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THE LEGAL PROTECTION OF PRIVACY AND CONFIDENTIALITY UNDER THE SELECTED DOMESTIC LAWS IN NIGERIA.

LIVINUS I. NWOKIKE
OND, HND, PGD, MBA, FNIM. LLB (Hons), BL, LLM, PhD (in view)
Department of International Law and Jurisprudence,
Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra, Nigeria,
Email: li.nwokike@unizik.edu.ng, website: www.geci.org.ng
Phone Numbers: +2348033521034, +2349073018015

Abstract
This paper critically x-rayed the rights to privacy and confidentiality under the freedom of information Act, 2011 among others to ascertain the extent the law protects non-disclosure of information by certain classes of persons, bodies and institutions. It is axiomatic that 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 hereby established under the Act notwithstanding what is contained in any other Acts or Laws. It is this protection of privacy and confidentiality which falls under the exemption under this Act or any other Law that forms the subject matter of this paper. We made comparison with other Acts, jurisdiction and exceptions thereat, which of course, were the sources of our information (methodology). We made recommendation as a way forward.

Keywords: Legal protection, privacy, confidentiality, selected domestic laws, Nigeria.

1. Introduction

Not quite long, there is the increasing deployment of new technologies by the government and businesses for various purposes like enhancement of service delivery and security purpose. These technologies have the ability to gather information and process the information with little or no effort and at outrageous speeds. While the benefits of these technologies cannot be denied, especially in terms of making life easy for individuals, the government and business entities, they have significant impact on human rights and fundamental freedoms. Consequently, the right to privacy particularly suffers due to its complex relationship with new technologies (Abdulrauf, 2019).

The significance of the right to privacy cannot be overemphasized (Weatherly Roberts, 2019). It is said to be one of the most important human rights issues of the modern ages (Mendel T et al, 2012).

2. Clarification of Terms

Legal: This of relating to, or involving law generally; falling within the province of law established, required, or permitted by law; lawful.
Protection: This is defined as the act of protecting.
Privacy: This is defined as the state of being alone and not watched or disturbed by other people. She was longing for some peace and privacy
Confidentiality: This is defined as situation in which you expect somebody to keep information see of: they signed a confidentiality agreement.
Domestic: This of relating to or involving one's own jurisdiction.
Information, public institution, public record, personal information.
Law: This is defined as the aggregate of legislation, judicial precedents, and accepted legal principles, the body of authoritative grounds of judicial and administrative action especially the body of rules, standards and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them.

Public Officer: This means a person who exercises; or formerly exercised for the purposes of government, the functions of any office or employment **(See Section 9(2)(i)-(ii) of the Official Secrets Act)**.

This is the reason why the right is contained in the Constitution of almost all nations (see section 37 of the Constitution of Federal Republic of Nigeria 1999 (as amended) which provides that the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected). Consequently, where the right is not expressly provided for, courts have found the right traceable to some provisions in the constitution of a nation, See **Kharrak Singh v. State of Uttar Pradesh (AIR 1963 SC 129)**. In this light, Birnhack contends that privacy is a fundamental right and a hallmark of democracy (Birnhack, 2008). Despite this importance of the right to privacy, Chadwick opined that it "is the quietest of our freedoms… It is easily down out in public policy debates…; privacy is most appreciated by its absence, not its presence."

In Nigeria specifically and developing countries is general, quite a number of emerging technologies have significant impacts on privacy. These new technologies include the internet, social networking sites (SNSs), electronic-Identity Cards, mobile phones. Their privacy implications have, however, not been given serious academic consideration. A major problem in this regard is the failure to properly conceptualize and appreciate the current privacy problem which basically highlights the conflict between the traditional and modern conceptions of privacy. While the traditional understanding of privacy essentially entails protection of individuals' private life from arbitrary interference or intrusions, the modern conception has far gone beyond merely protection from intrusion. The modern conception of privacy which is conceptualized according to the problem of recent times has more to do with protection of information privacy. It is this conception of privacy that this contribution focuses on. Lord Denning's speech (1961) is instructive here:

