that the Federal legislative bodies will make law in case of archives and public records of the Federation or any part thereof. While by section 5 of the constitution the House of Assembly may make laws for the State subject to the provision of section 4 which conferred legislative power on the National Assembly.

By the application of the legal doctrine of covering the field, the enactment of the FOI Act into law IPSO facto renders it unnecessary for any of the 36 states to take any further action on the matter. It is absolutely unnecessary for the States to make any law regarding this same legislation already enacted by the National Assembly. Where the State decide to make law on the same subject matter it must not be inconsistent with what the National Assembly made otherwise the law made by the National Assembly shall prevail to the extent of the inconsistency noticed in the State law.

The law made by the National Assembly is directly applicable in all parts of the Federation regardless of whether there is any in the State or not.

It is the same doctrine of covering the field that empower's anti-graft agencies such as the economic and Financial Crimes Commission (EFCC) and Independent Corrupt Practices Commission (ICPC) to arrest and try any public officer for financial crime in any part of the Country.

The Federal list doctrine of covering the field has been enunciated and upheld by the Supreme Court in these cases. Giremabe Vs. Bornu Native Authority (1961) ANLR 492, Doherty Vs. Balewa (1961) ANLR 630, A G of Ogun State Vs. A. G. of the Federation (1982) 3 NCLR 166 and A. G Abia State Vs. A. G. Federation (2002) 3 S.C 152.

It is not always the case that any time a Federal and a State law exist the doctrine applies. There must be an intention in the Federal law to completely and exhaustively cover the field that not merely supplementary to cumulative upon state law. Cases of Nigerian Breweries Plc Vs. The Governor of Oyo State & 2 Ors (Suit Number: CA/1/45/2005 and Independent National Electoral Commission Vs. Alhaji Abdulkadir Balarabe Musa & Ors (S.C. 228/2002) were referred to.

The legislative competence of Lagos State is not under challenge rather, it is the Constitutional power of the Federal Legislative that invested the National Assembly with the power to make laws that will bind the States if the subject of the law is on the subject that are stated in the concurrent legislative list.

The jurisdiction conferred on Federal High Court in section 251 of the constitution are those that are personal to the court. The power of the Federal High Court is also inclusive of section 251 (s) and section 252 (1) and (2). These provisions permit the addition of further power on the Federal High Court and we can see replica of this power in EFCC and ICPC and even Fundamental Human Rights cases.

There are also statutes that conferred jurisdiction on the courts. Citing Josiah Ayodele Adetayo & 2 Ors Vs. Kunle Ademola (2010) 3 5 SC.

It is there contention that this court has jurisdiction to determine this matter because the Freedom of Information Act in section 7 states that where access to information is denied, applicant can approach a court. Section 31 of the act stated that court means a High Court or Federal High Court respectively.

There is concurrent jurisdiction on both State and Federal high Court.

The Court is urged to uphold their argument in the originating process.

Replying on point of law, the Defendant/Objector submitted the issue of competence of the States and Federal Government and the doctrine of covering the field being discussed by the Plaintiff will only become relevant for adjudication, if this court is clothed with requisite jurisdiction to entertain this suit.

There preliminary objection is that the combined effect of section 251 of the 1999 Constitution and section 7 of the Federal High Court Act is that the Federal High Court has jurisdiction over specific matters, which do not include action of a State Government and in this case Lagos State Government.

A court without jurisdiction is without vires to determine any issue in the case and any proceedings, judgment and order made by the court become an exercise in futility and constitute a nullity.

The Court in which an action is brought has the power to hear and determine the issues between the parties reference to the following constitution, or the geographical area: or subject-matter of its operation or the relief's sought or a combination of any of these issues.

For the Federal High Court to have jurisdiction in any Civil matter, there are two vital conditions:-

I. One of the parties must be Federal Government or any of the agencies of the Federal Government and
ii. The subject matter must come within any of the items listed in section 251 (1) of the constitution relying on Nepa Vs. Edegbero (2000) 11 NWLR (Pt. 679) 658 and Adetayo Vs. Ademola (2010) All FWLR (Pt. 1806).

In the instant case neither the Plaintiff nor any of the Defendant is an agency of the Federal Government, defined in the case of Edison Automotive Ind. Ltd Vs. Nerfund (2009) All FWLR (Pt. 477) at 124.

The subject matter must also be within the jurisdiction of the court and there is no feature in the case which prevents the court from exercising its jurisdiction. Citing the cases of Hakeem Vs. Unibadan (2003) 10 NWLR (Pt. 829) at 584 and Oladipo Vs. Nigeria Custom Service Board (2009) All FWLR (Pt. 498)

The court is urged to uphold the objection and strike out this case.

All the submissions above are what is before me with respect to the preliminary objection of the Defendants and response of the Plaintiff to the same.

I have also, therefore adopted the same issue raised for determination with respect to the objection which again I repeat here for better understanding and appreciation of same. The sole issue for determination is:-

Whether this Honourable Court having regards to the claims of the Plaintiff and the relevant constitutional and statutory provisions has the requisite jurisdiction to entertain the Plaintiff's action as constituted.

Considering the argument before the court I have reduce the issue into two.

Firstly is whether this court has requisite jurisdiction to hear and determine issues brought under the Freedom of Information Act, 2011 and secondly, whether this court is the venue jurisdiction of the instant case as constituted before this court.

The issue above takes me to the statute where this court derive its jurisdiction which is the ground norm that is the 1999 constitution of Nigeria as amended. Section 251 (1) of the 1999 Constitution provides that:-

“Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil cases and matters.

From clear and unambiguous interpretation of the above provision of the constitution, this court has jurisdiction in matters listed in section 251 (1) of the constitution and such jurisdiction as may be conferred on it by the National Assembly.

The Freedom of Information Act is an Act of the National Assembly which has conferred additional jurisdiction on this Honourable Court under clause 20 of the Freedom of Information Act, 2011.

The word court in clause 20 of the Freedom of Information Act 2011 has been interpreted in clause 31 of the same act as High Court or Federal High Court.

The intention of the National Assembly to confer jurisdiction on this court has been clearly and unambiguously expressed in the interpretation clause to the Freedom of Information Act. That is clause 31 of the Act.

In the interpretation of statute, it has to be given the ordinary grammatical meaning see the Supreme Court cases of Nyama Vs. Federal Republic of Nigeria (2010) 7 NWLR (Pt. 1193) 344 at 399 and Action Congress Vs. Independent National Electoral Commission (2007) 12 NWLR (Pt. 1048) 226 at 318

The constitution allows the National Assembly to confer additional jurisdiction of this court. This power the National Assembly has exercised in the Freedom of Information Act, 2011 as the National Assembly has done in the past on the EFCC Act, NDLEA Act, ICPC Act and even in Trafficking in persons Act.

I hold that this court has jurisdiction on any matter arising from the Freedom of Information Act, 2011.

The second issue I have to consider is whether this court is the venue jurisdiction of the instant case as presently constituted.

The word court in clause 20 of the Freedom of Information Act, 2011 has been interpreted in clause 31 of the same to mean High Court or Federal High Court. By this, the Act has conferred jurisdiction on both the State High Court and Federal High Court.

The instant case has been brought against the Lagos State Government and the Attorney General of Lagos State. The question that comes to mind is will the State High Court assume jurisdiction if the information sought is from the Federal Government or any of it agencies. The answer is no.

This issue has been resolved in the cases of Tukur Vs. Government of Gongola State (Supra) and Adetayo Vs. Ademola (2010) All FWLR (Pt. 533) 1806. See also the recent decision of the Court of Appeal Lagos Division in the case of Dr. Erastus Akingbola Vs. Federal Republic of Nigeria & Anor (2014) LPELR 24258 (C.A.) where the Court of Appeal referred to Niki Tobi J S C in Omwudiwe Vs. Federal Republic of Nigeria (2006) 10 NWLR (Pt. 988) 382. Where the Supreme Court held that, there is need to examine the Parties in litigation as well as the subject matter of the litigation for close scrutiny in resolving the issue.

The state High Court is the proper venue jurisdiction of this case.

I hereby strike out this case for lack of venue jurisdiction.

SALIU SAIDU
JUDGE
3/03/2015

APPEARANCES:
OLUKAYODE MAJEKODUNMI for the PLAINTIFF
ADE IPAYE - *Attorney General Lagos State* with O. AKINSOLA and
O. IBRAHIM *Senior State Counsel's* for the DEFENDANT

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ASABA JUDICIAL DIVISION
HOLDEN AT ASABA
ON THURSDAY THE 2ND DAY OF APRIL, 2015
BEFORE HIS LORDSHIP
HONOURABLE JUSTICE C.M.A. OLATOREGUN ISOLA
JUDGE

SUIT NO: FHC/ASB/CS/29/2014

BETWEEN:

INCORPORATED TRUSTEES OF HUMAN)
DEVELOPMENT INITIATIVES) ……. APPLICANT

AND

1. OSHIMILI NORTH LOCAL GOVERNMENT COUNCIL) ……. RESPONDENTS
2. HON. INNOCENT ESENWAEZE)

R U L I N G

The Applicant sought leave and same was granted on the 21st of May, 2014 to apply for judicial review of the denial of access to information pursuant to the Applicant's freedom of information request dated 24th of February, 2014

On the 18th of June, the 2nd Defendant brought a notice of brought a Notice of Preliminary

Objection on the ground that:

1. *There was no service f the Originating Court Process on the 1st Respondent/Applicant in accordance with Order 6 Rule 8 of the Federal High Court Civil Procedure Rules 2009*
2. *That the action is incompetent in view of the violation of Section 7 of the Delta State Local Government Law 2004 (as amended).*
3. *There was no service of the Originating Court Process on the 2nd Respondent/Applicant personally as provided for by Order 6 Rule 2 of the Federal High Court Civil Procedure Rules 2009.*

The Plaintiff filed a written address in opposition to the Preliminary Objection on the 30th of June, 2014.

Both parties raised issues of non-compliance.

In the case of the Respondents, they complained about the originating processes not being served on a Principal Officer but a Clerk and in the case of the 2nd Respondent that he was not personally served. Mr. B.O. Okoji for the 2nd Respondent referred to Order 6 rule 2 of the Federal High Court Civil Procedure Rules 2009.

Relying on Section 7 of the Delta State Local Government Law 2004 (as amended) Mr. B.O. Okoji submitted that it is mandatory for the Applicant to serve a Pre-action Notice on the 1st Respondent.

The Applicant relied on Order 26 Rule 5 of the Federal High Court Civil Procedure Rules 2009 to state that the Respondents ought to have filed a Counter Affidavit with a Written Address not later than 7 days after he was served with the processes.

The processes he stated were served on the Respondents on the 28th of May, 2014, and that he ought to have applied for an extension of time before bringing the application.

He referred to Section 21 of the Freedom of Information Act to state that an application made under the Freedom of Information Act is to be heard and determined summarily.

On the issue of service Mr. Andy Ogbolu for the Applicant contended that leaving the document with a Clerk in the Council is good service within the meaning of Order 6 Rule 8 of the Federal High Court Civil Procedure Rules 2009.

Relying on Order 6 Rule 6 counsel stated that the 2nd Respondent needs not be served as service on the 1st is deemed as service on the 2nd as an employee of the 1st.

On the issue of Pre-action Notice, Applicants Counsel submitted that a Pre-action Notice dated 24th of June, 2014 was served and same attached to the application as Exhibit 'B'.

His alternate argument is that the Local Government Act Section 7 is inconsistent with Section 20 of the Freedom of Information Act and to that extent void.

This application was brought within 3 months as provided by Order 34 Rule 4 of the Federal High Court Civil Procedure Rules 2009 but outside the 30 days provided for by Section 20 of the Freedom of Information Act. This was well taken care of by the application dated 15th day of May, 2014which sought amongst other reliefs extension of time to bring the application for judicial review.

Exhibit 'B' as observed by Mr. Okoji does not conform with a Pre-action Notice of intention to sue. As the said document is titled, it is a Request for the Local Government Budgets for Years 2012, and 2014 of the 1st Respondent.

I however agree with the Applicant's Counsel that an application of this nature which is meant to be dealt with summarily does not require a Pre-action Notice.

Such Pre-action Notice will merely hinder the summary nature of the action. The idea behind Section 20 of the Freedom of Information Act is to deal with judicial review of matters pertaining to denial of access to information speedily and summarily

This is just like an enforcement of fundamental right proceedings, which is meant to be heard and determined expeditiously. In this regard see the case of *OLATUNJI VS. HAMMED (2010) ALL FWLR (Pt. 540) @ 1365* where the Court of Appeal came to the conclusion that:

> *"Actions brought under Chapter IV (Sections 33 46) of the Constitution are always to be handled with dispatch.*
> *Consequently, an Applicant who complains that any of his rights under the said provisions of the Constitution are likely to be violated is not required to comply with pre-action notice. The same applies in breach of contract cases. It is only in normal civil actions that compliance with pre-action notice is mandatory."*

Similarly, the Court of Appeal in the case of CHIEF L.C. EZENWA VS. BEST WAY ELECTRONICS MANUFACTURING CO. LTD. & 5 ORS (1999) 5 NWLR (Pt. 613) *in a Certiorari Proceedings had this to say*

> *"An Applicant in certiorari proceedings, does not have to comply with the requirement of issuing a pre-action notice to a public officer. To insist otherwise is to allow the Respondent to hide behind the mask of mere technicality to thwart, protract and defeat the consideration of an application for certiorari on the merit. In the instant case, although the 3rd 6th Respondents are public officers who should in appropriate cases be availed of protection of the State Proceedings Law and be entitled to three months mandatory pre-action notice, they cannot claim such notice in a certiorari proceedings."*

I therefore do not believe that the service of a Pre-action Notice is required under this proceeding. None is therefore required.

Going by the provision of Order 6 Rule 8, the later part

"…….. or by leaving it at the office of the Corporation or Company"

and the decision in the case of ADAMU VS. AKUKALIA (2007) 51 WRN 118

I am of the firm believe that service on the Clerk in the Council is good service.

However I do not believe that Mr. Ogbolu has given a proper meaning and interpretation to Order 6 Rule 6 of the Federal High Court civil Procedure Rules 2009 in relation to the service on the 2nd Respondent. There was no copy

transmitted by the Court to the most Senior Officer of the Local Government and there is no evidence that any Senior Officer the 2nd Respondent.

I find that the 2nd Respondent was not served.

In relation to the 2nd Respondent the jurisdiction of this Court cannot be invoked to take this case against him. Instead of striking the suit out, the 2nd Respondent is to be personally served with the Originating Processes.

He is to be served within 7n days of today and if he desires to respond must do so within 7 days of being served.

Case is adjourned to the 12th day of May, 2015.

C.M.A. OLATOREGUN ISOLA
JUDGE
2ND APRIL, 2015

APPLICANT ABSENT.

A.I. OGBOLU ESQ. FOR THE APPLICANT

IN THE FEDERAL HIGH COURT
HOLDEN AT LAGOS, NIGERIA
ON TUESDAY THE 28TH DAY OF APRIL, 2015
BEFORE THE HONOURBLE
JUSTICE MOHAMMED NASIR YUNUSA
JUDGE

SUIT NO: FHC/L/CS/27/2014

BETWEEN:

THE EIE PROJECT LIMITED/GTE …….. PLAINTIFF

AND

1. COSCHARIS MOTORS LIMITED
2. THE ATTORNEY GENERAL OF THE FEDERATION …….. RESPONDENTS

R U L I N G

The application before the Court is brought pursuant to Section 1(3) and 20 of the Freedom of Information Act Order 34 Rule 1 and 5 of the Federal High Court Civil Procedure Rules 2009 and under the inherent jurisdiction of the Honourable Court. The applicant is seeking for four reliefs as listed on the Motion paper as:-

1. A Declaration that the failure and/or refusal by the 1st Respondent to disclose or make available to the Applicant the information requested in the Applicant's letter to the 1st Respondent dated 28 October, 2013 is a violation of the Applicant's right of access to information established and guaranteed by Section 1(1) and Section 4(a) of the Freedom of Information Act, 2011.
2. A Declaration that the failure and/or refusal by the 1st Respondent to give the Applicant a written notice that access to all or part of the information requested would not be granted and stating reasons for the denial and the section of the Freedom of Information Act, 2011 upon the 1st Respondent rely to deny the Applicant access to the information requested by the Applicant in its letter dated 28 October, 2013 amounts to a flagrant violation of Section 4(b), 7(1), (2) and (3) of the Freedom of Information Act, 2011 and is therefore wrongful.
3. An Order of Mandamus compelling the 1st Respondent to disclose or make available the information requested in the Applicant's letter dated 28 October, 2013 namely:
    a. Invoice(s) and landing documents for the two BMW vehicles acquired by the Nigerian Civil Aviation Authority (NCAA) with chassis numbers WBAHP41050DW68032 and WBAHP41010DW68044.
    b. Details of the payment for the said vehicles if they were paid in full or hire purchased as reported by the media.
4. An Order of Mandamus compelling the 2nd Respondents to initiate criminal proceedings against the 1st Respondent for wrongful denial of access to information to the Applicant under Section 7(5) of the Freedom of Information Act, 2011.
5. And for such further or other Orders as this Honourable Court may deem fit to make in the circumstances.

It is supported by an 8 paragraph affidavit sworn to by Ijeoma Mba, also attached are certain exhibits and is accompanied with a written address. Learned counsel formulated 7 issues for determination.

On issue No 1, Learned Counsel relied on section 2(7) and 31 of the Freedom of Information Act and submitted that irrespective of the status of the 1st Respondent as a private company, it clearly falls within the purview of the Sections 2(7) and 31 and urged the court to so hold. He argued that under the law, only Government entities are entitled to import duty waivers, and that in the instant case, the 1st Respondent benefiting from the import duty waiver, thus utilized public funds in the procurement of the vehicles.

On issued No 2, Counsel relied on Section 1(1) of the Act Section 14 of the Constitution of the Federal republic of Nigeria 1999 (as amended) and submitted that access to information is sine qua non for an active and intelligent participation of the people in all spheres and affairs of the community. He submitted further that the a citizen has the

right to know the facts, the true fact about the administration of the country as it is one of the pillars of a democratic State.

On the third issue, Learned Counsel reproduced the provisions of Section 1(3) of the Act and Section 20 and contended that these Sections unequivocally without much ado, vest on the Applicant and indeed any person who may have been wrongful denied access to information to apply to Court for the review of the wrongful denial of information. He relied on the case of NIC V. VIBELKO NIG. LTD (2006) ALL FWLR Pt 336 P. 386 at 400 where the court of Appeal held that where the main object is to discover the intention of the lawmaker which is deducible from the language used. Once the language of a statute is clear and unambiguous, the Court will give an ordinary or literal interpretation to it.

He submitted that the language of the particular sections of the Freedom of Information Act vesting the right to apply to the court for judicial review of a wrongful denial of access to information is sufficiently clear enough and urged the Court to give it a literal and naturally intended meaning.

On issue No 4, Counsel referred the Court to Section 4 of the Act and submitted that the 1st Respondent has responsibility to make information available when requested or in the alternative a written notice stating the reasons if any for denying the requested information.

Learned Counsel, contended further that a refusal constitutes a flagrant disregard for existing laws and as such, amounts to a breach of legally imposed obligations under the Act. Counsel, referred the Court to paragraph 6 of the affidavit in support of the application where the deponent averred that the 1st Respondent failed to provide the information required or give reason if any for the refusal as prescribed under the law.

On issue No 5, Learned Counsel, submitted that Section 20 not only gives the right to the Applicant to apply to the Court after an unlawful denial of Information but also fives the Court the authority to judicially review the violation of the provisions of the Act by the 1st Respondent. Learned counsel referred on the following authorities:-

1. LAYANJU Vs. ARAOYE (1959) SCNLR 416 P. 11-12
2. CHIEF EMANUWA UTAVBEGHO & ORS Vs. MINISTER OF LOCAL GOVERNMENT (1957 58) WNLR 179
3. CHIEF GANI FAWEHINMI Vs. INSPECTOR GENERAL OF POLICE AND ORS (2002) 7 NWLR (PT. 767) P 606
4. THE STARE EX PARTE SAVAGE Vs. E.C.N., OWERRI 8 ENLR 55.

Learned Counsel also referred the Court to paragraph 6 of the affidavit in support where it was deposed that the 1st Respondent neglected and willfully refused to oblige the Applicant with the requested information or give reasons for the willful refusal. He submitted that the Applicant having fulfilled all the conditions precedent has made out a case to be entitled to the writ of mandamus compelling the 1st Respondent to release the information which he alleged is unlawfully withheld.

On issue No 6, Learned Counsel reproduced the provisions of Section 7(5) of the Act and submitted that the 1st Respondent is undoubtedly, in breach of the clear provisions of the Act by its willful failure to provide the information requested or give written notice to the Applicant that access to all or part of the information requested will not be granted, stating the reasons for the denial, and the section of the Act under which the denial is made despite being aware of the provisions of the law.

On issue No 7, Learned Counsel referred the Court to Section 29(6) of the Act and urged the Court to Order the Attorney General to comply with the provisions of this Section by promptly commence criminal proceedings under the Freedom of Information Act against the 1st Respondent.

Counsel concluded by urging the Court to grant all the prayers of the Applicant.

The 1st Respondent opposed the application.
Learned Counsel for the 1st Respondent informed the Court that they have filed a 15-paragraph counter affidavit sworn to by Ndubuisi Chito, attached to it is one exhibit.

The counter affidavit is accompanied with a written address. Learned Counsel formulated three issues for determination as follows:

1. Whether the Applicant has appropriately, duly and in accordance with law invoked the jurisdiction of this Honourable Court to entertain this application.
2. Whether the provisions of the Freedom of Information Act, 2011 applies to private companies such as the Respondent.
3. Whether assuming but not conceding that the provisions of the Freedom of Information Act applies to private companies such as Respondent, the Respondent is in the circumstances of this case justified under S.12 of the Act in withholding the information sought by the Applicant.

On issue No 1, Learned Counsel relied on Section 20 of the Act and urged the Court to answer this issue in the negative and hold that the Applicant has no duty and in accordance with law invoked its jurisdiction to entertain this application.

Counsel, argued that from the provisions of Section 20 of the Act, the Applicant can only apply to the Court for a review of the decision not grant it access to the required information within 30 days and submitted that the Applicant did not bring the application within the mandatory period of 30 days and that there is no evidence that it obtained an extension of time from the Court and argued that the application is incompetent and must therefore fail.

Learned Counsel, referred to exhibit B, the letter written by the Applicant to the Respondent seeking information which was dated 28/10/2013 and dated on 30th October, 2013. He stated that it follows that by 8/11/13 when the Applicant received no response from the Respondent that the provision of the required information is deemed to have been denied. He argued that the Applicant is bound in law to apply to this Honourable Court for a review of that action within 30 days from 8/11/13.

Learned Counsel, further argued that form the record of Court, the Applicant did not apply for the review of the Respondent's decision until 14/03/14 when it filed the present action that is long after the expiration of the mandatory 30 days period granted to it by under Section 20 of the Act.

Counsel, submitted that the law is settled that a Court is only competent if the proceedings before it are initiated by due process of law. He relied on the case of MADEUKOLU V. NKEMDILI (1962) 1 ALL NLR 589 at 595. He argued that the Court has no jurisdiction to entertain the suit, the Applicant failed to initiate the action within 30 days as prescribed by Section 20 of the Freedom of Information Act, 2011. He argued that the application is incompetent and liable to be struck out in limine.

He also argued that the application is premature against the 2nd Respondent and therefore, unsustainable as the Applicant did not demonstrate that it had made as request to the 2nd Respondent to prosecute the 1st Respondent. It is the outcome of such a request that ought to be the subject of a judicial review by this Honourable Court.

He urged the Court to dismiss this application as premature and unsustainable.
On issue No 2, Learned Counsel urged the Court to answer the question in the negative and to hold that the provision of the Freedom of Information Act does not apply to private companies such as the Respondent and dismiss the application. He relied on Section 1(1) 2(7) and 31. He argued that these Sections are not applicable to the Respondents and contended that the Respondent does not fall within the category of private bodies providing service or utilizing public fund and as such be Freedom of Information Act, cannot apply to it as it is neither provide public service nor is it funded with public funds.

Learned Counsel, stated that the Respondent is a Private limited liability company engaged, in the buying and selling of motor vehicle. He referred the Court to paragraph 8, 9, 10 and 11 of the counter affidavit of the Respondent.
Counsel, further relied on case law and other provisions of the Act and explained that the phrase public institution was used throughout all the section of the Act and argued that it was not the intention of the legislature to create a right of access to record or information in possession of private companies or persons. He therefore, urged the Court to hold that the provisions of the Act are not applicable to the Respondent and as such, the rights of the Applicant under Section 1(c) of the Act cannot be enforced against the Respondent.

On issue No 3, Learned Counsel, stated that assuming that the Court holds that the Freedom of Information Act, 2011 applied to the Respondent, he urged the Court to hold that the Respondent is justified under Section 12 of the Act in withholding the information demanded by the Applicant. He pointed out that paragraphs 13 and 14 of the counter affidavit are not challenged in that all material particulars disclose to the Court that the sale of the two(2) BMW bullet proof by it to the Nigerian Civil Aviation Authority is now subject of investigation by the EFCC. He relied on Exhibit COS1 which is a newspaper report which confirmed that the Law Enforcement Agency had quizzed the former Minister of Aviation in relation to the purchase of the BMW bullet proof cars which the Applicant wanted information on.

Learned Counsel, relied on Section 12 of the Act and the case of OYEGUN V. NZERIBE (supra) and urged the Court to hold that the Respondent was justified under Section 12 of the Freedom of Information Act to release the Information sought from it by the Applicant.

Counsel referred to Section 2(7) and 31 of the Act, and argued that the Respondent is not a public institution and that the provisions of these Sections are not applicable to it. The summary of the submission is to the effect that the Respondent is a private company engaged in public service or utilizing public fund and submitted that the Freedom of information Act only applies only to government and its agencies and not to private persons like the Respondent.

He concluded by urging the Court to dismiss the application of the Applicant is lacking in merit and a waste of the Court judicial time.

Learned Counsel for the Applicant informed the Court that they have filed a further affidavit of 15 paragraphs sworn to by Ijeoma Mba, attached to it is one exhibit and that they field a reply.

The summary of the argument are:-

1. By the provisions of Section 2(7) and 31 of the Act public institution means government institutions and private bodies performing public functions, public funds and that these Section accommodate the 1st Respondent even through a private company qualifies as a public institution having utilized and benefited from public funds in the purchase cum importation of the two(2) BMW bullet proof cars. He relied on exhibit A attached to the further affidavit to show that the Respondent benefitted from the waiver in the importation of the two BMW bullet proof cars. He urged the Court to find and hold that the 1st Respondent is a public institution having benefitted from and utilized public funds in importing the two(2) BMW bullet proof cars.
2. On the issue of lack of jurisdiction. He submitted that time was extended by the order of the Honourable Court and submitted that the Act gives every person a right of access to information held public institution and contended that under Section 1(2) an Applicant, is not required to demonstrate any special interest information and where such is denied, the Applicant can apply to the within 30 days of denial for a judicial review. He relied on Order 34, Rules 3(1) (2) of the Federal High Court Civil Procedure Rules 2009 and Section 20 of the Act. Learned Counsel referred to its Ex parte application for leave and extension of time and the Order of Court dated 27th February, 2014 granting the said leave.
3. Learned Counsel also referred to the statutory role of the 2nd Respondent on the issue of obligation of investigation and non-compliance with the provisions of Section 4 of the Act on the issue of giving written notice to the Applicant that access to all or part of the information will not granted showing reasons for the denial and the Section of the Act under which the denial is made.
4. He also urged the Court to hold that the 1st Respondent is estopped from making assertion of being justified by the provisions of Section 2 of the Act as it failed to comply at the earliest opportunity.
   He concluded by urging the court to discontinue all the submissions of the 1st Respondent in their written address and dismiss same.

The above exercise is a summary of the arguments and submissions of Learned Counsel on both sides.

The issue before the Court is an application for judicial review. By the provisions of Order 34 Rule 3(1). No application for judicial review should be made unless the leave of Court has been obtained in accordance with the Rules. By sub Rules (2), the application shall be made Ex parte to, the Judge and shall be accompanied with:-

(a) A statement setting that the name and description of the Applicant, the reliefs sought and the grounds on which they are sought.
(b) By an affidavit verifying the facts relied on
(c) A written address in support of the application for leave.

In my view, Learned Counsel has substantially complied with the provisions of the Rules in filing the instant application. The application for leave was filed on the 9th day of January, 2014 and the Order granting leave was made on 27th February, 2014.

The relevant question is whether or not the Freedom of Information Act applies to the 1st Respondent Section 1(1) of the Act provide for right of access to records it reads:-

"Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in custody or possession of any public official, agency or institution howsoever described, is established. Section 1(2) provide that an Applicant under this Act needs not to demonstrate any specific interest in the information being applied for"

The argument of Learned Counsel for the 1st Respondent in a nutshell, is to the effect that the Act only apply to Public Institutions. Does it then means that private companies are exempted? I think not, if the intention of the legislature is to exempt private liability companies from being affected by the Freedom of Information, it would have stated so expressly.

I hold the view that by the provisions of Section 1(1) and (2) the Applicant is entitled to have access to the information regarding the purchase of the 2 BMW bullet proof cars as they were purchased by a public institution using public funds and they are to be used for public functions.

I also believe that the 1st Respondent is under a duty to release the information requested by the Applicant as they have utilized and benefitted from public funds in the purchase of the 2 bullet proof cars by enjoying the waiver of import duty as only public institution are exempted from the payment of such duties.

This Court has a duty to exercise its discretion to order the enforcement of public duties. There is an imperative duty on the part of the 1st Respondent to allow the Applicant to have access to the information on the two(2) BMW cars when the said information was requested for and the Applicant as per the provisions of Section 1(2) is not obliged to have a substantial personal interest in seeking to have access to the said information.

The point being made is that the information being requested is not a private information, it is an issue of transparency and particularly when the two(2) BMW bullet proof cars were purchased or acquired by a public institution.

After considering all the issue raised by the parties, I am satisfied that the refusal of the 1st Respondent to make available the information required by the Applicant is a violation of the Freedom of Information Act, 2011 and in that regard, I grant the following reliefs (1), (2) and (3) sought by the Applicant.

HON. JUSTICE M.N. YUNUSA
JUDGE
28TH APRIL, 2015
IN THE FEDERAL HIGH COURT

HOLDEN AT LAGOS, NIGERIA
ON MONDAY THE 15TH DAY OF JUNE, 2015
BEFORE THE HONOURABLE
JUSTICE MUHAMMED NASIR YUNUSA
JUDGE

SUIT NO. FHC/L/CS/26/2014

BETWEEN:

THE EIE PROJECT LIMITED/GTE ……. APPLICANT

AND

1. FIRST BANK OF NIGERIA PLC

2. THE ATTORNEY GENERAL OF THE FEDERATION ……...… RESPONDENT

JUDGMENT

This is a Motion on Notice brought pursuant to section 1 (3) and 20 of the Freedom of Information Act Order 34 Rules 1 and 5 of the Federal High Court Civil Procedure Rules 2009 and under the inherent Jurisdiction of this Honourable Court. The Applicant is seeking for the following reliefs:-

1. A DECLARATION that the failure and/or refusal of the 1st Respondent to grant access to or make available to the Applicant the Information requested in the Applicant's Letter dated 30th October, 2013 is to wrongful denial of access of information under Section 7(5) of the Freedom of Information Act, 2011.
2. DECLARATION that the failure and/or refusal by the 1st Respondent to give the Applicant a written notice that access to all or part of the information requested would not be granted and stating reasons for the denial and the section of the Freedom of Information Act, 2011 upon which the 1st Respondent rely to deny the Applicant access to the information requested by the Applicant in its letter dated 30th October, 2013 amounts to a flagrant violation of Section 4(b), 7 (1), (2) and (3) of the Freedom of Information Act, 2011 and is therefore wrongful.
3. AN ORDER OF MANDAMUS Compelling the 1st Respondent to grant access to or make available to the Applicant Information requested in the Applicant's letter dated 30th October, 2013 which was duly delivered to the 1st Respondent namely:-

    a. The credit application file the bank provided for the lease facility of N836,970,156.00 (Eight Hundred and Thirty Six Million, Nine Hundred and Seventy Thousand, One Hundred and Fifty Six Naira) for the purchase of two Bullet proof BMW 760 LI HSS vehicles for the NCAA from Coscharis Motors Limited with the following details:-
        i. original documents including pro-formal invoice(s) from the supplier, request letter from NCAA and insurance certificate for the assets (the BMW vehicles);
        ii. rationale for approval including the credit application (or an acceptable alternative) originating the request and details of the approving authority; and
        iii. offer letter to NCAA stating the terms and conditions of the loan facility.

    b The loan account statement reflecting the 2 payments already made as stated during the testimony of Mr. Joyce D. Nkemakolam, the Director of the Aerodrome and Airspace Standards and former Acting Director General of NCAA.

4. AN ORDER OF MANDAMUS compelling the 2nd Respondent to initiate criminal proceedings against the 1st Respondent for wrongful denial of access to information to the Applicant under Section 7(5) of the Freedom of Information Act, 2011.

It is supported by an 8 Paragraph affidavit sworn to by Mrs Ifeoma Mba, also attached are certain Exhibits. Learned Counsel, filed a written address and identified 7 issues for determination as follows:-

1. Whether the 1st Respondent is a public institution within the meaning of the Freedom of Information Act.
2. Whether the Applicant has the right to request from the 1st Respondent under the Freedom of Information Act and is therefore entitled to the requested Information.
3. Whether the Applicant has the right to apply to Court to compel the 1st Respondent to disclose the information unlawfully withheld from the Applicant despite the latter's request for the said information.
4. Whether the 1st Respondent has an obligation to provide the information requested and if by its refusal to disclose the information or give reasons if any, for the refusal, it is in breach of said obligation.
5. Whether the Court has the authority and to compel the 1st Respondent to provide the requested information which has been unlawfully withheld.
6. Whether the act of the 1st Respondent constitutes an offence of wrongful denial under the provisions of the Freedom of Information Act.
7. Whether the 2nd Respondent can be compelled to institute criminal proceedings against the 1st Respondent.

On Issue No. 1, Learned Counsel, reproduced the provisions of Section 2(7), 31 of the Freedom of Information Act and Section 31 of the Central Bank Act. He submitted that the foundation of the instant suit is a certain amount of money which is a public fund and is alleged to have been used by the NCAA to purchase the two bullet proof vehicles which is basically the subject of the request for information sent to the 1st Respondent.

Counsel, urged the Court to take judicial notice of the fact that the 1st Respondent collects taxes on behalf of the Federal Government, therefore it is in the position of holding public funds performing public duties. He also cited the provisions 31 of the Central Bank of Nigeria Act Cap 64 LFN 2004.

He submitted that despite being a Private Company, the 1st Respondent is collecting taxes as aforesaid performs a public function within the meaning of the Freedom of Information Act, and amendable to the provisions of the said Act to provide access to Information requested by the Applicant.

On Issue no. 2, Learned Counsel, relied on the provisions of Section 1 (1)(2) of the Freedom of Information Act and Section 14 of the CFRN 1999 (as amended).

He submitted that access to information is sine qua non for an active and Intelligent participation of the people in all spheres and affairs of the Community in a democratic set up so that they are capable of forming a broad opinion about the way in which they were governed, tackled and administered by the government and its functionaries.

Counsel, further submitted that no democratic Government can survive without accountability and he stated that the basic postulates of accountability is that people should have information so as to be in a position to fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy.

On Issue No. 3, Learned reproduced the provisions of Section 1 (3) and 20 of the Act and submitting that these Sections unequivocally vest on the Applicant and any person who may have been wrongly denied access to information to apply for the review of the wrongful denied of Information.

He relied on the case of NDIC V VIBELKO NIGERIA ED (2006) ALL FWLR PT. 336, 386 AT 400. Where the main object is to discover the intention of the Lawmaker which is deductible from the Language used and that once the language of a statute is clear and unambiguous, the Court will give an ordinary or literal interpretation to it. The literal interpretation is to be followed unless that would lean to an absurdity and inconsistency with the provisions of the statute as a whole.

He submitted that the Language of these sections of the Freedom of Information Act vesting the right to apply to the Court for the Judicial review of a wrongful denial of access to information is sufficiently clear enough and urged the Court to give it a literal and naturally intended meaning.

On Issue No. 4, Counsel, relied on the Provisions of Section 4(a) and (b) submitted that the 1st Respondent is charged with the responsibility of making information available when requested or in the alternative a written notice stating the reasons if any and the Section of the Act under which the 1st Respondent purports to deny the requested information.

He further submitted that the refusal constitutes a flagrant disregard for existing laws and such amounts to a breach of legally imposed obligation under the Act. He referred the Court to Paragraph 6 of the affidavit in Support of the application where it was deposed that that 1st Respondent failed to provide the Information requested or give reasons, if

any for the refusal as prescribed under the law.
On Issue No. 5, Counsel, relied on Section 20 of the Act and relied on LAYANJU V. ARDOYE (1959) SC NLR 412.

2. CHIEF EMANUWA UTA V BEGHO & ORS V MINISTER OF LOCAL GOVERNMENT (1957 58) WNLR 176.

3. FAWEHINMI V INSPECTOR GENERAL OF POLICE & ORS (2002) 7 NWLR PT. 767 606.

He contended that the 1st Respondent has a public duty to comply with the provisions of the Act by providing information when required or in case of denial, to give written notice of such denial and the provision of the Act which it relies to deny the requested information. He relied on Paragraph 6 of the affidavit in Support.

Learned Counsel, further submitted that the Applicant having fulfilled all the conditions precedent has made out a case to entitle it to a writ of mandamus compelling the 1st Respondent to release the information when it has unfaithfully withheld it referred the Court to Paragraphs 4 and 5 of the affidavit in support. He pointed out that the Applicant has clearly requested for the performance of the duty and the 1st Respondent willfully failed to oblige and flagrantly violated the provisions of the law.

On Issue No. 6, Learned Counsel, relied on Section 7(5) of the Act and submitted that the 1st Respondent is undoubtedly in breach of the clear provisions of the Act but its willful failure to provide the information requested or given which notice to the Applicant that access to all or part of the information requested will not be granted, stating reasons for the denial and the section of the Act under which the denial is made despite being aware of the provisions of the law.

On Issue No. 7, Counsel, relied on and reproduced the provisions of Section 29(6). He submitted that the Act charges the Honourable Attorney General with the responsibility of overseeing and ensuring compliance with the provisions of the law and one of the major ways of doing that is to ensure that the flagrant disregard for the provisions of the Act does not go unpunished.

He urged the Court to order the Attorney-General to commence Criminal proceedings under the Act against the 1st Respondent.

Learned Counsel, concluded by urging the Court to grant the prayers of the Applicant.

Learned Counsel for the 1st Respondent, opposed the application by filing a 12 Paragraph Counter Affidavit sworn to by Thomas Eboh, and it is accompanied with a written address, Counsel, formulated a sole issue for determination as follows:-

> *"Whether pursuant to the provisions of the FOI Act the 1st Respondent may be obliged/or compelled to provide information to the Applicant in terms of the request contained in its letter of October 30th 2011"*

Counsel, submitted that under the Freedom of Information At, the 1st Respondent may not be obliged and cannot be compelled to provide information to the Applicant in terms of the request contained in the Applicant's letter of 30th October, 2014.

The submission of Learned Counsel is predicated on the following grounds:-

1. That the 1st Respondent is not subject or better still, cannot be made a subject to the FOI Act.
2. That the 1st Respondent cannot properly be made a subject of the Order of Mandamus
3. That the Information being sought by the Applicant is privileged and Confidential.

Learned Counsel, reproduced the provisions of Section 1 (1) and stated that it is very clear and unambiguous. He submitted that the appropriate question is that the operative word used in the provisions is the word 'Public' argued that the obligation to provide information in terms of the Provisions is one imposed on a public official, agency or institution. He submitted that the appropriate question that naturally follows from a reading of the Section is whether the 1st Respondent is a public official, agency or Institution? He answered the question in the negative. Learned Counsel, reproduced the provisions of Section 31 of the Act where a public Institution is defined.

He argued that to qualify as a public institution, the institution in question must be either

a. a Legislative, executive, judicial or advisory body of the Government, or a subsidiary of such government body or
b. a private body providing public services, performing public function or utilizing public funds.

He submitted that the 1st Respondent does not qualify as a public institution within the meaning and intendment of the FOI Act.

Learned Counsel, relied on the provisions of Section 66 of the Banks and other Financial Institutions Act, 1991. He submitted that the 1st Respondent engages in banking business, and is not engaged in providing a public service or in performing public function (properly so called) and service, it does so for profit and at Commercial value. He submitted that the 1st Respondent does not receive subversions or financial support from the government/whether Federal or State) and that it cannot be said to be utilizing public funds.

Learned Counsel, reputed the allegations of the Applicant that the 1st Respondent is a public Institution and stated that the allegations are spurious and desperate and as such represent a dispute attempt to impose on allegation where non exists.

Learned Counsel, argued strenuously that the 1st Respondent is not a public Institution which the meaning of Freedom of Information Act, and submitted that not being a public institution within the meaning of the FOI, it is not and may not be obliged to provide the information sought by the Applicant in terms of the request contained in its letter dated 30th October, 2014. He also submitted that it is trite that where no obligation exist no right may be assumed and urged the court to so hold.

On whether or not the 1st Respondent can be compelled by an order of Mandamus to provide information to the Applicant in terms of the request contained in the letter dated 30th October, 2014. He relied on the case of AMASIKE V REGISTRAR GENERAL AFFAIRS COMMISSION (2010) 19 NWLR PT. 1214 337 and OHAKIM V AGBASO (2010) 19 NWLR PT. 1226 174.

He stated that the Order of Mandamus is available only against public officers and institutions and even then, such an order only ensures in and of a public duty.

He stated that on the strength of the above cited authorities the 1st Respondent not being a public institution, within the meaning and intendment of the FOI Act, cannot be compelled by an Order of Mandamus to provide information to the Applicant in terms of the request contained in the letter dated 30th October, 2014 and urged the Court to so hold.

Counsel, further submitted that under the rules governing banker-customer relationship, the 1st Respondent has a duty to treat as privileged and confidential all information relating to its customers. He relied on the case of TOURNER V NATIONAL PROVINCIAL UNION BANK OF ENGLAND (1924) 40 T.L.R. 234 and state that this duty is not limited to the state of account of the customer but extends to all other facts known to the 1st Respondent. He also submitted that it is not be intendment of the FOI Act to derogate from this duty and that if it were to be so, the Act would clearly have state so.

He urged the Court to dismiss the Application with substantial costs in favour of the 1st Respondent.

Learned Counsel for the Applicants filed a 9 Paragraph further affidavit. Counsel, placed reliance on the averments in the further affidavit and is accompanied with a reply.

Counsel, relied on the definition of Black's Law Dictionary where a Public Service is defined as:-

"A Service provided or facilitated by the Government for the general public's convenience and benefit. Government employment, work performed for or on behalf of the government""

Learned Counsel also proffered arguments on the following headings:-

1. 1st Respondent's argument on Section 66 of BOFIA 1991
2. Can the 1st Respondent be made a subject of the Order of Mandamus being sought by the Applicant?
3. On whether the information sought is Privileged and Confidential.

Most of the arguments and submissions proffered were already argued in the written address. Accompanying the

application.

The above exercise is a summary of the arguments and submissions of Learned Counsel on both sides. I have read all the processes filed by both Counsel. It is my considered opinion that there are two important questions to be answered by the Court:-

1. Whether or not the Applicant has the requisite locus standi to request for information from the 1st Respondent within the meaning of the Freedom of Information Act.
2. Whether or not the 1st Respondent can be compelled to release the information so requested and/or be compelled to give a reasons for the denial of such request.

The starting point is to refer to the preamble to the Freedom of Information Act 2011 which provides that:-

> ***An Act 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 for disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and for related matters.***

Again, Section 1(1) provides for right of access to records. It emphasis that the Freedom of Information Act is a positive Legislation, as it stated clearly that notwithstanding anything contained in any other Act, law or regulation, the right of any persons to Access or request Information, whether or not contained in any written form, which is in the custody or possession of any Public official, agency or constitution howsoever described as established.

This provision in effect changed the position of the law by dispensing with any provisions in any Act regulating denial of the right of access to records.

It is important to point out that the 1st Respondent did not deny that they are not collecting tax and other levies on behalf of the Government among other duties. It follows that where any institution is in custody of record regarding tax payers money, it is under a duty to allow an Applicant to have access to such record in line with the provisions of the Freedom of Information Act. Being in custody of such funds implies the performance of a public duty.