> My Lords, if the law of England gives no remedy for an infringement of privacy, then, it becomes a duty at once to implement some Bill to put it right. Furthermore, if this Bill itself is not workable for the purpose then let us, in Committee, make it workable; because this problem has been with the courts for well over 100 years and our lawyers, 100 years ago and more, indicated a remedy, particularly in regard to the intrusion on the privacy of Royalty.
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> When King George III was ill it was said by the Lord Eldon that if his physician had made notes in a diary of the King's illness, and what he had seen and heard, and had kept those notes and threatened afterwards to publish them, then the courts would have stopped him. Then later, there was the case when Prince Albert and Queen Victoria made a number of etchings, 63 in number, of their private lives, concerning their friends, their family, and children and dogs. A publisher managed to get hold of them and made a catalogue describing all these etchings, and threatened to published them and to put a facsimile of Prince Albert's and Queen Victoria's signatures upon them. Thereupon Prince Albert brought an action to restrain the publisher. In that action it was held by the judges that the publisher ought to be restrained, and the Vice-Chancellor laid down a principle to protect privacy in these words. He said it was:
>
> > **'an unbecoming and unseemly intrusion, offensive to that inbred sense of propriety natural to every man; a sordid spying into the privacy of domestic life, into the home of a family entitled to the most marked respect in this country.'**
>
> The decision was confirmed by the Lord Chancellor, who said that privacy was the right invaded. So, in 1848, the courts of this country were ready to give a remedy for the infringement of privacy.
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> In 1890, two lawyers in America (the noble Lord, Lord Mancroft, has mentioned them), wrote an article in the Harvard Law Review built on this very case of Prince Albert's, in which they said that this was just a single instance of the general right of privacy; and on that basis the courts of the United States, applying also Common

Law, have founded a complete doctrine of the right of privacy. Just a little while ago a photographer surreptitiously took a photograph of a husband and wife in a loving embrace as the husband was leaving, and a periodical published it without consent. The courts of the United States gave a remedy in damages, and enunciated the principles of the right of privacy in a way which would surely do justice to anybody at Common Law. They said:

> **'…the unwarranted… publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.'**

That is the law as evolved in the United States from our Common Law. Why cannot we have something similar? I am not in despair. The Judges may well do it. There is nothing in any decision of this House, judicially, which prevents it, in that whenever any grievous cases come up we find that the lawyers produce a remedy… This right of privacy, my Lords, is only one aspect of fundamental human rights which we have enunciated and put out name to, not only in the European Convention of Human Rights but in our very Constitution which we have framed, and also in that which we have helped frame for Nigeria and that which we are now helping to frame for Sierra Leone. We have the words:

'Every person has a right to respect for his private and family life, his home and his correspondence.'

Have we not any such right in England when it is being enunciated for us in countries overseas? Let us consider the question (it does not come into this Bill) of telephone-tapping, opening correspondence and so forth. Have we not a right to prevent infringement of privacy in that connection? All I would say is that if the law does not give the right of privacy, the sooner this Bill gives it the better.

That Bill was not passed into law. Since then, the subject of privacy was considered in 1972 by a Committee presided over by Mr. Kenneth Younger. It was against the establishment by statute of a general right of privacy. But in the Courts we have had a series of cases – especially on breach of confidence – which go some way towards protecting individuals against intrusion on their privacy (Denning, 2010).

3. The Laws that restrict access and Freedom of the Press and the Public to Government Held Information

In Nigeria, there are several statutes with provisions which prohibit access to information or prohibit the publication of confidential matters including matters of national security. These statutes include:

a. The Criminal Code Act , 2004
b. The Penal Code Law, Cap 89, Laws of Northern Nigeria, 1963
c. The Official Secrets Act, 2004
d. The Evidence Act, 2011, Sections 187, 188, 189, 190-195 under rules of state and privileged communication; and
e. The Constitution, 1999, s. 39(3)(a) and (b).
f. Matrimonial Causes Act, and the Children and Young Persons Law of the various states.