On whether or the 1st Respondent is protected under Section 66 of the Banks and other Financial Institutions Act not to release any information regarding a Customer's account. Even if the Respondent is under a duty not to release the said information directly to the Applicant they can do so through the Customer the reasons for the denial should be make known to the Applicant within period stipulated in the act.

The Position of the law is that where the law prescribes a particular method of exercising a statutory power, such power must be exercised accordingly and no other method is permissible. See the case of:-

1. OGUNLAJI V AIG RIVERS STATE (1993) 6 NWLR (PART 505) 209
2. A MASIKE V REGISTRAR GEN. CAC (2006) 3 NWLR (PART 968) 462.

Where a person claims to have acted pursuant to power granted by statute, such person must justify the act, if challenged by showing that the statute applied in the circumstances and that he is empowered to act over it.

In the instant suit, Learned Counsel for the Applicant, relied on the provisions of Sections (1), (2), (3), 4(b), 7(1), (2), (3), 2(7), Section 20 Section 31 of the Freedom of Information Act.

On whether or not the Applicant has the locus standi to apply for the information requested. Section 1(2) answered the question, it provides:-

> ***"An Applicant under this Act needs not to demonstrate any specific interest in the information being applied for"***

This provision therefore creates a special locus standi for the Applicant to apply for the information requested. An Applicant is not expected to have any specific interest in the said information. In other words any Person can apply for

the release of the Information and by the provisions of Section 1 (3) of the Act which reads thus:-

> "*Any person entitled to the right to have information under the Act shall have the option to Institute proceedings in the Court to compel any public institution to comply with the provisions of this Act"*

By the combined effects of section 1(2)(3), any person can apply for the release of information from any public official, any or institution howsoever described and where the information is denied the person, can approach the Court to seek redress.

The word Bank is not defined in the Constitution of the Federal Republic of Nigeria 1999 or in the Interpretation Act. However, the word in its Ordinary grammatical meaning is an institution or place that provide financial services. See the case of:

1. **S.B.N. V. DELULF (2004) 18 NWLR (PART 05) 341.**
2. **F.MB.N. V. OLLOH (2002) 9 NWLR (PART 773) 475.**
3. **F.M.B.N. V N.D.I.C (1999) 2 NWLR (PART 591) P. 333 AT 339.**

The relationship between a Bank with its customer is that of an agent and principal, as well as that of a debtor and creditor. The relationship is also contractual. It is essential that of a debtor to a Creditor, in the case of Credit balances. In other words, the Bank undertakes to receive money and collect bills for its customer's account.

A distinction must be drawn with a request for information in respect of a transaction that requires the release of information as to record of a Public Institution. That is to say, the right to have access to records and the key word keep public official, agency or institution howsoever described. The 1st Respondent is a creation of the law as it was an Institution established under the provisions of the Companies and Allied Matters Act as a Public Liability Company and the Bank and other financial Institutions Act among others.

More so, Section 31 of the Freedom of Information Act is even very clear when it defines public institutions to include private bodies providing public services, performing public functions or utilising funds. Is the 1st Respondent not using tax payers money in the performance of its duties and responsibilities to its Customers? I hold the view that it is a public Institution within the definition of the Freedom of Information Act.

In the light of the above, I hereby grant reliefs 1, 2, 3 and in respect of relief 4. The Applicant is hereby ordered to file a formal complaint in the office of the honourable Attorney-General and Minister of Justice, the 2nd Respondent who has the Constitutional duty to initiate Criminal proceedings.

HON. JUSTICE M. N. YUNUSA
JUDGE
15/06/2015

IN THE FEDERAL HIGH COURT
HOLDEN AT LAGOS, NIGERIA
ON MONDAY THE 24TH DAY OF NOVEMBER, 2015
BEFORE THE HONOURABLE
JUSTICE MOHAMMED NASIR YUNUSA
JUDGE

SUIT NO: FHC/L/CS/25/2014

BETWEEN:

THE EIE PROJECT LTD/GTE ……..……. APPLICANT

AND

1. THE NIGERIAN CIVIL AVIATION AUTHORITY]
] RESPONDENTS
2. THE ATTORNEY GENERAL OF THE FEDERATION]
THE FEDERATION

RULING

This is a Notice of Preliminary Objection brought pursuant to Section 24(2) of the Civil Aviation Act the Honourable Court, the Respondents/Applicants are seeking for the following reliefs:

1. That this Honourable Court lacks jurisdiction to hear this suit
2. That the condition precedent before instituting against the 1st Respondent/Applicant was not met
3. An Order striking out this suit against the 1st and 2nd Respondents/Applicants for falling to comply with provision of Section 24(2) of the Civil Aviation Act cap Laws of the Federation of Nigeria 2006 as amended.
4. And for such further Order or other Orders or this Honourable Court may deem fit to make in the circumstances of this case

i. That the Applicant/Respondent failed to issue 30 days of pre-action Notice before the instant/commencement of this action against the 1st and 2nd Respondents/Applicants
ii. That failure to issue the 30 days' notice in writing before the commencement of this matter robs this Honourable Court of jurisdiction to entertain this matter.

The application is supported by a 6 paragraph affidavit in support sworn to by Kayode Michael. Learned counsel filed a written address and formulated the following issues for determination:-

1. Whether the Applicant/Respondent can institute/commence this action against the Respondent/Applicant without fulfilling the condition precedent of issuing/giving 30 days pre-action Notice in writing as provided for in Section 24(2) of the Civil Aviation Act 2006
2. Whether this Honourable Court has the jurisdiction to entertain/hear this matter.

On issue no. 1, Learned counsel, submitted that it is the position of the law that by virtue of Section 24(2) of the civil Aviation act 2006 an action can only be commenced against the 1st Respondent/Applicant after 30 days' notice in writing must have been given to the 1st Respondent/Applicant. He reproduced the provisions of Section 24(2) of the Civil Aviation Act 2006.

He contended that pre-action notice is a condition precedent that must be fulfilled before any action could instituted against the 1st Respondent/Applicant. He stated that the word SHALL used in the Civil Aviation Act, 2006, is to express compulsion, mandatory and fundamental condition that must be met and adhered to.

He referred the Court to the case of MOBIL PRODUCTION (NIG) LTD V. LESEPA (2002) 18 NWLR P.89 where the Supreme Court held that a suit commenced in default of service of a pre-action notice is incompetent against the party who ought to have been served with pre-action notice. Provided such party challenges the competence of the suit.

He pointed out that the 1st Respondent/Applicant is challenging the competence of the action instituted by the Applicant/Respondent's failure to give pre-action notice as required by the Section 24 of the Civil Aviation Act 2006 which renders the Applicant/Respondent's action incompetent. He cited and relied on NPA V. NTIEDO (1998) 6 NWLR (PT 555) 640 P30.

He further argued that issuance of pre-action notice where service is required is very fundamental as it touches on the issue of jurisdiction and the competence of the suit. Failure to issue same amounts to a vital or serious omission that makes a suit and renders it a nullity. He emphasized that it is not a mere irregularity that could either be waived or disregarded. He relied on the case of UGWUANYI V. NICON PLC (2004) 15 NWLR (PT 897) 612.

He urged the Court to strike out the instant suit for failure to issue a pre-action notice.

On issue no. 2, Learned counsel, submitted that it is trite and settled law that when a condition precedent to the commencement/institution of an action is not fulfilled or met, it deprives the Court of its jurisdiction to hear such an action.

He relied on the provisions of Section 24(2) of the Civil Aviation Act 2006 and submitted that the issuance of pre-action notice is a condition precedent to instituting any action against the 1st Respondent/Applicant.

He further argued that the Applicant/Respondent failed whether by omission or commission to issue a pre-action notice thereby denying this Honourable court its jurisdiction to entertain this matter.

He relied on: (1) **ODOEMELAM V. ADADIUME (2008) 2 NWLR (PT1070) P 179 AT 188-189**
(2) NCC V. MTN (2008) 7 NLWR (PT 1086 P 229 at 258
(3) N.I.M.R. V. AKINOLUGBADE (2008) 7 NWLR 68.

He submitted that the failure of the Applicant/Respondent to issue 30 days' notice in writing to the 1st Respondent/Applicant before instituting this action has no doubt robed this Honourable Court the jurisdiction to hear this matter and urged the Court to strike it out.

Learned counsel, concluded by urging the Court to strike out this suit against the Applicants for contravening the provisions of Section 24(2) of the Civil Aviation Act 2006.

The Applicant/Respondent opposed the application by filing a 6 paragraph counter affidavit sworn to by Ifeoma Mba.

Learned counsel, submitted that the issue before the court is whether an Applicant who has been wrongly denied access to information under the Freedom of Information Act 2011 needs to serve the public institution with a pre-action notice. He reproduced the provisions of Section 1 of the Freedom of Information Act 2011 which provides that:

a. Notwithstanding anything contained in any other Act, law or regulation the right of any person to access or request information whether or not contain in any written form which is in custody or possession of any public Agency or Institution, howsoever described is established.

b. Any person entitled to the right to information under the Act shall have the right to institute proceedings in Court to compel any public institution to comply with the provisions of the Act.

Learned counsel, submitted that in its ordinary and natural meaning, the word "notwithstanding" is a derogatory clause that is used to disapply prior provisions or occurrence, it is synonym for irrespective use despite not prevented "in spite of" etc legislative language, it is commonly referred to as a supremacy provisions.

He submitted that the word notwithstanding in Section 1(1) of the Freedom of Information Act, 2011 is a manifest intent that it did not intends to limits or subjugate the Act to any other law which was in existence prior to the enactment of the Act, except of course the Constitution. He argued that the legislature intended the Act to override the provisions of any other law (including the NCA etc) that the inconsistent with the Freedom of Information Act, 2011 and the enforcement of those rights.

Counsel, submitted that the unrestricted access to information granted by the provisions of Section 1(1) of the Freedom of Information Act, 2011 when extends unfettered right of access to the Court pursuant to the Freedom of Information

Act, 2011 cannot be subjected to or restricted or clogged by any means whatsoever through Section 24(2) of the Civil Aviation Act, 2006 as the Respondent/Applicant seeks to do through the preliminary objection.

Learned counsel, argued that to uphold the supremacy of the Civil Aviation Act 2006 will basically be tantamount to eroding the rights of access to Court as provided by the provisions of 1999 Constitution. He further submitted that the importance of access to justice as an essential instrument for the protection cannot be overemphasized.

Learned counsel, further reproduced the provisions of Section 20 of the Act and referred to the submission of the Respondents and the Applicant ought to have given a pre-action notice and that at the same time file their application within 30 days as stipulated in the Freedom of Information Act 2011 to rob the Applicant of the right to access to Court. He argued that undoubtedly after the expiration of the 30 days given by the above quoted section of the Act, the Applicant's statutory and well established right to apply to the Court would have been lost and can only apply based on the discretion of the Court when in fact and in law, the exercise of a discretion confers no right.

Learned counsel, asked the question why the law would require that public institution be provided notification of intent to sue in the first place? He contended that pre-action notification would be more relevant in a situation where it is needful to give the institution the opportunity to address the grievance that gave rise to the impending law suit in context of access to information, the fact that the public institution willfully refuses to provide information it holds on behalf of the public is enough justification that the Applicant would proceed to Court. The mere fact of refusal of access to public information is enough notification on its own. He urged the Court not to reward the Respondent for its willful violation of clearly established law. And wondered what purpose would it serve that NCAA should be given notice beyond that established under the Act, would that result in making the information available? If that were the case, he stressed they may as well, just right now, provide the information requested and that would be the end of the case.

Learned counsel, further submitted that the legislature does not intent that one month pre-action notice be giving to the 1st Respondent/Applicant before the right to apply to Court to enforce a wrongful denial of access to information can be exercised, he argued that to hold otherwise will be tantamount to an outright denial of the right of access to Court as enshrined in the Constitution and a violation of the right to apply to Court after the denial of the requested information as provided by the Freedom of Information Act, 2011.

Learned counsel, concluded by urging the Court to in the interest of justice, hold that the Applicants are not required to comply with the provisions of Section 24(2) of the Civil Aviation Act, 2006 before exercising the right of access preserved by the Constitution and the Freedom of Information Act, 2011 as to do so, will negate and contradict the provisions of both the Constitution and the Freedom of Information Act, 2011.

Learned counsel, for the Respondent/Applicant filed a reply on points of law. In the said reply, the main issue raised was that the Respondent/Applicant was not challenging the Applicant's right to access or request for information from the Respondent but pointed out that to achieve that, the Applicant must comply with the due process of law, which is that the pre-action notice must be served and that they are challenging the Applicant's right to institute proceedings in Court to compel any public institution to comply with the Act.

He cited and relied on case law authorities to illustrate the importance of a pre-action notice. He relied on NONYE V. AYICHE (2002) 2 NWLR (910) 623 at 649-650.

He also argued that Section 1 and 20 of the Freedom of Information Act 2011 cannot apply to the instant application. He emphasized that the Respondent/Applicant is not challenging the right to access or request information or right to go to Court to compel any public institution to give access to any information, since same is a legitimate right given under our law.

The issue before the Court is whether or not the requirement of a pre-action notice must be complied with by the Applicant before instituting an action under the Freedom of Information Act 2011.

The essence of a pre-action notice as stated in a plethora of cases is to bring fully the grievance of the Plaintiff to the notice of the Defendant so as to enable him to following appreciate the claim of the Plaintiff after a thorough perused, to make up his mind whether to settle or compromise the Plaintiff's claim or in the alternative dare the Plaintiff and leave him to pursue this claim.

In otherwords, it is to allow the proposed Defendant time to consider whether to make reparation to the intending Plaintiff or not. The law in that respect, has therefore, spelt out the due process and procedure on the mode or bringing

this action by the intending party. See the case of GBADAMOSI V. NIGERIAN RAILWAY CORPORATION (2007) ALL FWLR PT 367 P. 855.

The purpose of serving pre-action on a party is not to be taken by surprise and to allow the party to have adequate time to prepare to deal with the claim against it. See AMADI V. N.N.P.C (2006) 6 SC 66. In N.D.C. V. A.S.W.B. (2008) ALL FWLR (PT 422) P 1082 at 1081. The Supreme Court held that:

> **"The rationale behind the jurisprudence of pre-action notice to enable the Defendant know in advance the anticipated action and a possible amicable settlement of the matter between the parties, without recourse to the adjudication by the Court**"

It is settled law that failure to give pre-action notice is a fundamental omission which will nullify any action taken in its absence. See SHUAIBU V. NAICOM (2002) 12 NLWR (PT 780) P116.

It should be noted however, that non-compliance with the requirement does not take away the constitutional right of access to the Court from litigating parties neither does it defeat the cause of action, if the subject matter is within the jurisdiction of the Court, failure on the part of the Plaintiff to serve a pre-action notice on the Defendant gives the Defendant a private right to insist on such notice before the plaintiff may approach the Court. See the following cases:

ETIOSA LOCAL GOVT V. JEGEDE (2007) 10 NLWR PT 1043 P 537

ARO V. LAGOS ISLAND LOCAL GOVT COUNCIL (2002) 4 NLWR PT 757 0.365

NNONYE V. AYICHE (2008) 2 NLWR (PT 910) P. 623

In ETI OSA LOCAL GOVT COUNCIL V. JEGEDE (Supra) the Court of Appeal held that:

> **"An objection to jurisdiction founded on non-compliance with the requirement of a pre-action notice does not abrogate the right of a Plaintiff to approach the Court or defendant's cause of action. Once the subject matter is within the jurisdiction of the Court, failure of the Plaintiff to serve the pre-action notice will only give the Defendant a right to insist on such notice.**
> **In other words, it merely puts the jurisdiction of the court on hold pending compliance with the pre-condition."**

There are however, some exceptions to this general rule in OLATUNJI V. HAMMAD (2010) ALL FWLR (PT 540) P. 1365 at 1374 held that:

> **"Action brought under chapter IV (Sections 33 46) of the Constitution are always to be handle with dispatch**
> **Consequently, an Applicant who complies that any of his rights under the said provisions of the Constitution are likely to be violated is not required to comply with pre-action notice. The same applies in breach of contract cases, it is only in normal civil actions that compliance with pre-action notice is mandatory."**

Surely, the subject matter in the instant suit, is not a fundamental rights enforcement suit, and it is also not an action founded on breach of contract.

Now, I have perused the Freedom of Information Act, 2011 and it was not expressly provided that an application seeking for the enforcement of the provision of the Act shall not be affected by any limitation statute as it was provided under Order III Rule 1 of the Fundamental Rights Enforcement Procedure Rules, 2009. It should be noted that the requirement for the issuance of pre-action notice under Section 24(2) of the Civil Aviation Act 2006 is a mandatory provision of a statute in CALABAR CENTRA CORPORATIVE THRIFT & CREDIT SOCIETY LTD V. EKPO (2008) 6 NWLR PT 1083 P. 362 AT 398, the Supreme Court held that:

> **"A Court of law cannot ignore mandatory or obligatory provisions of a statute and tow the time of justice in the event that the statute has not done justice. Courts of law can only do so in the absence of mandatory or obligatory provisions of a statute. In other words, there the provisions of a statute are mandatory or obligatory, courts of law cannot legitimately brush the provisions aside just because to wants to do justice in the matter. To do so will to adulterating the provisions of the statute and that is not the function of the Court."**

In the light of the above, it is safe to put the jurisdiction of the Court on hold, pending compliance with the pre-condition of serving a pre-action notice as expressly provided in section 24(2) of the Civil Aviation Act, 2006. It is important to also point out that failure to comply with the provisions regarding the pre-action notice is not a ground that will warrant the striking out of the instant suit.

The 2nd Respondent has filled processes but was not in Court to adopt same. The said processes are deemed abandoned and are hereby struck out.

HON. JUSTICE M.N. YUNUSA
JUDGE
24TH NOVEMBER, 2015

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL HEADQUARTER
HOLDEN AT ABUJA
ON MONDAY THE 1ST DAY OF FEBRUARY, 2016
BEFORE HIS LORDSHIP, HONOURABLE JUSTICE E.S. CHUKWU
JUDGE

SUIT NO: FHC/CS/648/2014

BETWEEN:
INCORPORATED TRUSTEES OF MEDIA RIGHTS AGENDA ….. APPLICANT

AND

1. HOUSE OF REPRESENTATIVES)
2. CLERK OF HOUSE OF REPRESENTATIVES) ….. DEFENDANTS
3. AG OF THE FEDERATION)

JUDGMENT

The Applicant is by this Motion on Notice is seeking the following reliefs as endorsed on the face of the Motion paper to wit:

i. A DECLARATION that the failure of the 1st and 2nd Respondent to furnish Applicant with the certified true copies of documents sought vide Applicant's letter of 24th July, 2014 amount to a wrongful denial of information under the Freedom of Information Act, 2011 (the Act).

ii. ORDER of the Honourable Court COMPELLING the 1st and 2nd Respondents jointly and severally to, within seven (7) days of the Judgment in this Suit, furnish Applicant with the certified true copies of the documents requested through Applicant's letter of 24th July, 2011 and which documents are as set out in the Schedule to this application.

There are 9 grounds upon which the application is predicated as endorsed on the Motion paper.
There are facts relied upon.

In support of the application is an affidavit of 8 paragraphs deposed to by Austin Ahusimhere, a Litigation Officer. It is worthy of note that paragraph 4 has sub-paragraphs 4a 4h. Counsel relied on all the paragraphs of the accompanying affidavit and the Exhibits marked as Exhibit A and B respectively.

In compliance with the rules there is a written address by the Applicants Counsel.

Learned Counsel after summarizing the facts of this case distilled a lone issue for the determination of the Suit to wit: "WHETHER APPLICANT HAS PROVED ITS ENITLEMENT TO THE RELIEFS SOUGHT IN THIS APPLICATION.

Learned Counsel in answering the poser in the affirmative quoted in extenso the provisions of Sections 1, 2 (6 & 7) of the Freedom of Information Act and urged the Court to hold that the Applicant has the right to bring this action. That the Applicant had fulfilled all she is required to do to be entitled to the information they requested.

Learned Counsel submitted further that by Section 4 of the Freedom of Information Act, the Respondent are under a duty to provide the Applicant with the requested document within 7 days of their receipt of the Applicant's request.

Similarly that by Section 7(4) where the Respondents does not avail the Applicants of the information within 7 days they are deemed to have refused it.

Counsel urged the court to hold that the words of the Freedom of Information Act is mandatory and does not permit of any discretion and cited and relied on the case of INYANG Vs OBONG (2002) 2 NWLR (PT 751) 284 @ 331 PARA C D.

Counsel finally urged the Court to grant their application as prayed.

The Applicant upon the receipt of the Respondents counter affidavit filed further on 19/6/2015. The further affidavit of Austin Ahusimhere is of 5 paragraphs with paragraph 104 having sub-paragraphs 4a 4g respectively.

Learned Counsel filed a reply on points of law and submitted forcefully that neither Section 8 of the Freedom of Information Act now Section 04 of the Evidence Act made it mandatory for a Public Institution to charge fees either for transcription or certification of documents.

Counsel submitted that those provisions are merely optional so that any Public Institution that desires may charge such fees.

Secondly, Counsel urged the Court to hold that for fees to be charged the Respondents must have demanded for it and in the instant case they never demanded and did not specify the amount.

Counsel finally urged the Court to discountenance the submission of the Respondents and grant all the Applicant's reliefs as endorsed on the motion paper.

The Respondents 1st and 2nd Respondents opposed this application and filed a counter affidavit of 6 paragraphs, deposed to by Ali Hassan Mohammed.

The potent averments in the counter affidavit are as averred in paragraphs 4a 4f. Learned Counsel accompanied the counter affidavit with a written address. After a brief summation of the facts of this case distilled a lone issue for determination to wit:

> **"whether or not the Applicant is entitled to have the Orders they seek from the Court in the face of the facts deposed to in the circumstance."**

Learned Counsel submitted that by virtue of Section 104 of Evidence Act every Public Officer having custody of a Public Document which any person has a right to inspect shall give that person a copy of it on payment of legal fees prescribed in that respect with a certificate at the foot of such document.

Secondly, Counsel relied on Section 8 of the Freedom of Information Act, 2011 which stipulates that fees shall be limited to standard charges of document for duplication and transcription were necessary.

It was urged on the Court that the Applicant requested for transcript without paying for the transcript.

Counsel urged the Court not to grant the application as that will be foisting or aiding the Applicant to obtain certified true copy in breach of Section 104 of the Evidence Act.

Counsel urged the Court to hold that the Respondents never refused the application but rather that the Applicants refused to comply with the law.

Counsel urged the Court to refuse the application as the Applicants had not fulfilled the condition precedent for the obtaining the information required by law.

The Respondents filed a further and better counter affidavit on 23/6/2015. The said further and better affidavit was deposed to by Charles Yoka.

Learned Counsel accompanied the further and better counter affidavit with a written address whereof Counsel reargued the issues they had earlier on argued in their written address.
Counsel for short urged the Court to refuse the application as they have refused to pay the appropriate fees required of them.

COURT: I have studied the application of the Applicants and the robust counter affidavit of the Respondents. The issue is very clear and straight forward that there is only a very thin line. While the Applicants avers that they have

fulfilled all condition precedent to be entitled to the information sought the Respondents have vehemently opposed them on the condition that noncompliance with the provision of Section 104 of the Evidence Act and Section 8 of the Freedom of Information Act.

It is pertinently very disheartening that the narrow compass in the dispute can be narrowed down on proper legal advice.

It is obvious that the Freedom of Information Act makes it obligatory under certain circumstances that information be made available to Applicants.
This is not a free for all affairs that is why there is a provision for payment of the certification and duplication of the document. So it is obvious that the Respondents were in good footing when they requested for fees certification or duplication of the required document.

The Law is settled that by the provision of Section 104 of the Evidence Act any person applying for a public document is enjoined to pay for the certification and same will be duly delivered to the Applicant.

What is more by the provision of Section 8 of the Freedom of Information Act, any Applicant must pay what is reasonable for the certified document.

The Applicants having not paid for the certification cannot come to use the Court to compel the Respondents to part with the document without payment.

In the circumstance this application fails and it is accordingly dismissed.

I make no Order as to cost.

That is my Judgment.

Dated this 1/2/2016.

HON. JUSTICE E.S. CHUKWU
JUDGE
FEDERAL HIGH COURT, ABUJA

FEDERAL HIGH COURT, ABUJA
IN THE FEDERAL HIGH COURT HOLDEN AT LAGOS, NIGERIA
ON FRIDAY THE 26TH DAY OF FEBRUARY, 2016
BEFORE THE HONOURABLE JUSTICE
M.B. IDRIS
JUDGE

SUIT NO: FHC/IKJ/CS/248/15

BETWEEN

THE REGISTERED TRUSTEES OF THE SOCIO-ECONOMIC RIGHTS AND ACCOUNTABLITY PROJECT (SERAP) **PLAINTIFF**

AND
1. THE ACCOUNTANT GENERAL OF THE FEDERATION **DEFENDANTS**
2. THE ATTORNEY GENERAL OF THE FEDERATION

JUDGMENT

This is an application dated 16th February, 2012 in these terms:-

"MOTION ON NOTICE BROUGHT PURSUANT TO SECTION 20 OF THE FREEDOM OF INFORMATION ACT 2011, ORDER 34 RULES 1, 3(1), (2) AND (6)(B) OF THE FEDERAL HIGH COURT CIVIL PROCEDURE) RULES, 2009 AND THE INHERENT JURISDICTION OF THE HONOURABLE COURT

TAKE NOTICE that pursuant to the leave of Hon. Justice S. Adah given on the 7th of February 2011, the Honourable Court will be moved on the...day of ... 2012 at 9 O'clock in the forenoon or so soon thereafter as counsel may be heard on behalf of the Plaintiff / Applicant for the following reliefs:-

A *A Declaration* that the failure and/or refusal of the Respondents to individually and/or collectively disclose detailed information about the spending of recovered stolen public funds since the return of civil rule in 1999, and to publish widely such information, including on a dedicated website, amounts to a breach of the fundamental principles of transparency and accountability and violates Articles 9, 21 and 22 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

B. A DECLARATION that by virtue of the provisions of Section 4 (a) of the Freedom of Information Act 2011, the 1st Defendant/ Respondent is under a binding legal obligation to provide the Plaintiff/Applicant with up to date information on the spending of recovered stolen funds; including:
   (a) Detailed information on the total amount of recovered stolen public assets that have so far been recovered by Nigeria.
   (b) The amount that has been spent from the recovered stolen public assets and the objects of such spending.
   (c) Details of projects on which recovered stolen public assets were spent.

C. AN ORDER OF MANDAMUS directing and or compelling the Defendants/ Respondents to provide the Plaintiff/Applicant with up to date information on recovered stolen funds since the return of civilian rule in 1999, including:
   (a) Detailed information on the total amount of recovered stolen public assets that have so far been recovered by Nigeria.
   (b) The amount that has been spent from the recovered stolen public assets and the objects of such spending.
   (c) Details of projects on which recovered stolen public assets were spent.
   (d) And for such further order or other orders as the Honourable Court may deem fit to make in the circumstances.

AND TAKE NOTICE that on the hearing of this application the said Applicants will use the Affidavit and the

exhibits therein referred to."

The application was supported by an affidavit, a statement and a written address. In the affidavit in support, it was declared as follows:-

"AFFIDAVIT IN SUPPORT

I, Adetola Adeleke, Male, Christian, and Litigation Clerk of 4 Akintoye Shogunle Street off John Olugbo Street Ikeja Lagos hereby make Oath and state as follows:-

1. That I am a Litigation Clerk of the Socio-Economic Rights and Accountability Project (SERAP), the Applicant in this suit
2. That I have the consent and authority of the Applicant herein to depose to this affidavit
3. That by virtue of my position and the fact stated in paragraph 2 hereof, I am conversant with the facts of this case and with the facts deposed to herein
4. That the Applicant is a human rights non- governmental organization established in Nigeria and incorporated under Part C of the Companies and Allied Matters Decree, 1990. A copy of the Certificate of Incorporation of SERAP is attached herewith as Exhibit 1
5. That the Applicant seeks to promote transparency and accountability in government through human rights. A copy of the Constitution of the Plaintiff is hereby attached as Exhibit 2.
6. That the Federal Government of Nigeria has enacted the Freedom of Information Act, 2011.
7. That in the pursuit of its mandate and pursuant to the right of access to information guaranteed by the Freedom of Information Act 2011, the Plaintiff/Applicant, by letter dated 26 September 2011, requested the 1st Defendant/Respondent to provide it with up to date information relating to the spending of recovered stolen funds since the return of civilian rule in 1999
8. But since the receipt of the request/ application letter, and up till the filing of this suit, the 1st Defendant/Respondent has so far failed, refused and or neglected to provide the Plaintiff/ Applicant with the details of the information requested for. Now produced, shown to me and marked EXHIBIT 3 and 4 are copies of the letter sent to the 1st Defendant/Respondent and the evidence of receipt of the letter by the 1st Defendant respectively
9. I was informed by Counsel to the Applicant and I verily believe him as follows:
   (i) By virtue of Section1 (1) of the FOI Act 2011, the Plaintiff/Applicant is entitled as of right to request for or gain access to information which is in the custody or possession of any public official, agency or institution
   (ii) By the provisions of Section 2 (7) and 31 of the FOI Act 2011, the 1st Defendant / Respondent is a public official.
   (iii) By virtue of Section 4 (a) of the FOI Act when a person makes a request for information from a public official, institution or agency, the public official, institution or urgency to whom the application is directed is under a binding legal obligation to provide the Applicant with the information requested for, except as otherwise provided by the Act, within 7 days after the application is received.
   (iv) The information requested for by the Plaintiff/Applicant relates to the spending of recovered stolen funds since the return of civilian rule in 1999.
   (v) By Sections 2 (3) (d) (V) & (4) of the FOl Act, a public official or institution is under a binding legal duty to ensure that documents containing information relating to the receipt or expenditure of recovered stolen funds are widely disseminated and made readily available to members of the public through various means.
   (vi) The information requested for by the Plaintiff/Applicant does not come within the purview of the types of information exempted from disclosure by the provisions of the FOI Act.
   (vii) Up till the time of filing this action the Defendants/Respondents have failed, neglected and/or refused to make available the information requested by the Applicant.
   (viii) The Defendants/ Respondents have no reason whatsoever to deny the Plaintiff/Applicant access to the information sought for.
   (ix) The information requested for, apart from not being exempted from disclosure under the FOl Act, bothers on an issue of National interest, public concern, social justice, good governance, transparency and accountability.

(10) That the information the Applicant requested for do not form part of records compiled by the Defendants/Respondents for law enforcement purposes.

(11) That the Defendants/Respondents will not suffer any injury or prejudice if the information is released to the Applicant.

(12) That the information the Applicant requested for is not privileged in any way or manner.
(13) That the information the Applicant requested for do not concern any research material.
(14) That the information the Applicant requested for is not in respect of a scientific material, or matter kept in the National Museum or the National Library.
(15) That it is in the interest of the public that the information be released.
(16) That I was informed by Counsel to the Applicant and I verily believed him that in view of the above actions by the Defendants/ Respondents, the Applicant has been denied access to the information requested for
(17) That unless the reliefs sought herein are granted, the Defendants/ Respondents will continue to be breach of the Freedom of Information Act, and other statutory responsibilities.
(18) That it is in the interest of justice to grant this application as the Defendants/Respondents have nothing to lose if the application is granted.
(19) That I make this declaration in good faith"

The 1st Defendant filed a Counter Affidavit and a written address in opposition. In the Counter Affidavit, it was declared as follows:-

"COUNTER-AFFIDAVIT TO THE MOTION FOR JUDICIAL REVIEW DATED 16TH FEBRUARY, 2012

I, Edema Pius, Male, Christian and Nigerian Citizen of Block 142, Flat 23/24, Area C, Nyanya, Abuja do hereby make oath and state as follows:-

(1) That I am a staff in the Legal Department of the Office of the 1st Defendant/respondent and by virtue of this position I am conversant with the facts and circumstances herein deposed.
(2) That I have the consent and authority of my Employers to depose to this affidavit
(3) That I have carefully read the affidavit of a Adetola Adeleke of 17th February, 2012.
(4) That the 1st Defendant denies paragraphs 7 and 8 of the affidavit in support to the extent that by her letter dated 11th October, 2011 she informed the Plaintiff that she was still studying the Freedom of Information Act.
(5) That I was informed by Olugbenga Sheba of Counsel at our Office on 22nd March, 2012 at about 3:30pm and I verily believe his information to be true and correct that paragraphs 9, 10, 12, 13, 14, offend the relevant provisions of the Evidence Act as amended as they contain extraneous matters by way of legal argument and prayers.
(6) That contrary to the averments in paragraphs 11,15,16,17,18 and 19 of the affidavit in support I was also informed by Olugbenga Sheba of Counsel at the same place and time and I verily believe his information to be true and correct as follows:-
    (a) That the Plaintiff/Applicant has no interest howsoever in the subject matter.
    (b) That it will be in the interest of justice if the application is refused.
(7) That I swear to this affidavit in good faith"

At the hearing, Learned Counsel for the Plaintiff relied on the processes filed and adopted the written addresses filed. Counsel for the Respondents were absent, and the process filed in response and the written address in opposition were deemed adopted.

The 1st Defendant had filed a Notice of Preliminary Objection which had not been argued and/or moved. It is deemed abandoned and it is struck out. See generally **OKEKE VS. NWOKOYE (1999) 3 NWLR (PT. 635) 495; SCOA VS. DANBATA (2003) FWLR (PT. 178) 1001; APP VS. OGUNSOLA (2002) FWLR (PT. 117) 1120; CONSOLIDATED BREWERIES PLC VS. AISOWIEREN (2002) FWLR (PT. 116) 959; SOCIETE BIC SA VS. CHARZIN IND. LTD (2006) ALL FWLR (PT. 297) 1109.**

In the Plaintiff's written address, the issue formulated for determination was whether by virtue of the provision of section (4) (a) of the Freedom of Information Act 2011, the Defendants are under an obligation to provide the Plaintiff with the information requested for?

It was argued that by virtue of Section 1 (1) of the FOI Act 2011, the Plaintiff is entitled as of right to request for or gain access to information which is in the custody or possession of any public official, agency or institution, and that by the provisions of Section 2(7) and 31 of the FOI Act 2011, the 1st Defendant/Respondent is a public official.

It was argued that by virtue of section 4 (a) of the FOI Act when a person makes a request for information from a public official, institution or agency, the public official, institution or agency to whom the application is directed is under a binding legal obligation to provide the Applicant with the information requested for, except as otherwise provided by the Act, within 7 days after the application is received, and that the information requested for by the Plaintiff relates to the spending of recovered stolen funds since the return of civilian rule in 1999. That by Sections 2(3)(d)(V) & (4) of the FOI Act, a public official is under a binding legal duty to ensure that documents containing information relating to the receipt or expenditure of recovered stolen funds are widely disseminated and made readily available to members of the public through various means, and that the information requested for by the Plaintiff does not come within the purview of the types of information exempted from disclosure by the provisions of the FOI Act.

It was contended that up till the time of filing this action the Defendants/ Respondents have failed, neglected and/or refused to make available the information requested by the Applicant, and that the Defendants/Respondents have no reason whatsoever to deny the Plaintiff/Applicant access to the information sought for.

That the information requested for, apart from not being exempted from disclosure under the FOI Act, bothers on an issue of National interest, public concern, social justice, good governance, transparency and accountability.

The Court was urged to grant the application. The cases of **ANIBI VS. SHOTIMEHIN (1993) 3 NWLR (PT.282) 461 and GOV. EBONYI STATE VS. ISUAMA (2003) FWLR (PT. 169) 1210** were relied on.

In the 1st Defendants' written address it was argued that the Plaintiff lacked the locus standi to institute this action became no sufficient interest had been shown.

It was argued that the application was statute barred having been brought three months after the cause of action accrued contrary to Order 34 Rule 4 of the Rules of this Court.

It was argued that paragraphs 9, 10, 11, 12,13 and 14 were extraneous matter contrary to section 115 of the Evidence Act, and that this application be dismissed. The cases of **FAWEHINMI VS. IGP (2002) 8 MJSC 1 and THOMAS VS. OLOFOSOYE (2004) 49 WRN 37** were relied on.

I have read the processes filed and I have carefully considered the submissions made. Is the Applicant entitled to the reliefs sought herein this application?

Historically, freedom of information legislation comprises laws that guarantee access by the general public to data held by its government. They establish what is known as a "right to know" legal process by which requests may be made for government - held information, to be received freely or at minimal cost, having standard exceptions. Over 90 Countries around the World have implemented some form of legislation guaranteeing the right of access to information. Sweden's Freedom of the Press Act 1766 is the oldest of such legislation in the World.

A basic principle behind most freedom of information legislation is that the burden of proof falls on the body asked for information, not on the person asking for it. The person making the request does not usually have to give an explanation for their actions, but if the information is not disclosed a valid reason has to be given.

In Nigeria the House of Representatives passed the bill on the 16th day of February, 2011 and the Senate on the 16th day of March 2011. The harmonized version of the bill was signed into law by the President on the 28th day of May 2011.

The highlights of this law is as follows:-

- ? It guarantees the right of access to information held by public institutions, irrespective of the form in which it is kept and is applicable to private institutions where they utilize public funds, perform public functions or provide public services;
- ? It requires all institutions to proactively disclose basic information about their structure and processes and mandates them to build the capacity of their staff to effectively implement and comply with the provisions of the Act;
- ? It provides protection for whistleblowers;
- ? It makes adequate provision for the information needs of illiterate and disabled Applicants;
- ? It recognizes a range of legitimate exemptions and limitations to the public's right to know, but it makes some

of the exemptions subject to a public interest test that, in deserving cases, may override such exemptions;

- ? It creates reporting obligations on compliance with the law for all institutions affected by it. These reports are to be provided annually to the Federal Attorney General's Office, which will in turn make them available to both the National Assembly and the public;
- ? It requires the Federal Attorney-General to oversee the effective implementation of the Act and report on execution of this duty to Parliament annually.

There is no doubt that the Freedom of Information Act (FOI Act) is intended to act as a catalyst for change in the way public authorities approach and manage their records.

Under the FOI Act, any individual is able to make a request to a public institution for information. An Applicant is entitled to be informed in writing as to whether the information is held and have the information communicated to them. If any of the information is refused, the organization must provide the Applicant with a Notice which clearly states the reasons why it is withholding the information that has been requested.

It must be noted that an Applicant will not be able to get all the information he wants. The Act requires that there will be valid reasons why some kinds of information may be withheld, such as if the release would prejudice National Security or commercial interests. See generally sections 1, 12, 14, 15, 16, 17, 19, 20 and 21 of the F01 Act.

Public institutions are expected to have an information communicated to an Applicant promptly but not later than 7 days after it has received a request. Where a request is refused, the public institution shall give notice to the Applicant and should state the exemption providing the basis for refusal within the FOI Act and why it applies to the information requested. This notice must also be communicated to the Applicant within 7 days.

There are two general categories of exemption: (a) Absolute exemptions:- those where there is no duty to consider the public interest; and (b) qualified exemptions:- those where, even though an exemption exists, an authority has a duty to consider whether disclosure is required in the public interest. Briefly, the public interest test requires an authority to determine whether the public interest in withholding the information outweighs the public interest in disclosing it by considering the circumstances of each particular case in the light of the potential exemption which might be claimed. The balance lies in favour of disclosure since withholding outweighs disclosure, imperatively.

The public interest test applies to the exemptions contained in section 15 (1) and 16 of the FOI Act. I shall now deal briefly with the issues of information provided in confidence under section 15 (1) (a); legal professional priviledge under section 16 (a); and information expected to interfere with the contractual or other negotiations of third party under section 15 (1) (b) of the F01 Act.

Section 15 (1) (a) in part provides an exemption to the right of access under the Freedom of Information Act if release would be an actionable breach of confidence.

This exemption qualifies the right of access under Freedom of Information Act by reference to the common law action for 'breach of confidence'. According to that action, if a person who holds information is under a duty to keep that information confidential (a 'duty of confidence'), there will be a 'breach of confidence' if that person makes an unauthorized disclosure of the information.
The concept of 'breach of confidence' has its roots in the nation that a person who agrees to keep information confidential should be obliged to respect that confidence. However, the law has now extended beyond this: the Courts recognize that a duty of confidence may also arise due to the confidential nature of the information itself or the circumstances in which it was obtained.

The Concept of 'breach of confidence' recognizes that unauthorized disclosure of confidential information may cause substantial harm. For example, the disclosure of a person's medical records could result in a serious invasion of that person's privacy, or the disclosure of commercially sensitive information could result in substantial financial loss. The law protects these interests by requiring the information to be kept confidential: if information is disclosed in breach of a duty of confidence, the Courts may award damages (or another remedy) to the person whose interests were protected by the duty.

This exemption only applies if a breach of confidence would be 'actionable'. A breach of confidence will only be `actionable' if a person could bring a legal action and be successful. The Courts have recognized that a person will not succeed in an action for breach of confidence if the public interest in disclosure outweighs the public interest in keeping

the confidence. So although the Act requires no explicit public interest test, an assessment of the public interest must still be made. However, the factors the Courts have considered to date and the weight they give to them are not the same.

If a public authority receives a request for information which it has obtained from another person and that public authority holds the information subject to a duty of confidence, that information will be exempt if providing it to the public would constitute an actionable breach of that confidence.

Whether or not a public authority holds information subject to a duty of confidence depends largely on the circumstances in which it was obtained and whether the public authority expressly agreed to keep it confidential. A duty of confidence may also arise due to the confidential nature of the information itself.

If a request includes information which may fall within this exemption, three questions must be asked. If the answer to any of the questions is 'no', the information will not be exempt under section 15:

- ? Was the information obtained by the public authority from any other person?
- ? Is the information held subject to a duty of confidence (express or implied)?
- ? Would the disclosure of this information to the public, otherwise than under the Freedom of Information Act, constitute an actionable breach of confidence? This will include consideration of whether there would be a defence to an action for breach of confidence.

Each of these questions is examined below.

Was the information obtained by the public authority from any other person?

Section 15 only protects information which was obtained by a public authority from a person (including another public authority). The origin of the information could be an individual, or a group of individuals or an organization.

While this exemption may apply where a duty of confidence is owed by one public authority to another, it will not apply where both of those public authorities are government departments. Although government departments are treated as separate persons for the purposes of freedom of information, a government department cannot claim that the disclosure or any information by it would constitute a breach of confidence actionable by any other government department.

The phrase 'from a person', will usually require the information to have been obtained from outside the department and not from an employee. However, this will not always be the case. Section 15 may apply where disclosure would breach a duty of confidence which a public authority owes to an employee in their private capacity. On the other hand, if the information is disclosed in the course of employment, when an employee is acting on behalf of the public authority and solely in the capacity of employee, there will be no duty of confidentiality for the purposes of section 15.

The person from whom the information was obtained may not be the same person whose confidence is being protected; the information may have passed through the hands of another person before reaching the public authority.

Is the Information held subject to a duty of confidence?

Public authorities routinely hold information which has been obtained from other public bodies, private organizations and individuals to which obligations of confidence are likely to attach. For example: frank exchanges of views with other public authorities, information which is commercially sensitive: and the personal, private information of individuals.

Information will only be held subject to a duty of confidence if it has the 'necessary quality of confidence'. See **COCO VS. AN CLARK (ENGINEERS) LTD (1969) R.P.C. 41**. This means that it must be information which is worthy of protection - someone must have an interest in the information being kept confidential. For example, even if a commercial contract states that everything in the contract is 'confidential', any useless or trivial information cannot be confidential and no duty of confidence will arise in relation to that information.

For information to be 'confidential' it must also be 'inaccessible' in the sense of not being in the public domain or a matter of public knowledge. Whether information is in the public domain is a question of degree; it will depend on the circumstances and the extent or public knowledge at the time when disclosure is requested. Information relating to an

act which is done in a public place may still be private information and, equally, an activity is not necessarily private simply because it is not done in public.

For example, in **CAMPBELL V. MGN LIMITED (2004) 2 ALL ER 995** the House of Lords found that publication of a photograph of the claimant leaving a narcotics anonymous meeting could be a breach of confidence. Even though the claimant had been in a public place, the photograph enabled the location of the claimant's treatment for her addition to be identified.

The Courts will recognize that a person holds information subject to a duty of confidence in two types of situations.

- ? Where that person expressly agrees or undertakes to keep information confidential: there is an express duty of confidence.
- ? Where the nature of the information of the circumstances in which the information is obtained imply that the person should keep the information confidential: there is an implied duty of confidence.

These two types are discussed below.

Where that person expressly agrees or undertakes to keep information confidential.

Where a public authority expressly agrees to keep information confidential there is an express duty of confidence, provided that the information has the necessary quality of confidence. For example, where a public authority signs a contract which contains a confidentiality clause or agrees in correspondence that, if information is provided, it will be kept confidential.

While it will usually be a question of fact whether a public authority has agreed to or undertaken a duty of confidence, there are important policy considerations involved in the question of whether it is appropriate for a public authority to agree to a duty of confidence. As explained above, public authorities must consider the application of this exemption not only when disclosure of confidential information is requested but also when potentially confidential information is obtained. If information does not need to be kept confidential but a public authority expressly agrees to keep it confidential when it is obtained, this may result in the information being exempt from the Act under section 15. In light of the public interest in open government and freedom of information, public authorities must consider carefully whether it is appropriate to agree to keep information that it receives confidential.

When considering whether to agree to hold information subject to a duty of confidentiality, a public institution should consider:

- ? the nature of the interest which is to be protected and whether it is necessary to hold the information in confidence in order to protect that interest.
- ? Whether it is possible to agree to a limited duty of confidentiality, for example by clearlystating the circumstances in which a public authority would disclose information.
- ? Whether the information will only be provided on the condition that it is kept confidential and, if so, how important the information is in relation to the functions of that public authority.
- ? The nature of the person from whom the information is obtained and whether that person is also a public authority to whom freedom of information and the Code of Practice applies (where the person supplying the information is also a public authority, departments must be particularly cautious is agreeing to keep the information confidential).

If it is necessary and justifiable for a public authority to agree to keep the information confidential, that public authority should take practical steps to respect the confidential nature of the information. Ensuring that the circulation of confidential information is controlled and that the confidential status of that information is regularly reviewed will assist with responding to future freedom of information requests.

Where the nature of the information or the circumstances in which the information is obtained imply that the information should be kept confidential.

An implied duty of confidence can arise even though a public authority has no pre-existing relationship with the person to whom the duty is owed, or has not agreed to keep the information confidential.

Some information which is obtained by a public authority will be manifestly confidential; by its very nature it will be

clear both that substantial harm could be caused by its disclosure and that the public authority should not disclose it to members of the public. For example, a public authority obtains the medical records of an individual; in most circumstances, it will be clear that disclosure of that information to the public could cause substantial harm and offence to that individual. In this type of situation, the law may step in to imply a duty of confidence. The public authority may be obliged, by virtue of the very nature of the information, to keep it confidential. Whether the nature of the information concerned means that it is held subject to a duty of confidence is a question of degree and will, to a certain extent, depend on the circumstances at the time that disclosure is requested.

The circumstances in which information was obtained may impose an implied duty of confidence in relation to information which is not obviously of a confidential nature (i.e where the public authority may not be immediately aware of its confidential nature). For example, if a public authority has statutory powers of compulsion, that is to say if it can legally oblige people to provide information for certain purposes, a duty of confidentiality will often arise in relation to that information and the public authority may be prohibited from disclosing the information in other contexts.

This may also apply where information is provided under 'threat of compulsion' - where a person provides information to a public authority in the knowledge that if they did not do so, the public authority would use its powers to compel disclosure. Additionally, when a public authority obtains information for a particular purpose, a duty of confidentiality may arise which prevents that information being used for a different purpose. For example, confidentiality attaches to information which is given to the Police during the course of a criminal investigation, whether it is given by a suspect under caution or by a potential witness. See **FRANKSON and Others VS. HOME OFFICE; JOHNS VS. OFFICE (2003) 1 WLR 1953**, in particular per Scott Baker LJ at 35.

Other factors which may be relevant to ascertaining whether information is held subject to an implied duty of confidence could include the following:-

? Whether there is along standing, consistent and well-known practice on the part of the public authority of protecting similar information against disclosure and the supplier of the information could reasonably have expected this to continue.

? Whether the information is provided gratuitously or for consideration (in the latter case, it is less likely that an obligation of confidence would arise).

Whether an implied duty of confidence arises is essentially a question of law. If a public authority has not expressly agreed to keep information confidential but suspects that a duty of confidence may be implied, it will often be necessary to seek legal advice.
Would the disclosure of this information to the public, otherwise than under the Freedom of Information Act, constitute an actionable breach of confidence?

UNAUTHORISED DISCLOSURE

For a disclosure to breach a duty of confidence it must be unauthorised. Unauthorised disclosure could take place where disclosure runs contrary to the express wishes of the person to whom the duty is owed or where a department does not have the consent of the person concerned. If a person has sanctioned disclosure of the information, for example if they have expressly consented to disclosure, section 15 will not apply as disclosure would not be a breach of confidence actionable by that person.

PUBLIC INTEREST TEST

The English Courts have recongnised that disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential. When considering the application of section 15, departments must consider whether the public interest in disclosure of the confidential information concerned means that it would not constitute an actionable breach of confidence to disclose that information to the public.

The following principles must be applied when conducting this balancing test:

? Where a duty of confidence exists, there is a strong public interest in favour of keeping that confidence.

? There is no general public interest in the disclosure of confidential information in breach of a duty of confidence. If the public interest in keeping the confidence is to be outweighed it will be necessary to identify a

specific interest in favour of disclosure.

- There is a public interest in ensuring public scrutiny of the activities of public authorities. If disclosure would enhance the scrutiny of the activities of public authorities then this will be a factor in the balancing exercise. However, where the interests of a private person are protected by a duty of confidence (whether an individual or an organization), the general interest in public scrutiny of information held by a public authority is unlikely in itself to override the public interest in keeping the confidence.
- The Freedom of Information Act itself has no influence on the weight which attaches to the public interest in the disclosure of information for the purposes of section 15.
- The English Courts have traditionally recognized that the defence to breach of confidence in the public interest applies where disclosure would protect public safety, or where there has been wrongdoing, such as misfeasance, maladministration, negligence or other iniquity on the part of the public authority.
- When considering the balance of interests, public authorities must have regard to the interests of the person to whom the duty of confidence is owed; the public authority's own interests in non-disclosure are not relevant to the application of this exemption.
- No regard may be had to the identity of the person who is requesting the information nor to the purpose to which they will put the information. The question is whether disclosure 'to the public' would be a breach of confidence, and not whether disclosure to the particular person requesting the information would be a breach. A request for information from a journalist or pressure group must be treated in the same way as a request from a person who is conducting historical research.

If this exemption is wrongly applied and information is incorrectly withheld, a public authority may face sanctions under the Act for not complying with the duty to provide information. However, if the exemption is wrongly applied and information is incorrectly disclosed, a public authority may, in some circumstances, face an action for breach of confidence. In balancing the relevant public interests, the question to be asked is what conclusion would a Court come to if the information were disclosed to the public and an action for breach of confidence was brought? That is to say:

- If a Court would conclude that the public interest in disclosure to the public outweighed the public interest in keeping the confidence then the information will not be exempt under section 15; unless another exemption applies, the information must be disclosed.
- If a Court would conclude that the public interest in disclosure did not outweigh the public interest in keeping the confidence, the information will be exempt and the request should be refused on the basis of section 15.

When considering the public interest test, one should not consider the motive for the freedom of information request nor the effect which disclosure to that particular requester would have. However, one must consider the effect that disclosure to the public would have. Examples of cases where there may be a public interest in the disclosure of confidential information include:

- Information revealing misconduct/ mismanagement of public funds
- Information which shows that a particular public contract is bad value for money.
- Where the information would correct untrue statements or misleading acts on the part of public authorities or high-profile individuals.
- Where a substantial length of time has passed since the information was obtained and the harm which would have been caused by disclosure at the time the information was obtained has depleted.

Examples of cases where the public interest is unlikely to favour the disclosure of information may include:

- Where disclosure would provoke some risk to public or personal safety.
- Where disclosure would be damaging to effective public administration.
- Where there are contractual obligations in favour of maintaining confidence.
- Where the duty of confidentiality arises out of a professional relationship.
- Where disclosure would affect the continued supply of important information (for example, information provided by whistle-blowers)
- Where information was provided under compulsion.

These examples are for illustrative purposes only. Decisions on which way the delicate balance of arguments may rest will vary on a case by case basis.

Section 16 (a) applies to information that would be subject to legal professional privilege. Legal professional privilege covers confidential communications between lawyers and clients and certain other information that is

created for the purposes of litigation. Section 16 ensures that the confidential relationship between lawyer and client is protected.

Section 16 is subject to a public interest balance. However the English High Court have recognised that there is generally a very substantial public interest in maintaining the confidentiality of legally privileged material, and that as such equally weighty factors in favour of release must be present for the public interest to favour disclosure. See **DR. JOHN PUGH MP VS. INFORMATION COMMISSIONER AND MINISTRY OF DEFENCE (EA/2007/0055) 17TH DECEMBER, 2007 and DEPT. OF BUSINESS AND REGULATORY REFORM VS. O'BRIEN (2009) EWHC 164 (QB)**

WHAT INFORMATION MAY BE COVERED BY THIS EXEMPTION?

LEGAL PROFESSIONAL PRIVILEGE

Legal Professional Privilege (LPP) is a rule of litigation that protects, in general terms, confidential communications between lawyers and their clients. It may also cover some communications between a lawyer and third parties for the purpose of preparing litigation. Under the litigation rule, if material is subject to LPP, a party generally does not have to disclose it during the course of legal proceedings (see paragraph 11).

The principle of LPP has been established by the Courts in recognition of the fact that there is an important public interest in a person being able to consult his or her lawyer in confidence. The Courts do not distinguish between private litigants and public authorities in the context of LPP. Just as there is public interest in individuals being able to consult their lawyers in confidence, there is public interest in public authorities being able to do so.

Section 16 applies to information in respect of which a claim to LPP could be maintained in legal proceedings. It does not require that any legal proceedings are in fact in progress, although it will certainly be of potential relevance where that is the case.

LPP can be waived, both intentionally and unintentionally. As privilege belongs to the client not the lawyer, it is for the client to choose whether to waive privilege. Prior to FOIA, intentional waiver would generally occur in the context of litigation, and based upon the government's assessment of the interests of justice in a particular case. Waiver can also occur in part, where advice is disclosed to a third party under strict conditions. Special rules also apply where legal advice is relied upon in the course of Court proceedings. See **FOREIGN AND COMMONWEALTH OFFICE VS. THE NFORMATION COMMISSIONER (29 APRIL 2008) (EA/2007/0092).**

Waiver may also result from unintentional or erroneous disclosure. For example, revealing the substance of legal advice when explaining a decision may constitute waiver. Where LPP is waived, the advice is no longer privileged and section 16 cannot be relied upon.

What material is subject to LPP?

- ? LPP predominantly attaches to communications with lawyers. This may include communications between a public authority and:
- ? external lawyers in private practice (solicitors or counsel),
- ? Its own salaried in-house legal advisers, including those retained or employed by public authorities such as government departments in their own legal departments, and
- ? Lawyers employed by other public authorities.

In certain circumstances legal communications with third parties may attract LPP, for example when seeking evidence from an expert for the purposes of litigation. See for example, **ANDERSON VS. BANK OF BRITISH COLUMBIA (1876) 2 CH D 644.**

Just because a document has been to or comes from a lawyer does not necessarily mean it will be protected by LPP. It will need to come within one of the two categories of LPP: advice privilege and litigation privilege.

- *Advice privilege* relates to communications between a person and his lawyer provided they are confidential and written for the purpose of obtaining legal advice or assistance in relation to rights and obligations. The leading judgment is that of the House of Lords in Three Rivers. See **THREE RIVERS DISTRICT COUNCIL & ORS VS. GOVERNOR AND COMPANY OF THE BANK OF ENLAND (2004) UKHL 48**

- *Litigation privilege* attaches to confidential communications that come into existence when litigation is in reasonable prospect or is pending, for the dominant purpose of giving or getting advice in regard to the litigation or collecting evidence for use in the litigation. It applies to communications between the client and his lawyer, whether direct or through an agent, or between any one of them and a third party.

Legal communications must retain a quality of confidence to attract LPP. Communications will be "confidential" if they have taken place in circumstances where a relationship of confidence is express or can be implied. Both lawyer and client generally expect their communications to be confidential. Indeed, professionally, lawyers owe their clients a duty of confidence. Correspondence between lawyers acting for the same client may also attract LPP.

Information which is protected by LPP may be disclosed to one person on terms that it is to be treated as confidential so that the quality of LPP is not lost.

Within government, the involvement of several departments in such communications will not erode the quality of confidence but if legal advice received by a department is widely shared beyond government and its agencies, consideration will need to be given as to whether it is still confidential for these purposes. Whether or not LPP has been waived, thereby losing the protection of the privilege is a complex question of law which will turn on the specific facts of the case.

It should also be remembered that LPP may apply to a summary of legal advice. Even where the source of that summary is not the advising lawyer. In **USP STRATEGIES V. LONDON GENERAL HOLDING LTD (2004) EWHC 373 (CH)**, Mr. Justice Mann held that privilege extends to material which 'evidences or reveals the substance of legal advice'. The Tribunal followed this approach in the case of **MR. M. SHIPTON V. INFORMATION COMMISSIONER AND NATIONAL ASSEMBLY OF WALES (EA/2006/0028),** finding that a civil servants submission to a Minister which summarised the legal advice that had been received was also covered by LPP.

THE PUBLIC INTEREST TEST

Section 16 is subject to a public interest balance. Therefore, if it has been decided that information falls within the terms of section 16, it is necessary to consider whether or not the public interest in withholding the information outweighs the public interest in disclosing it.

The Courts have historically recognised the important public interest in the proper administration of justice, and have noted the key role LPP plays in maintain this. See **R. VS. DERBY MAGISTRATES' COURT, EX P.B. (1996) AC 487, 507** where Lord Taylor CJ described LPP as *"a fundamental condition on which the administration of justice as a whole rests"*. In Derby Magistrates', Lord Taylor CJ observed that *"The principle that runs through all these cases ... is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent"*. See **R. VS. DERBY MAGISTRATES' COURT, EX P B (1996) AC 487, 507**. The consequences of disclosure were noted by Lord Taylor CJ at 508: `... once any exception to the general rule is allowed, the client's confidence is necessarily lost'.

In the case of **MR. CHRISTOPHER BELLAMY V. THE INFORMATION COMMISSIONER AND D T I (EA/2006/0023),** the Tribunal considered the case law on LPP, finding that '... there is a strong element of public interest inbuilt into the privilege itself. A least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest'. The Tribunal has consistently followed this approach in further cases. See **MR. T. KITCHENER VS. THE INFORMATION COMM. AND DERBY COUNTY COUNCIL (20 DECEMBER 2006) EA/2006/0044) AND MR. F. ADLAM VS. INFO. COMMISSIONER AND HM TREASURY (5 NOVEMBER 2007) (EA/2006/0079).** In February 2009, the High Court found in the case of the **DEPARTMENT OF BUSINESS AND REGULATORY REFORM V O'BRIEN (2009) EWHC 164 (QB**) that the section 42 exemption has two key features: (a) it recognises the in-built public interest/the weight with which must be given to LPP itself, and (b) the strength of the public interest in-built in to LPP itself.

Therefore, although the exemption in section 16 is qualified and each case must be considered on its own merits, where information is withheld using this exemption it will be by virtue of the strong public interest consideration which is recognised by the English courts and the Tribunal.

Public interest in protecting legal Advice / communication.
It is in the public interest that the decisions taken by government are taken in a fully informed legal context where

relevant Government departments therefore need high quality, comprehensive legal communication for the effective conduct of their business. That Communication/ advice needs to be given in context, and with a full appreciation of the facts.

The legal adviser needs to be able to present the full picture to his or her departmental clients, which includes not only arguments in support of his or her final conclusions but also the arguments that may be made against them. It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view, weighting up their relative merits. This means that legal advice obtained by a government department will often set out the perceived weaknesses of the department's position.

Without such comprehensive advice / communication the quality of the government's decision making would be much reduced because it would not be fully informed and this would be contrary to the public interest.

Disclosure of legal advice / communication has a high potential to prejudice the government's ability to defend its legal interests - both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice / communication having been fully considered, and presented without fear or favour. Neither of these is in the public interest. The former could result in serious consequential loss, or at least in a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because decisions themselves may not be taken on a fully informed basis.

There is also a risk that lawyers and clients will avoid making a permanent record of the advice/ communication that is sought or given or make only a partial record. This too would be contrary to the public interest. It is in the public interest that the provision of legal advice is fully recorded in writing and that the process of decision making is described accurately and fully. As policy develops or litigation decisions are made it will be important to be able to refer back to advice given along the way.

At worst there may even be a reluctance to seek the advice at all. This could lead to decisions being made that are legally unsound and that attract successful legal challenges, which could otherwise have been avoided. Government's willingness to seek frank legal advice is essential in upholding the rule of the law.

It is likely that legal advice given in one context will be helpful or relevant to subsequent issues. This means not only considering the circumstances in which future legal interests could be prejudiced but also bearing in mind that the public interest in protecting the confidential relationship between lawyer and client is a long term public interest which could be damaged by individual disclosures. The disclosure of legal advice even when no litigation is in prospect may disadvantage the government in future litigation. It is quite possible that legal advice in connection with one department will have wider implications for other departments so it is important that decisions on disclosure are considered in their full context.

Public interest in disclosure of legal advice

In some circumstances the public interest will require the disclosure of LPP material. This is likely to be in those circumstances where the government would waive its privilege if litigation were in progress.

Consideration will need to be given to other factors which need to be balanced against the public interest in the continuing confidentiality of legal advice. There is a public interest in public authorities being accountable for the quality of their decision making. Ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability. Transparency in the decision making process and access to the information upon which decisions have been made can enhance accountability.

It could be argued that there is a public interest in some cases in knowing whether or not legal advice has been followed. However, the factual position is unlikely to be so simple.

The weight to be attached to these public interest factors will differ according to the case in question. However, given the very substantial public interest in maintaining the confidentiality of LPP material, it is likely to be only in exceptional circumstances that it will give way to the public interest in disclosure.

It is to be understood that the principle of privileged communications embraces two concepts-the confidentiality of communications between a legal adviser and client, and the privilege of communications made post litem motam (in contemplation of litigation)
Confidentiality of communications between legal adviser and client:

- ? The privilege covers communications by solicitors, advocates, solicitor-advocates and advocate-clerks. It probably covers in-house lawyers and lawyers working for one public authority providing advice to another public authority.
- ? The legal adviser must be acting in his professional capacity and the communications must occur in the context of his professional relationship with his client.
- ? It is likely that communications are privileged whether or not they relate to pending or contemplated litigation.
- ? The privilege does not extend to matters known to the legal adviser through sources other than the client or to matter in respect of which there is no reason for secrecy. Communications which are intended to b 'confidential' in a non-legal sense are likely to attract the privilege.
- ? The privilege does not extend to communications which relate to fraud or the commission of an offence.
- ? Documents held by the legal adviser but prepared by others are not privileged (including communications between the client and third parties), but legal advice given by the legal adviser to client concerning the same documents is privileged.
- ? The fact that advice was sought is not necessarily privileged.

Section 15 (1) (b) imposes an obligation on a public institution to deny an application for information whose disclose could reasonably be expected to interfere with the contractual or other negotiations of a third party. It is my view that "a third party" includes a legal practitioner in the context of his professional relationship with his client. What could severely prejudice the function of parties to a contract "could reasonably be expected to interfere with the contractual or other negotiations" of the said parties.

It is not the case of the Defendants that the information requested is exempted by law.

The argument of the 1st Defendant that because the Plaintiff has not shown sufficient interest or any interest at all on the subject matter of the information requested or that the Plaintiff did not tell the Court how or in what way the non-disclosure or non- release of the requested information has directly affected the Plaintiff as a basis for concluding that the Plaintiff/ Respondent has no locus standing to institute the present action would be disregarded, rejected and jettisoned by the Court.

The reason for this is that the argument of the 1st Defendant's Counsel fails to appreciate the fact that the Freedom of Information Act 2011 is a very special and specific legislation which seeks to liberalize and expand the access to information to any Nigerian, whether a natural person or an artificial person (like the Plaintiff/ Respondent's organization). There is nowhere in the entire gamut of the provisions of the Freedom of Information Act, 2011, where the requirement of interest is imposed on the Applicant for information in the custody of a public official or public institution. The argument of the 1st Defendant Counsel is contrary to the spirit and intendment of the Freedom of Information Act is clearly stated in the explanatory note to the Act. The intendment and spirit is to make information more freely available. For the avoidance of doubt, the Explanatory Note reads as follows: *"An Act 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 public interest and the Protection of Personal Privacy, Protect Serving Public Officers from adverse consequences for disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and for related matters".*

The underlined portion of the content of the Explanatory Note to the Freedom of Information Act 2011 makes it contextual the reason why no restriction of disclosure of the Applicant's interest or sufficient interest must not be made a condition precedent for the request for information or a condition precedent for the institution of action when the information requested is denied.

It is already established by a plethora of judicial authorities that an explanatory note to legislation is a reliable interpretational aid to any statute or legislation. It is also the law that a statute must not be interpreted in a way that will defeat the object and intendment of the statute. See the case of **ONOCHIE VS. ODOGWU (2006) 2 S. C. (PT H) page 153.**

The further and final reason why the locus standing argument of the 1st Defendant's Counsel must be discountenanced by the Court is to be found in the tenor of Section 1 of the Freedom of Information Act 2011 itself. This Section puts it beyond doubt especially in its sub-section (2) that the Applicant for information need not show any interest in the information being requested. For the avoidance of doubt, the entire provision of Section 1 of the Freedom of Information, 2011. Is produced verbatim as follows:

1. (1) Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution however described, is established.
   (2) Any applicant under this Act needs not demonstrate any specific interest in the information being applied for.
   (3) Any person entitled to the right to information under this Act, shall have the right to institute proceedings in the court to compel any public institution to comply with the provisions of this Act".

It is my view that the Plaintiff in the instant case qualifies as an Applicant anticipated or envisaged by the Freedom of Information Act, 2011. This is so because the interpretation or definition Section of the Freedom of Information Act has defined an Applicant *"as any person who applies for information under this Act"* and the same definition section proceeded to define a person as *"including a corporation sole and body of persons whether corporate or incorporate, acting individually, or as a group."* It is clear that the Plaintiff in this case is incorporated and registered under Part C of the Companies and Allied Matters Act 1990 as evidenced by the Certificate of Incorporation Exhibit 1 attached to the originating application, which already forms part of the record of the Court.

All the cases cited by Counsel to the 1st Defendant such as **CHIEF GANI FAWEHINMI VS. INSPECTOR GENERAL OF POLICE & ORS (2002) 8 M. J. S. C. PAGE 1and the case of CHIEF DR. IRENE THOMAS & ANOR VS. THE MOSTREVEREND TIMOTHY OMOTAYO OLUFOSOYE (2004) VOL. 49 WRN PAGE 37** are not exactly opposite to the facts and circumstances of this present case. The reason for this is that in the two cases the Supreme Court of Nigeria was not faced with a situation where a substantive and actual legislation liberalized locus and stated categorically and without equivocation as contained in Section 1, particularly subsection 2 of the Freedom of Information Act, 2011. Once a statute is clear and ambiguous as to its intendment, a restriction or inhibition or limitation not contained in the statute cannot be imposed on the person who comes before the Court pursuant to the statute. Once the provision of an enactment is clear and unambiguous as in the case of Section 1 (2) of the Freedom of Information Act,2011 no extrapolation is allowed. The statute must be given its clear and ordinary meaning. See the cases of **IBRAHIM VS. OJOMO (2004) 1 S.0 (PT 11) PAGE 136, OBASANJO VS. YUSSUF (2004) 5 SC (PT 1) PAGE 27.**

It is on the strength of the above that the Court hold that the Plaintiff has locus standi to institute the present action.

Resorting to the provision of the Federal High Court Rules 2009, Order 34 Rule 4 to contend that the Plaintiff action is statute barred is absolutely inappropriate and must be disregarded. It is my view that the only law that can give a time bar for the purpose of the proceedings filed pursuant to the Freedom of Information Act, 2011 (the Present Proceeding is such) itself is the Freedom of Information Act.

The proceedings filed pursuant to the Freedom of Information Act, 2011 is a very special one and it is the content, spirit and tenor of the Freedom of Information Act, 2011 that must specify within what time the action pursuant to a refused request must be filed.

It is my view that if none filing of the court action after the refusal of application within thirty (30) days will constitute a bar to the subsequent filing of the action, the substantive legislation- the Freedom of Information Act, 2011 would have expressly stipulated so. There is no provision in the Freedom of Information Act, 2011 which mandatorily states that an application that is not filed after the refusal of access to the information will still be statute barred.

Every other limitation Law or Act for instance the Limitation Law of Lagos State or the Limitation Law of every other state in Nigeria make specific provisions stating clearly and unequivocally that if actions are not filed in respect of various subject matters contract, land, tort, negligence etc within stipulated period, the action shall be barred statutorily forever. There is no such similar provision in the Freedom of Information Act, 2011.

It is clear that when the 1st Defendant was communicated with, its reply was that it was still studying the provision of the Freedom of Information Act, 2011. This was by the 1st Defendant's letter of 11th October, 2011. It is my view that the cause of action cannot be deemed to have arisen then. The Plaintiff is entitled therefore to decide to give the 1st Defendant sufficient time to study the Freedom of Information Act, 2011 pursuant to the content of the letter from the lst Defendant. A cause of action will be deemed to arise after the break in correspondence when the Plaintiff received no response to the Reply written by the Plaintiff to the 1st Defendant dated 14th of October, 2011.

Furthermore, even going by the position of the 1st Defendant, the substantive / originating application

commencing this case was filed on the 6th December, 2011, even if the base date is taken from the date of the letter to the 1st Defendant is taken as the 25th of September, 2011 in the extreme (as the case on which the cause of action arose) the. Plaintiff is still within the three (3) months when it filed the present suit on the 6th December, 2011.

It is therefore my view that on the strength of the above findings, the contention of the 1st defendant that the present action is statute barred must be rejected. It is accordingly rejected.

I have read paragraphs 9, 10, 12 13 and 14 of the supporting affidavit and it is clear that they offend section 115 Evidence Act. The particulars of the informant were not provided, including the time and place of the information. And other paragraphs contained conclusions. The said paragraphs contained conclusions. The said paragraphs are therefore hereby struck out. See **OJUKWU VS. MIL. GOV. LAGOS STATE (1986) 1 NWLR (PT. 18) 621.**
I am of the view that paragraphs 5 and 6 of the Counter Affidavit contain extraneous matters, being conclusions contrary to Section 115 of the Evidence Act, and are also hereby struck out.

It is my view that notwithstanding the above, the remaining paragraphs of the Affidavit in Support are capable of sustaining the prayers sought in this application.

I am of the view that on receipt of the Plaintiff's request the Defendants had the duty to respond to same. If it does hold the information, it must supply it within 7 days from receipt of the request. Where a decision to withhold is taken, the Defendant must inform the Plaintiff of its reasons. In respect of these reliefs, the Defendant had kept mute. Let me state that they have no such power under the law.

The Freedom of Information Act is meant to enhance and, promote democracy, transparency, justice and development. It is designed to change how government works, because we have all resolved that it will no longer be business as usual. Therefore, all public institutions must ensure that they prepare themselves for the effective implementation of the Freedom of Information Act.

The judiciary has no choice but to enforce compliance with the Freedom of Information Act.

The judiciary cannot shirk its sacred responsibility to the nation to maintain the rule of law. What is done officially must be done in accordance with the law. Obedience to the rule of law by all citizens but more particularly by those who publicly took oath of office to protect and preserve the Constitution is a desideratum to good governance and respect for the rule of law. In a constitutional democratic society, like ours, this is meant to be the norm.

Overall, I am of the view and do hold that this action should and does succeed in whole.

In the case at hand, the information requested for by the Plaintiff relates strictly to the spending of recovered stolen funds since the return of civilian rule in 1999.

By the clear provisions of Section 2(3)(d)(V) of the FOl Act 2011, documents containing information relating to the receipt or expenditure on the recovered stolen funds constitute part of the information which a public institution is obligated to published, disseminate and make available to members of the public. Since the 1st Defendant has no legally justifiable reason for refusing to provide the Plaintiff with the information requested for, this court ought to compel it to comply with the provisions of the Act as he is not above the law.

Again, the creation of a right of access to information by Section 1 (1) of the FOI Act has imposed on the 1st Defendant and other public officials, institutions and agencies alike, a corresponding duty to give or provide any Applicant, access to any public record or information in their custody when applied for by the latter. Therefore, the 1st Defendant must conform to the legally binding obligation imposed on him by Section 4(a) of the FOI Act.

Again, Section 4 (a) of the FOI Act 2011 is a mandatory and absolute provision which imposes a binding legal duty or obligation on a public official, agency or institution to comply with a request for access to public information or records except where the FOI Act expressly permits an exemption or derogation from the duty to disclose. Nigerian courts have consistently held that the use of mandatory words such as "must" and "shall" in a statute is naturally prima facie imperative and admits of no discretion. See **ANIBI VS. SHOTIMEHIN (1993) 3 NWLR (PT. 282) 461 @ 472 - 473.** It is my view that the use of the word "shall" in Section 4 of the FOI Act connotes that the provision is mandatory and must be complied with to the extent provided by the Act.

In **GOVERNOR OF EBONYI STATE & ORS VS. HON. JUSTICE ISUAMA (2003) FWLR [PT. 1691] 1210 @ 1227-1228**, the Court of Appeal while stressing the need for public officials to obey rules of law held as follows:

> *"Obedience to the rule of law by all citizens but more particularly those who publicly took oath of office to protect and preserve the constitution is a desideratum to good governance and respect for the rule of law. In a democratic society, this is meant to be a norm; it is an apostasy for government to ignore the provisions of the law and the necessary rules made to regulate matters."*

In the light of the exposition of the Court of Appeal above highlighted, it is my view that this Court ought to make an order compelling the 1st Defendant to comply with the provisions of the FOI Act by providing the Plaintiff with the information requested for by the latter.

Judgment is therefore hereby entered in favour of the Plaintiff against the Defendants as follows:-

(a) A DECLARATION is hereby made that the failure and/or refusal of the Respondents to individually and/or collectively disclose detailed information about the spending of recovered stolen public funds since the return of civil rule in 1999, and to publish widely such information, including on a dedicated website, amounts to a breach of the fundamental principles of transparency and accountability and violates Articles 9, 21 and 22 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

b. A DECLARATION is hereby made that by virtue of the provisions of Section 4 (a) of the Freedom of Information Act 2011, the 1st Defendant is under a binding legal obligation to provide the Plaintiff with up to date information on the spending of recovered stolen funds, including:

  (a) Detailed information on the total amount of recovered stolen public assets that have so far been recovered by Nigeria.
  (b) The amount that has been spent from the recovered stolen public assets and the objects of such spending.
  (c) Details of projects on which recovered stolen public assets were spent.

c. AN ORDER OF MANDAMUS is made directing and or compelling the Defendants to provide the Plaintiff with up to date information on recovered stolen funds since the return of civilian rule in 1999, including:

  (a) Detailed information on the total amount of recovered stolen public assets that have so far been recovered by Nigeria.
  (b) The amount that has been spent from the recovered stolen public assets and the objects of such spending.
  (c) Details of projects on which recovered stolen public assets were spend.

M.B. IDRIS
JUDGE
26/2/16

O.O. Majekodunmi for the Plaintiff

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON THURSDAY THE 30TH DAY OF JUNE 2016
BEFORE HIS LORDSHIP, HON. JUSTICE (DR) NNAMDI O. DIMGBA
JUDGE

SUIT NO: FHC/ABJ/CS/221/16

BETWEEN:

INCORPORATED TRUSTEES OF MEDIA RIGHTS AGENDA (MRA) ……. APPLICANT

AND

1. NIGERIAN POLICE FORCE
2. THE INSPECTOR GENERAL OF POLICE NIGERIAN POLICE FORCE ……. RESPONDENTS
3. HON. ATTORNEY GENERAL OF THE FEDERATION

JUDGMENT

By an originating Motion on Notice dated 22/04/16 but filed on 25/04/16 the Applicant prayed the Court as follows:

A. DECLARATION that the failure of the 1st and 2nd Respondents to furnish Applicant with the information requested through Applicant's letter of 23rd February, 2016 amounts to a wrongful denial of information under the Freedom of Information Act, 2011.

B. ORDER of the Honourable Court COMPELLING the 1st and 2nd Respondents jointly and severally to, within seven (7) days of the judgment in this suit, furnish Applicant with the information requested through Applicant's letter of 23rd February, 2016 and which information is as set out in the Schedule to this application.

And such other order or other orders as the Honourable Court may deem fit to make in the circumstance.

TAKE FURTHER NOTICE that the information requested from the Respondents vide Applicant's letter dated 23rd February, 2016 are as set out in the following schedule.

SCHEDULE

1. *What internal policies, practice directive, standing orders (howsoever called) guide the classification and declassification of information in your custody, on the grounds of national security?*
2. *What are the categorizations of classification and the steps that must be followed towards categorizing information as either confidential, top secret or otherwise?*
3. *What are the levels of classification and who has the authority to classify information?*
4. *What is the period or duration for which each classified piece of record or information must remain classified?*
5. *Is there any requirement in any Law, Rule or Regulation for the classifier of the information to state reason for the classification and/or his/her identity before a piece of information is classified or declassified?*
6. *Who or what institutions exercise oversight function over the classification of information?*
7. *Please provide us with copies of the relevant section of the laws, directives, standing orders etc, that guide the classification and archiving of classified and declassified information?*
8. *Who has custody of information after it is classified and what happens to the information when it is subsequently declassified?*
9. *What are the mechanisms for bulk, sampling and systematic classification and declassification of information?*
10. *Who has the authority to destroy records/information in your custody and from where does that person derive his/her authority?*
11. *Can records/information be removed from the public before being destroyed?*
12. *Please provide us with details of the designated unit or office that processes classification of records.*
13. *Please provide us with details of how the public can access state records in your custody.*

14. *What is the laid down procedure that Courts and prosecutors have follow to have access to state records in your custody?*
15. *What are the roles of the Ministers of Defence and Internal Affairs relating to classified information in your custody?*

In support of the application is a Statement made pursuant to Order 34 Rule 3(3) of the Rules of this Court. In the said Statement, the Applicant described itself in the following words:

"DESCRIPTION OF APPLICANT

Applicant is a Non-governmental and non-profit making anti-corruption and good governance organization registered under the laws of the Federal Republic of Nigeria with mandate to promote and defend the right of Freedom of Expression in Nigeria. Applicant has its Corporate Office at 21, Budland Street, Isheri, Ojodu, Ikeja, Lagos State. Applicant is the convener and a member of the Freedom of Information (FOI) Coalition, multi-stakeholder coalition promoting public access to public held information across Nigeria."

In the said Statement also, the Applicant further stated the reliefs which it seeks, which in substance are replications of the reliefs sought in the face of the originating motion. The grounds on which this suit was brought were itemized on the Statement and are set out below as:

A. *Applicant is a corporate body duly registered under Nigeria law and therefore a legal personality under the Nigeria law. Applicant is guaranteed the right to request for and obtain information from any public institutions or officers such as the Respondents by Section 1 and other relevant sections of the Freedom of Information Act, 2011 (the Act).*
B. *Both 1st and 2nd Respondents are public institutions by virtue of Sections 2(7) of the Act. The 2nd Respondent is the head in the 1st Respondent's hierarchy of authority and therefore an executive authority. The Respondents are subject to the laws of Nigeria including the Freedom of Information Act, 2011 (FOI Act) in the performance of their functions and activities as public institutions.*
C. *The 2nd Respondent, by law, is responsible for the actions and inactions of the 1st Respondent including the failure to furnish Applicant with the documents requested through Applicant's letter of 23rd February, 2016.*
D. *The 3rd Respondent is the Chief Law Officer of the Federation and is also, by law, has the oversight function of monitoring the implementation and observance of the provision of the FOI Act by public institutions in Nigeria.*
E. *Sections 2 & 9 of the FOI Act impose a duty on the 1st Respondent as a public institution to make and keep records of its activities and proceedings including the information and documents requested for by the Applicant through Applicants letter of 23rd February, 2016. The said provisions of the FOI Acts also mandate the 1st and 2nd Respondent to make such records and information available to the public upon request, including the Applicant herein.*
F. *The 1st and 2nd Respondents are under a statutory obligation by virtue of Sections 1,2,4,9 and other relevant provisions of the Act to furnish the Applicant with the information requested through Applicant's letter of 23rd February, 2016 and which information is set in the schedule hereto.*
G. *Applicant is entitled by Section 4 of the Act to receive the requested information from 1st and 2nd Respondents within 7 days of the 1st and 2nd Respondents receipt of Applicant's request for the information.*
H. *The information requested for by the Applicant is not privileged information or information exempted from disclosure by the FOI Act. Thus, the 1st and 2nd Respondents have no right, power or privilege to refuse furnishing Applicant with the requested information in the light of the facts of this matter.*

In support of the application is a 7 paragraph affidavit deposed to by Austin Ahusimhere on 25/04/16, to which was attached one exhibit, namely Exhibit A which is a letter dated 23/02/16 from the Applicant to the Respondents being a request for information under the Freedom of Information Act, 2011. In keeping with the Rules of Court, learned counsel for the Applicant, G.N. Chigbu Esq., filed a Written Address dated 22/04/16 but filed on 25/04/16 in which he formulated and argued a single issue, namely:

Whether the Applicant has met the conditions for grant of the reliefs sought herein.

Upon service with the above Applicants processes, a number of processes were filed for the Respondents. For the 1st and 2nd Respondents, these were filed: (a) a 9 paragraph Counter Affidavit deposed to by Usoh Stephanie Abieyuwa on 17/05/16; and (b) a Written Address dated 09/05/16 but filed on 17/05/16. For the 3rd Respondent, this was filed: a Motion on Notice dated 03/06/16 but filed on 09/06/16 praying the Court to strike out the suit for want of jurisdiction, or

where jurisdiction is assumed, for the name of the 3rd Defendant to be struck out for non-disclosure of a cause of action against the 3rd Defendant. This motion was supported by a 6 paragraph affidavit deposed to by Thomas Etah on 09/06/16, and a Written Address arguing the motion.

When the matter came up for final argument on 08/06/16, only the Applicant was represented by Counsel, G.N. Chigbu Esq. There was no representation for the Respondents even though they were aware that the matter was coming up. Learned counsel for the Applicant, G.N. Chigbu Esq., adopted his processes, adumbrated on same and urged the Court to grant the Applicant all the reliefs sought. Given the absence of the Respondents, the Respondents' processes having been duly filed were deemed adopted by virtue of Order 22 Rule 9 of the Rules of this Honourable Court.

DETERMINATION OF MOTION ON NOTICE

I believe it is best to first determine the 3rd Respondent's motion dated 03/06/16 as its success could terminate the suit in limine. The grounds of the objection are: (i) That the Applicant did not disclose any cause of action in this application; (ii) That the Applicant is not a juristic person capable to sue and be sued; (iii) That the Applicant has no cause of action against the Honourable Attorney General of the Federation; and (iv) That the 3rd Respondent/Applicant is neither a proper party nor necessary party in the suit.

On the cause of action, the 3rd Respondent's argument is that under the Freedom of Information Act 2011, an Applicant's cause of action will only arise where he applies for a document or information and he is denied same. But that in the case at hand the request of the Applicant is that the Inspector General of Police should lecture it on the procedure for classifying a document, and therefore that the Applicant cannot be said to have any cause of action that is grounded on the Freedom of Information Act. Reference was made to Egbe v. Adefarasin (1987) 1 NWLR (Pt. 47) 1.

On the legal capacity to sue, the 3rd Respondent argued that only 3 categories of persons in law can sue and be sued. These are: a) natural persons; b) companies incorporated under the Companies and Allied Matters Act (CAMA); c) corporation established by law or statute. It was thus submitted that the Applicant did not fall into any of the 3 categories and therefore lack the capacity to sue. And that the Applicant as an artificial person can only come to life vide registration coupled with the issuance of Certificate of Incorporation by the Corporate Affairs Commission in line with the provisions of CAMA. Reference was made to Cerlen v. University of Jos (1994) 1 SCNJ P 72; Umar v. WGG (Nig) Ltd (2007) 7 NWLR (Pt. 105) 558.

On grounds 3 and 4, that is, the impropriety of suing the 3rd Respondent, the following contentions were made. Firstly, that a perusal of the originating processes only shows the 3rd Respondent's name as party sued but that nowhere in the affidavit evidence was the 3rd Respondent mentioned much less any wrong that it has committed against the Applicant disclosed, or the remedy which the Applicant seeks from the 3rd Respondent. Secondly, that it was unnecessary to join the 3rd Respondent, the Attorney General of the Federation since there is no claim that is made directly against the Federal Government, the Applicant's grouse, if any exists, being directly against the Nigerian Police and the Inspector General of Police. Finally, it was contended that this is a case that can effectually be determined without necessarily joining the 3rd Respondent. Reliance was placed on A.G Kano v. A.G. Federation (2007) NWLR (Pt. 1029).

For inexplicable reasons the Applicant did not file any response to the motion challenging the competence of the suit. However, in the interest of justice, I have considered the contentions made by the 3rd Respondent on the merit. On the first ground of objection, to wit, that no cause of action was disclosed because the Applicant did not ask for a document or information, but only a request for a lecture on the manner of classification by the Nigerian Police, I have taken the pains to examine what the meaning of "information" is in the context of the FOI Act. Information is defined in Section 31 as "*includes all records, documents and information stored in whatever form, including written, electronic, visual images, sound, audio recording etc"*. See also Section 29(9)(b) of the Act. To my mind, this definition of "information" seems quite liberal and unrestrictive. And this is rightly so because the whole essence of policy as expressed in the enactment called the FOI Act and as expressed in the long title of the legislation and in other relevant parts including Section 2(3), is to provide access to information in whatever form the information might be and in the possession of public institutions to the citizenry in manner that is consistent with public interest. The same elastic, liberal and flexible definition is provided for the phrase "public record or document" in the Act. Given the liberal intention to the construction of "information" that can be requested from relevant government agencies, I have considered the information requested for from the Respondents by the Applicant as contained in the Schedule to this application. In my view, those information though a bit far-reaching, can properly be accommodated within the meaning of "information" and "public record" in the context of the FOI Act and thus were legitimately requested for by the Applicant. It is open to the Respondent to furnish the information requested for, and where not feasible and they

wish to deny or refuse, they must situate the refusal or the denial within any of the heads of exemption expressly provided for in the FOI Act.

On the ground of lack of capacity to sue, the Statement in support made pursuant to Order 34 Rule 3(2) of the Rules of Court describes the Applicant as an organization "*registered under the laws of the Federal Republic of Nigeria.*... The Court, is in the absence of any compelling reasons to the contrary, believes in the truth of this position and as contained in the Applicant's originating process on the exclusive basis of which the jurisdiction of this Court can be determined. See Onuekwusi v. R.T.C.M.Z.C (2011) 6 NWLR (Pt. 1243) 341; Adetona v. I.G Enterprises Ltd (2011) 7 NWLR (Pt. 1247) 535.

It follows therefore, in my view, that if the Applicant is duly registered in accordance with the laws of Nigeria, it must have the right to bring the action which it has brought in the context of the subject matter. It does not need to show or exhibit its certificate of incorporation from the Corporate Affairs Commission (CAC) as the 3rd Respondent had argued in order to maintain this suit. In any event, the definition of "person" within the FOI Act who has the capacity to bring an FOI action in court includes: "*a body of persons whether corporate or incorporate; acting individually or as a group*" . I do not therefore believe that this ground of objection has any merit and should succeed.

The third and fourth grounds attack the propriety of joining the Attorney General of the Federation when the grouse is one only against the Nigerian Police. With due respect to the 3rd Respondent, this is a ground of objection that has been repeatedly rehashed by the AG's Office in various suits before this Court. I believe the ground to be misconceived. The 3rd Respondent is sued not because there is any direct grouse with the 3rd Respondent or that it has control of the information sought. The Attorney General is sued as both a necessary and a nominal party by virtue of being the Chief Law Officer of the Federation with an oversight over all government agencies and institutions, including the 1st and 2nd Respondents, on issues of legal and constitutional compliance, due process and rule of law, which issues clearly are implicated from the facts as presented in the originating processes. It is in that capacity I believe the Attorney General has been sued, and must defend this action. In any event, the FOI Act itself in Section 29 has donated a very special place to the Attorney General in terms of the overall enforcement and compliance with access to public information obligations of public institutions. Having been given such a prime place within the legal regime, it sounds certainly counter-intuitive and perhaps, disingenuous, to say the least, that the same AGF's office can come back to argue that it was improperly joined as a party in a suit where the principal allegation is that an agency of government is demurring from enforcing its obligations under the FOI Act.

For the above reasons, my considered view is that the motion challenging the competence of the suit lacks merit and is accordingly dismissed.