We shall now examine some of these statutes, to wit.

The Criminal Code Act

Section 97 of the Criminal Code Act provides:

1. Any person who being employed in the public service, communicates any fact which comes to his knowledge by virtue of his office, and which is his duty to keep secrets or any document which comes to his possession by virtue of his office and which it is his duty to keep secret, except to some person to whom he is bound to publish or communicate it, is guilty of a misdemeanor and is liable to imprisonment for two years.

2. Any person who, being employed in the public service, without proper authority abstracts, or makes a copy, of any document the property of his employer is guilty of a misdemeanour and is liable to imprisonment for one year.
3. A prosecution for an offence under the provisions of this section shall not be commenced except by, or with the consent of a law officer.

By Section 516 - 518 of the Criminal Code Act, which deals with conspiracy, an accessory to the crime, such as, a recipient of the information may also be a party to the offence if he counsels, aids or procures the commission of the offence, see Section 7(c) of Criminal Code Act.

Under normal civil service rules and practice, practically every official matter is regarded as secret. The requirement of the consent of a law officer for prosecution of this offence is therefore a saving clause, to protect and guard against frivolous prosecutions, whilst effort is directed at prosecuting deserving cases. Prosecution is with the consent of the Attorney General.

b. The Official Secrets Act, 2004

The Official Secrets Act is a statute that makes provision for securing public safety and matters related thereto. The Act covers:

1. The prohibition of the disclosure of official or classified information, **Attorney General v Clough (1963) 1 All ER 420**
2. The prevention of spying, espionage and sabotaging of the nation's military and other strategic installations, **Adler v George (1964) 2 QB 7** and
3. Related matters

This Act classifies government or official secrets into:

1. Classified matters; and
2. Protection of defence establishments.

We shall examine some of these.

Classified Matters

Section 1 of the Official Secrets Act, makes it an offence for any person to transmit any classified matter to a person to whom he is not authorised on behalf of the government. There are no locally decided cases on this area of law. However, in the English case of:

Crisp and Homewood's case (1919) 83 JP 121

A clerk in the British War Office disclosed details of contracts between the War Office and the manufacturer of military clothing, to the director of a tailoring company. This was held to be an offence under section 2 of the English Official Secrets Act 1911, on which the Nigerian Official Secrets Act is modelled.

Apart from public officers, this law affects other members of the public. Therefore, if a journalist or any person comes across a classified document, even if he picked it from a dust bin, he is prima facie liable for this offence, if he publishes or transmits such information to another person. This is more so as the section prohibits: mere obtaining; or retention of a classified matter.

Where a public officer gave the information to a journalist, both of them are caught by section 1. The public officer is also caught additionally for failure to comply with instructions on custody of classified matters. However, a person may plead that he could not be expected to believe that the document was a classified matter, which plea will stand if when he knew or could be reasonably have been expected to believe that the matter was classified, he forthwith placed his knowledge at the disposal of the police, **see Section 1(3)(a).** The test of liability is objective. It is that of a reasonable man in his shoes. A classified matter by section 9, is any information or thing, which under any system of security classification from time to time in use by the government or any branch of it, is not to be disclosed to the public, and which disclosure to the public would be prejudicial to the security of Nigeria.

c. State Privilege in Respect of Evidence of Official and Privileged Communication under the Evidence Act

Several provisions of the Evidence Act deal with the circumstances when the State may be able to withhold evidence of official and privileged communication from being given during court proceedings. The relevant sections of the Evidence Act are **sections 187, 188, 189, 190-195**. The said **Sections 187, 188, 189, 190-195, Evidence Act, 2011** which are pointedly on the issue are reproduced below:

4. Circumstances when Application is Disclosure of Information shall be allowed

We shall discuss this under the following circumstances, to wit:

a. Privileged Communications During Marriage

S. 187 No husband or wife shall be compelled to disclose any communication made to him or her during marriage by any person to whom he or she is or has been married nor shall he or she be permitted to disclose any such communication, unless the person who made it, or that person's representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for an offence specified in section 182 of this Act.