DETERMINATION OF SUBSTANTIVE SUIT

On the substantive suit, the learned counsel for the Applicant submitted, referring to pertinent provisions of the FOI Act, that the Applicant has the right to bring an action such as the present suit where he has requested for information to which he is entitled and a public institution or officer refuses or fails to provide such information in the appropriate form as the Respondents did in the present case. Counsel further submitted that the information which the Applicant requested from the special place to the Attorney General in terms of the overall enforcement and compliance with access to public information obligations of public institutions. Having been given such a prime place within the legal regime, it sounds certainly counter-intuitive and perhaps, disingenuous, to say the least, that the same AGF's office can come back to argue that it was improperly joined as a party in a suit where the principal allegation is that an agency of government is demurring from enforcing its obligations under the FOI Act.

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Act, the Applicant is empowered to enforce by legal action its right of access to information under the Act. Finally, Counsel submitted that courts have the duty to enforce the mandatory provisions of the law. And that a community reading of the provisions of the FOI Act relied upon by the Applicant shows that there is a mandatory legal duty on the 1st and 2nd Respondents to furnish the Applicant with the information requested for in compliance with section 1, 4, 7(4) and 20 of the Act. Reliance was placed on Inyang v. Ebong (2002) 2 NWLR (Pt. 751) 284.

In response, the learned counsel for the 1st and 2nd Respondents in the Written Address argued that there was never a denial to the Applicant's request by the 1st and Respondents. And that where there is a delay, as allegedly happened, it cannot be said to be a denial. Counsel appeared to argue that the delay was occasioned by the chains of command in the Nigerian Police which must be followed from the highest rank of "Inspector General of Police" to the least rank of "Constable". For good measure, learned counsel submitted that the Applicant has not made out the case to be entitled to the reliefs sought, but that the Respondents have adduced reasons for the delay of the Applicant's request based on the chains of authority which will approve the answered questions before being passed on to the Applicant.

Above represents a summary of the competing case presented by the parties on the merit. It is not in doubt that on the 24/02/16 the 1st and 2nd Respondents got a written communication from the Applicant requesting for a number of information contained in a list in the referenced letter. I believe and confirm that the Applicant is well within its right to have brought this request by virtue of Section 1 of the FOI Act. I have already held in relation to the 3rd Respondent's motion that the nature and type of information requested for finds legitimate accommodation within the FOI Act as it fits within the very broad definition of information and public records as defined in the Act.

It is important to stress that the FOI Act is a special legislation, and is one in which the liberty of action by the public institutions on which the obligations which it creates rest, is severely constrained. Thus by Section 4, upon receipt of a request for information, the institution has 7 days within which to furnish the information, and where it is unable to oblige a request within this made out the case to be entitled to the reliefs sought, but that the Respondents have adduced reasons for the delay of the Applicant's request based on the chains of authority which will approve the answered questions before being passed on to the Applicant.

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It is important to stress that the FOI Act is a special legislation, and is one in which the liberty of action by the public institutions on which the obligations which it creates rest, is severely constrained. Thus by Section 4, upon receipt of a request for information, the institution has 7 days within which to furnish the information, and where it is unable to oblige a request within this set time, might enjoy an extension of time for an additional period not exceeding 7 days. The need for an extension of time might be relevant in situations where the nature or perhaps the internal or bureaucratic working environment of the institution dictates that some internal consultations and endorsements will need to be done. What is mandatory is that the public institution must not just remain silent, but must take a decision one way or the other. Where t is unable to oblige, it must still give a notice of its refusal to the Applicant with reasons. Interestingly, the reasons must not be whimsical, capricious or at large but must be situated within any of the exemptions granted under the Act. First is exemption from compliance on grounds of international affairs and defence under Section 11 of the Act. Second is exemption from compliance on grounds of law enforcement and investigation under Section 12 of the Act. Third is exemption from compliance on ground that giving the information will breach privacy rights of other person such as clients and patients under Section 14 of the Act. Fourth is exemption from compliance on ground that giving the information will breach third party information such as the trade secrets and sensitive commercial information of another person under Section 15 of the Act. Fifth is exemption from compliance on the ground that obliging the request will undermine professional and other privileges conferred by law under Section 16 of the Act. Sixth is exemption from compliance on the ground that obliging the request will reveal information which contains course or research materials prepared by faculty members under Section 17 of the Act. Seventh is exemption from compliance on the ground that obliging the request will lead to the provision of information which contains test questions, architects and engineers plans, library circulation among other sundry information under Section 19 of the Act. And certainly, the obligation to provide information under the Act does not apply to published material or material available for purchase by the public, library or museum material made or preserved solely for public reference, or materials placed in the National Archives. See Section 26 of the Act. It is important to stress that even for the exempted

information, the information can still be disclosed where the public interest in disclosure outweighs the need for confidentiality justifying the exemptions in the first place.

From all of the above, it is obvious that there cannot be any legal justification (at least not founded on the FOI Act) for an agency such as the 1st and 2nd Respondents to just keep silent and not obliging the request will undermine professional and other privileges conferred by law under Section 16 of the Act. Sixth is exemption from compliance on the ground that obliging the request will reveal information which contains course or research materials prepared by faculty members under Section 17 of the Act. Seventh is exemption from compliance on the ground that obliging the request will lead to the provision of information which contains test questions, architects and engineers plans, library circulation among other sundry information under Section 19 of the Act. And certainly, the obligation to provide information under the Act does not apply to published material or material available for purchase by the public, library or museum material made or preserved solely for public reference, or materials placed in the National Library, National Museum or non-public section of the National Archives. See Section 26 of the Act. It is important to stress that even for the exempted information, the information can still be disclosed where the public interest in disclosure outweighs the need for confidentiality justifying the exemptions in the first place.

From all of the above, it is obvious that there cannot be any legal justification (at least not founded on the FOI Act) for an agency such as the 1st and 2nd Respondents to just keep silent and not respond as they appeared to have done even though they got the Applicant's letter on 24/02/16. The application for the Court's leave to commence this action was filed on 29/03/16 and granted on 13/04/16., while the substantive motion was filed on 25/04/16, which is a period of about two months from time the request was sent to the 1st and 2nd Respondents. I hold that the 1st and 2nd Respondent breached their duty under the FOI Act by not dealing with the request that had been validly presented to them. If they had any reservations regarding the nature of the information being sought, the least they could have done would be to supply any of the items on the list that could supply, and refuse any or others if such could be situated under any of the heads of exemptions spoken above. I do not find the reasons given for failure to act, to wit, that it is a mere delay not denial and that things were being hampered by the chains of command that regulate the manner of running the Police Force. That may well be so. However, it is important to note that there is no heading of exemption under the FOI Act that is labeled or anchored on chains of command. Chains of command should, and I hold, be a matter of internal concern of the Respondents, and should not stand in the way of obliging an Applicant with public information which the law has already given him entitlement to. The only relevance chain of command has will be that it could be understood that the public institution is still having internal consultations, but as already noted, by Section 6(b) of the Act, the most that this can give the Respondents is a right for an extension by a further 7 days from the original 7 days. Beyond this, their latitude is pretty much closed and they necessarily have to comply.

In the light of the above, I hold that the Applicant is entitled to succeed. I enter judgment in the Applicant's favour in the terms prayed for in the face of the application.

I make no order as to costs.

HON. JUSTICE (DR) NNAMBI O. DIMGBA
JUDGE
30/06/16

PARTIES: Absent

APPEARANCES: G.N. Chigbu Esq., for the Applicant.

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT COURT 2, IKPOBA HILL, BENIN CITY
ON FRIDAY THE 4TH DAY OF NOVEMBER, 2016
BEFORE HIS LORDSHIP THE HONOURABLE
JUSTICE O. O. TOKODE JUDGE

SUIT NO: FHC/B/CS/192/2015

BETWEEN:

REGISTERED TRUSTEE OF EMPOWERMENT FOR UNEMPLOYED YOUTHS INITIATIVE - PLAINTIFF

AND

1. CODE OF CONDUCT BUREAU
2. MR. SAM SABA - DEFENDANT

RULING

By originating summons dated 16th August, 2015 and filed on 19th August 2015, the Plaintiff placed before this court the following questions for determination:

1. Whether by sections 6 (6) (a) and (b) 251 (1) (p) (q) and (r) paragraph 3 (a) (b) (c) and (d) of Code of Conduct Bureau and Tribunal Act 2004 and section 7(1) (p) (q) (r) of the Federal High Court Act 2009 the Federal High Court has jurisdiction over the administration, control and management of records of public officers in the custody of the defendants.

2. Whether having regard to the provisions of Section 9 (2) of the Freedom of Information Act 2011 and section 3 (a) (b) (c) and (d) of the Code of Conduct Bureau and Tribunal Act 2004, the Defendant is under any legal obligation to make public the assets declared by a public officer.

3. Whether the plaintiff has locus standi in this suit.

Pursuant to the foregoing, the Plaintiff seeks the following reliefs from the court.

1. DECLARATION that by the provisions of section 251 (1) (p) (q) and (r) of the 1999 Constitution and section 7 (1) (p) (q) and (r) of the Federal High Court Act 2009 the Federal High Court has the power to adjudicate on issues connected with the administration, control and management of records of public officers in the custody of the defendants.

2. DECLARATION that the 1st Defendant is register of officials' declaration must be made public on request by any person or group of persons immediately after a public officials' take oath of office.

3. DECLARATION that the third party can access private information of public officers in public custody.

4. AN ORDER OF PERPETUAL INJUNCTION restraining the Defendants from barring access to assets declaration of public officers Nigeria forthwith.

5. AND FOR SUCH FURTHER OR OTHER ORDER as this Honourable Court may deem fit to make in the circumstance.

The summons is supported by a 21 paragraph affidavit, deposed to by one Momoh Danesi, trustee of the Plaintiff, one exhibit (Ex. A the certificate of incorporation of the Incorporated Registered Trustees of the Plaintiff). There is also the Plaintiffs' written address.

The foregoing processes were served on the 1st and 2nd defendants by a bailiff of this court who deposed to an affidavit of service dated 28/10/15.

When the matter came up for hearing before this court the defendants were neither present nor represented by counsel. Thus the Court ordered hearing notice be issued and served on the defendants. Pursuant thereto hearing notice dated 3rd November 2015 and was served on the 5th November 2015 and another dated 19th February 2016 was served on the 24th February 2016 on the 1st and 2nd defendants. Despite this, the defendants did not attend court nor were they represented by counsel. The case came up on the 2/11/15, 19/11/15, 10/12/15, 11/2/16 and 18/4/16. When the defendants still failed to attend court despite the service on them of the hearing notices, this court granted Plaintiff's Counsel the leave to proceed with his motion since the defendants have shown reasonably that they have no intention to defend the case.

In moving the application, the Plaintiff Counsel, President Aigbokhan referred the court to the originating summons and all the processes attached thereto. He placed reliance on the affidavit in support an adopted the written address as his arguments in the case. He referred the court to the fact that the defendant did not file any process to oppose his application despite the service of the originating processes on them as well as the hearing notices. Therefore, he urged the court to regard the dispositions in the affidavit as unchallenged. He referred to paragraph 15 of the affidavit and submitted that public information is public participation governance. That it is their legal right to participate in the government. He urged the court to grant his application.

In the written address, the plaintiff submitted three issues for determination as follows:

1. Whether by sections 6 (6) (a) and (b), 251 (I) (p) (q) and (s), paragraphs 3(a) (b) (c) and (d) of Code of Conduct Bureau Tribunal Act 2004 and section 7 (I) (p) (q) (r) of the Federal High Court Act of 2009, the Federal High Court has jurisdiction over the administration control and management of records of Public officers in the custody of the defendants.

2. Whether having regard to the provisions of section 9(2) of the Freedom of Information Act 2011 and section 3 (a) (b) (c) and (d) of the Code of Conduct Bureau Tribunal Act 2004, the defendant is under any legal obligation to make public the assets declared by a Public Officer.

3. Whether the Plaintiff has locus standi in this suit.

On issue No. 1, Plaintiff submitted that its purpose of approaching the court is for the interpretation of sections 6(6) (a) & (b), 251 (1)(p), paragraph 3 (a)(b)(c) and (d) of part 1 of 3rd schedule to CFRN 1999, section 7 (I) (p) (q) (r) of the Federal High Court Act and Section 9(2) of the Freedom of Information Act 2011 as to whether the Defendants can deny the Plaintiff access to public record.

Counsel submitted that pursuant to paragraph 18 of the affidavit in support of the motion, this case is not of public officers' non compliance with the Code of Conduct for public officers but of statutory interpretation of the aforementioned provisions of law.

Counsel submitted that this court has exclusive jurisdiction to entertain and determine matters of administration, management and control of public records in the custody of the defendants. That the power conferred upon the Federal High Court by the constitution in S. 251 (I) (p) (q) and (r) cannot be whittled down by anything contrary contained in any law of the National Assembly. That it is indisputable that by S. 251 (I) (p) (q) and (r) of the CFRN, the Federal High Court has exclusive jurisdiction in civil cases and matters where the management, control, operation and interpretation of the constitution as it affects the Federal Government of any of its agencies is in issue. He referred to the case of *Justice Ayo Salami V NJC & 9 ORS (2014) LPELR 22774 (CA) 25-27 (paragraphs E-D)*

On issue No. 2, the Counsel argued that the Freedom of Information Act (FOIA) 2011 creates a duty on the part of the defendants to maintain public register or assets disclosure of public officers to which individuals are entitled to have access on application. He referred to S. 9(2) Freedom of Information Act 2011.

Counsel argued that the aims and objectives of the Defendants is to ensure that the actions and behavior of public officers conform to the highest standards of public morality and accountability. He referred to paragraphs 4 and 11 of the affidavit and S. 2 Code of Conduct Bureau and Tribunal Act.
Counsel submitted that as part of maintain public standards, asset declaration decreases incidence of corruption,

restores hope and confidence of the people towards their servants because a public officer is a public delegate and a trustee of the Commonwealth of the people. He submitted further that it is relatively easy to identify corrupt officers, making a comparative analysis of assets declared on assumption of office and on exist so as to observe or detect ostentatious accumulation. He referred to section 3(a) & (c) of the Code of Conduct Bureau and Tribunal Act Cap 15 LFN 2004.

Counsel further submitted that where a private record like assets declaration is kept with the bureau, it becomes a public record. And in order for the wider public to know which public documents are in the possession of a Public Authority, the FOIA 2011 and Code of Conduct Bureau and Tribunal Act 2000 create a duty on the part of the public authorities to maintain a register public documents, a register that in itself is a public document to which individuals are entitled to have access. Counsel submitted that a document is public in so far as it is held by a public authority and has been submitted to a public authority by a private party or another public authority. Counsel further submitted that the Defendants are under a legal obligation to make assets declaration public for inspection.

Learned Counsel also submitted that publication of asset declaration is an internationally recognized obligation for public officers including members of the legislative and judicial arm of government. He referred to S.52 (1) and S. 94(1) (2) of the CFRN 1999 (as amended). He submitted that the main essence of declaration of assets is to prevent public officers from over value their assets as groundwork to embezzling public funds and that the defendant is under legal obligations to make assets of public officers a public thing on request by a third party.

Counsel referred to the situation in the United States of America and submitted that the US Court protect the right of its citizen to see a private record of judges. He cited the case of *Duplantier V United States 606 F. 2d 654 (5th Cir. 1979).*

Learned Counsel further submitted that all public officers are mandated under the law and the constitution to declare all his properties assets and liabilities and those of his spouse or unmarried children under the age of 21 years. He referred the court to the 3rd and 5th schedule to the Constitution of the Federal Republic of Nigeria 1999 and the Code of Conduct Bureau and Tribunal Act 2004. He submitted that it is important for citizen to know the assets and liability of public officers before and the period of representation because secrecy comes before stealing. That the refusal of defendant to public assets of public officers is far more injustice that privacy invasion.

He also submitted that under the Code of Conduct Bureau and Tribunal Act 2004, the defendants are expected to receive and investigate disclosures made by public officers. And under FOIA 2011, the defendants are expected to release to third party the records of public officers. That assets declaration/disclosure is immediately a public officer takes oath of office. That the legal duty to release assets declaration is on request as long as the record is in the possession of the defendants. He referred to paragraph 11(1) of the 5th schedule CFRN 1999.

Counsel further submitted that the information filed in the asset form is under the privacy rule because it is strictly confidential but that the information becomes public document once it is sworn to in court and filed with the 1st defendant. That the combined effect of S.3 of the CCB and Tribunal Act and S. 9 (2) of the FOIA made every citizen to be entitled to become a watch dog rather than leaving the cumbersome task at the mercy of the defendant. That privacy rule in a democratic setting is unacceptable and the uppermost standard is an open register. That a public officer is in a public glare even if the information required is a large amount of intimate details. It should be disclosed because it explains transparency. He referred to paragraph 12, 13, and 17 of the supporting affidavit.

Furthermore, Learned Counsel submitted that the right of information is a necessary ingredient of participatory democracy. That there is a symbiotic relationship between the right to information and the rights of democratic participation and that they are organically integrated. That the principle of political theory recognizes the people as the repository of sovereignty. That participatory democracy without access to information by the people is hypocritical. That access to public documents or information held by the defendants is a political right ensuring oversight over government and increasing the accountability of government. That a public officer is expected to sustain a high level of morality, accountability and responsibility which must be exercised within the milieu of rule of law. That access to assets declared by a public officer is an oversight responsibility of citizen over representatives. He referred to paragraph 13, 14, 15 and 16 of his affidavit in support and submitted that free access to information of public interest promotes democratic values in public administration by enabling people to check the lawfulness and efficiency of the operations of government and its officials. That also by paragraph 8 of the support affidavit. The complexity of the civil sphere is making the Plaintiffs crave for accurate data on public administration which cannot be effective unless public authorities as the first defendant is willing to disclose pertinent public information. He urged the court to so hold.

Counsel also submitted that the constitution makes it compulsory for the defendants to comply with the provisions of FOIA 2011 to promote transparency in governance. He referred to paragraph *3 (d) of the third schedule Part 1 CFRN 1999.* He submitted that the word, *"any law relating thereto"* in that paragraph simply refers to FOIA 2011. That the primary purpose of FOIA 2011 is to make available to public, information concerning records in public custody and this is to enhance a smooth disclosure of information to the requesting public by the defendants. He referred to paragraph 14 and 18(a) of the supporting affidavit.

Finally, on the 3rd issue, whether the Plaintiff has established locus standi in the suit, counsel submitted that assets declaration is a public exercise of solemn affirmation of honesty by a public officer to the defendants. He referred to paragraphs 5, 6, 7, 8, 9, 10, 11, 12 and 21 of the supporting affidavit and submitted that the factors which justify access to the records with the defendants are that the defendant have extra ordinary sets of responsibilities which are accompanied by public expectation, that access to records in the custody of the defendant will breath down the incidence of corruption in Nigeria and most importantly that the mandate of the defendants complements the national goals of government in search for transparency, responsibility and accountability.

Counsel submitted further that the long title of the FOIA is to "make public records and information more freely available, provide for public access to public records and information".

That locus standi in this case is connected to the string of public interest of the plaintiff that warrants recognition and protection. He submitted also that in a modern democracy, a significant part of the totality of public information a citizen requires is in the hand of the state. That the defendants must be subject to a general obligation to make records in its custody available to the Plaintiff. He referred to the case of *Gupta V Union of India (1982) AIR (SC_ 149 at 232 paragraph 66 at 80* and submitted that placing privacy "veil" on public records with the defendants is prone to instigate violation of morality required for good leadership. That an ethical agency that is comfortable in secrecy cannot claim to decency.

Counsel finally referred to the case of *Ladejobi V Oguntayo (2004) 18 NWLR (pt. 904) 149 at 173 paragraphs G. H.* He submitted that the applicant has shown its locus standi in paragraph 3 of the supporting affidavit. That the Plaintiff's power to promote rule of law is safe guarded in section 6(6) b CFRN. He submitted that where the court conceives that a Plaintiff is somehow connected to a dispute in which he feels that it should exercise his right of access to court to protect his own interest or group interest, such plaintiff should not be shut out as far as it can be discerned from his pleadings that he has a protectable interest of some sort.

Counsel concluded his submission by posting a question that, for how long shall the defendants pamper privacy interest against public accountability of the requesting plaintiff? He submitted that not after today.

As I stated earlier in this ruling the defendants did not file any response to the plaintiff's affidavit neither were they represented throughout the hearing despite the fact that the plaintiff's processes were served on them. This court also caused hearing notices to be issued and served on the two defendants, at different times to give them notice of the hearing of the case, yet they took no step to defend the suit thereby denying the court the benefit of their position on the Plaintiff's question and submissions. Nevertheless, the case will be decided on its own merit but solely on the Plaintiffs arguments and submissions.

For the purposes of guidance, I have formulated three issues to be decided to resolve the questions raised by the Plaintiff.

1. Whether this court has the requisite jurisdiction to entertain this suit.
2. Whether the plaintiff has the locus standi to present the suit
3. Whether the court can grant the prayers sought by the plaintiff in this suit.

Because of its fundamental nature as well as its inter relationship with the issue of jurisdiction, I shall decide, first, the issue of locus standi to determine whether the plaintiff have the necessary proprietary interest or right to present the suit in the first place.

If the court hold that the plaintiffs have locus standi to present the case, then I will process to issue no 2, that is, jurisdiction. But if I come to the conclusion that the Plaintiff's lack locus standi to present the case, there will be no need to proceed further as the absence of locus standi will impede on the court's jurisdiction to determine the case.

Locus standi or standing to sue is the legal right of the party to an action to be heard in litigation before a court of law or

tribunal. A person is said to have locus standi if he has shown sufficient interest in the action and that his civil right and obligation have been or are in danger of being infringed. See *Adesokan V Adegorolu (1991) 3 WLR (pt. 179) 293 at 307 paragraph B per Akpabio JCA; Olagunju V Yahaya……..(missing words) NWLR (pt. 542) 501 CA; Okafor V Asah (1991) 3 NWLR (pt. 593) 35……(missing words) V.A.G Rivers State (1999) 3 NWLR (pt. 593) 82 CA; Ogunmokun V Military Administrator of Osun State (1999) 3 NWLR (pt 594) 261 CA; Ibrahim V. INEC (missing word) NWLR (pt. 614) 334 CA.*

As a general rule, a person has locus standi in a given situation if it is possible for such a person to show that the issue at hand causes him harm and that an action undertaken by the court could redress that harm. In *Alofoje V Federal Housing Authority & 2 Ors (1996) 6 NWLR 559,* the Court of Appeal held that where an appellant have no legal capacity or standing to institute the action, the court will have no jurisdiction to adjudicate in the matter. See aalso the case of *Gombe V PW Nig Ltd (1995) 6 NWLR (pt. 402) 402 at 567 paragraph F-G. In R V Paddington Valuation, Ex Parte Peachey Property Corporation Ltd (1966) 1 QB 380*. Lord Denning (MR) said that the Court will not listen, of course, to a mere busy body who was interfering in things which did not concern him. But it will listen to anyone whose interests are affected by what has been done.

In *A.G. Akwa Ibom State V Essien (2004) 7 NWLR (pt. 872) 288,* the court of Appeal held:

"it is trite that for litigant to invoke the judicial power of the court in the realm of public law, he must show sufficient interest or threat of injury he has or will suffer from the infringement complained of. This interest or injury test is the yardstick in determining the question of the locus standi of a complaint and it is to be determined in the light of the facts or special circumstances of each case" see also *Akinnubi V Akinnubi (1997) 2 NWLR (pt. 486) 144 S.C*

As I said earlier, in this ruling, it is pertinent to note that locus standing and jurisdiction are interwoven in the sense that locus standi goes to affect the jurisdiction of the court before which an action is brought. Thus where there is no locus standi to file an action in the first place, the court cannot properly assume jurisdiction to entertain the suit. See *Waziri V Danbayi (1999) 4 NWLR (pt 598) 239 CA.*

A.G. Akwa Ibom State V Essien (2004) 7 NWLR (pt. 872) 288 CA

Where a plaintiff has no locus standi to bring a suit, the suit becomes incompetent and the court lacks the jurisdiction to entertain it. See

Ejikeme V Amaechi (1998) 3 NWLR (pt. 542) 456 CA
Ogunmokun V Military Admin of Osun State (1999) 3 NWLR (pt. 594) CA
Ayoda V Baruwa (1999) 11 NWLR (pt. 628) 595.

I have examined carefully the plaintiff's affidavit to be able to establish the plaintiff's interest in the case and the harm or injury which this suit is sought to redress.

It is also trite that in an application to determine whether a claimant has locus standi or not, the judge is bound to confine himself within the four walls of the writ of summons/statement of claim before him and no more as these are matters of laws. See: *Adesokan V Adegorolu (1999) 3 NWLR (pt. 179) 293 at 305-306 paragraphs H-B per Akpabio JCA; A. G. Federation V AG Abia (2001) 11 NWLR (pt. 725) 689 SC at 742, paragraph A per Wali JSC.*

Since the plaintiff commenced the suit by originating summons, I can only look through the summons and the affidavit in support to determine whether the plaintiff has locus standi to present the suit.

In paragraph 3 of the affidavit in support, the plaintiff deposed as follows:

> *"That the plaintiff is registered with the Corporate Affairs Commission to defend the interest of unemployed youths in Nigeria among other objectives"*

Also in paragraph 5, the Plaintiff deposed as follows:

> *"That one of the objectives of the plaintiff is to create and environment for empowerment of unemployed youths in the country."*

Although the Plaintiff attached to the affidavit the certificate of Incorporation of the Incorporated Trustees Empowerment for Unemployed Youth Initiative, however, it did not attach its memorandum or constitution which could have allowed the court to glance into its objectives to see whether they include the power to present this suit or

make the prayers sought in the summons. In the absence of that, I do not see how the foregoing objective give the Plaintiff power to seek the reliefs sought in this suit.

The importance of the Plaintiff having the requisite locus standi is further underlined by the provision in sections 6(6)(b), 46 (1) and 272 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

For the avoidance of doubt, these sections are reproduced verbatim below:

(1) S.6 CFRN 1999 provides:
The judicial powers vested in accordance with the foregoing provisions of this section

(b) Shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person"

(2) S. 46 (1) CFRN 1999 provides:
"Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that state for redress.

(3) S. 272 (1) CFRN 1999 provides:
"Subject to the provisions of section 251 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

What cut across from the foregoing three provisions of the constitution is the need for the existence of specific legal right or interest which is infringed or likely to be infringed before a plaintiff can present a suit. There is nowhere in the whole of the plaintiff's affidavit where it claim that its right is trampled upon, threatened or likely to be tramped.

The Plaintiff's Counsel in his arguments on this issue submitted that the factors that justify access to the records with the defendants are that the defendants have extra ordinary set of responsibilities which are accompanied by public expectation and that access to records in this custody of the defendant will breathe down the incidence of corruption in Nigeria.

The foregoing and other submissions of the plaintiff in respect of the issue are not and cannot be assumed or elevated to the important requirement of legal or civil right which the Plaintiff must necessarily have before he can bring action against the defendants.

This is because it is the law that locus standi or legal capacity to institute proceedings in a court of law is not dependent on the success or merits of a case, it is a condition precedent to a determination of a case on the merits. See *Owodunni V Registered Trustees of C.C.C. (2000) 6 SC (Part III) 60, A. G. Akwa Ibom State V Essien (2004) 7 NWLR (pt. 872) 288 CA.*

Furthermore, it has been held that where no question as to the civil rights and obligation of the Plaintiff is raised in the statement of claim for determination, the statement will be struck out. See *Thomas Olufosoye (1986) 1 NWLR 669 at 682 683*

The Plaintiff cited the case of *Ladejobi V Oguntayo (2004) 18 NWLR (pt. 904) at 173 paragraphs G-H* in support of their case but it is my view that, that case does not support the Plaintiff's case. This is because the issue in Ladejobi's case is in respect of Chieftaincy title, that is, the locus standi of a family or ruling house in Chieftaincy matter and the right of a family member to sue in representative capacity to protect family interest in property or Chieftaincy title. In that case the Supreme Court per Pat Acholonu JSC; sounded a word caution that were the court conceives that a proponent of a cause is somehow connected to dispute in which he feels that he should exercise right of access to the court to protect his own interest or indeed group interest, he should not be shut out as long as it can be discerned from the pleadings.
Furthermore, in *Guda V Kita (1999) 12 NWLR (pt 629) 21,* the Court of Appeal held that a plaintiff can only seek

redress in a court of law if he has interest which he law regards as sufficient. The term "*Sufficient interest*" could however be determined in the light of the facts and circumstances of each case.

I have examined the plaintiff's affidavit and submissions in this case and could not found therein how on where their personal or peculiar interest will be affected by the prayer sought in this case.

It is my view that, from the totality of his case, the Plaintiff did not establish any particular interest in the subject matter of the dispute.

The position of the law is that the burden is on the plaintiff to prove that he has the locus standi to commence an action and failure to discharge the burden, the action must fail.
Contract Resources (Nig) Ltd V Wende (1998) 5 NWLR (pt. 549) 243 (CA) Ezechigbo V Gov of Anambra State (1999) 9 NWLR (pt. 619) 386 CA

From the foregoing analysis it is also considered view that the plaintiff has failed to discharge the burden of providing their interest in this case.

In that circumstance what is the nature of the order th court can make. The Supreme Court answer this question in the case of *Emezi V Osuagwu & Ors (2005) LPELR 1330 (SC) per Akintan JSC (P21 paragraphs A-D* where it held as follows:

> *"It follows therefore that when a plaintiff has been found not to have the standing to sue, the question whether other issues in the case has been properly decided or not does not arise. This is because the trial court has no jurisdiction to entertain the claim. The correct position of the law therefore is that where a plaintiff is held to lack the locus standi to maintain his action, as I have found in this case, the finding goes to the jurisdiction of the court and denies its jurisdiction to determine the action.*
>
> *The proper order to be made in such a situation therefore is to strike out the claim. See Oloriode V Oyebi (1984) 1SCNLR 390; Thomas V Olusofoye (1986) 1 NWLR (pt. 18) 669; Momoh & Anor v Olofu an Madokolu V Nkemdilim (1962) 1 All NLR 587 91962) 2 SCNLR 341*

Earlier, in Adesokan V. Adetunji, (1994) 6 SCNJI (Pt.1) 123 at 146, the Supreme Court, adopting the decision in Oloriode V Oyebi, held that the proper consequential order when the Plaintiff is found not to have locus standi is to strike out the suit. It held thus:

"At whatever state the finding is made that the Plaintiff lacks locus standi to maintain the action, the jurisdiction of the Court to entertain the action is affected and the course of action open is to put an end to it by striking it out"

I humbly adopt the above reasoning of the Supreme Court and hereby strike out this case for lack of jurisdiction.

O. O. TOKODE
JUDGE
4/11/2016

Counsel Appearance
President Aigbokhan for the Plaintiff

IN THE LAGOS JUDICIAL DIVISON
HOLDEN AT IKEJA
BEFORE HON. JUSTICE D.T. OKUWOBI (MRS)
TODAY MONDAY THE 19TH DAY OF JUNE, 2017

SUIT NO: ID/1129MJR/2016

BETWEEN:

INCORPORATED TRUSTEES OF MEDIA RIGHTS AGENDA) CLAIMANT

AND

1. OJODU LOCAL COUNCIL DEVELOPMENT AREA) DEFENDANTS
2. ATTORNEY GENERAL OF THE FEDERATION)

BENCH RULING

This Exparte application dated 6th December 2016 seeks leave for some declarations Mandamus Orders and exemplary damages for violation of the Applicant rights to access of information guaranteed by S.1(1) 4, 7(4) of the Freedom of Information Act 2011. The letter of the Applicant dated 4th November, 2016. In Request for Records of Water Works Plan for Araromi Zion Estate is the subject matter.

It was alleged that the 1st Respondent willfully refused to reply to the Letter of Request as provided for by the Freedom of Information Act. The reply Under Section 4 ought to be within 7 days of the Applicants letter; the information sought is not under the exception in the Act. Unless leave is granted the Respondents will continue to violate the Applicants right under the Freedom of Information Act.

The Order for Leave sought is in relation to an Order of Mandamus to lie for the performance of a statutory duty imposed by law. It is not granted as a matter of course. The statutory duty complained of as not performed in this case is failure to give information to the Applicant under the Freedom of Information Act.

The Act in Section 4 (b) states that where the public institution considers the application should be denied, the institution shall give written notice to the Applicant that access to such information will not be granted, stating reasons for the denial and the section of the Act under which the denial is made. I find the failure to show evidence of this by the Applicant fatal to his case. It is a condition which must be met and not deemed in the peculiar facts of this case.
The Court will refuse to give an order of Mandamus if there is another remedy open to the party seeking it.

I find this application for leave is premature and I will not speculate on the fact that there was a denial by the Respondent's failure to comply. Leave sought is hereby refused.

Hon. Justice D.T. Okuwobi (Mrs.)
Judge
19th June, 2017

IN THE HIGH COURT OF LAGOS STATE
HOLDEN AT IKEJA JUDICIAL DIVISION
BEFORE THE HON. JUSTICE I.O. AKINKUGBE (MRS.)
SITTING AT HIGH COURT NO. 49 GENERAL CIVIL DIVISION
TODAY 13TH JULY 2017

ID/1139MJR/2016

THE INCORPORATED TRUSTEES OF MEDIA RIGHTS AGENDA — CLAIMANT/APPLICANT

AND

1. LAGOS STATE PRIMARY HEALTH CARE BOARD — DEFENDANTS/
2. ATTORNEY GENERAL OF THE FEDERATION — RESPONDENTS

R U L I N G

The Applicant by Motion Exparte dated 6th December 2016 is seeking leave to apply for Judicial Review under the Freedom of Information Act 2011 (FOI) to seek the following reliefs:-

I. A DECLARATION that the failure and or refusal by the 1st Respondent to disclose or make available to the Applicant the Information requested by the Applicant in the Applicant's letter to the 1st Respondent dated November 4, 2016 amounts to a violation to the Applicant's right of access to information established and guaranteed by Section 1 (1) & (4) of the Freedom of Information Act 2011

II. A DECLRATION that the failure and or refusal by the 1st Respondent to disclose or make available to the Applicant the information requested by the Applicant in the Applicant's letter to the 1st Respondent dated November 4, 2016 amount to wrongful denial of access to information under Section 7(5) of the Freedom of Information Act 2011.

III. A DECLARATION that the failure and or refusal by the 1st Respondent to give written notice to the Applicant that access to all part of the Information requested will not be granted, stating reasons for denial and the Section of the Act under which the denial is made amount to a violation of Section 4 (b) of the Freedom of Information Act 2011.

IV. AN ORDER OF MANDAMUS compelling the 1st Respondent to disclose or make the following available to the Applicant:

? Details and copies of plans put in place to provide Araromi Zion Estate located in Akiode Area of Ojodu LCDA with health care services.

? Details and copies of plans put in place to provide the Araromi Zion Estate located in Akiode Area of Ojodu LCDA with health care services taking into consideration their peculiar needs and circumstances.

? Details of any records or assessment carried out on the needs of the said Estate and copies of relevant research or assessment report or reports.

? If there are plan to provide the said Estate with primary health care facilities, please outline the timeframe for the implementation of the plan and

? Details of the budgets implementation of the plans if any.

V. AN ORDER compelling the 2nd Respondent to initiate criminal proceedings against the 1st Respondent for the offence of wrongful denial of access to information under Section 7(5) of the Freedom of Information Act, 2011

VI. The sum of N1,000,000.00 (One million Naira) only on the footing of exemplary and aggravated damages for the unlawful violation of the Applicant's right to access of information established and guaranteed by Section 1(1) & 4 of the Freedom of Information Act 2011 and wrongful denial of access to information under Section 7(4) of the Freedom of Information Act 2011

VII And for such other Order or other Orders as the Hon. Court may deem fit to make i the circumstances.

The grounds upon which the reliefs are sought are as contained on the statement. There is also a verifying affidavit filed along with 2 documents attached.

The facts as contained in the Statement filed pursuant to Order 40 Rule 3 (2) (a) of t the High Court of Lagos State (civil procedure) Rules 2012 (the rules), in a nutshell are to the effect that the Applicant by letter dated 20th January 2016 requested the 1st Respondent to provide the information contained in the said letter, which was acknowledged and received the same date. That the 7 days provided under the Freedom of Information Act 2011 (FOI Act) to receive a response from the 1st Respondent have since passed and that the refusal of the 1st Respondent to furnish the information requested amounts to a "denial and violation of the Applicant's right of access to information as provided under the F.O.I Act 2011."

One issue was raised for determination in the Written Address:- "whether on the materials placed before the Court the Applicant has made out a case to entitle her leave from the Court to apply for judicial review".

I have carefully considered the facts before the Court as well as the submissions of Learned Counsel to which I shall refer as I deem necessary

Section 1 of the FOI Act entitles the Applicant to seek leave to access public records. Section 20 of the same act, also makes provision for an Applicant who has been denied access to information to apply to Court for a review within 30 days after the denial.

The question however is has the Applicant been denied access to any information sought to entitle them to seek for the reliefs being sought?

Section 4 (b) of the FOI Act states as follows:-

(b) Where the public institution considers the Application should be denied, the institution shall give written notice to the Applicant that access to all or part of the information will not be granted, stating reasons for the denial and the Section of this Act under which the denial is made."

Flowing from the above stated provision it is based on the receipt of that written notice I hold that the Applicant can then approach the Court as provided for in Section 7(1) with the notice given to the Applicant stating the grounds for the refusal, that the Applicant can then approach the Court challenging the decision of refusal. Section 7 (1) is reproduced as follows:

Where the government or public institution refused to give access to a record or information applied for under this act, or a part thereof, the institution shall state in the notice given to the applicant the grounds for the refusal, the specific provision of this act that it relates to and that the applicant has a right to challenge the decision refusing access and have it reviewed by a court.

The Applicant cannot put the cart before the horse, there has to be a written notice stating grounds for refusal as this is a precondition that must be complied with. Having failed to exhibit the said notice the Order for Mandamus is refused.

In view of my findings above, this Application I find is premature and leave is accordingly refused.

HON. JUSTICE I.O. AKINKUGBE (MRS)
JUDGE
13TH JULY 2017

IN THE FEDERAL HIGH COURT
HOLDEN AT ABUJA NIGERIA
ON TUESDAY THE 7TH DAY OF NOVEMBER, 2017
BEFORE THE HONOURABLE
JUSTICE A. ABDU-KAFARATI
ACTING CHIEF JUDGE

SUIT NO.FHC/ABJ/CS/172/2017

BETWEEN

PUBLIC &PRIVATE DEVELOPMENT CENTRE LTD/GTE (PPDC) ……APPLICANT

AND

CODE OF CONDUCT BUREAU (CCBN)
THE CHAIRMAN, CCB ……..RESPONDENTS

JUDGMENT

This is a motion on notice dated 11th April, 2017 brought pursuant to order 34 rules 5 and 6 of the Federal High Court rules 2009, sections 1, 2 (6) and 20 of the Freedom of Information Act 2011 and under the Inherent powers of the court. The Plaintiff/Applicant prays for the following orders:-

a.. A DECLARATION that the failure of the 1st and 2nd Respondents to furnish the Applicant with the information relating to declaration of assets by former President Goodluck Ebele Jonathan and Vice President Arch. Namadi Sambo after assumption of office on 29th May, 2011 and after exit from office on 29th May, 2015; and President Muhammadu Buhari and vice President Prof. Yemi Osinbajo after assumption of office on 29th May, 2015 as requested through the Applicant's letter dated 6th February, 2017 amounts to a wrongful denial of information under the Freedom of Information Act, 2011.

b. AN ORDER of the Honourable Court compelling the Respondents, jointly and severally, to within seven days of the judgment in this suit, furnish the Applicant with the Information relating to declaration .of assets by President Goodluck Ebele Jonathan and Vice President Arch. Namadi Sambo after assumption of office on 29th May, 2011 and after exit from office on 29th May, 2015; and President Muhammadu Buhari and Vice President Prof. Yemi Osinbajo after assumption of office on 29th May, 2015 as requested through the Applicant's letter dated 6th February, 2017.

The motion is supported by a statement made pursuant to order 34 rules 3 (2) of the rules of this court. The statement contains the name and description of the Applicant, the reliefs sought and the grounds for the reliefs.

It is also supported with an affidavit of eleven paragraphs. Attached to the affidavit is Exhibit A which is the Applicants' letter dated 6th February, 2017 requesting for the information.

There is also a written address in support of the motion.

In opposition the defendants filed a counter-affidavit of 14 paragraphs and a written address.

Upon receipt of the defendants' counter-affidavit the applicant filed a written reply on points of law.

I have gone through the facts of this case as contained in the parties' affidavit evidence. I have also considered the written submissions of learned counsel and from all these, the only issue that arose for determination is:-

"Whether the reliefs sought are grantable against the defendants herein".

Section 2(1) of the Freedom of Information Act establishes right of access to information. The said sections provides:-

"Notwithstanding (anything) contained in any Act, Law or regulation, the right to any person to access

information, whether or not contained. in any form which is in the custody or possession of any public official, agency or institution howsoever described is hereby established".

However, paragraph three (a) of the Third Schedule to the 1999 Constitution as amended provides:-

"3The Bureau shall have power to:-

(c) Retain custody of such declaration and make them available for inspection by any citizen of Nigeria on such terms and conditions as the National Assembly may prescribe".

There is no doubt that the Third Schedule to the Constitution is part of the 1999 Constitution and therefore superior to the Freedom of Information Act (which is an Act of the National Assembly).

It has not been shown that the terms and conditions mentioned in the Third Schedule to the Constitution have been set out or made by the National Assembly.

The National Assembly not having prescribed the terms and conditions pursuant to paragraph 3(c) of the Third Schedule to the constitution this application is premature as regards the declaration of assets by some past and serving Governors or any other public officer.

Until the terms and conditions stated in paragraph 3 (c) of the Third Schedule to the constitution are prescribed by the National Assembly the Defendants are not bound and not compellable to disclose the information requested by the Applicant.

I therefore hold that the application has no merit and same hereby dismissed.

That is the judgment of this Court.

ABDU- KAFARATI
AG. CHIEF JUDGE
7/11/17

Mr. M. E. Osenyi for the Applicant

Mr. O. Kolawole for the defendants

IN THE FEDERAL HIGH COURT
HOLDEN AT ABUJA NIGERIA
ON FRIDAY THE 9TH DAY OF NOVEMBER, 2017
BEFORE THE HONOURABLE
JUSTICE A. ABDU-KAFARATI …..JUDGE

SUIT NO: FHC/ABJ/CS/1062/2015

BETWEEN:

LANRE O. AMU, …… PLAINTIFF

AND

1. THE COUNCIL OF LEGAL EDUCATION OF NIGERIA]
2. ATTORNEY GENERAL OF THE FEDERATION] DEFENDANTS
3. THE PRESIDENT FEDERAL REPUBLIC OF NIGERIA]

JUDGMENT

This is an Amended Originating Summons dated 18th day of April, 2016 brought pursuant to the Freedom of Information Act, 2011 and under the inherent jurisdiction of the Court. The Amended Originating Summons raises one question for determination, to wit;

> **Whether the 1st Defendant, the Council of Legal Education is not liable and in violation of Freedom of Information Act (FOIA) by deliberate failure to produce any records in response to plaintiff's FOIA request to produce records.**

Pursuant to this sole issue the plaintiff prays for the following:

a) A declaration that the 1st Defendant is in violation of the Freedom of Information Act (2011) and that the 2nd and 3rd Defendants should take all necessary steps to ensure that the 1st Defendant complies with the FOIA.
b) An order compelling the 1st Defendant to grant Plaintiff's FOIA request as detailed in plaintiff's Exhibit #2 within 30 days; and
c) An Award of N10,000,000.00 (Ten Million Naira) only in General Damages against the 1st Defendant.

In support of the Summons is an affidavit of seventeen (17) paragraphs. Attached to the affidavit in support are exhibit 1 and 2 respectively.

Also in support is a written address.

In opposition to the Amended Originating Summons the 1st Defendant filed a counter affidavit of twenty-eight paragraphs and a written address.

In response to the 1st Defendant counter affidavit the plaintiff filed a further affidavit of twenty-nine (29) paragraphs dated 24th day of June, 2016. Attached to the further affidavit are exhibits 1-4 respectively. The plaintiff also filed what he called 'plaintiff concise reply to 1st Defendant's written address' dated 13th day of June, 2016.

I have gone through the facts of this case as we well as the legal submissions of learned counsel. It should be noted that the 2nd and 3rd Defendants did not file any counter affidavit.

The case of the plaintiff borders on Freedom of Information Act and not whether he applied for admission into the Nigeria Law School or not. It is not also a challenge to the authorities of the Nigeria Law School.

The claims of the plaintiffs are very clear. They are as follows:

1. **A declaration that the 1st Defendant is in violation of the Freedom of Information Act (2011) and that the 2nd and 3rd Defendants should take all necessary steps to ensure that the 1st Defendant complies with the FOIA.**
2. **An order compelling the 1st Defendant to grant Plaintiff's FOIA request as contained in plaintiff's FOIA request.**

The plaintiffs FOIA request is attached to the Amended Originating Summons.

From the counter affidavit of the 1st Defendant, the allegation that they denied the plaintiff the information requested for is not denied. Section 1(1) of the Freedom of Information establishes the right of access to information.

The said section provides:

> **Notwithstanding any contained in any other Act, Law or regulation, the right of any person to access or request information whether or not contained in any written form which is in the custody or possession of public official, agency or institution howsoever ascribed is established.**
>
> **(3) Any person entitled to the right to information under this Act, shall have the right to institute proceedings in the Court to compel any public institution to comply with the provisions of this Act.**

The Plaintiff has applied for the information contained in his exhibit 2 attached to this Summons and the documents have not shown that he is not entitled by law.

I am of the view that the plaintiff has done all that is required of him to do and having been denied the information he approached this Court. It is my view that he is entitled to the grant of prayers (a) and (b) respectively.
The issue formulated for determination is resolve in favour of the plaintiff and the application as per relief (a) and (b) is granted.

For the avoidance of doubt it is hereby ordered that:

1. **A declaration that the 1st Defendant is in violation of the Freedom of Information Act, 2011 and that the 2nd and 3rd Defendants should take all necessary steps to ensure that the 1st Defendant complies with the FOIA is granted.**
2. **An order compelling the 1st Defendant to grant Plaintiff's FOIA request as contained in plaintiff's Exhibit 2 within 30 days is granted.**

Prayer (c) on damages is refused because the Act does not envisage award or any damages.

That is the Judgment of this Court.

A.Abdul-Karati
Acting Chief Judge
9/11/2017

Mr Lanru O. Omu appears in person
Mr N. Obasi O Obi for the 1st Defendant (with him T. A. Rapu Esq and C. P. Nwozor Esq) for the 1st Defendant
Mr M. Abubakar for the 2nd and 3rd Defendants

IN THE FEDERAL HIGH COURT
HOLDEN AT ABUJA NIGERIA
ON TUESDAY THE 14TH DAT OF NOVEMBER, 2017
BEFORE THE HONOURABLE
JUSTICE A. ABDU-KAFARATI
ACTING CHIEF JUDGE

SUIT NO:FHC/ABJ/CS/171/2017

BETWEEN

INCORPORATED TRUSTEES OF AFRICAN CENTRE
FOR MEDIA & INFORMATION LITERACY ..…RESPONDENT/APPLICANT

AND
1. CODE OF CONDUCT BUREAU
2. THE CHAIRMAN, CCB …. APPLICANTS/RESPONDENTS

JUDGMENT

This is a motion on notice dated 11th day of April, 2017 brought pursuant to order 34 rules 5 and 6 of the rules of this court and sections 1, 2(6) and 20 of the Freedom of Information Act, 2011.

They pray for the followings orders:

a. **A DECLARATION** that the failure of the 1st and 2nd Respondents to furnish the Applicant with the information relating to declaration of assets by some past and serving Principal Officers of the National Assembly as requested through Applicant's letter dated 18th January, 2017 amounts to a wrongful denial of information under the Freedom of Information Act.
b. **AN ORDER** of the Honourable Court Compelling the Respondents jointly and severally to within seven days of the judgment in this suit furnish the Applicant with the Information relating to declaration of assets by some past and serving Principal Officers of the National Assembly named in the Applicant's letter dated 18th January, 2017 addressed to the Respondents.

The motion is supported by statement made pursuant to Order 34 rules 3 (2) of the rules of this court. The statement contains the names and description of the Applicant, the reliefs sought and the grounds for the reliefs.

It is also supported with an affidavit of eleven paragraphs. Attached thereto is Exhibit A. The applicant also filed a. written address.

In opposition the defendants filed a counter-affidavit to the motion. They also filed a written address.

The Applicant filed a reply on points of law.

This suit is on all force with suit No. FHC/ABJ/CS/ 168/2017 between Mr. Godwin Onyeacholam V (1) Code of conduct Bureau (2) The Chairman, Code of Conduct Bureau in which I held that the Third Schedule to the 1999 constitution as amended takes precedent over the Freedom of Information Act 2011.

Paragraph 3(c) of the Third Schedule to the 1999 constitution as amended reads:

"3 The Bureau shall have power to:
(c) retain custody of such declaration and make them available for inspection by any citizen of Nigeria on such terms and conditions as the National Assembly may prescribed".

The National Assembly has not yet prescribed the terms and conditions under which the 1st and 2nd defendants can release any information relating to the declaration of Assets by some past and serving principal officers of the National

Assembly as requested through the Applicant's letter dated 18th January, 2017.

The National Assembly having riot prescribed the terms and conditions pursuant to paragraph 3(c) of the Third Schedule to the 1999 constitution as amended, this application is premature as regard the declaration of Assets by some past and serving principal officers of the National Assembly named in the Applicant's letter dated 18th January, 2017.

Consequently 1 hold that the present action is premature as the terms and conditions under which the defendants can provide the requested information have not been put in place.

I further hold that the defendants are not bound and not compellable to provide the said information. The application has no merit and same is hereby dismissed.

That is the judgment of this Court.

A. ABDU-KAFARATI
AG. CHIEF JUDGE
14/11/17

Mr. M. E. Ogenyi for the Applicant
Fatima Danjuma Esq for the Defendants

IN THE FEDERAL HIGH COURT HOLDEN AT LAGOS NIGERIA
ON TUESDAY THE 21ST DAY OF NOVEMBER, 2017.
BEFORE THE HONOURABLE
JUSTICE HADIZA .R. SHAGARI
JUDGE

SUIT NO: FHC/L/CS/71612017.

BETWEEN:

EIE PROJECT LTD/GTE APPLICANT

AND

OBAFEMI AWOLOWO UNIVERITY RESPONDENT

JUDGMENT

This case is commenced by Originating Motion dated 30th June, 2017 and filed on 4th July; 2017 brought pursuant to Order 34 Rules 1 and 2 Federal High Court Rules 2009 and under the inherent jurisdiction of this Honourable Court.

Praying for the following:

1. A Declaration that the failure and or refusal of the Respondent to disclose or make available to the Applicant the information requested by the Applicants letter dated 22w' February, 2017 and 30th March, 2017 amounts to a violation of the Applicants right or access to information as guaranteed by Section 1 (1) and 4 Freedom of Information Act 2011.

2. A Declaration that the failure and or refusal of the Respondent to disclose or make available to the Applicant the information requested by the Applicant in its letters dated 22" February, 2017 and 30th March, 2017 amounts to wrongful denial of access to information under Section 7 (5) Freedom of Information Act 20'11.

3. An Order of Mandamus compelling the Respondent to disclose or make the following available to the Applicant.
   i. Federal Government allocation received in 2015.
   ii. Details of revenue generated from students fees and other business ventures in 2015.
   iii. Details of revenue generated from donations endowment and other gifts in 2015.
   iv. Details of expenditure line items in 2015.

4. And for such further Order or other Orders as this Honourable Court may deem fit to make in the circumstances.

The Grounds of the Applications are:

1. The Applicant is a non-Governmental Organization and public interest groups registered under the Companies and Allied Matters Act with the mission of promoting good governance and accountability.
2. The Respondent is a Public Institution and Federal University established under the Obafemi Awolowo University Act 2004 as contemplated under Section 2 (7) Freedom of Information Act.
3. The Applicant wrote letters dated 22nd February, 2017 and 30H1 March, 2017 to the Respondent requesting for information under the Freedom of Information Act.
4. The Respondent received the letters but refused to accede to the Applicants request.
5. The Respondent is deemed to have denied the applicant request under the freedom of information Act.
6. The Respondent kept on making verbal promises to honour the Applicants request and thereby wasted the time of the Applicants in making this Application.
7. The Honourable Court is seized with the requisite jurisdiction to review the Respondents illegal acts or omission.

The Motion was supported by 10 Paragraphs Affidavit deposed to by one **Seun Akinyemi** (m), they rely on all the Paragraphs annexed 5 Exhibits 1, 2, 3, 4, and 5. They also filed Written Address adopted same as their Argument and submission in urging the Court to grant the reliefs sought.

Affidavit deposed to is as follows:

1. That I am the Applicant's Research Associate and therefore very conversant with the facts leading to this deposition.
2. That I have the consent authority of the Applicants to depose to this affidavit.
3. That the facts deposed to herein are facts within my personal knowledge except otherwise stated
4. The Applicant is a non-governmental organization and public interest group registered under the Companies and Allied Matters Act with the mission of promoting Nigerian Laws and citizens' rights. Pleaded and marked "Exhibits 1" is the Applicant's Certificate of Incorporation.
5. The Applicant wrote letters dated 22" February 2017 and 30th day of March, 2017 to the Respondent for information under the Freedom of Information Act but the Respondent refused to accede to the Applicant's request. Pleaded and marked Exhibits 2, 3, 4 and 5 are the letters and proof of service.
6. The Respondent has an office within the jurisdiction of this Honourable Court at 11, Isheri Road, Ogba, Lagos State.
7. That I verify all the facts in our statement in support of this Application.
8. That this Application be granted in the interest of justice.
9. That I hereby verify the correctness of the content of the statement accompanying this Application and the facts deposed herein.
10. That I depose to this affidavit in good faith, believing same to be true and in accordance with the Oaths Act.

They raised a sole issue for determination as:

Whether on the materials placed before the Court, the Applicant has made out a case to entitle her to the relief sought.

They submitted that judicial review is regulated by Order 34 Civil Procedure Rules of this Honourable Court under which this Application is brought and from the facts contain d in the Affidavit in support the Applicant has placed sufficient materials before this Honourable Court to reliefs sought.

Section 1 Freedom of Information Act 2011 Provides:

(1) Notwithstanding anything contained in any other Act" law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established.
(2) An Applicant under this Act need not demonstrate cap), specific interest in the information being applied for.
(3) Any person entitled to the right to information under this Act, shall have the right to institute proceedings in the Court to compel any public institution to comply with the provisions of this Act

While Section 20 same Act provides:

Any Applicant who has been denied access to Information, or a part thereof, may apply to the Court for a review of the matter within 30 days after the Public Institution denies or is deemed to have denied the Application, or within such further time as the Court may either before or after the expiration of the 30 days fix or allow.

That by the above Section of the Act the Applicant is entitled to the information sought and also the right to institute proceedings compelling the Respondent to furnish the requested information as contained in its letter.

That the refusal by the 1st Respondent to make the requested information available to the Applicant is a violation of the rights of the Applicants access to information under the Freedom of Information Act. The case of Dan Musa Vs. Inume (2007) 17 NWLR Part 1063 Page 391 at 411 412 Paragraph H- F- where it was held that the Leave to apply for judicial review is almost granted automatically once the Court is satisfied with the processes filed.

It is trite law that the Courts have the duty to enforce the mandatory provisions of the law.

By the facts in the instant case the Applicant is entitled to the prayers made in this Application.

They rely on the case of **Ndoma Egba Vs. Government of Cross Rivers State (1991) 4 NWLR Part 188 Page 778**

Paragraph 3 - C and lnyan Vs. Ebong (2002) 2 NWLR Part 751 Page 284 at Page 331 Paragraph C - B.

The Honourable Court was urged to grant the reliefs.

The Respondents in this Suit were duly served with all the processes but refused or neglected to file any response to the Application.

It is trite law that where only the Applicant filed an Affidavit in support of his Application in a Motion on Notice or Originating Process, such affidavit being evidence, must be cogent, compelling and unchallenged in order to entitle the Applicant to a favourable ruling. See the case of Lawal Osula Vs. UBA Plc (2003) 5 NWLR Part 813 Page 376 CA.

Where deposition in affidavit are not denied by way of a Counter affidavit they are generally deemed admitted as the Court is to act thereon.

The case of Long Johnson Blakk (1998) 6 NWLR Page 555 Page 524 at 532 S.C.

Where however a party filed an affidavit deposing to certain vital facts which are material to the case in dispute as in the instant Suit the opposing party has the duty to counter those facts by way of a Counter Affidavit and failure to do so, those facts must be deemed unchallenged.

By Section 2 of Freedom of Information Act 2011, which provides,

1. A Public Institution shall ensure that it records and keeps information about all its activities, operations and businesses.
3. A Public Institution shall cause to be published in accordance with (4) of this Section the following information:
   e) A list of
      (i) files containing Applications for any contract, permit, grants, license or agreements.
      (ii) reports, documents, studies or publications prepared by independent contractors for the institution, and
      (iii) materials containing information relating to any grant or contract made by or between the institution and another public institution or private organization.

(4) A Public Institution shall ensure that information referred to in this section is widely disseminated and made readily available to members of the Public through various means including print, electronic and online source and at the office of such Public Institution.

(6) A person entitled to the right of access conferred by this Act shall have the right to institute Proceedings in the Court to compel any Public Institution to comply with the provision of this Section.

From the facts and circumstances of this case this Application succeeds and it is granted.
All the reliefs herein are granted in accordance with Section 6 (6) (a and b) 1999 Constitution as Amended and Section 2 (3 and 4) Freedom of Information Act 2011.

HON. JUSTICE HADIZA .R. SHAGARI
JUDGE
21st November, 2017.

APPEARANCES:
PARTIES: *Not in Court.*
M.O. Sani, *for the Applicant*

IN THE HIGH COURT OF LAGOS STATE
IN THE IKEJA JUDICIAL DIVISION
BEFORE THE HON. JUSTICE B. A. OKE- LAWAL (MRS.)
TODAY TUESDAY THE 28TH DAY OF NOV. 2017

SUIT NO: ID/1141/NJR/16

BETWEEN

INCORPORATED TRUSTEES OF MEDIA RIGHTS AGENDA .. CLAIMANT

AND

1. LAGOS STATE MINISTRY OF HEALTH]
2. ATTORNEY GENERAL OF THE FEDERATION] DEFENDANTS

RULLING

This is a Notice of Preliminary Objection dated 14/6/17 seeking out of the suit for want to jurisdiction n by the court to determine the suit as presently constituted.

The objection is premised on the ground that the substance of the case of the applicant is not constitutionally contained in the exclusive legislative list under the second schedule of the 1999 Nigerian Constitution to confer exclusive power on the Federal Government to make the laws for the federation and the grievance of the applicant is against the Lagos State Government which is not an agency of the Federal Government and assuming the freedom of Information Act.

He also stated that the 1st respondent sued is not a juristic person who can be sued.

There is an affidavit in support deposed to by Tolulope Savage and she stated that Lagos State Government is not an agency of the federal government as contemplated under the constitution of the Federal Republic of Nigeria and the Freedom of Information Act 2011 is applicable only to public records of the Government of the Federation and not of the State and because Nigeria is a Federation the power to make laws on public records is currently shared between the National Assembly and the State house of Assembly in their respective sphere of jurisdiction and the concurrent power granted by the constitution to the Federation and the State is exclusive to each tier of Government.

She stated that the public records of Lagos State are generated and kept by various ministries, departments, agencies and personnel of the State Government in execution of their functions and responsibilities in the service of the state and such government agencies and personnel are statutorily created and regulated by laws of the State House of Assembly.

She stated that the handling of public records has serious security implications which are routinely handled by rules established by the State Government and therefore the Freedom of Information Act being a legislation of the National Assembly on public records is not applicable to the records of the states in the federation in so far as the States have not enacted some as laws vide their respective State Houses of Assembly.

The applicant filed a counter affidavit against the notice of preliminary objection dated 29/6/17 deposed to by Gbadamosi John the Programme Officer at Media Rights Agenda.
He stated that the information requested by the applicant are not alien to the 1st respondent and aer within the 1st respondent area of work, functions and activities.

He stated that the 1st respondent is a public institution going by the definition of public institution contained in the Freedom of Information Act 2011 and is a commission of Lagos State Government.

He state that the Freedom of Information Act is operational throughout the federation of Nigeria and the legislating on archives on records of the federation and government of the state is different from legislating on the Freedom of Information and the Freedom of Information Act deals with public records and information on public institution as

defined by the Freedom of Information Act and the 1st respondent is a commission of the State as noted in the Act and the 1st respondent is a person in law created by Decree 14 of the 1967 and the applicant commenced the action within the time stipulated by the Freedom of Information Act and the rules of the court.

He stated that it is the constitutional duty of the National Assembly with the power to make laws that will bind the states if the subject of the laws is on that which is stated in the concurrent list.

The learned counsel for that applicant Mr. O. T. Oshikoya in the written address submitted that in an application to strike out the statement of claim the applicant must accept the facts as averred and the court must determine the issue on the statement of claim alone as held in IBRAHIM V. OBIM (1988) 3 NWLR (PT/ 82) 257 and A/G FEDERATION V.A/G ABIA STATE (2001) 11 NWLR (PT/ 625) 689 AT 740 amongst other cases.

He also referred to the case of ANYA V. IYAVI (1993) 7 NWLR (PT. 305) 290 arguing that where the claim discloses a cause of action and the subject matter of the action is within the jurisdiction of the court the plaintiff is competent to bring the action.

He argued that the court lacks jurisdiction to entertain this suit as Freedom of Information Act 2011 which is a Federal Legislation is not applicable to Lagos State since same has not been domesticated in the Laws of Lagos State.

He argued that a non-juristic person lacks the capacity to sue or be sued and any action against such party should be struck out. He relied on the case of FGN & ORS V. SHABU NIG. LTD & ANOR (2013) LPELR 21457 in arguing that where a court lacks jurisdiction the Supreme Court in the case of GOMBE V. P.W. NIG. LTD (1995) 6 NWLR (PT. 402) 402 AT 418 has held that the proper order to be made by the court is that of striking out the case.

In the written address of the respondent to the objection the learned counsel Mrs. Mosunmola Olanrewaju submitted that S4 (5) of the (1999) constitution provides that if any law enacted by the state is consistent with any law validly made by the National Assembly the law by the National Assembly shall prevail and the other law shall to the extent of the inconsistency be void.

She also referred to S2 (1) and 31 (3) of the Freedom of Information act which defined public institution and then in S31 it provides that public institution means any legislative executive judicial administrative or advisory body of the government including boards, bureaus committees or commissions of the state and any subsidiary body of these bodies etc.

She argued that where words used by statute are plain and unambiguous they should be given their ordinary and plain meaning as held in OKOTIE-EBOH V. MANAGER (2004) 18 NWLR (PT. 905) 242.

She submitted that there is no section in the 1999 constitution which prescribes that a law enacted by the National Assembly has to be adopted by the State House of Assembly to make the law applicable to the State.

She submitted that by S. 4(2) and 4(4) of the 1999 Constitution the National Assembly has powers to make laws for the peace, order and good government of the federation or any part thereof and that the EFCC Act and ICPC laws cover the whole of the federation and that S4 (5) of the Constitution voids State Assembly becomes immediately applicable, irrespective of the provisions of any State law to the contrary.

She also argued that S20 of the information Act 2011 provides that an applicant denied access to information may apply for a review within 30 days after the public institution denIes or is deemed to have denied the application or within such further time as the court may either before or after the expiration of the 30 days fix or allow. She stated that by letter 4/11/17 the applicant sought for information and when the 1st respondent refused, the applicant commenced judicial review process on the 9/12/17 so it is commenced within time.

She submitted that the 1st respondent is a person in law created by Decree No. 14 of 1967 on the 27/5/67 and the 1st respondent was one of the agencies that took off with the state and the creation of Lagos State by Decree 14 1967 automatically conferred legal status on the 1st respondent.

Issue for determination:

Is the Freedom of Information Act applicable to Lagos State?

S4(2) of the constitution of the Federal Republic of Nigeria (1999) provides that: The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the exclusive legislative list set out in part 1 of the second schedule to this constitution.

The power of the National Assembly to make laws, for the peace, order and good government of the Federation with respect to any matter included in the exclusive legislative list shall save as otherwise provided in this constitution be to the exclusion of the Houses of Assembly of States.

While S4 (4) of the 1999 Constitution also provides that:
In addition and without prejudice to the powers conferred by S2 of this section, the National Assembly shall have power to make laws with respect to the following matter that is to say

Any matter in the concurrent legislative list set out in the first column of part II of the second schedule to this constitution to the extent prescribed in the second column opposite thereto and

Any other matter with respect to which it is empowered to make laws in accordance with the provisions of this constitution.

S4(5) and (6) of the 1999 Constitution provides as follows:
If any law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly the law made by the National Assembly shall prevail and that other law will to the extent of the inconsistency be void.

The legislative powers of a State of the Federation
shall be vested in the house of Assembly of the State.

While S5(7) of the 1999 Constitution provides that:
The House of Assembly of a State have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matter that is to say

(a) Any matter not included in the exclusive legislative list set out in part 1 of the second schedule to this constitution;
(b) Any matter included in the concurrent legislative list set out in the first column of Part II of the second schedule to this constitution to the extent prescribed in the second column opposite thereto and
(c) Any other matter with respect to which it is empowered to make laws in accordance with the provisions of this constitution.

The National Assembly has power to make laws for the federation on matters both in the exclusive and concurrent list and where the Federal laws conflict with the state laws the Federal law will be prevail thereby establishing the superiority of the Federal law over the State law in its application to the States. See S4(5) of the 1999 constitution. The power to make laws under the concurrent list is to both the Federation and the State and is not exclusive to the State.

The Freedom of Information Act was duly and validly enacted by the National Assembly under S4(2) and 4(4) of the 1999 Constitution.

As rightly argued by the learned counsel for the applicant, S31 of the Act in defining public institution included in its definition the bodies of the state and subsidiary body of those bodies.

Taking the above into consideration, I had that the Freedom of Information Act 2011 applies to the Federation and all States of the Federation and Lagos State is a part of the Federation.

Issue 2

Did the applicant file the application for judicial review out of time as stipulated under S20 of the Freedom of Information Act?

The respondent wrote a letter dated 4/11/16 and filed the application on the 7/12/16. S20 of the Freedom of Information Act 2011 requires the applicant who is denied access to information to apply within 30 days after the public institution

denies or is deemed to have denied the application or within such time as the court may either before or after the expiration of the 30 days fix or allow.
The applicant's letter dated 4/11/17 and by the provisions S4 (a) of the Freedom of Information Act, the institution is to respond within 7 days of receipt of the request. In the Preliminary objection it is stated that the defendant received the letter of request same day. It will therefore be expected that the writer of the letter would wait for at least 7 days and it is when there is no response he may apply to the court. Taking that into consideration the application for judicial review was filed within time.

Issue 3

Is the Lagos State Ministry of Health a Justice Person?

In the counter affidavit the deponent stated that the 1st respondent is a person in law as it took off with Lagos State when created by Decree 14 of 1967 by virtue of State (Creation and Transitional Provision) Decree No. 14 of 1967 Lagos State.

There is no affidavit evidence to contradict this fact and is deemed accepted and where evidence is unchallenged the court is entitled to act and accept it as held in OFORLETE V. STAET (2000) 12 NWLR 415 AT 436.

Taking the above into consideration, I hold that the 1st respondent is a juristic person. The Preliminary Objection is dismissed in its entirely.

HON. JUSTICE B. A. OKE-LAWAL (MRS.)
28/11/17

IN THE COURT OF APPEAL
IN THE AKURE JUDICIAL DIVISION
HOLDEN AT AKURE
TUESDAY THE 27TH DAY OF MARCH, 2018
BEFORE THEIR LORDSHIPS

HON. JUSTICE UZO 1. NDUKWE-ANYANWU	JUSTICE COURT OF APPEAL (PRESIDING)
HON. JUSTICE OBANDE FESTUS OGBUINYA	JUSTICE, COURT OF APPEAL
HON. JUSTICE RIDWAN MAIWADA ABDULLAHI	JUSTICE, COURT OF APPEAL

APPEAL NO: CA/AK/4/2017

MARTINS ALO ==== ==== ==== ==== APPELLANT

AND

i.	SPEAKER, ONDO STATE HOUSE OF ASSEMBLY (Hon. Mrs. Jumoke Akindele)	]]	RESPONDENTS
ii	AUDITOR GENERAL, ONDO STATE	]	

JUDGMENT

(DELIVERED BY HON. JUSTICE RIDWAN MAIWADA ABDULLAHI, JCA)

This is an appeal against the judgment of Hon. Justice W. A. Akintoroye of Akure Division of the High Court of Justice; Ondo State delivered on 18th of July, 2016. In which he declined jurisdiction to hear a Motion for Order of Mandamus against the Respondents.

BRIEF STATEMENT OF FACTS

1. The Appellant applied through his solicitors by a letter dated 6th January, 2016 for the approved Audited Account of Ondo State between 2012 and 2014.
2. In the said letter, his solicitors described him as a journalist and civil Rights Activist (see page 5 of the records). However in his affidavit in support of motion exparte and motion on notice he described himself as a journalist and a project officer at Upline Resources Foundation, a Non-Governmental Organisation, based in Akure.
3. The Respondents by their Counter-affidavit deposed to against the motion on notice for mandamus, stated that the 1st Respondent does not keep the statement of account of Ondo State and was not the Speaker of the Ondo State House of Assembly between 2012 and 2014. (see page 53 of the record)
4. The 2nd Respondent acknowledged receipt but asked for time to seek legal advice from the Ministry of Justice vide their letter to the Appellant's solicitors 7th January, 2016
5. However, without waiting, the Appellant rushed to Court on the 11th February, 2016

The appeal was heart on the 7th of February, 2018 whereof the filed and exchanged Briefs of Argument on both sides were adopted by the parties' legal representatives.

F.E. Emodamori Esq. who appeared for the Appellant identified and adopted the Appellant's Brief filed on the 19th January, 2017 containing four issues for determination of the appeal, as follows:

a. Whether the Freedom of Information Act, 2011 is not covered by any provision or item in either the exclusive or concurrent legislative list in the constitution of the Federal Republic of Nigeria, 1999 (as amended) thereby rendering the Act ultra vires, unconstitutional, null and void. (Ground 1 and 2 of the appeal).
b. Whether the learned trial judge was not wrong by refusing to grant the reliefs sought by the Appellant on the ground that the Freedom of Information Act was not applicable to the States in spite of the fact that the document sought to be obtained by the Appellant vide the order of mandamus is a public document which the Appellant is entitled to in law and equity. (Ground 3 of the appeal).

c. Whether the learned tried Judge was not wrong and consequently violated the Appellant's right to fair hearing when he *suo motu* raised the issue that the Appellant failed to file an affidavit of service in compliance with Order 40 Rule 5(6) of the Ondo State High Court (Civil Procedure) Rule 2012 before the date fixed for the hearing of the application for mandamus and that the failure deprived the trial court jurisdiction in the matter, without affording the parties the opportunity of addressing the Court on the issue. (Ground 4 of the appeal).
d. Whether the cost awarded against the Appellant in this case while selflessly pursuing interest and or accountability and transparency in governance in line with Section 22 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) was not contrary to public interest. (Ground 5 of the appeal).

Counsel also identified and adopted the Appellant's Reply Brief filed on the 19th October, 2017 and urged us to allow the appeal and set aside the decision of the lower court. He further urged the court to grant the appellant's claim as contained in the Motion on Notice leading to this appeal.

Taiwo Olubodun (DDCL) MOJ, Ondo State who appeared for the Respondents, identified and adopted the Respondent's Brief filed on the 5th October, 2017, deemed same day and urged us to dismiss the appeal. It contains also four issues for determination to wit:

a. Whether the trial court breached the Appellant's right to fair hearing when it suo motu raised the issue of Appellant's failure to file affidavit of service as mandatorily required by Order 40 Rule 5 (6) of the Ondo State High Court (Civil Procedure) Rules 2012 before the hearing of motion on notice for mandamus and whether the trial court properly declined jurisdiction (Ground 4)
b. Whether the trial court was wrong in holding that the information or Freedom of Information is neither in the Exclusive nor Concurrent Legislative List in the 2nd schedule to the 1999 Constitution (as amended) thus making the Freedom of Information Act 2011 enacted by the National Assembly on Freedom of Information inapplicable to Ondo State (Ground 1&2)
c. Whether the learned trial judge could on the facts have granted the reliefs sought by the applicants vide the Order of Mandamus notwithstanding the inapplicability of the Freedom of Information Act 2011 to Ondo State when the Appellant did not satisfy the requirements or condition for grant of order of mandamus.
d. Whether or not the award of N5,000 against each of the Respondent in the circumstances of the case by the trial court was excessive (Ground 5)

There is similarity in each of the sets of issues formulated by the parties as quoted above with slight difference in the mode of couching. I will therefore use the set of issues provided by the Appellant being the owner of this appeal in determining same.

ISSUE 1

It is submitted that the Freedom of Information Act, 2011 was enacted to regulate access to Public Records and that the intention of the National Assembly in this regard is clear from the long title of the Act which states as follows:

> **"AN ACT TO MAKE RECORDS AND INFORMATION MORE FREELY AVAILABLE, PROVIDES 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 FOR DISCLOSING CERTAIN KINDS OF OFFICIAL INFORMATION WITHOUT AUTHORISATION AND ESTABLISH PROCEDURES FOR THE ACHIEVEMENT OF THOSE PURPOSE AND; FOR RELATED MATTERS"**

It is further submitted that the long title of an Act is a useful aid for interpretation when there seems to be an ambiguity or doubt in the intention of the Law Makers. Referred to the cases of U.T.C (NIG) LTD V. PAMOTEI (1989) 2 NWLR (PT. 103) 244 @ 285 PARA. D and COCA KOLA V AKINSOLA (2017) 17 NWLR (PT. 1593) P. 74 @ 164-165.

Learned Counsel for the Appellant submitted that the right of the Appellant and other Nigerians to receive and impact information is guaranteed in S. 39(1) of the 1999 Constitution. He cited the case of ATT. GEN. OF ONDO STATE V. ATT. GEN. OF THE FEDERATION (2002) 9 NWLR (PR.772) P.222 @304 AND 339 and contend that the National Assembly has the power to make law on information or public record either exclusively or concurrently with the States Houses of Assembly. Referred to S.9 of the 1999 Constitution as well as items 67 and 68 on the Exclusive Legislative Lists in Part 1 of the 2nd Schedule thereof.
Counsel submitted that based on the foregoing, "Information" is actually contained in S. 39(1) 1999 CFRN which is

deemed to be an existing law of the National Assembly under S.315(1) of the 1999 Constitution. In the same vain, "public records" is in item 4 on the Concurrent List of the same Constitution in respect of which the National Assembly has power to make laws, particularly the Freedom of Information Act, 2011.

He contend that the long title of an enactment does not need to be listed expressly or verbatim in the Legislative List in order to confer legislative power on the appropriate Legislative Authority to make laws on same as implied by the judgment of the lower court. What is important is the subject matter to which the legislation relates, in this case, "public records".

Consequently, it is submitted that the "Freedom of Information Act 2011" was enacted by the National Assembly in exercise of its legislative therefore Constitutional, it is not Ultra Vires or Null and Void. We are urged to so hold in resolving issues No. 1

In response by issue-B of the Respondents, reference was made to S. 4(1), (2), (3), (4), (6) and (7) of the 1999 Constitution on powers of the National Assembly and States Houses of Assembly to make laws. It is submitted that by virtue of S. 4(7)(a) and (b) of the 1999 Constitution the State House of Assembly can legislate on residual matters known as the "Residual List" and also share law making power with the Federal Government with respect to items in the "Concurrent List subject to the extent prescribed in the Constitution. Referred to the case of ATT. GENERAL, ABIA STATE v. ATT. GENERAL OF THE FEDERATION (2002) FWLR (PT. 101)1491 @ 1589-1590 PARAS C-C.

The Learned Counsel to the Respondents stated that the contention of the Respondents which the lower court upheld is that information or Freedom of Information which is subject matter of the application for mandamus brought pursuant to the Freedom of Information Act, 2011 is not an item in the Exclusive Legislative List. Information or Freedom of Information can therefore be said to fall under the Residual List. It is the House of Assembly of a State that has exclusive power to legislate on residual matters; that is matters that are neither in the Exclusive nor the Concurrent Lists. Referred to the case of A.G. FEDERATION v A.G. LAGOS STATE (2013) 16 NWLR (PT.1380) P.249 @342-343.

It is therefore submitted that the Freedom of Information Act, 2011 passed by the National Assembly, as a Federal Law, cannot be Applicable to states, Information and or Freedom of Information is neither in the Exclusive List nor in the Concurrent List.

That the Freedom Information Act, 2011 is inevitable in the overall interest of the nation as the country has long existed under the Constitution without the Act.
On argument of the Appellant in respect of "Public Records" was listed in the Concurrent Legislative List and it is synonymous with "Public Documents" in the Evidence Act, 2011 defined in S.102; that the lower court rightly rejected the argument by its conclusion that it would amount to expanding the law rather than expounding the law is infallible. Moreso that the Constitution does not provide any definition or meaning of the word "Public Records"

On the issue of S.39 of the 1999 Constitution, it is submitted that though it guarantees right to receive and impact ideas and information, it does not conferred a right to compel the giving of information by anybody or institution but only guarantees freedom of expression. That the section does not answered the question of who can legislate on information.

Taiwo Olubodun Esq. stated that in urging this court to hold that 'information' or 'freedom of information is within the legislative competence of the National Assembly, the Appellant placed heavy reliance on the case of A.G. ONDO STATE v A. G. FEDERATION (2002) 9 NWLR (PT. 772) P.222; that the facts of the case and the Ratio are different from the present situation.

That in A.G. ONDO STATE v A. G. FEDERATION, the Supreme Court actually found that item 60(a) in the Exclusive Legislative List when read with S. 15(5) directs the National Assembly to abolish all 'corrupt practices' and abuse of office'. Hence the conclusion and decision that National Assembly could legislative on corruption. In the present situation however, there is nothing in the 1999 Constitution giving such directions to the National Assembly. That S.39 of the 1999 constitution strenuously relied upon by the Appellant only provides for 'freedom of expression' and not 'Information or Freedom of Information'. The item 4 in the concurrent list only provides for "Archives and Public Records" and not 'information' or 'Freedom of information'. It is therefore submitted that the case of A.G. ONDO STATE v A. G. FEDERATION (supra) is unhelpful and clearly distinguishable from the present situation.

Counsel urge us to resolve the issue in favour of the Respondents.

In reaction, the Learned Counsel for the Appellant submitted that 'Public Records cannot be anything different from 'Public Document' similarly, 'Information' according to *OXFORD ADVANCED LEARNER'S DISCITIONARY,* means "facts or details about somebody or something" must necessarily have a source in which the context of the Freedom of Information Act 2011, is the Public Records. That Public Records is categorically listed in the concurrent legislative List and by the clear provision of S. 4(4)(a) and (b) of the Constitution, the National Assembly has the power to legislate on it.

Counsel is of the opinion that since Public Records is a matter listed in the Concurrent List, the Freedom of Information Act, 2011 is binding on all states within the Federation including Ondo State by virtue of the age long doctrine of covering the field.

Cited and relied on A.G. THE FEDERATION v A. G. OF LAGOS STATE (2013) 16 NWLR (PT. 1380) P.249 @328 PARAS. F-A Femi E. Emodamori Esq. urge us to hold that 'Public Record in respect of which the Freedom of Information Act, 2011 was enacted is contained in the 'Concurrent Legislative List and therefore makes the Act not only constitutional but binding on the states by virtue of the doctrine of covering the field.

Consequently, we are urged to resolve the issue is favour of the Appellant.

RESOLUTION ON ISSUE ONE (1).

Looking at the long title of the *Freedom of Information Act, 2011* as quoted earlier in this judgment, it could be deduced therefrom that the National Assembly intention is to regulate access to 'Public Records'. The Act was enacted by the National Assembly in exercise of its legislative power pursuant to S.4(1), (2) and (3) of the 1999 Constitution. It is therefore constitutional.

I am of the opinion that 'Public Records' is synonymous with 'Public Documents' which the Evidence Act, 2011 defined is S. 102. There is nothing to show that using such definition resulted in expanding the law, rather it is in aid to interpret the intention of the Legislative body vis a vis the promulgated 'Freedom of Information Act, 2011'

Information can conveniently be given from 'Records', as such the argument of the Respondents that what the Appellant requested for was information and not Records cannot be used to defeat the purpose for which the request was made. Information can always be gotten from 'Records' and or Documents as the case may be.

Since 'Public Records' is a matter listed in the "Concurrent Legislative List" the Freedom of Information Act, 2011 is to mind binding on all States of the Federation by virtue of the age-long Doctrine of Covering the field. See the cases of A.G. FEDERATION v A. G. LAGOS STATE (SUPRA) AT P.306 PARAS. C-E; LAKANMI V. A.G. WESTERN REGION (1970) 6 NSCC 143 AND A.G. OGUN STATE V. A.G. FEDERATION (1982) NSCC 1 @ 35.

Flowing from the above, I hold that 'Public Records' in respect of which the Freedom of Information Act, 2011 was enacted is contained in the "Concurrent Legislative List" and therefore makes the Act not only Constitutional but binding on the states by virtue of the Doctrine of Covering the Field.

This issue No. 1 is resolved in favour of the Appellant against the Respondents.

I will proceed to consider ISSUE NO. 3 of the Appellant which is ISSUE 'A' of the Respondents hammering on jurisdiction of the court below.

In arguing this issue, the Learned Counsel for the Appellant stated that it is settled law that where a court raises an issue suo moto, it has a duty to give parties the opportunity to be heard on the issue before judgment. Referred to the case of OMOKUWAJO v. F.R.N. (2012) 9 NWLR (PT. 1359) P. 300 @ 482 PARAS. B-G.

That the Learned Trial Judge in his judgment raised the issue of non filing of affidavit of service of the originating motion as provided by Order 40 rule 5(6) of the Ondo State High Court (Civil Procedure) Rules, 2012 before the hearing of the originating motion and consequently held that the failure deprived the trial court jurisdiction to hear the motion. Referred to pages 107-109 of the Record of Appeal.

That contrary to the above assertion, two separate affidavits of service of the originating processes on the 1st and 2nd Respondents were filed by the bailiff of the trial court and contained in pages 39 and 40 of the records.

Femi E. Emadamori Esq. is of the opinion that Order 40 Rules 5(6) does not impose an obligation on the Applicant to file a separate affidavit of service in addition to the one filed by the Bailiff of the trial court who actually carried out the service. He submitted that the essence of affidavit of service is to ensure those who ought to be served any court process are actually served and given the opportunity to be heard. Referred to the case of OLADEKOYI v. I.G.P. (2011) 16 NWLR (PT. 1273) p.406 @427 PARAS E-G.

That non filing of an affidavit of service alone is not capable of nullifying an originating motion particularly where the Respondents appeared and took part in the proceedings without objection, since the focus of the Court now is to dwell on substantial justice and avoid technicalities. Relied on OLADEKOYI v. I.G.P. (supra).

In conclusion, Learned Counsel for the Appellant submitted that the Learned Trial Judge was wrong and consequently violated the Appellant's right to fair hearing when he suo motu raised the issue that the Appellant failed to file and affidavit of service in compliance with Order 40 Rule 5(6) (supra) before the date fixed for the hearing of the application for mandamus and that the failure deprived the court jurisdiction in the matter, without affording the parties the opportunity of addressing the court on the issue. The court is urged to so hold and resolved issue No. 3 in favour of the Appellant.

In response, the Learned Counsel of the Respondents contend that the affidavit under Order 40 Rule 5(6) (supra) is different from the one required to be filed by the bailiff. It is to be filed by the Appellant himself. That in RE-APPOLOS UDO (1984) 4 NWLR (PT. 63) P.120 @ 126 PARAS. E.G. The Court of Appeal held while considering identical provision on Fundamental Right Enforcement Procedure Rules, that the contents of the affidavit envisaged under the provision must be sworn to and filed by the Applicant and not the Court Official.

TAIWO OLUBODUN (DDCL) MOJ, Ondo State referred to the case of ONYEMAZU v. OJIAKO (2010) 4 NWLR (PT/ 1185) P. 504 @ 522-533 PARAS. A-C. where it was held that the filing of this special affidavit verifying names and addresses of person(s) served as provided in Oder 37 Rule 5(4) of the High Court of Anambra State (Civil Procedur) Rules must be done by the Applicant and not the bailiff of the Court. That the provision is identical with Order 40 Rule 5(6) of the Ondo State High Court (Civil Procedure) Rule. 2012.

He said that the affidavit filed by the bailiff did not satisfy the requirement of the law.

On issue of where a court raises an issue suo motu, it has a duty to give the parties the opportunity to be heard on the issue before judgment, it is submitted that while this is the general proposition of the law, there are exceptions. It is now settled that where the issue raised suo motu by the court relates to the court's own jurisdiction, it is needless for the court to grant the parties hearing. Cited the cases of UKIRI V. UBA PLC (2016) ALL FWLR (Pt. 854) P. 1954 AND OMOKUWAJO V. FED. REP. OF NIGERIA (2013) ALL FWLR 1 @ 23 PARA. C-E.

Learned Counsel submitted that the issue of failure to file the mandatory verifying affidavit of service in compliance with Order 40 Rule 5(6) is of jurisdiction. Referred to ONYEMAIZU V. OJIAKO (SUPRA) @ P.525.

That in effect the provision prescribed enabling pre-condition which must be strictly compiled with before a court can be said to be properly seized of a matter. Referred to the case of BAJOGA V. GOVERNMENT FRN (2008) 1 NWLR (PT. 1067) P. 85 @ 118 PARAS. C-H.

Taiwo Olubodun (DDCL) said that the lower court appreciated the mandatory provision which can not be waived and correctly relied on the case of INEC & 2 ORS V. INIAMA & ORS (2008) 8 NWLR (PTP 1058) P. 182 AND CHIEF IKEDI OHAKIM V. CHIEF MARTINS AGBASO & 3 ORS (2010) 19 NWLR (PT. 1226) P.172 @ 230 in which the Supreme Court held that in a claim for an order of mandamus, Applicant must comply with all the preconditions necessary for the invocation of the jurisdiction of the court for an order of mandamus.

That in the present case the Appellant did not file any affidavit verifying service and his reliance on the ordinary affidavit of service by the bailiff cannot cure the defect.

That the learned trial court did not in any way violated the Appellant's right to fair hearing. It is a well settled principle of law that where a special procedure is prescribed for enforcement of a particular right or remedy, non compliance is fatal to the enforcement of that remedy. Referred to the cases of ABIA STATE TRASPORT CORPORATION & ORS V. QUORUM CONSORTIUM LTD (2002) LPELR 1041 CA; (2004) 1 NWLR (PT. 855) P. 601 and RAYMONS DONGTOE V. CIVIL SERVICE COMMISSION, PLATEAU STATE & ORS (2001) 9 NWLR (PT. 717) P. 132.

In conclusion, the Respondents' Counsel submitted that failure of the Appellant to comply with Order 40 Rule 5(6) (supra) which S.21 of the Freedom of Information Act, 2011 prescribed as the procedure for enforcing compliance with the Act is fatal to the enforcement of the Appellant's reliefs. Therefore, we are urged to resolve this issue in favour of the Respondents.

Having painstakingly perused the record of appeal as transmitted to this court and considering the arguments of parties on the issue under references. I choose to commence the resolution of the issue of right to fair hearing when the trial court suo motu raised the issue of non-compliance with the provision of Order 40 Rule 5(6) of the Ondo State High Court (Civil Procedure) Rules, 2012.

It is settled law that where a court raises an issue suo motu, it has a duty to give the parties the opportunity to be heard on the issue before judgment. See the cases of OMOKUWAJO v. F. R. N. (supra) and OKAFOR v. ILUKWE (supra). This is the general proposition of the law but there are exceptions and one of them is where the issue raised suo motu by the court relates to its jurisdiction, it is needless to grant the parties hearing. See the cases of UKIRI v. UBA and OMOKUWAJO v FRN (supra) in which the Supreme Court stated the exceptions to the general proposition as follows:

> "The need to give the parties a hearing when a judge raises an issue on his own motion or suo motu would not be necessary if:
>
> a. The issue related to the court's own jurisdiction.
> b. Both parties are/were not aware or ignored a statute which may have bearing on the case. This is to say where by virtue of statutory provision the judge is expected to take judicial notice. See S.73 of the Evidence Act.
> c. When on the face of the record, serious question of the fairness of the proceedings is evident."

At this point, it is imperative to consider whether the issue raised suo motu by the learned trial judge relates to the Court's jurisdiction.