b. Official and Privileged Communications

S. 188 No Justice, Judge, Grand Kadi or President of a Customary Court of Appeal and, except upon the special order of the High Court of the State, Federal Capital Territory, Abuja or the Federal High Court, no magistrate, or other persons before whom a proceeding is being held shall be compelled to answer any questions as to his own conduct in court in any of the capacities specified in this section, or as to anything which came to his knowledge in court in such capacity but he may be examined as to other matters which occurred in his presence whilst he was so acting.

S. 189 No Magistrate or police officer or any other public officer authorised to investigate or prosecute offences under any written law shall be compelled to disclose the source of any information as to the commission of an offence which he is so authorised to investigate or prosecute and no public officer employed in or about the business of any branch of the public revenue shall be compelled to disclose the source of any information as to the commission of any offence against the public revenue.

S.190. (1) Subject to any direction of the President in any particular case, or of the Governor of a State where the records are in the custody of a State, no one shall be permitted to produce any unpublished official records relating to affairs of state or to give any evidence derived from such record except with the permission of the officer at the head of the Ministry, Department or Agency concerned, who shall give or withhold such permission as he thinks fit.

Provided that the head of the Ministry, Department or Agency concerned shall on the order of the court, produce to the judge the official record in question or, as the case may be, permit evidence derived from it to be given to the judge alone in chambers; and if the judge after careful consideration shall decide that the record or the oral evidence, as the case may be, should be received as evidence in the proceeding, he shall order this to be done in private as provided in section 36(4) of the Constitution.

S. 191. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

Provided that the public officer concerned shall, on the order of the court, disclose to the judge alone in chambers the substance of the communication in question; and if the judge is satisfied that the communication should be received in evidence this shall be done in private in accordance with section 36(4) of the Constitution.

S. 192 (1) No legal practitioner shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such legal practitioner by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
Provided that nothing in this section shall protect from disclosure:
(a) any such communication made in furtherance of any. illegal purpose:
(b) any fact observed by any legal practitioner in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.
(c) It is immaterial whether the attention of such legal practitioner was or was not directed to such fact by or on behalf of his client.

(3) The obligation stated in this section continues after the employment has ceased.

S. 193. The provisions of section 192 shall apply to interpreters, and the clerks of legal practitioners.

S. 194. If any party to a suit gives evidence in such suit or proceeding, whether at his own instance or otherwise, he shall not be deemed to have consented to such disclosure as is mentioned in section 192 and, if any party to a suit or proceeding calls any such legal practitioner as a witness, he shall be deemed to have consented to such disclosure only if he questions such legal practitioner on matters which, but for such question he would not be at liberty to disclose.

S. 195. No one shall be compelled to disclose to the court any confidential communication which has taken place between him and a legal practitioner consulted by him, unless he offers himself as witness in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has. given, but no others.

Under the above heading, the decision of Court in **Dawaki Gen. Ent. Ltd. v. Amaf Co Ent. Ltd, [1999] 3 NWLR (Pt.594) 225 CA.** suffice there, the respondents brought an action against the appellant claiming *inter-alia*, a declaration of ownership in respect of properties and an order of specific performance. Evidence was taken from the parties at the trial. P. W. 1, a counsel gave evidence on the transactions relating to the sale of the property.

At the conclusion of the trial, the trial court gave judgement for the respondent. The appellant aggrieved by the decision of the trial court appealed to the Court of Appeal where he contended among others that the evidence of P.W.I, a counsel contradicts the provisions of section 173 of the Evidence Act (now section 195 of the Evidence Act, 2011). The Court of Appeal in deciding the appeal therefore considered the pro visions of sections 170 to 173 of the Evidence Act (now sections 192 to 195 of the Evidence Act, 2011) among others.
The Court per Muhammed, J.C.A. held: The general rule governing the fiduciary relationship of a legal practitioner and his client as stipulated by sections 170 to 173 of the Evidence Act (now sections 192 to 195 of the Evidence Act, 2011) is that no disclosure of any communication made to the legal practitioner in the course of and for the purposes of his employment as a legal practitioner by or on behalf of his client is allowed. This kind of communication is the one regarded as privileged communications, i.e. those statements made by certain persons, e.g. attorney-clients, husband-wife, within a protected relationship. I agreed with the learned trial judge that the evidence given by PW1 was on matters known to both parties and cannot be said to enjoy any privilege.

c. Exemption of International Affairs and Defence

(1) A public institution may deny an application for any information the disclosure of which may be injurious to the conduct of international affairs and the defence of the Federal Republic of Nigeria.

(2) Notwithstanding subsection (1), an application for information shall not be denied where the public interest in disclosing the information out weights whatever injury disclosure would cause, **See Section 12 of FOA**.

d. Exemption of Law Enforcement and Investigation

(1) A public institution may deny an application for any information which contains –

(a) Record compiled by any public institution for administrative enforcement proceedings and by any law enforcement or correctional agency for law enforcement purposes or for internal matters of a public institution, but only to the extent that disclosure would –

(i) interfere with pending or actual and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency.

(ii) interfere with pending administrative enforcement proceedings conducted by any public institution;

(iii) deprive a person of a fair trial or an impartial hearing;

(iv) unavoidably disclose the identity of a confidential

(v) constitute an invasion of personal privacy under Section 15 of this Act. However, where the interest of the public would be better served by having such record being made available, this exemption to disclosure shall not apply;

(vi) obstruct an ongoing criminal investigation;

(b) information the disclosure of which could reasonably be expected to be injurious to the security of penal institutions.

(2) Notwithstanding anything contained in this section, an application for information shall not be denied where the public interest in disclosing the information outweighs whatever injury that disclosure would cause.

(3) A public institution may deny an application for information that could reasonably be expected to facilitate the commission of an offence. For the purposes of subsection (1)(a), "Investigation" means an investigation that –

(a) Pertain to the administration or enforcement of any Act, law or regulation;

(b) Is authorized by or pursuant to any Acts, law or regulation, **See Section 13 of FOA**.

e. Exemption of Personal Information

(1) Subject to Subsection (2), a public institution shall deny an application for information that contains personal information. Information exempted under this subsection shall include-

(i) 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;

(ii) Personnel file and personal information maintained with respect to employees, appointees or elected officials of any public institution applicants for such poisons;

(iii) Files and personal information maintained with respect to any applicant register or licensee by any government and/or public institution cooperating with or engaged in professional or occupational registration, licensure or discipline;

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

(v) 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.

(2) A public institution shall disclosure any information that contains personal information if-

a. The individual to whom it relates consents to the disclosure;
b. The information is publicly available.

(3) Where disclosures 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 13(2) of this Act, **See Section 15 of FOA**.

f. Exemption of Third Party Information

(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 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;
b. Information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.
c. Proposal and bids for any contract, grants, or agreement, including information which if it were disclosed would frustrate procurement or given an advantage to any person.

(2) A public institution shall not, pursuant to Subsection (1), deny disclosure of a part of a record if that part contains the result or product of environment testing carried out by or on behalf of a public institution.

(3) Where the public institution disclosures information, or a part thereof, that contains the results of a product or environmental testing, the institution shall at the same time as the information or part thereof is disclosure provided the applicant with a written explanation of the methods used in conducting the test.

(4) A public institution shall disclose any information described in paragraph (1)(a), (b) and (c) if that disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in the disclosure clearly outweighs in importance any financial loss or gain to, or prejudice to the competitive position of or interference with contractual or other negotiation of a third party, **See Section 16 of FOA**.

g. Exemption of Professional or other Privileges Conferred by Law

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

a. Legal Practitioner-Client privilege;
b. Health Workers-Client privilege;
c. Journalism confidentiality privilege;
d. Any other professional privileges conferred by an Act, **See Section 17 of FOA**.

h. Exemption of Course or Research Material

A public institution may deny an application for information which contains course materials or research materials prepared by faculty members, **See Section 18 of FOA**.