In the case of INYEMAIZU v. OJIOKO (SUPRA) at page 525, the Supreme Court held thus:

> **"Any failure to comply strictly with the provision of Order 37 Rule 5(4) of the High Court of Anambra State (Civil Procedure) Rule goes to the competency of the motion. In order words, it renders the motion incompetent and so deprives the court of the necessary vires to entertain the matter."**

There is the need at this stage to state the provision of Order 40 Rule 5(5) of the Ondo State High Court (Civil Procedure) Rules, 2011 which is the extant Rules applicable and not 2012 as referred by the parties and the court below:

> **"An affidavit giving the names and addresses of and the places and dates of services on all persons who have been filed before the motion or summons is entered for hearing and if any person who ought to be served, under this rule has not been served, the affidavit shall state that the fact and the reason for it and the affidavit shall be before the judge on the hearing of the motion or summons."**

In the recent decision of the Supreme Court in ACHONU V. OKUWOBI (2017)(SUPRA) it was clearly stated that generally there are two types of jurisdiction. There are:

1. Jurisdiction as a matter of procedural law.

2. Jurisdiction as a matter of substantial law.

That where the jurisdiction of a court is a matter of procedural law, failure to comply with certain aspect of the procedure is a mere irregularity which does not render the action incompetent.

Looking at the above quoted Order 40 Rule 5(5) (supra) there is nothing in it relating to judicial review vide which the suit leading to this appeal was commenced that imposes an obligation on an Applicant to personally served the originating Motion for Judicial Review on the Respondents or to personally depose to an affidavit of service.
It is pertinent to state that the issue of non-service of the Originating Motion and or non-filling of affidavit of service of same was never raised either by the court or the Respondents throughout the proceedings before the lower court except

in the judgment.

To my mind, the essence of service of process of court is to put the other side on notice and an affidavit of service is to prove to the court that service has either been effected or not on the parties. This will enable the court in its exercise to judicial powers to either proceed with the mater or order otherwise.

In the instant, there was no complain as to service of any of the court's processes and the parties were before the court thoughout the proceedings up to judgment.

In any event, non-filing of an affidavit of service alone is not capable of nullifying an Originating Motion particularly where the Respondents appeared and took part in the proceedings without objection as in this case.

Moreover, the focus of the court now is to dwell on substantial justice and avoid technicalities. See the case of OLADEKOYI V. I. G. P. (2011) 16 NWLR (PT. 1273) P.406 @ 277 PARAS. E-G.

In any case, a community reading of the provision of Order 40 Rule 5(5) of the Ondo State High Court (Civil Procedure) Rules, 2011 and the recent decision of the Apex Court in ACHONU V. OKUWOBI (2017) 14 NWLR (PT. 1584) P.142 @ 171 PARAS B-F will result in discountenance with the argument of the Respondents on issue of jurisdiction of the court below. This I found and so hold.

Furthermore, I hereby hold that the learned trial judge was wrong in depriving himself of jurisdiction in the matter based on the provision of Order 40 Rule 5(5) of the Ondo State High Court (Civil Procedure) Rules, 2011.

In view of the aforesaid, this Issue NO. 3 is resolved in favour of the Appellant against the Respondents.

ISSUE NO. 2 (B)

Learned Counsel for the Appellant adopts all the argument under ISSUE NO. 1 (A) to the effect that the Freedom of Information Act, 2011 is constitutional and applicable to all the states within the Federation including Ondo State particularly on the Supreme Court decision in ATT. GEN. OF ONDO STATE v. ATT. GEN OF THE FEDERATION (2002) 9 NWLR (PT. 772)P.222 @ 339 which is virtually on all fours with instant cases.

He contend that it is trite law that where a relief is provided for by any written law or by Common Law or Equity and is properly claimed by a party seeking the relief or remedy, he cannot be denied same simply because he has applied for it under wrong law or rule of law, as to do so would patently be unjust. Referred to the cases of THOMAS V. F.J.S.C (2016) 11 NWLR (PT. 1523) P. 312 @ 325-326 PARAS. H-C, MAJA V. SAMOURIS V. PERSONS UNKNOWN (2002) 7 NWLR (PT. 765) P.78 @ 106 PARAS. D-E; MUDASHIRU V. PERSONS UNKNOWN (2006) 8 NWLR (PT. 982) P.267 @ 280 PARAS. F-G AND FALOBI V. FALOBI (1967) 1 NMLR 169.

Counsel submitted that the audited account of Ondo State which the Appellant sought to obtain vide the other of mandamus at the trial court is a Public Document within the meaning of S.102 of the Evidence Act, 2011 to which the Applicant is entitled by virtue of S.39(1) of the 1999 Constitution, S.104 of the Evidence Act, the Common Law and Equity. It is not and cannot by any stretch of imagination be termed a classified document.

That the Respondents being in custody of the Audited Accounts of Ondo State between 2012 and 2014 have a duty under the law to make the documents available to members of the public including the Appellant on demand.

It is submitted that the Appellant clearly established a legal right and locus standi to approach the trial court for the relief of mandamus. Referred to the cases of IKECHUKWU V. NWOYE (2015) 3 NWLR (Pt. 1446) p. 367 @ 397 PARAS. B-C and AYIDA V. TOWN PLANNING AUTHORITY (2013) 10 NWLR (PT. 1362) P. 226 @ 274 PARAS. F-G.

Femi E. Emodamori Esq. submitted that the learned trial judge was wrong by not granting the Appellant's claim based on the perception that the Freedom of Information Act was inapplicable to state since the Appellant's entitled to the relief in Law and Equity.

We are urged to so hold and resolve ISSUE NO. 2(B) in favour of the Appellant.
In response, the Learned Counsel to the Respondents contend that the mode of commencement adopted by the Appellant before the lower court was by Writ of Mandamus. Assuming without conceding that the Freedom of

Information is applicable to the state, the Appellant still failed to meet the conditions necessary for the grant of the relief sought by Mandamus. These are:

I. There must be a duty the performance of which the applicant has sufficient legal interest.
ii. The duty to be performed must be of a public nature and not an obligation to resolve any other private dispute.
iii. The applicant must show that he has demanded the performance of the duty and that performance has been refused to be discharged.
iv. There must be no other remedy available to the applicant apart from order of mandamus.

That all the above listed conditions must be conjunctively present before an application for an order of Mandamus can be granted. Referred to APPLICATION PRODUCTS (NIG) LTD 2005 3 NWLR (PT. 911) P. 511 @ 181; MISS O. A. AKINTEMU & ORS v. PROFESSOR ONWUMECHILI (1985) 1 NWLR (PT. 1) P.88 PARA. C and SHITA-BAY V. FGSC (1981) 1 SC (PT.67) P.797.

That the Appellant failed to meet two of the conditions which are (i) and (ii).

It was submitted that the facts deposed to in the affidavit in support of Motion on Notice of the Appellant did not show sufficient legal interest in the Public Duty which he wants to compel the Respondents to perform.

That in the case of AYIDA V. TOWN PLANNING AUTHOURITY (SUPRA) relied upon by the Appellant, the Supreme Court at the page 260 para. H held that:

> **"The Court will not entertain an application from a busy body or meddlesome interloper who interferes in this that do not concern them……"**

We are urged to hold that the Appellant did not meet this condition.

The second condition said the Appellant failed to meet is that the Duty to Perform must be of a Public nature or in Public Interest. Referred to FAWEHIMI V. IGP & ORS (2002) 7 NWLR (PT. 767) AT P.41 PARA. C.

That the deposition in para. 2 and 5 of the affidavit in support of motion the request for information is in private interest to promote the private affairs of a Non-Governmental Organisation Up line Resource Foundation, an organization without admin or office.

That the duties of the Respondents are of making laws and authority of Government Accounts, not of providing information and that their duties as Public Officers are of public nature which is only rendered to the entire citizenry of Ondo State and not for any sectional or group interest as the Appellant had wanted to compel them to perform.

Taiwo Olubodun Esq. opined that for the order of Mandamus to lie, the Public Duty must have been imposed any law. Referred further to the case of AYIDA V. TOWN PLANNING AUTHORITY (SUPRA) @ P.274.

Learned Counsel to the Respondents urge us to resolve this issue 2(B) in favour of the Respondents.

In reaction, Femi E. Emodamori Esq. referred to the provision of S. 1(2) of the Freedom of Information Act, 2011 which state that: "An Applicant under this Act needs not demonstrate specific interest in the information being applied for."

He submitted that in applying for an order of Mandamus pursuant to the Freedom of Information Act, 2011 the general requirement in Mandamus proceedings for an Applicant to show sufficient legal interest has been jettisoned. In any event, referred to para. 5 of the affidavit in support of the Originating Motion at the trial court contained in page 3 of the Record of Appeal, then stated that are the Respondents saying a foundation whose objective is to ensure "Transparency and Accountability in Governance" is not Public Interest?

Learned Counsel urged us to discountenance the Respondents' argument and resolve the said issue 2(B) against them.

RESOLUTION OF ISSUE NO. 2(B) OF THE APPELLANT AND ISSUE NO. 3 OF THE RESPONDENTS.

I have earlier on in this judgment under ISSUE 1(A) resolved that the Freedom of Information Act, 2011 enacted by the National Assembly is applicable to all states within the Federation. It was also resolved under the same ISSUE 1 that the Audited Account of Ondo State which the Appellant sought to obtain is a Public Document within the meaning of

S.102 of the Evidence Act, 2011.

S.1(2) of the Freedom of Information Act, 2011 states that:

> **"An applicant under this Act needs not demonstrate specific Interest in the Information being applied for."**

This goes to show that in applying for an order of Mandamus pursuant to the Freedom of Information Act, 2011 the general requirement in Mandamus proceedings for an Applicant to show sufficient legal interest has been jettisoned. Notwithstanding, Para. 5 of the affidavit in support of the Applicants' Motion on notice clearly states thus:

> **"I had before now been placed in charge of a project by the Foundation to which I belong, referred to in paragraph 2 above, which required me to have access to and process information on the budgetary allocations, disbursement and budgetary performances of some government agencies in Ondo State as part of the policy of the foundation towards ensuring transparency and accountability in governance."**

To my mind, "transparency and accountability in governance" is in the 'Public Interest'. It seems that is the objective of the Foundation to which the Applicant belongs. That been the case, the duty sought to be performed is therefore in the Public Interest.

I am of the opinion that the Appellant clearly established a legal right and locus standi to approach the trial court for the relief of Mandamus. See the case of IKECHUKWU V. NWOYE (SUPRA) and AYIDA V. TOWN PLANNING AUTHORITY (SUPRA) cited and relied upon by the Appellant.

Flowing from the above, I found that the Appellant entitled to the relief sought and therefore hold that the learned trial judge was wrong by not granting the Appellant's claim based on the perception that the Freedom of Information Act was inapplicable to States since the Appellant was entitled to the relief in Law and Equity.

This ISSUE NO. 2(B) is resolved in favour of the Appellant and against the Respondents.

ISSUE NO. 4(D)

Learned counsel for the Appellant contended that the costs of N10,000.00 awarded in favour of the Respondents who are public officers defending the suit at the trial court in their Public Capacity through legal practitioners in the State Ministry of Justice paid from Public Fund who incurred Spirited Private Citizen using his own resources to fight for transparency and accountability in governance was unreasonable and contrary to Public Interest. In any event, the costs awarded by the trial court was based on erroneous legal premise as submitted earlier that it had no jurisdiction to entertain the Appellant's claim and that the claim was ungrantable.

He urged us to consequently resolve ISSUE 4 (D) in favour of the Appellant

In conclusion, Femi E. Emodamori Esq urged this court to allow the Appeal and grant the Appellant's claim as contained in the motion on Notice leading to this appeal in line with the exercise of the powers of this court as provided in S. 15 of the Court of Appeal Act.

In response, the Learned Counsel to the Respondent contend that it is a well established principle that costs follow event in litigation and that a successful party is entitled to costs unless there are special reason(s) for depriving the party of that entitlement. Referred to the case of ANYAEGBUNAM V OSAKA (1993) 5 NWLR (PT. 294) P.449 @ 462 PARA. G.

That by Order 49 Rule 1(1) of the Ondo State High Court (Civil Procedure) Rules, 2011, the principles to be observed in fixing amount of costs is that the party who is in the right is to be indemnified for the expenses to which he has been necessary put in the proceedings as well as compensation for the time and efforts in coming to court.

That the law does not preclude Government or its Officials or agents from being compensated with costs in appropriate circumstances. It was submitted that the Government of Ondo State incurred costs in transporting the lawyers and parties to court. The time and efforts the parties and counsel put in the case for 5 months and at each sitting are worth the award of costs. The time, money and efforts spent on typing and filling processes in court are considerable.

We are urged not to disturb the sound exercise of discretion in this case and further urged to resolve this ISSUE NO.

4(D) in favour of the Respondents.

RESOLUTION OF ISSUE NO. 4(D)

In award of costs, the court exercising its discretion ought to determine the quantum judicially and judiciously. See PHMB V. UTOMI (199) 13 NWLR (PT. 636) P.572 @578. And if that is done, the Appellate court will now interfere with the exercise of discretion. In the contrary, an Appellate court has the right to interfere in order to correct an arbitrary use of discretion.

I am in agreement with the contention of the Learned Counsel to the Respondent that it is well established principle that such costs follows event in litigation and successful party is entitled to costs unless there are special reason(s) for deriving the party of that entitlement. See ANYAEGBUNAM V. OSAKA (SUPRA) and Order 49 Rule 1(1) (supra) cited by the Learned Counsel to the Respondents.

In any event, the costs awarded by the trial court as based on erroneous legal premise on issue of lack of jurisdiction to entertain the Appellant's claim and that the claim was ungrantable.

In this circumstance the order as to costs is set aside for being erroneously awarded in favour of the Respondent.

Therefore, this ISSUE NO. 4(D) is resolved in favour of the Appellant.

On the whole, having resolved the four (4) issues in favour of the Appellant and against the Respondents, this appeal succeeds and therefore allowed. The judgment of the lower court in Suit. No. AK/5M/2016 delivered by Hon. Justice W. A. Akintoroye on the 18th day of July, 2016 is hereby set aside.

HON JUSTICE RIDWAN MAIWADA ABDULLAHI
JUSTICE, COURT OF APPEAL

APPEARANCES:

1. Femi Emmanuel Emodamori Esq. for the Appellant

2. Taiwo Olubodun Esq. for the Respondents.

CA/AK/4/2017
UZO I. NDUKWE-ANYANWU, JCA

I had the privilege of reading the draft form the Judgment just delivered by the learned brother Ridwan Abdullahi Maiwada, JCA. I agree with his reasoning and final conclusions. I have nothing useful to add.

UZO I. NDUKWE-ANYANWU
JUSTICE, COURT OF APPEAL

APPEAL NO. CA/AK/4/2017
OBANDE FESTUS OGBUINYA, JCA

I had the singular privilege to peruse, in advance, the leading judgment delivered by my learned brother. Ridwan Maiwada Abdullahi, JCA. I concur, in *toto*, with it.

For the sake of emphasis, possession of *locus standi* has been the bane of the citizens' advocates, in the public interest litigation, to query transparency and accountability in governance in Nigeria. In a democratic dispensation, such as the Nigeria's, the citizens have been proclaimed the owners of sovereignty and mandates that place leaders in the saddle. The requirement is a serious fracture of the citizens' inalienable right to ventilate their grievances against poor governance *vis-à-vis* expenditure of public funds generated from their taxes. The sacrosanct provision of section 1(2) of the Freedom of Information Act, 2011, which has ostracized this disturbing requirement, has, admirably, remedied the harmful mischief appurtenant to it. Interestingly, the provision, discernible from its tenor, punctures the unwarranted establishment of *locus standi* in *mandamus* proceedings that orbit within the perimeter of the Act. In effect, the provision, which must be respected to the letter, exposes the poverty of the respondents' stance on the absence of *locus standi* in the appellant and, bu extension, constitutes a *coup de grace* in their case.

It is for this reason, couple with elaborate reasons assembled in the leading judgment, that I, too, allow the appeal in the terms decreed in it.

OBANDE FESTUS OGBUINYA
JUSTICE, COURT OF APPEAL.

IN THE COURT OF APPEAL
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY

ON WEDNESDAY THE 28TH DAY OF MARCH, 2018
BEFORE THEIR LORDSHIPS

PHILOMENA MBUA EKPE	**JUSTICE, COURT OF APPEAL**
SAMUEL CHUKWUDUMEBI OSEJU	**JUSTICE, COURT OF APPEAL**
MOORE ASEIMO ABRAHAM ADUMEIN	**JUSTICE, COURT OF APPEAL**

APPEAL NO. CA/B/469/2014

BETWEEN:
EDO STATE AGENCY FOR THE CONTROL
OF AIDS (EDOSACA) .....APPELLANT

AND

1.	COM. AUSTIN OSAKUE	}	
2.	DR. ESTHER AIRIA	}	
3.	BARRISTER GREG ADEJO	}	
4.	COM. OMOBUDE AGHO	}	
5.	FOUNDATION FOR GOOD GOVERNANCE AND SOCIAL CHANGE (FFFGGSC)	}	RESPONDENTS
6.	GENDER RIGHTS ACTION (GRA)	}	
7.	HEALTH AND ENVIRONMENTAL CONCERNS (HEC)	}	
8.	ANTI CORRUPTION REVOLUTION (ACR)	}	
9.	MEDIA AWARENEWSS GROUP (MAG) (For and on behalf of Civil Society Groups in Edo State)	}	

JUDGMENT
(DELIVERED BY SAMUEL CHUKWUDUMEBI OSEJI, JCA)

This appeal is against the judgment of the High Court of Edo State siting in Benin City and delivered on the 29th day of April 2014.

The Respondents in this appeal were the Applicants in the trial court wherein they instituted an action by way of Originating Summons against the Respondent (now Appellant). In the said Originating Summons filed on 14th February 2014, they raised the following issue for determination by the trial court.

"Whether the information sought after by the Applicants ought to be granted under the Freedom of Information Act 2011."

The reliefs sought by the Applicants against the Respondents (now Appellants are as follows:-

RELIEFS SOUGHT BY THE APPLICANTS:-

A. DECLARATION that compulsory disclosure of information by agency of government is governed by the provisions of the Freedom of Information Act 2011.
B. DECLARATION that the Respondent must release information relating to details of the revenue and expenditure of its agency between the periods of 2011-2013 to the applicants.
C. DECLARATION that the respondent must release information relating to details of the subventions of the Edo State Government to its agency between the periods of 2011-2013 to the applicants.
D. DECLARATION that the respondent must disclose information relating to details of the grant-in-aid from corporate bodies and private donors to its agency between the period of 2011-2013 to the applicants.
E. DECLARATION that the details of the contracting firms that handled the contract of printing and supplies for the agency and the amount the contract was awarded must be disclosed to the applicants.
F. DECLARATION that the details of the documents detailing the criteria used to place an individual

organization in the selection list for grants and the criteria used to remove an individual organization from the selection list for grants must be disclosed to the applicants.

G. DECLARATION that the details of the current number of civil society groups on the selection list for grants and current number of civil society groups in Edo State on the list for grant must be disclosed to the applicants.
H. DECLARATION that the details of the individual organization on the list and documents showing that same have been forwarded to the donor he disclosed to the applicants.
I. DECLARATION that the details of the local and international donors from the year 2011 till date and the program and financial report sent to the donors must be disclosed to the applicants.
J. DECLARATION that the failure of the Respondent to disclose information requested by the applicants is illegal, oppressive and vexatious.
K. AN AWARD OF N500,000.00 (FIVE HUNDRED THOUSAND NAIRA) against the Respondent as general and/or exemplary damages/compensation for the unlawful denial of information requested for by the Applicants from the date of judgment and interest therein at 10% per annum until judgment sum is fully liquidated against the Respondent.
L. The costs of instituting and prosecuting this action, as assessed by the applicant in the sum of N10,000,000.00 (Ten Million Naira) against the respondent.

The said Originating Summons was supported by a 26 paragraph affidavit to which is attached a letter marked as Exhibit A. There is also a written address in support of the Originating Summons.

The Appellant upon being served with the said Originating Summons reacted by filing a 13 paragraph counter affidavit and a written address dated 20/3/2014.

Upon the adoption of the written addressed by the parties, the learned trial judge delivered a Ruling on the 29/4/2014 wherein all the reliefs except reliefs K and L were granted in favour of the Respondents.

The Appellants being aggrieved with the outcome of the said ruling filed a Notice of Appeal on the 8/7/2017. It contains two grounds of Appeal.

The Respondent also filed a Notice of Cross appeal on 4/7/2017 but deemed properly filed and served on 31/1/2018.

Brief of argument were subsequently filed and exchanged in compliance with the Rules of this court and which briefs of argument were adopted and relied upon by the parties at the hearing of this appeal on 31/1/2018.

In the Appellant's brief of argument filed on 16/2/2015 but deemed properly filed on 31/1/18, the following two issues were formulated for determination.

1. Whether the Freedom of Information Act being an act of National Assembly applies to the Public Records of Edo State Government in view of the Provisions of the Constitution of the Federal Republic of Nigeria 1999 (Ground 1)
2. Whether the learned trial judge was right to have adjudicated on the issue of "Domestication" that was not raised by the parties of the trial court. (Ground 2).

In the Respondent's brief of argument filed on 4/7/2017 and deemed properly filed on 31/1/18 the two issues raised by the Appellant were also adopted for determination by this court.

I will therefore premise the consideration of this appeal on the said two issues.

ISSUE 1

Dwelling on this issue learned counsel for the Appellant referred to Section 2(2) and Section 4 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) to submit that Nigeria is a Federation and the unique feature of a Federal system of Government is the recognition of the Separateness and independence of each of the three tiers of government that make up the Federation.

The added that by virtue of Section 4, the Legislative power of the Federal Government is not at large or without limitations, therefore the power of the National Assembly to legislate on a given matter must be traceable to the body of the Constitution as contained in the exclusive concurrent legislative lists. Vide A.G ABIA STATE VS. A.G OF THE FEDERATION (2002) 6 NWLR (PT 763) 265 AT 386.

It was then submitted that the Freedom of Information Act is a legislation which pertains to public records and the legislative powers to make laws on public records in Nigeria shared between the Federal Government and the Federation States by virtue of the provisions of paragraph C, Items 4 and 5 of the concurrent legislative list. He further argued that the Freedom of Information Act which is the pedestral upon which the case of the Appellant sands, being an Act of the National Assembly within the context of Item 4, is only applicable to the public record of the Federal Government as distinct from that of the State government.

On this basic principle of federalism, reference was made to the book "Federalism in Nigeria under the Presidential Constitution" by Professor B. O. Nwabueze; wherein the learned author at page 61 analysed the provisions of Items 4 and 5 of the Concurrent Legislative list and came to the conclusion that a law made by the National Assembly on public Records is not binding on the State and vice-versa.

On this it was posited that the power granted under paragraph C relating to archives and public records is exclusive to both the Federal and State government in their respective domains of jurisdiction which is an index of federalism as judicially approved in the case of OYAKHIRE VS UMAR (1998) 3 NWLR (PT 542) 438.

Learned counsel also submitted that the doctrine of covering the field is not applicable to the provisions of Items 4 and 5 in the concurrent list because the power of the National Assembly in the instant case is expressly limited to the public records of the federation as distinct from those of the states. He added that the trial court failed to consider the provisions of Section 4(4) of the constitution vis-à-vis the matters listed under Items 4 and 5 and thereby arrived at an erroneous conclusion.

He further referred to Section 29 of the Freedom of Information Act which makes it mandatory for all public institutions to submit annual report to the Attorney General of the Federation without any mention of the State Attorney's General or state agency.

On the impropriety of an Act of the National Assembly imposing duty on the Government of a state he cited the case of HON. MINISTER OF JUSTICE ATTORNEY GENERAL OF FEDERATION VS ATTORNEY GENERAL OF LAGOS STATE SC/340/2010 delivered on 19th July, 2013.

On a final note it was contended that it will be antithetical to the constitution and fundamental principles of federalism if the Freedom of Information Act is held to be applicable to states. This court was then urged to resolve the issue in favour of the Appellant.

ISSUE 2

Herein it was submitted that the learned trial Judge wrongly analysed the processes filed in the suit and wrongly evaluated the arguments of counsel for the parties, thereby leading to the arrival of wrong conclusion with regard to the issue of "Domestication" of the Freedom of Information Act 2011.

He contended that the issue of "Domestication" was not raised by the Appellant in the counter affidavit to the Originating Summons and it was not raised in the Respondent's reply to the counter affidavit in which it was wrong for the Learned trial Judge to address the issue of "domestication" when issues were not joined on it by parties. On this the following cases were relied on: KASIMU VS NNPC (2008) 3 NWLR (PT 1015)569 AT 585 AND PATRICK OGBU & ORS. VS FIDELIS AND 8 ORS. (1994) 7 NWLR (PT 355) 128. It was then urged on this court to resolve the issue in favour of the Appellant and also allow the appeal.

Replying of issue 1, learned counsel for the Respondents submitted that where the National Assembly has the power to regulate a particular subject and does same in any given form to cover exhaustively the federating states, the state legislatures lacks the power to complement the legislation of the National Assembly or to prescribe additional regulations even if it will not alter the intention of the Act. He cited the case of RECTOR, KWARA POLYTECHNIC VS ADEFILA (2007) 15 NWLR (PT 1056) 42 AT 98.

He added that in the instant case the Freedom of Information Act 2011 intends to completely and exhaustively cover the field. Therefore by the provisions of paragraph 5 of part 2 of the 2nd Schedule to the 1999 constitution, states are covered to the ground even if their concerns are consistent with that of the National Assembly because the supremacy of the parliament means that any law enacted by the National Assembly on the concurrent list that covers the implementation of the Act both at Federal, State and Local Government levels bars the states from enacting any state law on the subject.

It was further submitted that where the field has been covered by the National Assembly, the state Assembly cannot make any other law on the same subject. Reliance was placed on the case of ELENDU VS EKWOABA (1995) 3 NWLR (PT 386) 704, A.G. OGUN STATE VS INTERNATIONAL BREWRIES PLC (2001) 7 NWLR (PT 713) 647, A.G. OGUN STATE VS A.G. OF THE FEDERATION (1982) 2 NCLR 166 at 180 181; A.G. OF ABIA STATE VS. A.G. OF THE FEDERATION (2002) 9 NSCQR 670 at 785 and 788.

It was further contended that where the National Assembly has legislated on the Freedom of Information Act 2011 which deals with public records and archives, the State House of Assembly cannot enact its own law on the same subject even if it is not in conflict with the existing law.

Reference was made to Section 4 (2) and (4)(a) of the 1999 constitution to submit that the National Assembly has unlimited powers to take legislative initiative in making laws for peace, order and good government of the Federation and her units to the extent therefore that any inconsistency in the concurrent powers as shared by the Federal and State governments would be resolved in favour of the National Assembly to the extent of the inconsistency provided the Federal legislation is meant to cover the field. Leaned counsel also referred to paragraphs 4 and 5 of Part 11 of the 2nd Schedule to the 1999 constitution to submit that the use of words "subject to" in paragraph 5 acquires a special meaning and implies that provisions are subordinate to paragraph 4 thereof. He relied on the following cases; A.G. ANAMBRA STATE VS A.G. OF THE FEDERATION (1993) 6 NWLR (PT 302) 692 AT 726; OBAYUWANA VS GOVERNOR OF BENDEL STATE (1982) 12 SC 147 LOVELEENTOYS LTD VS KOMOLAFE (3013) 14 NWLR (PT 1375) 542 at 554.

Furthermore, it was contended that there is no Freedom of Information Law enacted by the Edo State government and this implies that the Freedom of Information Act will apply in Edo State without any need dwell on the issue of inconsistency.

On issue 2, it was submitted that the issue of domestication does not form part of the issues upon which the trial court determined the case and it does not form part of the ratio decidendi, in which case any pronouncement on it is academic Vide BELGORE VS AHMED (2013) 8 NWLR (PT 1355) 60 AT 97, ADAMAWA VS YAKUBU (2013) 6 NWLR (PT 1351) 481 at 497.

Alternatively it was submitted that, even if the learned trial judge had raised the issue suo motu, ti constitutes one of the exceptions to the general rule that courts are not allowed to raise any issue sou motu without hearing the parties on it and this is by virtue of Section 123 of the Evidence Act 2011 which provides for facts and situation that can be taken judicial notice of as held in WEMA BANK PLS VS L.I.T. NIGERIA LTD (2011) 6 NWLR (PT 1244) 479 at 506.

It was then urged on this court to dismiss the appeal.

Now, the single issue in contention here is whether the Respondents can rely on the provisions of the Freedom of Information Act 2011 to demand for the release of some documents to them by the Appellant (Edo State Agency for the Control of Aids).

For the Appellants, it is erroneous for the Respondents to rely on the Freedom of Information Act 2011, which is a Federal Law to demand for records belonging to a State Agency when there is no such law in operation in Edo State.

For the Respondents however, the Freedom of Information Act is meant to apply throughout the Federation based on the doctrine of covering the field and once the National Assembly enacts any such Act, it is necessary for any state to have its own law on the same subject, even if such matter is in the concurrent legislative list.

To properly address this issue it will be expedient to embark on forage of the constitution of the Federal Republic of Nigeria 1999 (as amended)

Section 2 (1) and (2) provides:-

> **2(1) Nigeria is one indivisible and indissoluble sovereign State to be known as the Federal Republic of Nigeria**
> **2(2) Nigeria shall be a Federation consisting of states and a Federal Capital Territory.**

From the above provision, Nigeria operates a federal system of government. Federalism is defined as the mixed or

compound mode of government, combining a general government i.e. (central or 'Federal government') with regional governments i.e. (states, provincial, cantonal or other sub-units of governments) in a single political system. It can thus be defined as a form of government in which there is a division of powers between two levels of government. In modern terms, it is a system based upon democratic rules and institutions in which the power to govern is shared between the central and state provincial governments in accordance with the terms and conditions proscribed by the subsisting constitution. (see Wikipedia).

In Nigeria as in a number of other countries, the constitution provides for a tree tiered system of government. That is to say, the Federal, the State and Local governments. Hence Section 3(b) of the 1999 constitution provides for Local Government as follows:

> **3 (b) "There shall be seven hundred and sixty eight local government areas in Nigeria as shown in the Second Column of Part 1 of the First Schedule to this Constitution and six area councils as shown in Part 11 of that schedule."**

The legislative powers of the Federal Government as well as the State government are as prescribed in Section 4 of the constitution and for the purpose of this issue in contention, the said section is herein below set out:-

"4.-(1) The legislative powers of the Federal Republic of Nigeria shall vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representatives.

(2) The National Assembly shall have power to make law for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Executive Legislative List set out in Part 1 of the Second Schedule of the Constitution.

(3) The power of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List shall, save as otherwise provided in the Constitution, be to the exclusion of the Houses of Assembly of States.

(4) In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say:-

  (a) Any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and
  (b) Any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.

(5) If any law enacted by the House of Assembly of a state is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall to the extent of the inconsistency be void.

(6) The Legislative powers of a State of the Federation shall be vested in the House of Assembly of the State.

(7) The House of Assembly of a State shall have power to make laws for the peace, order and good government of the state or any part thereof with respect to the following matters, that is to say:-

  (a) Any matter not included in the Executive Legislative List set out in Part 1 of the Second Schedule to this Constitution;
  (b) Any matter included in the Concurrent Legislative List set out in the first column of Part 11 of the second schedule to this Constitution to the extent prescribed in the second column opposite thereto; and
  (c) Any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.

(8) Save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law, an accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.

(9) Notwithstanding the foregoing provisions of this section, the National Assembly or a House of

Assembly shall not, in relation to any criminal offence whatsoever, have power to make any law which shall have retrospective effect."

From the above set out provisions, it is clear that the National Assembly is conferred with the power to make laws for the peace, order and good government of the Federation or any part thereof with respect to matters included in the Exclusive Legislative List set out in part 1 of the Second Schedule to the constitution and the exercise of power thereto shall be to the exclusion of the State Houses of Assembly. In addition, the National Assembly is also conferred with powers to make laws with regards to any matter in the concurrent legislative list as set out in the first column of Part 1 of the Second Schedule to the constitution and only to the extent prescribed therein.

On the other hand, the House of Assembly of a State is equally conferred with power to make laws for the peace, order and good government of the state or any part thereof with respect to matters not included in the Legislative List set out in Part 1 of the Second Schedule of the constitution, and any matter included in the concurrent Legislative List set out in the First column of Part II of the Second Schedule to the constitution to the extent as prescribed therein and to any other matter with respect to which it is empowered to make laws in accordance with the provisions of the constitution.

One point that clearly emerged from the provisions of Section 4 of the constitution is that the powers to make laws by each tier of government has been defined and listed in the schedules to the constitution or as per any other provision. Except however for the fact that under Section 4 (5), where the law made by the House of Assembly is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail and that other law shall to The extent of the inconsistency be void. See also the case of A.G. OF THE FEDERATION VS A.G. LAGOS STATE (2013) 16 NWLR (PT 1380) 249; A.G. ABIA STATE VS. A.G. OF THE FEDERATION (2002) 6 NWLR (PT 763); OSUN STATE INDEPENDENT ELECTORAL COMMISSION & ANOR. VS ACTION CONGRESS & ORS. (2010) 19 NWLR (PT 1226) 273.

In the instant case the issue of inconsistency does not arise given the fact that presently the Edo State government is yet to enact the Freedom of Information Law.

The Respondents' stance is that under the circumstance, the Freedom of Information Act 2011 enacted by the National Assembly shall apply to Edo State with particular reference to the appellant and there will be no need for the Edo State House of Assembly to legislate on the same subject matter again by virtue of the doctrine of covering the field.

To my mind, this will amount to taking the doctrine to the extreme and undermining the fundamental principle of Federalism which is very vital to our nascent and budding democratic process. It will in fact undermine the provisions of the 1999 constitution. In other words, to follow the Respondents' line of argument and perception of the doctrine of covering the field will amount to opening the door to a unitary system of government inherent in a military or autocratic regime. Thank goodness the 1999 constitution which is the grundnorm and reference point for a genuine road map for the operation of the principle of federalism as agreed and subscribed to by the people of this country, vide the preamble and Section 2(1) thereof have agreed to the existence of a central government and component Units known as states and while the central government through the National Assembly shall have power to make laws for the overall well being of the country, the component units called states are also not left out but equally empowered to make laws for the peace, order and good government of the state with respect to matters listed in the concurrent legislative list set out in the first column of Part II of the second schedule to the constitution or any other matter for which it is empowered to make laws in accordance with the constitution.

In this regard, my own view is that the state is not a stooge to the federal government but derives its own power and strength to exist and manage its own affairs just like the Federal government does from the constitution. It is only where there is a clash of interest in legislation that the law made by the State Assembly shall give way to that made by the National Assembly as per section 4(5) of the constitution and the authorities earlier cited.

All said and done, a perusal of the Freedom of Information Act will not, in my humble view, project the intention that it is meant to cover the field. In other words it is nowhere indicated or prescribed in the whole gamut of the Act that it shall apply both to the central and state governments.

A number of examples shall bring to the fore, this reality. For instance Section 29 (1) (a-h) requires the concerned publication institutions to submit a report to the Attorney General of the Federation on or before 1st February or each year. Subsection (4) mandates the same Attorney General of the Federation to notify the chairman and some ranking members of relevant committees in the Senate and House of Representatives of the existence of such reports and make it available in soft and hard copies to them not later than April of each year. Subsection 6 also confers on the said Attorney General oversight responsibility in order to ensure that all institutions to which the Act applies comply with the provisions of the Act.

Incidentally the said Act did not make any reference to the Attorneys General of States or the States Houses of Assembly in terms of oversight responsibility over state institutions or submission of annual report. The question then is, can the Attorney General of the Federation exercise oversight function over state institutions or require them to submit annual reports to the exclusion of the state Attorney General? Secondly can the Attorney General of the Federation give directives to the Appellant (Edo State Agency for the Control of Aids) when the constitutions has clearly crated the office of the Attorney General of a state?

The answer is a definite "NO". Conversely, the Attorney General of a state cannot be expected under the Freedom of Information Act to submit annual report of the activities of State institutions concerned to the National Assembly to the exclusion of the State House of Assembly.

Furthermore, Section 29 (a) provides that:-

> **"For the purposes of this section, the term "government" includes any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the government (including the Executive office of the President), or any other arm of government agency or public institution;……."**

The above set out provision made express reference to the (Exclusive office of the President) for the purpose of the application of the Act but no mention was made of the (executive office of the Governor).

Section 31 which is the interpretation section defines "minister" means the minister charged with Responsibility for information. No mention was made of the commissioner responsible for information in the state.

This no doubt presupposes that the Freedom of Information Act, though a noble and worthwhile piece of legislation, does not have automatic application to the states as submitted by learned counsel for the Respondents. It therefore behoves any state interested in adopting the provisions of the Act in its territory to set the necessary machinery in motion for the enactment of a similar law by the House of Assembly of the state. A few examples of Acts of the National Assembly which have been left to the discretion of any state that so desires to enact similar law includes the Child Rights Act, Administration of Criminal Justice Act, Administration of Justice Commission Act.

Coming to public records and archives, Items 4 and 5 in Part 2 of the 2nd Schedule to the 1999 Constitution which is the concurrent Legislative List under which the Federal and State governments have concurrent powers to make laws provides thus:-

> **4. "The National Assembly may make laws for the Federation or any part thereof with respect to the archives and public records of the Federation.**
> **5. A House of Assembly may, subject to paragraph 4 hereof, make laws for that state or any part thereof with respect to archives and public records of the Government of the States,"**

The above set out provisions make the issue quite clear to the effect that while the National Assembly is conferred with the power to make laws with respect to public records and archives of the federation, the House of Assembly of the States are also conferred with powers to make laws with respect to archives and public records of the government of the state. Subject however to paragraph 4, which to my mind means that in the course of making any law relating to any archive or public record of any state, the House of Assembly of the state must be mindful not to go beyond its jurisdiction into that of the Federal government.

What is germane here is the reality brought to the fore to the effect that both the Federal and State legislature have concurrent powers to legislate or archives and public records within the limits prescribed by the constitution.

I therefore agree with the submission of the learned counsel for the Appellant that the law made by the National Assembly in respect of archives and public records is only applicable to the public records and archives of the federation whilst any law made by the House of Assembly of a state will apply only to public records and archives in that state.

I am also in the comfort zone with book "Federalism" by Professor Ben Nwabueze SAN also referred to by the learned counsel for the Appellant. Therein the learned author and renowned constitutional law expert posited at page 61 of the book with regard to Items 4 and 5 of Part II of the 2nd Schedule as follows:-

> **"The Federal government has exclusive power over the archives and public records of the**

Federation while those of a state come under the exclusive authority of the State government."

Learned counsel for the Respondents had also strongly contended that by the words "Subject to" as used in Item 5 it follows that the Act of the National Assembly will prevail even in the present situation. I will state clearly here that there is no dispute in that regard because it further emphasizes the provision of Section 4(5) of the constitution which provides that in the event of any inconsistency between a law made by the National Assembly and that made by a state that of the National Assembly shall prevail.

In the instant case, the point is whether the state should refrain from making its own law pursuant to Item 5 because there is already in existence the Freedom of Information Act. My strong view on it is that given the provisions of the said Act as presently enacted vis-a-vis section 4 of the 1999 constitution and Items 4 and 5 of Part II, 2nd schedule thereof, the Appellant is not bound to comply with the provisions of the Freedom of Information Act 2011 by acceding to the request by the Respondents, until the Edo State government enacts a similar law pursuant to the power conferred on it by Section 4 (7)(b) of the 1999 Constitution.

I am not unaware of the heavy reliance on the doctrine of covering the field by the learned counsel for the Respondents. However he seemed to have misconstrued the said doctrine by insisting that once the National Assembly has made a law on a particular subject, the State House of Assembly cannot make any law on the said subject but must be bound by the said law made by the National Assembly. I believe that an examination of some authorities on the issue will throw more light on this subject of discourse. In OSUN STATE INDEPENDENT ELECTORAL COMMISSION & ANOR. VS ACTION CONGRESS & ORS. (2010) LPELR 2818 (SC) OR (2010) 19 NWLR (PT 1226) 273. The Supreme Court per Tabal JSC provided a clear picture on the doctrine as follows:-

> **"By the Doctrine of Covering the field where the National Assembly has enacted a law on a particular subject, a State House of Assembly cannot enact a law on the same subject which is in conflict or inconsistent with the provisions of the enactment of the National Assembly. And where there is such an inconsistency between the provisions of any law enacted by the National Assembly and that enacted by the House of Assembly of a state, the law enacted by the House of Assembly of a state shall, to the extent of the inconsistency be null and void. This is in tune with the provisions of Section 4 (5) of the 1999 constitution which prescribes:**

4(5) "If any law enacted by the House of Assembly of a state is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other law shall to the extent of the inconsistency be void."
This articles the doctrine of covering of the field referred to and relied upon by Uwais (CJN) in A. G. ABIA STATE VS. A.G. FEDERATION (2002) 6 NWLR (PT 763) 264 at 391".

See also A.G. FEDERATION VS A.G. LAGOS STATE (SUPRA) (also relied on by the Appellant); A.G. OGUN STATE VS A.G. FEDERATION (1982) NSCC PAGE 1; INEC VS MUSA (2003) 3 NWLR (PT 806) 72; OLALEYE-OTE VS BABALOLA (2012) 6 NWLR (PT 1297) 574; THE MILITARY GOVERNOR OF ONDO STATE VS ADEWUNMI (1988) LPELR (3188) SC.

Flowing from the above cited authorities, my humble stance is that under the concurrent legislative list, both the National Assembly and the House of Assembly of a state have concurrent powers to legislate on matter listed within their respective purview but by virtue of Section 4(5) of the 1999 constitution, where there is inconsistency between such similar enactments, that of the National Assembly shall prevail to the extent of the inconsistency in the enactment by the State House of Assembly.

In the instant case, the Edo State House of Assembly is yet to make any law pertaining to or similar to the Freedom of Information Act 2011 in which case the issue of inconsistency does not rise and until such law is enacted in Edo State the Appellant is not obliged to comply with the Respondents request to supply them with records and other details as listed in the Originating Summons.

This issue is therefore resolved in favour of the Appellant.
On issue 2 which deals with whether the learned trial Judge was right to have adjudicated on the issue of "domestication" when it was not raised by any of the parties. The contention of learned counsel for the Appellant is that the learned trial Judge wrongly analysed the processes filed in the suit and also wrongly evaluated the arguments of counsel for the parties and consequently arrived at a wrong conclusion by referring to the issue of "domestication" not contested by the parties.

The Respondents' position is that the issue of domestication does not form part of the principles upon which the lower court determined the case before it and it does not form part of the ratio decidendi in the judgment.

The learned trial judge had in the judgment at page 109 of the Record of Appeal held that:-

> **"The issue of the Act not been (sic) "Domesticated" as argued by the learned solicitor General, that is not being adopted for the application in the State House of Assembly is a strange phenomenon. It is only used in international Laws, treaties, conventions etc and not for the national laws. As I found earlier, the ultimate coverage of the Act, is a constitutional coverage which binds both Federal and State governments. The Land Use Act 1978 for example did not need any "domestication" before all the states applied it and still apply it throughout the Federation"…….".**

I have carefully perused the written addresses filed by the parties in support and against the Originating Summon as well as the proceedings of the lower court where the said addresses were adopted and the matter adjourned for judgment on the 25/3/2014. I observe that the issue of domestication was nowhere raised or argued by the Appellant's counsel therein. It follows that the finding of the learned trial judge on the issue as detailed in page 109 of the record is not borne out of the affidavit evidence or submission of counsel for the parties. It was therefore evidently raised suo motu but erroneously ascribed to the learned Solicitor General.

It is settled law that though a court is at liberty to raise an issue suo motu, it can only validly rely on it in determining the matter after hearing the parties in the case on the issue so raised. Failure by a court to observe such requirement constitutes a breach of the rule of fair hearing and any decision reached thereof is a nullity and consequently liable to be set aside by an appellate court. See OKOYE VS C.O.P & ORS (2015) LPELR (24675) SC; UGO VS OBIEKWE (1989) 1 NWLR (PT 99) 566; OJE VS BABALOLA (1991) NWLR (PT 185) 267; SHASI VS SMITH & ORS (2009) LPELR (3039) SC OLATUNJI VS ADISA (1995) 2 NWLR (PT 376) 167.

In the circumstances, my answer to the issue 2 as raised by the Appellant is in the Negative and it is accordingly resolved in favour of the Appellant.

On the whole this appeal is found to be meritorious and it is accordingly allowed. The judgment of the High Court of Edo State delivered on the 29th day of April 2014 is hereby set aside.

Parties to bear their costs.

CROSS APPEAL

The Cross Appellant's Notice of Cross Appeal was filed on 4/7/2017 but deemed properly filed on 31/1/2018. The cross-appellants brief of argument was filed on 4/7/2017 but deemed properly filed and served on 31/1/2018 while the Appellant/cross-respondent brief of argument was filed on 30/1/18 and also deemed properly filed and served on 31/1/18.

The said briefs of argument were adopted and relied on by the parties at the hearing of the Appeal on 31/1/18.