5. Circumstances when Application for Disclosure of Information shall be allowed

We shall briefly discuss them under the following, to wit.

Right of Access to Records

(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 of 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, **See Section 2 of Freedom of Information Act, 2011**.

Information about Government Institution

(1) A public institution shall ensure that it records and keeps information about all its activities, operations and businesses.

(2) A public institution shall ensure the proper organization and maintenance of all information in its custody in a matter that facilitates public access to such information.

(3) A public institution shall cause to be punished in accordance with Subsection (4) of this Section, the following information:

a. A description of the organization and responsibilities of the institution including details of the programmes and functions of each division and department of the institution;
b. A list of all classes of record under the control of the institution in sufficient details to facilitate the exercise of the right to information under this Act;
c. A list of all manuals used by employees of the institution in administering or carrying out any of the programmes or activities of the institution, **See Section 3**;
d. A description of documents containing final opinions including concurring and dissenting opinions as well as orders made in the adjudication of cases;
e. Documents containing substantive rules of the institution;
f. Documents containing statements and interpretations of policy which have been adopted by the institution;
g. Documents containing final planning policies, recommendations, and decision;
h. Documents containing factual reports, inspection reports, and studies whether prepared by or for the institution;
i. Documents containing information relating to the receipt or expenditure of public or other funds of the institution;
j. Documents containing the names, salaries, titles, and dates of employment of all employees and officers of the institution;
k. Documents containing the right of the state, public institutions, or of any private person(s);
l. Documents containing the name of every official and the final records of voting in all proceedings of the institution;
m. A list of files containing applications for any contract, permit, grants, licenses or agreement;
n. A list of reports, documents, studies, or publications prepared by independent contactors for the institution;
o. A list of materials containing information relating to any grant or contract made by or between the institution and another public institution or private organization; and
p. The title and address of the appropriate officer of the institution to whom an application for information under this Act should be sent, provided that the failure of any public institution to publish any information under thus sub-section shall not prejudicially affect the public's right of access to information in the custody of such public institution.

(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 sources, and at the offices of such public institutions.
(5) a public institution shall update and review information required to be published under this section periodically, and immediately whenever changes occur.
(6) any person entitled to the right of access conferred by this Act shall have the right to institute proceedings in a Court to compel any public institution to comply with the provisions of this section.
(7) Public institutions are all authorities whether executive, legislative or judicial agencies, ministries, and extra-ministerial departments of the government, together with all corporations established by law and all companies in which government has a controlling interest, and also, private companies utilizing public funds, providing public services or performing public functions.

Request for Access to Records

(1) An application for access to a record or information under this Act shall be made in accordance with Section 2 of this Act.
(2) For the purpose of this Act, any information or record applied for under this Act that does not exist in print but can by regulation be produced form a machines, normally used by the government or public institution shall be deemed to be record under the control of the Government or public institution.
(3) Illiterate or disabled applicants who by virtue of this illiteracy or disability are unable to make an application for access to information or record in accordance with the provision of Subsection (1) above, may make that application through a third party, **Section 4**.
(4) Any authorized official of a government or public institution to whom an application makes an oral application for information or record, shall reduce the application into writing in the form prescribed under subsection (1) above and shall provide a copy of the written application to the applicant.

Times for Granting or Refusing Application

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 Bill, 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 given written notice to the application that access to all part of the information will not be granted, stating reasons for the denial, and the section of this Bill under which the denial is made, **Section 5**.