Three issues for determination were formulated in the cross-appellant's brief and they are herein below set out:-

(1) Whether the trial court was right in its decision refusing to compensate cross-appellants for breach of right of expression. (Ground 1).
(2) Whether the cross-respondent has the responsibility to protect the cross-appellants from damaging acts and hear the cost, when it fails. (Ground 3.)
(3) Whether the trial court was right in refusing to pronounce sentence of conviction after a finding of guilt. (Ground 2).

The cross-respondent on the other hand formulated a sole issue for determination as follows:-

> **"Whether the claim for damages and cost of action was made out by the Respondent/cross-appellants at the trial court so as to be entitled to the award of damages as claimed".**

I will adopt the three issues raised in the cross-appellant's brief for the resolution of this cross-appeal.

ISSUE 1

Herein learned counsel for the Cross-appellant posited inter alia that freedom of expression and opinion include two closely related features, firstly the right to read, to listen, to see and to otherwise receive communications and secondly, the right to obtain information as a basis for transmitting ideas or facts to others and they are both encapsulated in Section 39 of the 1999 constitution which deals with the right to freedom of expression. He added that the cross-appellants copiously supplied un-contradicted facts in their affidavits to explain the damages incurred and this was further contained in their written arguments to the effect that failure to release the information on time will cripple the activities and usefulness of the Cross-appellants. It was therefore contended that the lower court never considered those facts and arguments made by the Cross-appellants in reaching the decision that the argument on compensation was not clearly made out and which decision led to miscarriage of justice.

It was further submitted that by not disclosing the information requested for by the Cross-appellants, the Cross-Respondent breached their fundamental rights and this entitles them to compensation in the sum of N500,000.00 as per the provisions of Section 7 (5) of the Freedom of Information Act, 2011. He added that the primary object of the award of the sum of N500,000.00 is to compensate the Cross-Appellants for the harm done to them and it constitutes a balanced estimate of the ignorance suffered by the Cross-Appellants as a result of the Cross Respondents' unlawful conduct. He cited the case of ELIOCHIM VS MBADIWE (1986) 1 NWLR (PT 14) 47.

It was further submitted that though the lower court held that the argument on cost of action and damages was not clearly made out yet it went ahead to award the sum of N100,000.00 as cost of action. This he argues was a far cry from the amount claimed by the Cross-Appellants and such wrong exercise of discretion amounts to a miscarriage of justice given that the suit was a class action on the exercise of discretion he referred to the following cases:- INTERNATINAL OFFSHORE CORPORATION VS SLN LTD (2003) 16 NWLR (PT 845) 157; OGENE VS OGENE (2008) 2 NWLR (PT 1070) 29 AND ASUU VS OGUNSANWO (2014) 17 NWLR (PT 1437) 475.

On issue 2 it was submitted that one of the reliefs sought by the Cross-Appellants in the lower court in the "cost of instituting and prosecuting the action as assessed by the Cross-Appellant in the sum of N10 million but the lower court awarded only the sum of N100,000.00 regardless of filing fees and out of pocket expenses as held in REMANE VS OKOTIE-EBOH (1960) NSCC VOL. 135 AT 159.

On the principle guiding the award of costs as well as the power of an appellate court to review the cost awarded by a trial court he referred to the following cases:- M.H. LTD VS OKEFIEMA (2011) 6 NWLR (PT 1244) 514 AT 538; NBCI LTD VS ALFIJIR (1999) 14 NWLR (PT 638) 176; NNPC VS KLIFCO (2010) 10 NWLR (PT 1255) 209; INTERNATIONAL OFFSHORE CORPORATION VS SLN LTD (Supra) UYOI VS EGWARE (1974) ALL NLR 293 AND OGOR VS KOLAWOLE 1985 6 NCLR 664 AT 666-667.

It was then submitted that where an infringement of human rights has occurred, the better way to bring such infringement to an end is to award a heavy cost which in this case will protect the Cross-Appellants from the damaging acts of the Cross-Appellants.

On issue 3, it was submitted that once there is a breach of the provisions of the Freedom of Information Act 2011, a conviction must ensue in monetary terms and one of the objectives of sentencing under the said Act is for Restitution by way of compensating the victim of the offence in the sum of N500,000.00. He added that by the provision of Section7 (5) of the Act, once an infraction of the right of information is established, the order of conviction to a fine of N500,000.00 flows automatically and by section 419 of the Administration of Criminal Justice Act 2015, a sentence of imprisonment takes from that day it was pronounced by the court. Also, that by Section 424 of the Administration of Criminal Judge Act 2015, the court has power to impose a term of 6 months imprisonment in default of payment of penalty against the Cross-Respondent for failure to obey the court order.

Finally, it was urged on this court to invoke Section 15 of the Court of Appeal Act 2010 and make an order for cost of action to the tune of N10 million and convict the Cross-Respondent with a fine of N500,000.00.

Replying as per their sole issue for determination, learned counsel for the Cross-Respondent, first submitted that the Freedom of Information Act is not applicable in Edo State in which case there is no legal wrong done to be Cross-Appellants. Furthermore, that looking through the affidavit evidence of the Cross-Appellants, there are no facts disclosed which justifies the award of damages as they relate to matters of public interest. Reference was further made to paragraphs 8,9,16 and 17 of the Cross-Appellants affidavit to submit that none of the depositors relate to, or justifies the award of damages.

Also relying on the case of ADEKUNLE VS ROCKVIEW HOTELS LTD (2004) 1 NWLR (PT 853) 161 it was submitted that general damages are not awarded as a matter of course but on sound and solid legal principles and not on speculations or sentiments as the court is not a father Christmas. He added that in this regard, there is no evidence of probative value disclosed in the entire affidavit in support of the Originating Summons to warrant the grant of the sum of N500,000.00 as claimed by the Cross-Appellants. Vide SAIDU H. AHMED & ORS VS CBN (2012) LPELR 9341 (SC).

It was further submitted that even the Freedom of Information Act (even if applicable to Edo State) does not contemplate award damages for a denial of giving information to which the Respondent/Cross-Appellants is entitled even though he sought to make the claim under the guise of breach of fundamental right of Freedom of expression which has nothing to do with Freedom of Information Act. This court was then urged to dismiss the cross-appeal.

I will consider the three issues together as they are interlinked.

On the issue of damages, the Supreme Court in ANAMBRA STATE ENVIRONMENTAL SANITATION AUTHORITY VS EKWENEM (2009) 13 NWLR (PT 1158) 410 held that:-

> **"The purpose of an award of damages is to compensate the plaintiff for damage injury or loss suffered. The guiding principle is Restitution in Intergrum, where the court is called upon to assess that a party which has been clarified by the act which is in issue must be put in the position in which he would have been if he had not suffered the damage for which is in issue must be put in the position he is being compensated.**
>
> **See also, YOUNG VS CHEVRON (NIG) LTD (2013) LPELR 22126 (CA). The case of SAIDU H. AHMED VS CENTRAL BACK OF NIGERIA (SUPRA) relied on by the Cross-Respondent is also quite apposite on the issue of damages. See also AGBANELO VS UNION BANK OF NIGERIA LTD (2000) 7 NWLR (PT 666) 534 where the Apex court held inter alia that "damages are pecuniary compensation obtainable by success in an action for a wrong which is either or tort or a breach of contract, the compensation being in the form of lump sum awarded at the tune, unconditionally and generally."**

Once a plaintiff has successfully shown and proved that he suffered personal injury resulting from the breach of duty of care owed him or her by the defendant, the claim for pain and suffering must be considered by the court as no principle can be laid down upon which damages for such pain and suffering can be awarded in terms of the quantum. See IGBHRERINIOVO VS SCC (NIG) LTD & ORS (2013) 10 NWLR (PT 1361) 138.

The learned trial judge held at page 110 of the Record that:-

> **"The claim for N500,000.00 as general and exemplary damages is not made out and all the arguments in that regard are misconceived. So also, that claim for costs of instituting and prosecution of the action. However, I award costs of N100,000.00 against the Respondent in favour of the Applicants."**

I have carefully gone through the Cross-Appellants affidavit in support of the Originating summons as well as written address and I cannot but agree with the stance of the learned trial Judge that the arguments in support of the claim for damages are misconceived. The authorities are clear on the point that award of damages is an exercise of discretion by the trial court and award must flow from a positive evidence of harm or injury to the claimant. An appellate court is such a situation will not unduly interfere with an award of damages by a trial court unless it is shown that such exercise of discretion is perverse, or that the trial court acted under the wrong principle of law or a misapprehension of facts or where the amount awarded is ridiculously low or ridiculously high that it must have been an erroneous estimate of the damages. See ZIK'S PRESS LTD VS IKOKU (1951) 13 WALA 188, BOLA VS BANKOLE (1980) 3 NWLR (PT 27) 141.

The award of damages is at the discretion of the trial court and it is premised on the pleadings of the parties and the evidence adduced in support and the court being guided by the applicable principles. See UNITY BANK PLS VS ADAMU & ORS (2013) LPELR 22047 (CA); A.G. OYO STATE VS FAIR LAKE HOTELS LTD (102) (1989) NWLR (PT 121) 255.

In this instant case, there is no evidence available to show convincingly, the injury suffered by the Cross-Appellants as a result of the refusal of the Cross-Respondent to grant their request to provide them with some documents in their

possession.
What is more, Section 25 (1) (c) of the Federation of information Act provides that a court can only make an order compelling an institution to disclose the information where it finds that the interest of the public in having the record being made available is greater and more vital than the interest being served if the request is denied.

Section 19 (2) of the said Act also provides that an application for information shall not be denied where the public interest in disclosing it outweighs whatever injury that disclosure will cause. The point being made here is that by the provisions of the Freedom of Information Act, any injury arising from refusal to disclose information can only be ascribed to public interest and not to an individual as the Cross-Appellants are trying to contend. Infact, they have not in my view disclosed any injury suffered or likely to be suffered personally as against the pubic interest that will entitle them to award of damages. See also Section 14 (3) of the Act.

On this issue of the claim for N500,000.00 damages as presented by the Cross-Appellants, I find this head of claim and the argument in support as puerile, naïve and absurd. This is given the clear provisions of Section 7 (5) to the effect that:-

> **7 (5) "Where a case of wrongful denial of access is established, the defaulting officer or institution commits an offence and is liable on conviction to a fine of N500,000.00".**

It is opposite that in our criminal jurisprudence, for a person to be found guilty of an offence, he must go through the process and procedure of a trial and which guilt must be proved by the prosecution beyond reasonable doubt. See Section 135 (1) of the Evidence Act 2011. See also BUHARI VS OBASANJO (2005) 13 NWLR (PT 941) 1 AT 209 AND DIKKO YUSUF VS OBASANJO (2005) 18 NWLR (PT 956) 96; IKPEAZU VS OTTI & ORS (2016) LPELR 40055 (SC).

The Cross-Respondent did not go through any such criminal trial and conviction to warrant the said fine of N500,000.00 which interestingly, the Cross-Appellants also insisted should be paid to them as damages or compensation. Little wonder the learned trial Judge held that the claim was misconceived and I entirely agree with that finding.

On the issue of cost, it is settled law that cost normally follows events unless there are circumstances warranting to the contrary. The award of costs involves judicial discretion which must be exercised based on certain principles. Also such discretion must not be affected by questions of benevolence or sympathy. See HACO LTD VS BROWN (1973) ALL NLR 354 UBN PLC VS NWAOKOLO (1995) 6 NWLR (PT 400) 127 AND M.H. LTD VS OKEFIENA (2011) 6 NWLR (PT 1244) 514 wherein this could held that the essence of costs is to compensate the successful party for part of the loss incurred in the litigation. Cost cannot cure all the financial loss sustained in litigation. It is also not meant to be a bonus for the successful party.

In the instant case, the Cross-Appellant had claimed for a cost of N10 Million naira but there is no evidence to support such claim. The High Court (Civil Procedure) Rules grants the trial court the power to award cost as may be determined to be proper and appropriate. The learned trial judge in this regard awarded the cost of N100,000.00 against the Cross-Respondent. This is my view constitutes a proper exercise of the court's discretion in that regard and will not be interfered with by this court.

Consequently the three issues are resolved against the Cross-Appellants. Accordingly, this Cross-Appeal is found to be grossly lacking in merit and amounts to unbridled quest for undeserved monetary shower. It is therefore dismissed.

I award a cost of N100,000.00 against the Cross-Appellants in favour of the Cross Respondents.

SAMUEL CHUKWUDUMEBI OSEJI
JUSTICE, COURT OF APPEAL.

APPEARANCES

OLUWOLE IYAMU (Solicitor General) Edo State Ministry of Justice with MRS. R. O. OAIHIMIRE; E. A. AYENI (MISS) and M. O. ERUAGA-IDAHOSA (MRS) for Appellant.

PRESIDENT AIGBOKAN with LOVETH OSAGIEDE (MISS) for the Respondents.

APPEAL NO. CA/B/469/2014
PHILOMENA MBUA EKP (JCA)

I have had the opportunity of reading before now the draft judgment just delivered by learned brother S.C. Oseji, JCA. I agree entirely with the reasoning and conclusions reached therein in resolving the issues formulated in this appeal.

I too find that there is indeed no evidence to support the claim of N10,000,000 (Ten Million Naira) put forward by the Cross-Appellant. I am in total agreement with the cost of N100,000 awarded by the trial Judge against the Cross Appellant as it is his discretion to do so.

In sum, the Cross Appeal is found to be unmeritorious and it is therefore dismissed.
I abide by the award of cost of N100,000.00 against the Cross Appellant as stated in the lead judgment.

PHILOMENA MBUA EKPE
JUSTICE, COURT OF APPEAL

CA/B/469/2014

{MOORE ASEIMO ABRAHAM ADUMEIN, JCA}

DISSENTING JUDGMENT

I had the advantage of reading the draft of the judgment just delivered by my learned brother, Samuel Chukwudumebi Oseji, JCA. Although my learned brother has painstakingly and thoroughly attended to the issues in this appeal, upon a careful consideration of the reasoning in the leading judgment, however, I find myself at cross-current with the opinion or view that the *"doctrine of covering the field"* does not apply to this case.

In this case, save for their claim for monetary damages and costs, the respondents are seeking certain pieces of information from the appellant under the Freedom of Information Act, 2011 and Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). Learned Counsel for the appellant opined that:

I. the Freedom of Information Act, 2011 "is a legislation made by the National Assembly on the records of the Federation",
II. "the National Assembly cannot be make legislation on the public records of a State Government by virtue of items 4 and 5 of the Concurrent Legislative List of the Constitution of the Federal Republic of Nigeria 1999", and
III. "the Freedom of Information Act is inapplicable to Edo State"

(See pages 5-6 of the appellant's brief).

The learned counsel referred to the opinion of Prof. B. O. Nwabueze (SAN) in his book "Federation in Nigeria and the Presidential Constitution", page 61 where the renowned learned author stated, *inter alia*, as follows:

> **"Perhaps the most remarkable feature of the concurrent legislative list is that there is no co-existence of powers at all in respect of four of the five remaining matters included therein allocation of revenue (Item A), antiquities and monuments (Item B), archives (Item C) and collection of taxes (Item D). The delimitation of the schedule restricts the federal and state governments to specific aspects of the matters, thus making those aspects exclusive to the one or the other. The result is that while these matters are dealt with under the concurrent legislative list their inclusion in no way implies that the power of the federal and state governments to act over any aspect of them co-exist together".**
> …….....
>
> **"The federal government has exclusive power over the archives and public records of the federation <u>while those of a state come under the exclusive authority of the state government."</u>**

Learned counsel for the appellant then contended that:

"The implication of the foregoing is that the power granted under paragraph C relating to archives and public records is exclusive to both the federal and state government in their respective domains of jurisdiction. This is underscored by the use of the expression"…public records of the Government of the State" in items 4 and 5 respectively."

It was submitted that section 29 of the Freedom of Information Act, 2011 "reveals the intention of its makers to wit: that it was meant to apply to the record of the Federation and not of the States", since the Attorney-General of the Federation has been held in Attorney-General, Ondo State v. Attorney-General of the Federation (2002) 9 NWLR (Pt.772) 419 to be "an agency of the Federal Government".

On the other side, learned counsel for the respondents submitted, *inter alia* as follows:

"Your Lordships, State House of Assembly have consistently waited for the National Assembly to legislate on a subject and thereafter prop up to say that the law is not applicable to them. Where the State House of Assembly refuses to pass a law on access to public records, and there exists a federal legislation on same which promotes good governance and public interest, the court must without choice implement the law. *See Attorney General of Ondo State v Attorney General of the Federation* (2002) 9 NWLR (Pt. 772) 222 @ 407 Paragraph A-C. Generally, states are not precluded from making any laws with respect to public records but any such laws will be superseded by the Act if there is inconsistency capable of diminishing the rights in the Act. See Section 4 (5) of the Constitution of 1999. Submit further that to do otherwise will truncate constitutional legislative responsibilities.

Where the National Assembly has the power to regulate a particular subject and does same in a given form to over exhaustively the federating states, state legislatures lack the power to compliment the legislation of the National Assembly or to prescribe additional regulations even if it will not alter the intention of the Act. Per Agube JCA in RECTO, KWARA POLYTECHNIC v. ADEFILA (2007) 15 NWLR (Pt. 1056) CA 42 P. 98 paras D-C observed thus:

> **Where both the Federal and state legislatures are empowered in a federal set up to legislate on the same subject and it appears that the federal law covers the field and this provide what the law on the subject would be for the entire federation, the state law on the subject (if any) is invalid. In this case, education is on the concurrent legislative list thus once the federal government has formulated a National Policy on technical education, the state policy must give way by way of covering the field.**

In this case, the Freedom of Information Act 2011 intends to completely and exhaustively cover the field and not merely supplementary to a state law or cumulate upon state law. The State Assembly now as a public policy and principle of constitutionalism, lacks *locus standi* to pass FOI Law under the guise of 'domestication'. We urge your Lordships to so hold.

We submit sir that it is a barren act of political arrogance for the state legislature to restrict the scope of the Freedom of Information Act 201 in a vacuum. A judicial review of non-existing state legislation over existing federal legislation is a stick in the cleft in parliamentary sovereignty. Nothing derogates the power of the National Assembly to legislate on public records or archives of state in the interest of good governance and development. By the provision of paragraph 5 of the part 2 of the 2nd Schedule to the 1999 Constitution, states are covered to the ground, even if their concerns are consistent with that of the National Assembly. The supremacy of parliament primarily means that any law enacted by the National Assembly over a subject matter on concurrent list that covers exhaustively the implementation of the Act in federal, states and local government bars the passing of a state law and overrides any existing law made by the state. We urge my Lordships to so hold."

Items 4 and 5 of the Part II of the Second Schedule to the Constitution of the Federal Republic of Nigeria, 1999 (as amended) proved thus:

"4. The National Assembly may make laws for the Federation or any part thereof with respect to the archives and public records of the Federation.

5. A House of Assembly may, subject to paragraph 4 hereof, make laws for that State or any part thereof with respect to archives and public records of the Government of the State."

The above constitutional provisions are clear, straightforward and unambiguous. The golden rule of interpretation of statues is that the plain words used in a statue attract, and should be given, their natural or ordinary grammatical meaning, unless such literal interpretation will lead to an absurdity. See African Newspapers Ltd. v. Federal Republic of Nigeria (1985) 2 NWLR (Pt. 6) 137; International Bank for West Africa Ltd. v. Imano (Nig.) Ltd (1998) 3 NWLR (Pt. 85) 633 and Victor Manyo Ndoma-Egba v. Nnameke Chikwukeluo Chukwuogor & 3 Ors. (2004) 6 NWLR (Pt. 869) 382 at 409, per Uwaifo, JSC. In the case of Josiah Ayodele Adetayo & 2 Ors. V. Kunle Ademola & 2 Ors. (2010) 15 NWLR (Pt. 1215) 169 at 205, the Supreme Court, per Adekeye, JSC, stated as follows:

"In the interpretation of a statute, where the word, of a ……legislation or constitution are clear, plain and unambiguous, there is no need to give them any other meaning than their ordinary, natural and grammatical construction would permit unless that would lead to absurdity."

In this case, by giving the words in item 4 of Part II of the Second Schedule to the Constitution of the Federal Republic of Nigeria, 1999 (as amended) their plain meaning, the National Assembly can make laws for "the Federation or any part thereof" in respect of the archives and public records of the "the Federation". The only word that needs an explanation or interpretation is: "Federation", as used in the said provision. Under section 381(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) "Federation" means "the Federal Republic of Nigeria", which by virtue of section 2(2) of the same Constitution consists of the States and the Federal Capital Territory. Since the said item 4 states that the National Assembly can legislate on the archives and public records of the Federation, and not archives and public records of "the Federal Government" *simpliciter*, the archives and public records referred to in the provision cover or include those of a State in Nigeria. This is in clear contrast to the provisions of item 5 which restricts the archives and public records which a House of Assembly can legislate on to those "of the Government of the State". The law is that courts should abide by the meaning ascribed to phrases or words by the same Act, enactment law of statute which has employed or used such phrases or words. Put differently, where a statute has defined phrases, terms or words used therein, the court should adhere to the definition or meaning given in the statute in its onerous task of constructing or interpreting the provisions of that statute. See Wilson v. Attorney General of Bendel State (1985) 1 NWLR (Pt. 4) 572 and ACME Builder Ltd. v. Kaduna State Water Board (1999) 2 SCNJ 25 at 53; (1999) 2 NWLR (Pt. 590) 288 at 313, per Onu, JSC, where the eminent jurist stated that:

> **"Be it noted, however, that it is settled law that where words or expressions have been legally or judicially defined, their ordinary meaning will surely give way to their legally or judicially defined meaning."**

To my mind, both the National Assembly and a State House of Assembly have concurrent powers to legislate on archives and public records, although a State House of Assembly can only legislate in respect of the archives and public records of the affected State. Since the National Assembly has already enacted the National Archives Act, Cap. N6, Laws of the Federation of Nigeria, 2004 with far-reaching provisions, including a comprehensive definition of the word "records" as used in the said Act, I will confine my view to "public records" of the Federation". The phrase "public records" has not been defined in the Constitution but it is defined in section 31 of the Freedom of Information Act as follows:

> **"*Public record or document*" means a record in any form having been prepared, or having been or being used, received, possessed or under the control of any public or private bodies relating to matters of public interest and includes any**
>
> **(a) Writing on any material;**
> **(b) Information recorded or stored or other devices; and any material subsequently derived from information so recorded or stored;**
> **(c) Libel, marking, or other writing that identifies or describes anything of which it forms part, or to which it is attached by any means;**
> **(d) Book, card, form, map, plan, graph, or drawing;**
> **(e) Photograph, film, negative, microfilm, tape, or other device in which one or more visual images are embodied so us to be capable (with or without the aid of some other equipment) of being reproduced."**

Therefore, public records under the Freedom of Information Act, 2011 include those under the possession and control of any public bodies relating to matters of public interest. The public records in this possession of the appellant, relating to matters of public interest, are covered by the Freedom of Information Act, 2011.

Contrary to the submission of the learned counsel for the appellant, since both the National Assembly and a State House of Assembly can legislate on archives and public records, I am of the view that the *"doctrine of covering the field"* is applicable to the provisions of items 4 and 5 Part II of the Second Schedule to the Constitution of the Federal Republic of Nigeria 1999 (as amended). The Supreme Court in Independent National Electoral Commission & Anor. v. Alhaji Abdulkadir Balarade Musa & 4 Ors. (2003) 3 NWLR (Pt. 806) 72 at 204, per Niki Tobi, JSC, stated that the "*doctrine of covering the field"* would apply where both the National Assembly and the State House of Assembly can legislate on matters under the Concurrent Legislative List. The learned jurist further stated that:

> **"The doctrine of covering the field can arise in two distinct situations. First, where in the purported exercise of legislative powers of the National Assembly or a State House of Assembly a law in enacted which the Constitution has already made provisions covering the subject matter of the Federal Act or the State Law. Second, where a State House of Assembly by the purported exercise of its legislative powers enacted a law which an Act of the National Assembly has already made provisions covering the subject matter of the State Law".**

The learned counsel for the appellant relied on the opinion of Professor B. O. Nwabueze (SAN) at page 61 of this book: "Federalism in Nigeria under the Presidential Constitution" where the eminent learned Senior Advocate of Nigeria concluded that by virtue of the provisions of paragraph 4 and 5 of the Concurrent Legislative List an Act of the National Assembly on public records is not binding on a State in Nigeria. My quick answer to this argument is to refer to the view of the Supreme Court in the case of the Attorney-General of the Federation v. The Attorney-General of Lagos State (2013) 16 NWLR (Pt. 1380) 249 at 327-328, per I. T. Muhammad, JSC, where the apex court stated on the doctrine of covering the field as follows:

> **"It is a doctrine relevant in federalism and postulates that where a Federal Constitution or a federal enactment has already covered a particular legislative field, no State or even local government law can be enacted to cover the same field already covered by the Constitution or the Federal enactment. The doctrine, thus, postulates the mutual non-interference such that in a country operated by rule of law hinged on a Federal Constitution, such as ours, there should be that unsigned agreement among the Federating States on one hand and the Federal (Central) government on the other hand, for non-interference, especially by legislative action, in their affairs of the other with a view to achieving a very strong and effective working of the Federal superstructure."**

Still on the doctrine of covering the field, the highly respected legal researcher and author, S.T. Hon (SAN) in his treaties: "S.T. HON'S CONSTITUTIONAL AND MIGRATION LAW IN NIGERIA" at pages 152 153 referred to some of the earliest decisions on the doctrine and how it has been applied in several jurisdiction by stating authoritatively and incisively as follows:

> **"One of the earliest decisions where the doctrine of covering the field was propounded was the U.S. case of *Houston vs. Moore, 5 Wheat 1 (1820),* in this case, the U.S. Supreme Court held that where Congress had legislated on a matter in the concurrent legislative list in a manner that clearly showed an intention to cover the whole field, a State legislature could not again lawfully enact a Law to cover the same field, though such Law be not directly in conflict with the federal enactment. This decision was adopted in the later case of *Priggs vs. Pennsylvania, 16 Pet. (1842) at 617-618,* per Story, J; where it was observed as follows:**
>
> > ***If congress have a constitutional power to regulated a particular subject, and they do actually regulate it in a given and in a certain form, it cannot be that the State Legislature have a right to interfere, and as it were, by way of complement to the legislation by Congress to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of the Congress, in what it does prescribe, manifestly indicates that it does not intent that there shall be any further legislation to act upon the subject matter.***
>
> **In Australia, one of the earliest decisions on the subject matter is the reported case of *Ex Parte McLean, (1930) 43 CLR 472 at 483,* where Dixon, J., after analyzing what the doctrine of covering the field is all about, observed that the "inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an**

intention, it is inconsistent with it for the law of a State to govern the same conduct or matter."

In Nigeria, one of the earliest cases on the applicability of this doctrine is that of *Lakanmi vs. Attorney General, Western State (1970) 6 NSSC and O 'Sullivan vs. Noarlunga Meat Ltd. (1957), AC 1 at 24,* the Supreme Court voided Edict No. 5 of 1967, promulgated by the then Western State Military Government, because it covered the same field as Decree No. 51, which was promulgated by the Federal Military Government. Both laws purported to cover investigation of assets of public officers."

Writing specifically on the Freedom of Information Act, 2011 the learned author (S.T. Non (SAN), stated at page 576 of his book that it was only passed into law by the "Nigerian National Assembly" after "dilly-dallying for a long time". Mr. Hon (SAN) then states at pages 578 and 579 as follows:

"There are…..notable provisions of this Act, which have clearly established the intention of the Legislature to legislative on transparent exposure or disclosure of public information, where there exist no exemptions or denials……..
……

It will be seen clearly from the provisions of the FOI Act that it is a piece of legislation which is not only necessary in a democratic society, it also seeks to establish good governance and to compliment the provisions of section 39(1) of the Constitution, especially the phrase *"freedom to….receive and impart ideas and information without interference."*

I am very persuaded by the views and reasoning of the learned Senior Advocate of Nigeria reproduced above. It is obvious from the provisions of the Freedom of Information Act, 2011 that the legislation, amongst other things, is intended to make information from public records, subject to the exceptions itemized in section 39(3) of the Constitution and in the Act itself, easily accessible in public. By allowing easy access to information in public records of agencies, departments, ministries and organs of Government, the Freedom of Information Act is also patently aimed at achieving one of the fundamental objectives and directive principles of State policy, as enshrined in section 15(5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), namely to expose and "abolish all corrupt practices and abuse of power". Section 13 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) imposes a d duty on all arms or organs of government and all authorities and persons "to conform to, observe and apply" the provisions of Chapter II of the Constitution, of which section 15 (5) is an integral part. Thus in the case of Attorney-General of Ondo State v. Attorney General of the Federation & Ors. (2002) 9 NWLR (Pt. 772) 222 at 408 409 , per Uwaifoi, JSC, the Supreme Court explained the justification for including and placing promotion and enforcement of the fundamental objectives and directives principles of State policy enshrined in the Constitution under the Exclusive Legislative List and that "by and large that they can in letter be turned into enactments within competence of the National Assembly as far as practicable when the need should arise".

Whilst considering the provisions of section 13 of the constitution with particular reference to section 15(5) of the Constitution, in Attorney-General of Ondo State v. Attorney-General of the Federation (supra) at 307 per Uwais, CJN, the Supreme Court stated as follows:

"It has been argued also that the word "State" in section 15 sub-section (5) means the Federal Government alone, because if the whole of the provisions of Chapter II of the Constitution of Fundamental Objectives and Directive Principles f State Policy are read together, it will be seen that only the Federal Government is in a position to carry out the principles and objectives. With respect, I do not accept this argument, because the provisions of section 13 thereof apply to "all organs of government, and all authorities and persons exercising legislative, executive or judicial powers". The provisions do not distinguish between Federal, State or Local Governments."

On menace of corruption in Nigeria and the real need to tackle it, the learned Chief Justice of Nigeria stated at page 306 of the said case that:

"Corruption is not a disease which afflicts public officers alone but society as a whole. If it is therefore to be eradicated effectively, the solution to it must be pervasive to cover every segment of the society."

Commenting on the importance and solemnity of the duty imposed by section 13 of the Constitution of the Federal Republic of Nigeria (as amended) with particular reference to the Judiciary, this Court, per Saulawa, JCA in Dr. Paul O. Ukpo & 3 Ors. v. Mr. Liyel Imoke & Ors. (2009) 1 NWLR (Pt. 1121) 90 at 176 177 stated that by decisively playing our roles, in order to salvage the nation, we "earn for ourselves the gratitude of the people and as Priests in the temple of

justice, the eternal blessing of the Almighty God".
I only wish to add that just like in the case of Attorney-General of Ondo State v. Attorney-General of the Federation (supra), where some sections of the Corrupt Practices and Other Related Offences Act, 2000 were invalidated, for being unconstitutional, by the Supreme Court, the appellant's remedy, if any, is to seek through the Attorney-General of Edo State the nullification of any alleged unconstitutional provisions or sections of the Freedom of Information Act, 2011 and not argue that members of the public cannot seek information in respect of the public records of the Government of Edo State employing the instrumentality of the Freedom of Information Act.

This is because the Freedom of Information Act, 2011 is a statute of paramount application and utility throughout Nigeria, the said Act having been enacted by the National Assembly pursuant to its powers under items 60 (a) and 67 of the Executive Legislative List and item (4) of the Concurrent Legislative List set in the Second Schedule to the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

By the doctrine of covering the field, where a particular legislative field, falling within the concurrent legislative list, has already been covered by either the Constitution or an Act of the National Assembly, a State Law on the same legislative field is nothing but a mere "surplusage", it is to be kept in abeyance and "will not be operative". See Attorney General of Abia State v. Attorney General of the Federation (2002) 3 SCNJ 158 at 391, per Uwais, CJN and Independent National Electoral Commission & Anor. v. Alhaji Abdulkadir Balarebe Musa & 4 Ors. (supra) per Niki Tobi, JSC.

Thus, where any law made or passed by a State House of Assembly is inconsistence with the Constitution or an Act of the National Assembly, to the extent of its inconsistency, such State Law is to be declared null and void, pursuant to the provisions of section 4(5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). See Attorney General of Abia State v. Attorney Geneal of the Federation (supra) at 208, per Uwais, CJN and Attorney General, Lagos State v. Eko Hotels Limited & Anor. (Appeal No. SC.321/2007 delivered on 08/12/2017) per Kekere-Ekun, JSC.

Section 1(1) of the Freedom of Information Act, grants right to any person "to access our request information….in the custody or possession of any public official, agency or institution howsoever described". The appellant falls within the meaning of "agency" under this provision and cannot hide, and should not be permitted to hide, under the defence that since the Edo State House of Assembly as not passed a Freedom of Information Law in respect of public records of the Government of the State it has no obligation to make available the information sought by the respondents.

To me, therefore, any insistence on a State Law before a person can be given an access to information contained in the public records of the government of a State, for lack of appropriate word or phrase, is an anathema, in view of the clear provisions of sections 15(5) and 39(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and section 1(1) of the Freedom of Information Act, 2011.

In this case, the respondents' claims relate to access to information in the public records of an agency of Edo State. The claims do not relate to the submission of any reports by the agency to any authority or person. The Freedom of Information Act, 2011 has already covered the field in respect of access by "any member of the public" to the public records of the appellant, subject, however, to the exception set out in the said Act.

The reasoning of the trial court in its judgment was very well-researched and grounded and there is no bass to disturb it or set it aside. The learned trial Judge rightly invoked and relied on doctrine of covering the field in granting the respondents' claim.

It is for these reasons that I do not find any merit in this appeal, which is hereby dismissed.

I affirm the decision of the trial court delivered on 29/4/2014 in Suit No. B/17M/2014 by E. F. Ikponmwen, J. (as he then was). Consequently, for the reasons given by my learned brother, the cross appeal is also dismissed by me.

I make no order for costs, as the parties are to bear their respective costs.

MOORE ASEIMO ABRAHAM ADUMEIN
JUSTICE, COURT OF APPEAL

IN THE FEDERAL HIGH COURT
HOLDEN AT LAGOS, NIGERIA
ON MONDAY THE 28TH DAY OF MAY, 2018
BEFORE THE HONOURABLE JUSTICE
M .B. IDRIS
JUDGE

SUIT NO: FHC/L/CS/1821/17

BETWEEN:-

THE REGISTERED TRUSTEES OF THE SOCIO-ECONOMIC RIGHTS AND ACCOUNTABILITY PROJECT] APPLICANT

AND

1. PRESIDENT OF THE FEDERAL REPUBLIC OF NIGERIA]
2. ATTORNEY GENERAL AND MINISTER OF JUSTICE OF THE FEDERATION] RESPONDENTS

JUDGMENT

This is an application dated 19th January, 2018 filed pursuant to Order 34 Rules 1 (A); Rule 3 (1) and (5)1) of the Federal High Court (Civil Procedure) Rules,2009 and under the inherent jurisdiction of the Court. The relief sought and the facts relied upon are as follows:-

"MOTION ON NOTICE BROUGHT PURSUANT

1. **ORDER 34 RULES 1(1) (A); RULE 3 (1) AND 5 (1) OF THE FEDERAL HIGH COURT RULES, 2009**
2. **INHERENT JURISDICTION OF THIS HONOURABLE COURT.**

TAKE ORDER that this Honourable Court will be moved on the …… day of …… 2018 at the Hour of 9'O Clock in the forenoon or soon thereafter as Counsel may be heard on behalf of the Applicant praying this Honourable Court for the following:-

1. AN ORDER of Mandamus directing and or compelling the 1st Respondent to do the following:-

   i. Urgently instruct security and anti-corruption agencis to forward to him reports of their investigations into allegations of padding and stealing of some N481 billion from the 2016 budget by some principal officers of the National Assembly, and to direct the Attorney General of the Federation and Minister of Justice Abubakar Malami, SAN and/or appropriate anti-corruption agencies to without delay commence prosecution of indicated officers.
   ii. Direct the publication of the report of investigations by security and anti-corruption bodies into the alleged adding of the 2016 budget;
   iii. Urgently halt alleged ongoing attempt by some principal officers of the National Assembly to steal N40 billion of the N100 billion allocated by his government as 'zonal intervention' in the 2017 budget;
   iv. Closely monitor and scrutinize the spending of t$131 billion (accrued from increased oil bench mark) allocated for additional non-constituency projects expenditure, to remove the possibility of corruption.

2. AN ORDER of Mandamus directing and or compelling the2nd respondent to do the following:-

   i. Prosecute indicted principal officers of the National Assembly who are alleged to have stolen and padded the 2016 budget

3. AND for such order or other orders as this Honourable Court may deem fit to make in the circumstance.

AND TAKE NOTICE that on the hearing of this application, the Applicant will use the affidavit and the exhibits

therein referred to"

AFFIDAVIT IN SUPPORT OF MOTION ON NOTICE

I, Ahmed Oshodi, Male, Nigerian, Muslim and Litigation Clerk of Socio-Economic Rights and Accountability Project (SERAP) of No. 2b, Oyetola Street, off Ajanaku Street, Salvation Bus- stop, Opebi Street, Ikeja, Lagos, do hereby make oath and state as follows:-

1. That I am a Litigation Clerk of the Socio-Economic Rights and Accountability Project (SERAP),the Applicant in this suit.
2. That I have the consent and authority of the Applicant herein to depose to this affidavit.
3. That by virtue of my position and the fact stated in paragraph 1 hereof, I am conversant with the facts of this case and with the facts deposed herein.
4. That the Applicant is a human rights non-governmental organization established in Nigeria and which seeks to promote transparency and accountability in Nigeria through human rights.
5 That I was informed by Joke V. Fekumo, Counsel to the Applicant, while reviewing the case at 9:30am in our office on the 16th of January, 2018, and I verily believe her as follows:

   a. That in the pursuit of its mandate, the Applicant, by a letter dated 15th September, 2017, requested the 1st Respondent to do the following;

      i. Urgently instruct security and anti-corruption agencies to forward to him reports of their investigations into allegations of padding and stealing of some N481 billion from the2016 budget by some principal officers of the National Assembly, and to direct the Attorney General of the Federation and Minister of Justice; Abubakar Malami, SAN, and/or appropriate anti- corruption agencies to without delay commence prosecution of indicted officers;
      ii. Direct the publication of the report of investigations by security and anti-corruption bodies into the alleged padding of the 2016 budget;
      iii. Urgently halt alleged ongoing attempt by some principal officers of the National Assembly to steal N40 million of the N100 billion allocation by his government as 'zonal intervention' in the 2016 budget;
      iv. Closely monitor and scrutinize the spending of N131 billion (accrued from Increased oil bench mark) allocated for additional non-constituency Projects expenditure, to remove the Possibility of corruption.

   b. But since the receipt of the letter, and up till the filing of this suit, the 1st Respondent has so far failed to grant the demands of the Applicant. Shown to me and marked Exhibits A, B and C are copies of the letter sent to the 1st Respondent and the evidence of receipt of the letter by the1st Respondent.

   c. That this matter is to compel the 1st Respondent, the President of the Federal Republic of Nigeria, to do the following;
      i. Instruct security and anti-corruption agencies to forward to him reports of their investigations into allegations of padding and stealing of some N481 billion from the 2016 budget by some principal officers of the National Assembly, and to direct the Attorney General of the Federation and Minister of Justice Abubakar Malami, SAN, and/or appropriate anti- corruption agencies to without further delay commence prosecution of indicted officers;
      ii. Direct the publication of the report of investigations by security and anti-corruption bodies into the alleged padding of the 2016 budget;
      iii. Closely monitor and scrutinize the spending of N131billion (accrued from increased oil bench mark) allocated for additional non-constituency projects expenditure, to remove the possibility of corruption.
   d. That furthermore, this matter is to compel the 2nd Respondent to do the following:
      i. Prosecute indicted principal officers of the National Assembly who are alleged to have stolen and padded the 2016 budget.
6. That I was informed by Joke V. Fekumo, Counsel to the Applicant, while reviewing the case at10:00am in our office on the16th of January, 2018, and I verily believe her as follows:

a. The Applicant filed a Motion Exparte dated 29th November, 2017,seeking from this Honourable Court an Order granting leave to the Plaintiff/Applicant to apply for judicial review and to seek an order of mandamus directing and/or compelling the 1st Respondent to do the following:
   i. Urgently instruct security and anti-corruption agencies to forward to him reports of their *investigations* into *allegations* of podding and stealing of some W481 billion from the 2016 budget by some principal officers of the National Assembly, and to direct the Attorney General of the Federation and Minister of Justice Abubaka Malami, SAN, and/or appropriate anti-corruption agencies to without delay commence prosecution of indicted officers:-
   ii. Direct the publication of the report of investigations by security and anti-corruption bodies into the alleged padding of the 2016 budget;
   iii. Urgently halt alleged ongoing attempt by some principal officers of the National Assembly to steal N40 billion of the N100 billion allocated by his government as 'zonal intervention' in the 2017 budget;
   iv. Closely monitor and *scrutinize* the spending of *N131 billion* (accrued from increased oil increased *oil* bench mark) allocated for additional non constituency projects *expenditure*, to remove the possibility of corruption.

b. Under the same Motion Exparte, the Plaintiff/ Applicant also sought for an Order granting leave to the Plaintiff/Applicant to apply for judicial review and to seek an order of mandamus directing and/or compelling the 2nd Respondent to do the following:
   i. Prosecute indicted principal officers of the National Assembly who are alleged to have stolen and padded the 2016 budget.

c. That on the 12th of January, 2018, the Plaintiff/Applicant's Motion Exparte was moved, and this Honourable Court granted leave to the Plaintiff/Applicant to institute this action.

7. That this matter is presently generating a lot of public concern and discourse and is presently in the front burner of national discourse thus germane to Nigerians and that the demands made by the Applicant on the 1st and 2nd Respondents are not onerous but simply bother on issues of National interest, public concern, social justice, good governance, transparency and accountability.

8 That it is in the interest of justice to grant this application as the Respondents have nothing to lose if the application is granted.

9. That I make this declaration in good faith, believing its content to be true to the best of my ability and in accordance with the Oaths Act"

A statement had been filed pursuant to the Rules of this Court and a written address. The Respondents were served, but they did not appear to defend the suit neither did they file any process in opposition.

At the hearing of the application learned Counsel for the applicant relied on the process filed and adopted the written address filed in support of the application.

In the written address it was argued that by Section 130 (2) of the 1999 Constitution the 1st Respondent as Head of the State, the Chief Executive of the Federation Commander in Chief of the Armed Forces of the Federation and public officer could be compelled to gran[the request sought by the Applicant in its letter dated 1 P. September, 2017 in the interest of justice and for the purpose of accountability and transparency.
The Court was urged to grant the application. These cases were relied on:

1. FAWEHINMI VS. IGP (2001) WRN 90
2. OHAKIM VS. AGBASO (2010 6-7 SE 96
3. MOHAMMED VS. STATE (2015) 2 SC (PT. 1) 165
4. FRN VS ADEWUNMI (2007) 4 SC (PT. 111) 42
5. SHELL VS. NWAWAKA (2001) FWLR (PT. 48) 1383
6. DAPIALONG VS. DARIYE (2007) 27 WRN 1
7. UGWU VS. ARARUME (2007) 31 WRN 1
8. GOV. EBONYI STATE VS. ISUAMA (2003) FWLR (PT.169)1210.

I have read the process filed. Should this application be granted in the light of the facts and the law?

I should start by stating that the Respondents were served with the Originating Processes but they opted not to defend

the suit. It is of course trite law that when in situation such as this facts are provable by affidavit and one of the parties deposes by certain facts, his adversary has a duty to swear to an affidavit to the contrary if he disputes the facts. Where, as in the instant case such a party fails to swear to an affidavit to controvert such facts these facts may be regarded as established. I do in the circumstances regard the facts in support of this application as true, correct and established. See AJOMALE VS. YADUAT (No.2)(1991) 5 SCNJ 178; OSITA VS. ISESA (1990) 2 NWLR (PT. 135) 688; EGBUNA VS. EGBUNA (1989) 2 NWLR (PT.106) 773; ALAGBE VS. ABIMBOLA (1978) 2 SC 39; TATA VS. A.G. BAUCHI STATE (1993) 9 NWLR (PT.317) 358; EJIDIKE VS. AKUNYILI (1990) 5 NWLR(PT. 152) 562; AJOMALE VS. YADUAT (NO.1) (1991) 5 NWLR (PT. 191) 257; EKEKEUGBO VS. FIBERESIMA (1994) 3 NWLR (PT. 335) 707.

From the processes filed these facts appear to be clear and in disputed:-

1. The Applicant is the Socio-Economic Rights and Accountability Project (SERAP), a human rights non-governmental organization whose mandate include to promote and seek respect for socio-economic rights of Nigerians, and to promote transparency and accountability in the public and private sectors through human rights.

2. The 1st Respondent is the President, Chief Executive Officer, Commander in Chief of the Armed Forces of the Federal Republic of Nigeria and a public officer and the 2nd Respondent is the Attorney-General of the Federation, Minister of Justice and the Chief Law Officer of the Federal Republic of Nigeria charged with the responsibility of instituting and initiating criminal :proceedings against any person before any Court of law in Nigeria in respect of any offence created by or under any Act of the National Assembly.

3. The Applicant in the pursuit of their mandate by a letter date 11th September, 2017, requested the 1st Respondent to do the following:-

    i. Urgently instruct security and anti-corruption agencies to forward to him reports of their investigations into allegations of padding and stealing of some W481 billion from the 2016 budget by some principal officers of the National Assembly, and to direct the Attorney General of the Federation and Minister of Justice Abubakar Malami, SAN, and/or appropriate anti-corruption agencies to without delay commence prosecution of indicted officers;
    ii. Direct the publication of the report of investigations by security and anti-corruption bodies into the alleged padding of the 2016 budget;
    iii. Urgently halt alleged ongoing attempt by some principal officers of the National Assembly to steal 440 billion of the W100 billion allocated by his government as zonal intervention' in the 2017 budget;
    iv. Closely monitor and scrutinize the spending of N131 billion (accrued from increased oil bench mark) allocated for additional non-constituency projects expenditure, to remove the possibility of corruption.

4. The 1st Respondent has since the receipt of the Applicant's letter and up to the filing of this suit so far failed, refused or neglected to comply with the demands of the Applicant.

5. The 2nd Respondent has refused to prosecute indicted principal officers of the National Assembly who are alleged to have stolen and padded the 2016 budget.

6. This court on the 12th day of January, 2018 granted leave to the Applicant to institute this action.

The Applicant herein is no doubt a human rights non government organization. With the promotion of the principles, of public interest litigation, the applicant herein has the right to move the Court where the rights of any person, the class of community are infringed or likely to be infringed. the applicant has the right in my view to initiate a Court of law for the enforcement of public interest or general interest in which the public or class of community has pecuniary interest or some interest by which their legal or liabilities are affected. public interest litigation is therefore a right given to the socially conscious member or a public spirited non-governmental organization to enforce a public cause by seeking judicial redress of public injury. Public interest litigation is also the device by which public participation in judicial review of administration action is assured. See FAWEHINMI VS AKILU NWLR (PT. 86) 189; FAWEHINMI VS. PRESIDENT (2008) WRN 65; NWANKWO VS. MADU (2009) 1 NWLR (PT. 1123) 671.

In most common law jurisdiction, including India, the Courts have stated that any member of the public having sufficient interest may maintain an action or petition by way of public interest litigation provided (I) There is a personal injury or injury to a disadvantaged section of the population for whom access to the legal justice system is difficult (ii) the person bringing the action has sufficient interest to maintain an action of personal injury (iii) The injury must have arisen because of breach of public duty or violation of the Constitution or of the law (iv) it must seek enforcement of such public duty and observance of the Constitutional law or legal provisions. See PUDR VS. UNION OF INDIA AIR (1982) SC, 1473; JUDGES TRANSFER CASE AIR (1982) SC 149; MEHIA VS. UNION OF INDIA (1588) 1 SCCC 471; KATARA VS. UNION OF INDIA AIR (1989) SC. COUNCIL FOR ENVIRONMENTAL LEGAL ACTION VS. UNICN OF INDIA (1996) 5 SCC 281; STATE VS. UNION OF INDIA AIR (1996) CAL 181.

The Applicant seeks leave for an order of mandamus which can be granted to compel the 1st Respondent to oblige the applicant's request for the purpose of transparency and accountability. the applicant has sufficient legal interest in monitoring the way and manner public funds are being utilized in Nigeria, and has demanded the performance of the public duty from the 1st Respondent who is obliged to act accordingly.

Again in FAWEHINMI VS. INSPECTOR GENERAL OF POLICE& ORS (2001) 1 WRN 90 AT92-93, where Nwaifor, J.S.C. stated as follows:-

> **"an Applicant for the grant of the order must show that he has sufficient legal interest to protect and that he has demanded the performance of the public duty from those obliged to do so and was refused:"**

Further, in the case of OHAKIM & ANOR VS. AGBASO & 4 ORS, (2010) 6-7 S.C. PG. 96, PARA 8-11, where it was held inter alia as follows:-

> **... mandamus, is simply an order issued by a Court of Law, usually the High Court to compel the performance of a public duty in which the person applying for the Mandamus has sufficient legal interest ..."**

The Applicant in this suit has sufficient legal interest as to the way and manner public funds are being utilized in Nigeria, and the Applicant has made demands bordering on transparency and accountability from the 1st Respondent who has refused its request, hence this action.

The Applicant herein no doubt has a right, cognisable by law. See generally A.G. LAGOS STATE VS. A.G. FED(2004) 18 NWLR (PT. 904) 1; NWOSU VS. NWOSU (2012) 8 NWLR(PT. 1301)1; FAWEHINMI VS. PRESIDENT FRN (2007) 14 NWLR (PT. 1054) 275.
Under Section 5(1)(a) of the 1999 Constitution, executive powers of the state are vested in the 1st Respondent and these powers are to be exercised in person or through the Vice President and Ministers of the Government or officers in the public service of the Federation. The powers shall extend to the execution and maintenance of the Constitution, all laws made by the National Assembly has for the time being, power to make laws,

By section 130(2) of the constitution, is the Head of the State and Chief Executive of the Federation. In the Executive and maintenance of the Constitution, the 1st Respondent is permitted to undertake duties expressly allowed by the Constitution or an enabling law made by National Assembly and to execute or enforce laws with the sanction or blessing of a Court of law. See generally A.G FED. VS ABUBAKAR (2007) ALL FWLR (PT.375) 405: A.G. LAGOS STATE VS FED (2005) ALL FWLR (PT. 244)805

The 1st Respondent is only expected to use his executive powers for the entire good of the people of the Federal Republic of Nigeria.

By Section 16 of the Constitution, the Nigeria State shall harnnes the resources of the nation and promote natural prosperity and an efficient, a dynamic and self-reliant economy. It shall also control the national economy in such a manner as to ensure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and responsibility amongst others. These ideals are entrenched in Article 22 (1) and (2) of the African Charter on Human and Peoples Rights, which has been ratified and domesticated by Nigeria, and to which Nigeria is bound by section 12 (1) of the Constitution. See also ABACHA VS. FAWEHINMI (2000) 4 SCNJ 400; NNAJI VS NFA (2011) ALL FWLR (PT. 559) 195. Nigeria are guaranteed the right to their economics social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. The state therefore has the duty to ensure the exercise of this right.

It is the duty and responsibility of the Respondents to conform to observe and apply the provision of Article 22 of the African Charter on Human and Peopled Rights and Section 16 of the Constitution. See OGAN VS. NLNG LTD (2010) ALL FWLR (PT. 535) 239; A.G ONDO STATE VS. A.G. FED (2002) 9 NWLR (PT. 772) 222; UKPO VS. IMOKE (2009) 1 NWLR (PT. 1121) 90. Nigerians are guaranteed the right to their economic social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. The state therefore has the duty to ensure the exercise of this right.

It is in this light that I find the allegations, the subject matter of this action worrying, and if proved, criminal and therefore deserving of prosecution by the relevant agency of government. In the case of DAPIANLONG VS7b-ARIYE (2007) 27 WRL 1 @ 42, ADEREMI JSC (as he then was) held on the need to see that public office holders do not run away from justice as follows:-

> **"The allegation leveled against the 1st Respondent as contained in the record are despicable to the highest degree. If proved in accordance with the laws of our land, by the cardinal principle of the morality, justice and democratic government that an offender guilty of crime should be sentenced by the Court to such penalty as his crime merits, the 1st Respondent must not be allowed to runway from justice…"**

The 2nd Respondent as the Chief Law Officer of the Federation is empowered to institute and undertake criminal proceedings against any person before any Court of law in Nigeria. For the avoidance of any doubt whatsoever, Section 150 (1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) state that the Attorney-General "shall be the Chief Law Officer of the Federation."

In stating the public prosecution power of the Attorney-General Section 174 (1) provides thus:-

> **"The Attorney-General of the Federation shall have power.**
>
> **(a) To institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a Court-martial, in respect of any offence created by or under any Act of the National Assembly."**

There is no gainsaying the fact that the 2nd Respondent is saddled with the Constitutional responsibility of instituting and initiating criminal proceedings against any person in Nigeria in respect to any offence created by or under any Act of the National Assembly.

The Corrupt Practices and Other Related Offences Act 2000 which is an act of the National Assembly (particularly sections 8, 9 and 44) makes it an offence for any person to corruptly enrich himself or in possession of unexplained or illicit wealth and also allows criminal penalties and forfeiture if in the course of an investigation there are reasonable grounds to believe that a corruption offence has been committed, that is, the stealing and paddling of the 2016 budget.

In fact, section 26(2) of the Act provides:

> ***"Prosecution for an offence under this Act shall be initiated by the Attorney-General of the Federation. or any person or authority to who he shall delegate his authority, in any superior court of record so designated by the Chief Judge of a State or the Chief Judge of the Federal Capital Territory, Abuja under section 60(3) of this Act; and every prosecution for an offence under this Act or any other law prohibiting bribery, Corruption, fraud or any other related offence shall be deemed to be initiated by the Attorney-General of the Federation:"***

There is no doubt that stealing and budge, padding are offences which fall within the class of corrupt practices envisaged in the Act. To this extent, the 2nd Respondent is under a legal duty to give effect to the earlier cited provisions of the Constitution and the Corrupt Practices and Other Related Offences Act 2000 by instituting and undertaking criminal proceedings against indicted officers of the National Assembly who are alleged to have stolen and padded the 2016 budget.

The power of the Attorney General of the Federation is recognized by the Court and it was held, in the case of MOHAMMED VS. STATE, (2015) 2. S.C. (PT.1) PG. 165-166 as follows:

> **"... That Sections 174 and 211 of the Constitution of the Federal Republicof Nigeria 1999 (as amended) which have almost identical wording set out the powers of the Attorney General of the Federation and that of the State respectively. Sections 174 (1) is reproduced as follows:**

174 (1) The Attorney General of the Federation shall have power

a. To institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court - martial, in respect of any offence created by or under any Act of the National Assembly..."

It appear that the 2nd Respondent has failed to carry out his constitution and statutory in this regard, and he has the powers to do so absolutely, even without interference from Court.

Undoubtedly, the power to initiate legal proceedings against the principal officers of the National Assembly indicted to have stolen and padded the 2016 budget is on the Attorney General. In the case of FEDERAL REPUBLIC OF NIGERIA VS. ADEWUNMI, (2007) 4 S.C. (PT.111) PG 42 it was held inter cilia thus:

" ... There is no doubt at all that the power to institute criminal proceedings against any person in the 1999 Constitution lies on the Attorney General of the State or the Federation as the case may be, but such power may be exercised by the Attorney General himself or through any officers of his department..."

There is no gainsaying the fact that the Respondent owes the Applicant and the Nigerian public a constitutional and statutory duty to institute and undertake criminal proceedings against the principal officers of the National Assembly indicted of stealing and padding of the 2016 budget.

As the Chief law officer of the State, the 2nd Respondent has the power to initiate in any Court of competent jurisdiction any civil proceedings with or without a relator involving the rights and interests of the public, which he deems necessary for the enthronement of the law, the preservation of order and the prevention of public wrongs. See A.G. FED. VS. A.G. IMO STATE (1982) 12 SC 274.

At this juncture, it is important to state teat the 2nd Respondent i.e. the Attorney General has absolute powers from the facts available to him to initiate criminal proceedings against any person who is capable in law of being prosecuted, which powers cannot be questioned by anybody. The 2nd Respondents absolute powers in criminal proceedings include his discretion to choose whom he will prosecute, and again this cannot be questioned by anybody. See OGUNJOBI VS. STATE (2013) ALL FWLR (PT. 670) 1195; AGUND1 VS. COP (2013) ALL FWLR (PT. 660) 1247.

Where the 2nd Respondent takes a decision either to prosecute or take over prosecution, the Courts always stand aloof and indeed resist any attempt to challenge such exercise of powers. Even though the power of the 2nd Respondent to initiate prosecution shall be done with regard to public interest, the interest of justice and the need to prevent abuse of powers, no Court of law has the power to review the exercise of this power, particularly by way of mandamus. See generally GEORGE VS. FRN (2011) 10 NWLR (PT. 1254) 1; BAGUDU VS. FRN (2004) 1 NWLR (PT. 853) 182; A.G. ONDO STATE VS. A.G. FED. (2002) 9 NWLR (PT. 772) 222; ABACHA VS. FRN (2006) 16 NWLR (PT. 1004) 1; A.G. ANAMBRA VS. UBA (2005) 15 NWLR (PT. 947) 44; ATTA VS. COP (2003) 17 NWLR (PT. 849) 250

It is in the light this law that this Court is clearly unable to compel the 2nd Respondent to institute criminal proceedings in the manner sought herein. This is a matter for the discretion of the Attorney General of the Federation.

May I use this medium to remind us all, that as citizens of this great country called Nigeria, we owe it a duty to abide by the Constitution, respect its ideals and its institutions, the National Flag, the National Anthem, the National Pledge and Legitimate authorities. It is our duty as citizens of Nigeria to enhance the power, prestige and good name of Nigeria, defend Nigeria and render such National Service as may be required of us. It is our duty to respect the dignity of other citizens and the rights and legitimate interests of others and to live in Unity and harmony and in the spirit of common brotherhood. It is our duty to make positive and useful contribution to the advancement progress and well being of the Country where we each reside, and to render assistance to appropriate lawful agencies in the maintenance of law and order. We should all remember that our national' ethics as a country, governed by law is discipline, integrity, dignity of labour, social justice, religious tolerance, self-reliance and patriotism.

And for those in governance, they should always remember that sovereignty belongs to the people of Nigeria from whom government derives all its powers and authority, that this state called Nigeria is one that is based on the principles of democracy and social justice, and it has declared that the security and welfare of the people shall be primary purpose of Government, and that the participation by the people in their government shall be ensured in accordance with the provisions of the Constitution. This is a call on us all to strictly conform to, observe and apply these ideals in government and in all our activities. There is no doubt in my mind that the Nigeria judiciary has an active role in realising these objectives in order to salvage our nation and earn for itself, the gratitude of the people, and as priests in

the temple of justice, the eternal blessing of Almighty God (The Supreme Judge)

The Applicant urged the Court in the interest of justice to grant an order of Mandamus directing and or compelling the 10 Respondent to:

i. Urgently instruct security and anti-corruption agencies to forward to him reports of their investigations into allegations of padding and stealing of some W481 billion from the 2016 budget by some principal officers of the National Assembly, and to direct the Attorney General of the Federation and Minister of Justice Abubakar Malami, SAN, and/or appropriate anti-corruption agencies to without delay commence prosecution of indicted officers;
ii. Direct the publication of the report of investigations by security and anti-corruption bodies into the alleged padding of the 2016 budget;
iii. Urgently halt alleged ongoing attempt by some principal officers of the National Assembly to steal N40 billion of the W100 billion allocated by his government as 'zonal intervention' in the 2017 budget;
iv. Closely monitor and scrutinize the spending of N131 billion (accrued from increased oil bench mark) allocated for additional non-constituency projects expenditure, to remove the possibility of corruption.

AN ORDER of Mandamus directing and or compelling the 2nd Respondent to do the following:

(i) Prosecute indicted principal officers of the National Assembly who are alleged to have stolen and padded the 2016 budget

Mandamus is a Latin word meaning "we command." As a prerogative order, which existed initially as a writ, mandamus is issued by a Court to compel the performance of a particular act by a lower Court or a governmental officer or body, usually, to correct a prior action or failure to act. See Blacks Law Dictionary (9th ed.), pp 1046-1047. One important consideration about mandamus is that the Applicant must have interest in the subject matter of the action. Another is that the Respondent must owe a duty, which is public in nature, the performance of which the Applicant is interested.

The nature and purpose of the prerogative order of mandamus has been canvassed in different words. In A.D.H. LTD VS. MINISTER OF THE FEDERAL CAPITAL TERRITORY (2013) 8 NWLR (PT. 1357) 493 SC. Akaahs, JSC submitted:

> "Before going into the arguments of counsel in the appeal, it is necessary at this juncture to find out what mandamus means. Mandamus which is derived from the Latin word rmandare' meaning to enjoin is an extraordinary writ issued by a court of competent jurisdiction to an inferior tribunal, a public official, an administrative agency, a corporation, or any person compelling the performance of an act usually only when there is a duty under the law to perform an act, the plaintiff has a clear right to such performance, and there is no other adequate remedy available. It is also an extraordinary remedy which is issued usually to command the performance of a ministerial act. It cannot be used to substitute the court's judgment for the Defendant', in the performance of a discretionary act,"

Justice Fabiyi, JSC also gave account of the nature and purpose of the order of mandamus in the recent case of AYIDA V. TOWN PLANNING AUTHORITY (2013) 10 NWLR (PT. 1362) 226 SC . In the words of the learned Justice of Supreme Court.

Mandamus has been defined as a writ issuing from a court of competent jurisdiction commanding an inferior tribunal, board or corporation to perform a purely ministerial duty imposed by law. NEBEL V. NEBEL 241 N C 491, 85 S.E. 2D 876, 882. Extraordinary writ which lies to compel performance of a ministerial act or mandatory duty where there is a clear legal right in the plaintiff and a corresponding duty on the Defendant, and a want of any other appropriate and adequate remedy. COHEN V. FORD 19 PA. COMWLTH 417; 339 A-2D 175, 177 (BLACK'S LAW DICTIONARY SIXTH EDITION, PAGE 961).

Parties are at one that the general principle of 'demand and refusal' as a requirement for an order of mandamus was not complied with by the appellants who strenuously maintained that same is not the law in Nigeria. The Respondents argued to the contrary and felt that for such failure on the part of the appellants, the action at the trial court was a non-starter.

An order of mandamus engenders the exercise of discretion by the Court. The requirement of 'demand and refusal' was

endorsed by this court in the case of FAWEHINMI V. AKILU (NO. 1) (1987) 4 NWLR (PT. 67) 797 AT PAGE 834. Though pronounced in an abiter dictum Obaseki, J.S.C., maintained that the Court may refuse to make an order of mandamus unless it has been shown that 'demand and refusal' principle has been complied with, inter dia. Further in Halsbury's Laws of England, 4th Edition, Volume 1, page 134 paragraph 124, the authors maintain that 'demand and refusal' is a general principle which must be complied with to rest an order. That is the position of this Court in FAWEHINMI V. INSPECTOR GENERAL OF POLICE (2002) 7 NWLR (PT. 767) 606 AT 697 - 698 PER KALGO, JSC. See: also CHIEF OHAKIM V. CHIEF AGBASO (2010) 6 -7 SC 85 AT 132; (2010) 19 NWLR (PT. 1226) 172 where Onnoghen, J.S.C. maintained the same stance and explained that prior demand for performance is to offer the public body the needed opportunity to perform the public duty in question or make amends.

I am of the considered opinion that the requirement of demand and refusal precondition is quite legitimate."

For mandamus to lie there must be a duty to act on the part of the Respondent, usually, a public body. The duty must be owed to the public. The duty may arise from statute, common law or prerogative. See R.V. SECRETARY OF STATE FOR WAR (SUPRA), AT P. 335; R. VS. CRIMINAL INJURIES COMPENSATION BOARD, EX PARTE CLOWES (1977) 3 ALL ER 854; (1977) 1 WLR 1353; COUNCIL OF CIVIL SERVICE UNIONS VS. MINISTER FOR THE CIVIL SERVICE (1984) 3 ALL ER 935, AT PP. 949-950; (1985) AC 374 HI, AT P. 409

Often, the decisive criterion for determining a body that is subject to mandamus is the source of power of the body, Lloyd, LJ argued that other factors should be taken into consideration. He said in R. V. PANEL ON TAKE-OVERS AND MERGERS, EX PARTE DATAFIN PLC (1987) 1 ALL ER 564 CA.

> **"On the basis of that speech, and other cases to which he referred us, Counsel for the panel argues (i) that the sole test whether the body of persons is subject to judicial review is the source of its power, and (ii) that there has been no case where that source has been other than legislation, including subordinate legislation, or the prerogative.**

I do not agree that the source of the power is the sole test whether a body is subject to judicial review, nor do I so read Lord Diplock's speech, of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then decry the body in question will be subject to judicial review. If at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review. See R. V. DISPUTES COMMITTEE OF THE NATIONAL JOINT COUNCIL FOR THE CRAFT OF DENTALTECHNICIANS, EX P NEATE (1953) 1 ALL ER 327, (1953) 1 QB 704.

But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may, as Counsel for the Applicants submitted, be sufficient to bring the body within the reach of judicial review. It may be said that to refer to 'public law' in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other."

In R. V. METROPOLITAN POLICE COMMISSION, EX PARTE BLACKBURN (1968) 1 ALL ER 763; (1968) 2 QB 118 CA, part of the questions raised before the English Court of appeal was whether mandamus can lie against the police to compel them to prosecute somebody who was alleged to have committed an offence. It was contended strenuously on behalf of the police that the obligation to prosecute for crime was discretionary, and therefore, mandamus could not lie. The Lord Justices agreed, but cited extreme cases when the Court could intervene.

Salmon, LJ canvassed the following points:

> "The chief function of the police is to enforce the law. The divisional court left open the point whether on order of mandamus could issue against a chief police officer should he refuse to carry out that function. Constitutionally it is clearly impermissible for the Home Secretary to issue any order to the police in respect of law enforcement. In this court it has been argued on behalf of the commissioner that the police are under no legal duty to anyone in regard to law enforcement. If this argument were correct, it would mean that insofar as their most important function is concerned, the police are above the law and therefore immune from any control by the court. I reject that argument. In my judgment the police owe the public a clear legal duty to enforce the law - a duty which I have no doubt they recognize and which generally they perform most conscientiously and efficiently. In the extremely unlikely event, however, of the police failing or refusing to carry out their duty, the court would not be powerless to intervene. For example, if, as is quite unthinkable, the chief police officer in any district were to issue an instruction that as a matter of policy the police would take

no steps to prosecute any house-breaker, I have little doubt but that any householder in that district would be able to obtain an order of mandamus for the instruction to be withdrawn. Of course, the police have a wide discretion whether or not they will prosecute in any particular case. In my judgment, however, the action which I have postulated would be a clear breach of duty. It would be so improper that it could not amount to an exercise of discretion."

Lord Denning, MR was more legalistic than Salmon, LJ. The indomitable Master of the Rolls went down memory lane. The office of Commissioner of Police within the metropolis" he argued,

"dates back to 1829 when SIR ROBERT PEEL introduced his disciplined Force. The commissioner was a justice of the peace specially appointed to administer the Police force in the metropolis. His constitutional status has never been defined either by statute or by the courts. It was considered by the Royal Commission on the Police in their report in 1962 (Cmnd. 1728). I have no hesitation, however, in holding that, like every constable in the land, he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act 1964 the Secretary of State can call on him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone. That appears sufficiently from FISHER V. OLDHAM CORPN. (1930) ALL E.R. REP. 96; [1930] 2 K.B. 364, THE PRIVY COUNCIL CASE OF A.G. FOR NEW SOUTH WALES V. PERPETUAL TRUSTEE CO LTD [1955] 1 ALL E.R. 846; [1955] A.C. 457.

Although the chief officers of Police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police, or the Chief constable as the case may be, to decide In any particular case whether enquires should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions and give effect to them, as, for instance, was often done, when prosecutions were not brought for attempted suicide; but there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £100 in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law.

A question may be raised as to the machinery by which he could be compelled to do his duty. On principle, it seems to me that once a duty exists, there should be a means of enforcing it. This duty can be enforced, I think, either by action at the suit of the Attorney-General: or by the prerogative order of mandamus. I am mindful of the cases cited by counsel for the commissioner which he said limited the scope of mandamus; but I would reply that mandamus is a very wide remedy which has always been available against public officers to see that they do their public duty. It went in the old days against justices of the peace both in their judicial and in their administrative functions. The legal status of the Commissioner of Police is still that he is a justice of the peace, as well as a constable. No doubt the party who applies for mandamus must show that he has sufficient interest to be protected and that there is no other equally convenient remedy; but once this is shown, the remedy of mandamus is available, in case of need, even against the Commissioner of Police of the Metropolis."

See also R. VS. METROPOLITAN POLICE COMMISSIONER EX PARTE BLACKBURN (NO.3) (1973) 1 ALL ER 324 CA.

In the light of all that I have said hereinabove, this application succeeds in part. Relief 1 is granted as prayed, relief 2 is refused.

M. B. IDRIS
JUDGE
28 5/18

J. V. Fekumo Esq for the Applicant

IN THE HIGH COURT OF LAGOS STATE
IN THE IKEJA JUDICIAL DIVISION
GENERAL CIVIL DIVISION
SITTING AT HIGH COURT NO. 23
BEFORE THE HON. JUSTICE B. A. OKE-LAWAL (MRS.)
TODAY WEDNESDAY THE 31ST DAY OF OCTOBER 2018

SUIT NO: 1D/1141/MJR/16

BETWEEN

INCORPORATED TRUSTEES OF MEDIA RIGHTS AGENDA] APPLICANT

AND

LAGOS STATE MINISTRY OF HEALTH]
ATTORNEY GENERAL OF FEDERATION] RESPONDENTS

RULING

This is a Motion on Notice dated 31/3/17 brought pursuant to Order 40 Rule 5 (1) of the Lagos State High Court (Civil Procedure) Rules 2012 and Section 1, 4 and 20 of the Freedom of Information Act and under the inherent jurisdiction of this Honourable court the applicant is seeking the following reliefs:-

(i) A declaration that the failure and/or refusal by the 1st respondent to disclose or make available to the applicant the information requested by the applicant in her letter to the 1st respondent dated November 4, 2016 amounts to a violation to the applicant's rights of access to information established and guaranteed by section 1(1) & 4 of the Freedom of Information Act, 2011.

(ii) A declaration that the failure and/or refusal by the 1st respondent to disclose or make available to the applicant the information requested by the applicant in her letter to the 1st respondent dated November 4, 2016 amounts to wrongful denial of access to information under section 7(5) of the Freedom of Information Act, 2011

(iii) A declaration that the failure and/or refusal by the 1st respondent to give written notice to the applicant that access to all or part of the information requested will not be granted stating reasons for denial and the section of the Act under which the denial is made amounts to a violation of section 4(b) of the Freedom of Information Act, 2011

(iv) An order of Mandamus compelling the 1st respondent to disclose or make the following available to the applicant:

- Details and copies of plans put in place to provide the Araromi Zion Estate located in Akiode area of Ojodu LCDA with health care service
- Details and copies of plans put in place to provide the Araromi Zion Estate located in Akiode area of Ojodu LCDA with health care service taking into consideration their peculiar needs and circumstances;
- Details of any research or assessment carried out on the needs of the said Estate and copies of relevant research or assessments report or reports;
- If there are plans to provide the said Estate with primary health care facilities, please outline the time frame for the implementation of the plans; and
- Details of the budgets and costs estimates for the implementation of the said plans, if any,

(v) and for such other order or other orders as the Honourable court may deem fit to make in the circumstance.

There is an affidavit in support deposed to by Idowu Adewale and he stated that he is an Employee of Media Rights

Agenda, in charge of the coordination of the Araromi Zion Estate Project and the applicant is a non-governmental organization registered under the Companies and Allied Matters Act and the applicant is the convener and a member of the Freedom of Information (FOI) Coalition, multi-stakeholder coalition promoting public access to public held information across Nigeria.

He started that the applicant through a letter dated May 27 2016 requested the 1st respondent for information stated in the said letter, the letter was received and receipt acknowledged by a staff of the 1st respondent on same day but the 1st respondent willfully refused to oblige the applicant with the requested information within the seven (7) days provided by the Freedom of Information Act or give reasons, if any for the willful refusal as prescribed under the Act.

He stated that the letter dated November 4, 2016 the applicant's counsel wrote to the 1st respondent reminding the 1st respondent of the applicant's request to which the 1st respondent failed to respond and the said letter by the applicant's counsel was received and receipt acknowledged by a Staff of the 1st respondent on November 4, 2016.

He stated that the applicant made a fresh request for information dated November 4, 2016 to the 1st respondent demanding the same information contained in her earlier request. The said applicant's request dated November 4, 2016 was received and receipt acknowledged by a staff of the 1st respondent on the same day and the seven (7) days provided by the Freedom of Information Act to respond to an application under the Act passed without the applicant receiving the requested information from the respondent.

He stated that the applicant is entitled as of right to request for or gain access to information which is in the custody or possession of any public official, agency or institution as it is with the 1st respondent an the1st respondent is under a binding legal obligation to provide the applicant with the information requested for, except otherwise provided by the act, within seven (7) days of receipt of the request and the information requested by the applicant from the 1st respondent does not fall under any exception within the Freedom of Information Act, 2011 and the respondent is a public body as recognized under section 2(7) and 31 of the Freedom of Information Act, 2011 and the information requested for by the applicant bothers on issues of public concern, good governance and accountability and the applicant need not demonstrate any specific interest in the information applied for from the 1st respondent and the refusal of the 1st respondent to furnish the information requested amounts to a denial and a violation of the applicant's right of access to information as provided by the Freedom of Information Act, 2011.

The respondents' counter-affidavit is deposed to by Tolulope Savage and she state that she is a State counsel in the office of the Lagos State Attorney General and Commissioner for Justice and the legislation being relied upon by the applicant, the Freedom of Information Act, 2011is applicable in relation only to public records of the Government of the Federation and not of the State and that Nigeria is a Federation and the power to make laws on public records is concurrently shared between the National Assembly and the State House of Assembly in their respective sphere of jurisdiction and the concurrent power granted by the constitution to Federation and the State is exclusive to each tier of Government.

He stated that the public records of Lagos State are generated and kept by various Ministries, Departments, Agencies and personnel of the State Government in the execution of their functions and responsibilities in the service of the State and such State Government Agencies and personnel are statutorily created and regulated by laws of the State House of Assembly and the handing of public records has serious implications which are routinely handled by rules established by State Government and therefore the Freedom of Information being a legislation of the National Assembly on public records is not applicable to the records of the States in the Federation in so far as the States have not enacted same as law vide their respective State House of Assembly and leave must be obtained to institute this action.

There is a further affidavit dated 29/6/17 deposed to by Gbadamosi John and he stated that the Freedom of Information Act being a Legislation of the National Assembly is applicable to public records of both Federal and State Government and the Freedom of Information exists for the interest of common goods and National interest and made to be operational throughout the Federation of Nigeria and the 1st respondent is a public body as recognized under section 2(7) and 31 of the Freedom of Information Act, 2011 and legislating on archives and records of the Federation and government of the State is different from legislating on the Freedom of Information and the Freedom of Information deals with public records and information on public institution as defined by the Freedom of Information Act.

ISSUE: Is the Freedom of Information Act application to Lagos State?

The learned Counsel for the Applicant Mosunmola Olanrewaju (Mrs.) referred to Section 1(1) & (2) of the Freedom of

Information Act, and section 14 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) stating that access to information is sine qua non for an active and intelligent participation of the people in all spheres and affairs of the community in a democratic set-up so that they are capable of forming a broad opinion about the way in which they are being governed, tackled and administered by the Government and its functionaries.

She referred to the case of **NDIC V. VIBELKO NIG. LTD (2006) ALL FWLR (Pt. 336) 386 at 440 (CA). Section 1(3), & S. 20** of the Freedom of Information Act in submitting that an Applicant and indeed any person who may have been wrongly denied access to information has the right to apply to court for review of the wrongful denial of information, and the court should give its literal and naturally intended meaning.

He argued that the Act unequivocally charge the Respondent with the responsibility to make information available when requested, or in the affirmative a written notice stating the reasons if any and the Section of the Act under which the respondent purports to deny the requested information, she referred to Section 4 and 24 of the Freedom of Information Act and argued that it is settled law that where a person or body has a duty of a public nature to perform an order of mandamus can be issued to compel the performance of the duty or exercise of the discretion provided a request to so do precede it, she relied on the case of **ANTHONY V GOVERNOR OF LAGOS STATE (2003) 10 NWLR (Pt. 828) Pg. 288.**

She also submitted that an order of mandamus only issue to a person or corporation requiring him on them to do some particular thing therein specified which pertains to his or their officer, and is in the nature of public duty, she referred to **OHAKIM V. AGBASO (2010) 19 NWLR (pt. 1226) 172 S.C.**

In response, Learned Counsel for the respondent **O. T. Oshikoya Esq** submitted that both the National Assembly and the House of Assembly of a state have the power to make law with respect to any matter to which they are empower to make law in accordance with the provisions of the constitution and referred to **ATTORNEY GENERAL OF ABIA STATE V. ATTORNEY-GENERAL OF THE FEDERATION (2002) 6 NWLR (Pt. 763) @ 386** and **OYAKHIRE V. USMAR (1993) 3 NWLR (Pt. 542(542)** in stating that in the exercise of the functions assigned to both tiers of Government each routinely set up agencies to enable it discharge its functions efficiently and in terms of efficacy of constitutional governance each of the tiers operates independently of the other and one is not regarded as interior to the other.

He submitted that the Attorney-General of the Federation is an agency of the Federal Government and it is inconceivable in a federal system that an Act of the National Assembly would impose new duties on the Government of a State or its agencies, stating that such an imposition will meet with resentment and refusal to perform for the enforcement of which there is no constitutional sanction and relied on the case of **ATTORNEY-GENERAL, ONDO STATE V. ATTORNEY-GENERAL OF THE FEDERATION (2002) 9 NWLR (Pt. 772) 419.**

On reply of points of law, the Learned Counsel for the Applicant Mosunmola Olanrewaju (Mrs.) submitted that the Freedom of Information Act is an Act to make public records and information more freely available, provide for public access to public records and information to the extent consistent with the public interest and protection of personal privacy, he referred to Section 31(3) of the Freedom of Information Act and Section 39 of the 1999 Constitution.

He argued that it is cardinal principle of interpretation of statutes that where the words used are plain and unambiguous , they should be given their ordinary and plain meaning , he relied on the case of **OKOTIE EBOH V. MANAGER (2004) 18 NWLR (Pt .905) 242** and items 4 & 5 of the concurrent list .

He submitted that if a state government legislate on archives and records which is inconsistence with that of the national assembly, it has to be adopted by the State House of the Assembly, the legislation by the state shall be void to the extent of inconsistency and referred Section 4 (5), 15(5) and item 60 (a), 67, 68 of the exclusive legislative list of the 1999 constitution.

In the case of **ANTHONY VS GOV OF LAGOS STATE (2003) 10 NWLR (PT 828) PC 288 AT 299 -300** the court held that where a person or a body has a duty of public nature to perform or discretion of a public nature to exercise, an order of mandamus can issue to compel the performance of the duty or exercise of the discretion provided a request to so do preceded it. **FAWEHINMI VS I.G.P 9 2002) 7 NWLR (PT 767) 606.**

If there is discretion in the performance of the duty , the court has power to examine whether the discretion to refuse to act has been properly exercise of that power, the court will not lightly overrule the discretion just because it considers it desirable that the duty be performed. Even if it found that the discretion was not properly exercised or that was in fact no

discretion at all in the matter , the court may still exercise its own discretion not to order mandamus on the general ground that the court will make an order in vain which could no longer be called out or on the ground of expediency**. (FAWEHINMI VS I.G.P (2002) 7 NWLR (PT 767) 606** referred to.

S1 of the freedom of information Act 2011

1) Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established.

2) An applicant under this Act needs not demonstrate any specific interest in the information being applied for

3) Any person entitled to the rights to information under this Act , shall have the rights to institute proceeding in the Court to compel any public institution to comply with provisions of this Act .

Section 4 provides that : where information is applied for under this Act the public institution to which the application is made shall , subject to section 6, 7 and 8 of this Act within 7 days after the application is received

(a) Make the information available to the applicant

(b) Where the public institution considers that the application should be denied, the institution shall give written notice to the applicant that access to all or part of the information will not be granted stating reasons for denial and section of this Act under which denial is made.

Section 20 of the Freedom of Information Act also provided that any applicant who has been denied access to information or apart thereof , may apply to the court for a review of the matter within 30 days after the public institution denies or is deemed to have the application , or within such further time as the court may either before or after the expiration of the 30 days fix or allowed.

The certificate of registration of Media Rights Agenda is attached to show its incorporation by Corporate Affairs Commission Under the companies and Allied Matters Decree.

The acknowledged copy of the letter for information from Media Rights to the Lagos State Ministry of Health is attached and it was received on the 27/5/16 and another letter dated 4/11/16 was received by Lagos State Government Ministry of Health on the 4/11/16 and the same letter was received by special adviser to the Government on Primary Health Care on the 4/11/16.

The respondent in the counter affidavit did not deny receipt of the above letters nor did they state that they replied to the letters.

Facts which are not denied are deemed admitted therefore. It is right to state that even though the respondents' received the letter they failed to respond to it in any manner.

In my ruling delivered on the 28/11/17 counsel argued the issue of whether the Freedom Act is applicable to Lagos State and the court ruled as follows "I hold that the freedom of information Act 2011 applies to the Federation and all states of the federation and Lagos State is a part of the federation and constitution of the Federal Republic of Nigeria of 1999 establishes the superiority of the federal law to the state law in its application to the states hence if there is any law made by state which conflict with federal law , the federal law will prevail . See S4 (5) of the 1999 constitution.

The Question: is the applicant entitled to an order of mandamus

The remedy of mandamus lies to secure the Performance of a public duty in the performance, and it gives a command that a duty or function of a public nature which normally though not necessarily, is imposed by statute but it neglect or refused to be done after due demand be done.
it is directed to any person, co-operation or inferior court requiring them to do some particular thing which pertains to their office and duty. The court will decline to award it if other legal remedies are available and effective, see **AMASIKE VS REGISTER GEN. G.A.C (2006) supra**.

The Learned counsel for the applicant relied on S14 of 1999 constitution of Nigeria 1999 in arguing that sovereignty

belongs to the people shall be the primary purpose of government and participation by the people in their government shall be ensured in accordance with the provisions of the constitution. Then it also deals with the compositions of the government of the federation and the State.

S39 of the constitution provides for freedom of expression and the press and it provides that every person shall be entitled to freedom of expression including freedom to hold opinions and receive and impart ideas and information without interference and every person shall be entitled to own and establish and operate any medium for the dissemination of information and ideas and opinions but it is involves owing, establishing or operating a television or wireless broadcasting station for any purpose whatsoever , they must be authorized by the president on fulfillment of conditions laid down by an Act of National Assembly.

In the case of ATTA VS C.O.P (2003) 17 NWLR (PT 849) 250.

The court held that a court before whom an application for mandamus is made has a discretion to grant or refuse it. A court may thus refuse to make an order of mandamus:

a) Unless it has been shown that a distinct demand for performance of the duty has been made

b) The demand has deliberately not been complied with

c) Undue delay

d) Motives of the applicant are unreasonable.

There is no evidence before me that the Araromi Zion Estate made a request for provision of primary health care.

In **AMASIKE VS RESGISTRAR GEN. C.A.C (2006) 3NWLR (PT 968) 462** the court held that a mandamus is a prerogative writ to the aid of which the subject is entitled upon a proper case previously shown to the satisfaction of the court. And for there to be a proper case previously shown an essential ingredient forming the background of the facts and circumstances imposing a public duty upon a person alleged to have failed to perform their duty must be supported by evidence. The court will not order mandamus unless it is in the public interest. There is no evidence that the Ministry of Health has refused to perform any duty as to primary health care as regards the estate fair which plan is requested. (Underlining mine emphasis).

An order of mandamus is a device for securing judicial enforcement of public duties. It is discretionary in nature. Underlining mine for emphasis). For mandamus to apply there must be an imperative public duty and not a discretionary power to act.

1) The applicant must have requested the performance of the duty

2) This must have been refused.

3) The applicant must have a substantial personal interest in the performance of the duty concerned.

4) The court has the jurisdiction to grant it.

See **ATTA VS C.O.P (2003)17 NWLR (PT 849) 250**

In **MIN. OF INTERNAL AFFAIRS VS OKORO (2004) NWLR (853) PG 58**

The trail court after considering the facts and submissions of counsel, and in spite of apparent difficulties in determining that date of respondents detention, proceeded and granted the respondents the reliefs sought.

Aggrieved, the appellant appealed to the court of appeal.

For an order of mandamus to lie, it must issue from a court of competent jurisdiction commanding an inferior body or person for the performance of a particular or purely ministerial duty imposed by law. In the instance case, in the absence of any presidential order or evidence of such before the trail court , the conclusion it reached in respect of the order of mandamus against the appellant was without basis and jurisdiction. It therefore amounted to nullity and

therefore should be set aside. **ITAYE VS EKAIDERE (1978) 9-10 SC 35** referred to. (Undermining mine for emphasis).

Where there is no evidence to support an order being sought by an applicant, as in the instant application for mandamus, the appropriate thing for the court to do is to dismiss such application. In the instance case, the grant of amnesty being the grant of amnesty being the product of the exercise of constitutional power of the president of the federal republic of Nigeria, the trial court should have satisfied itself that the power had been properly exercised before embarking on finding out who, among the respondents, were entitled to benefit from the actions or the order. However, in the absence of the presidential order before the trial court. the court was wrong by proceedings to grant the respondent's application.

The question that arises here:

Is this information in the custody or possession of the defendants and is there a duty imposed by law on the respondents?

In the letter for application for information received by Lagos State Ministry of Health. it is directed to the special adviser to the Governor on Primary Health care and it is a request for details and copies of plans put in place to provide Araromi Zion Estate in Akiode of Ojodu LCDA with primary health care services, details of research or assessment carried out on the needs f the said estate and copies of relevant research or assessment reports.

The writer also stated that if there are plans to provide the said estate with primary health care facilities, please outline the time frame for the implementation of the plans, details of the budgets and cost estimates for the implementation of the plans if any. This means the writer is uncertain of the existence of any such plans.

There is no documentation produced before the court to show that the said estate requested for primary health care services and by the tone and wording of the applicant, he is uncertain as to whether there are any such plans in existence. Media Rights Agenda certificate of regulation is before the court however the documents to show the responsibilities duties of this corporate body is not before the court and the need for the information requested in respect this particular Araromi Zion Estate.

The granting of mandamus, like other prerogative writs, is in court's discretion. Thus, it may be refused because of the applicant's improper motives, or possibly, where the failure to comply with the duty arose out of circumstances over which the authority had control. **R.VBRISTOL CORP (1974) 1 WLR 498**. It is a good ground to refuse mandamus if there is an equally convenient, beneficial and effectual way to enforce the duty in question. **PASMORE VS OSWALDTWISTLE U.C (1898)A.C 387.**

What is the motive for this application? It cannot be discerned from the processes before me.

In the case of AMASIKE VS REGISTER-GEN. C.A.C (2006) 3 NWLR (PT 968)462 AT 506. The court held that the applicant must show that he has sufficient legal interest to protect. The court will also not order mandamus unless It is in the public interest, there must be evidence to support that public duly upon the person alleged to have failed to perform that duty.

It is significant to note that mandamus would issue only where there is a public duty to act and not a public power to act. In the case of Re Fletcher, the applicant wanted mandamus to cause the parliamentary commissioner to investigate his complaint. The House of Lords held that the statute (i.e. the parliamentary Commissioners Act) says that the Commissioner "may" investigate. Under the Act, the commissioner has discretion to act but he is under no duty to do so. Therefore, mandamus was refused in this case. But where a power is coupled with a duty, it will issue. **Re FLETCHER (1970) 2 ALL E.R 527**. (Underlining mine for emphasis).

Is there a public duty on the Respondent s in this case?

In the case of **ATTA VS C.O.P (2003) 17NWLR (PT 849) 250 AT 265,271** the court held that a court may refuse to make an order of mandamus:

a) unless it has been shown that a distinct demand for performance of the duty has been made and the demand has deliberately not been complied with

b) where there is undue delay

c) Where the motives of the applicant are unreasonable

The court has discretion to grant it or refuse it however irrespective of the fact that an applicant for an order of mandamus has satisfied other requirements for securing the remedy the court will not grant the other if a specific alternative remedy which I equally convenient, beneficial and effectual is available. The appellant can secure effective remedy for the wrong he complained of in an action based on tort so the court was right to refuse to grant the order of mandamus.

In conclusion, I am not satisfied that the applicant has present sufficient information before court.
Secondly, the motive of the applicant is not discernible from the documents before the court.

Thirdly, I am not satisfied that the said plans are in the custody of the respondents.

Finally the public interest is not enhanced by the granting of this application.

The application lacks merit and is accordingly dismissed.

HON. JUSTICE B.A OKE-LAWAL (MRS)
31/10/18

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