Transfer of Application

(1) Where a public institution receives an application for access to information and the institution is of the view that another public institution has greater interest in the information, the institution to which the application is made may within 3 day s but not later than 7 days after the application is received, transfer the application, and if necessary, the information, to the other public institution, in which case, the institution transferring the application shall give written notice of the transfer to the application, which notice shall contain a statement informing the cant that such decision to transfer the application can be reviewed by a Court.
(2) Where an application is transferred under Subsection (1), the application shall be deemed to have been made to the public institution to which it was transferred on the day the public institution received it.
(3) For the purpose of Sub-section (1), a public institution has "a greater interest" in formation if-

a. The information was originally produced in or for the institution or

b. In the case of information not originally produced in or for the public institution, the institution was the first public institution to receive the information, **See Section 6**.

Extension of Time Limit for Granting or Refusing Application

The public institution may extend the time limit set out in Section 5 or Subsection 6(1) in respect of an application for a time not exceeding 7 days, if –

(a) The application is for a large number of records and meeting the original time limit would unreasonably interfere with the operations of the public institution;

(b) Consultations are necessary to comply with the application that cannot reasonably be completed within the originally time limit; by giving notice of the extension stating whether the extension falls under the circumstances set out in paragraphs (a) or (b), which notice shall contain a statement that the applicant has a right to have the decision of extend the time limit reviewed by a Court, **See Section 7**.

Denial by a Public Institution to Disclose Records

A public institution may deny an application for information that contains information pertaining to –

a. Test questions, scoring keys and other examination data used to administer and academic examination or determine the qualifications of an application for a license or employment.

b. Architects' and engineers' plans for buildings not constructed in whole or in part with public funds and for buildings constructed with public funds, to the extent that disclosure would compromise security; and

c. Library circulation and other records identifying library users with specific materials.

(2) Notwithstanding anything contained in this section, an application for information shall not be denial where the public interests in disclosing the information outweighs whatever injury that disclosure would cause, **See Section 20 of FOA**.

Miscellaneous Issues is Banker-Customer Relationship

Duty of Secrecy

The-obligation of the bank is always primarily to its customer. In the old case *of* **Tassell v Cooper (1850) 9 ACB 509: 137 ER 990**, it was decided that third parties cannot properly intervene between the banker and his customer. The only remedy available to an aggrieved third party is to apply to the Court for an interim injunction to prevent the bank from paying any money out or from doing certain things and in such proceedings the bank can be joined as defendant. The bank can therefore not dishonour cheques on the instruction of a third party and cannot expose the account to a third party without due authority of the customer. The bank's duty of secrecy is a legal one and this duty extends to all information the bank may come across either directly from the customer or from third parties (e.g. through references) and to information that may be adduced in the course of its transactions with the customer not only during the life of the account but also after the closure of the account. In **Foster v Bank of London (1962) 8 ACB 509**, a bill for £532 was accepted and made payable at the defendant bank. Payment was refused on presentation and the payee was allegedly told that the balance was insufficient by £104 upon which he paid into the account concerned, a sum of £104, and obtained payment of the bill. Despite the bank's denial, the Court held that it was obvious that it had revealed the state of its customer's affairs and the customer succeeded in an action for damages. Bank staff must therefore be trained not to disclose reasons for dishonouring a cheque other than the 'refer to drawer' or any other reasons for inscribed on the cheque. The payee can consult the customer if he wants to raise further enquiries.

The case of ***Tournier v National Provincial and Union bank of England Ltd*, (1924) 1 KB 461; 1923 All ER. REP. 550**. which appears to be the leading case on duty of secrecy, reinforces the confidentiality of banker-customer relationship but also extends the circumstances under which disclosure may be permitted.

In April, 1922 Tournier s account was overdrawn by £9.8.6d and he agreed to settle this on weekly instalments of f 1. When Tournier breached the promise, the bank manager telephoned his employers primarily to seek his private address but in the course of the conversation, the overdrawn state of toumier's account was disclosed. The bank manager was also alleged to have revealed that Tournier engaged in betting and for this, his employment was not renewed. He sued the bank for slander and for breach of implied contract that they would not disclose details of his account to a-third party. The Court of Appeal, reversing decision of the Lower Court, found for the plaintiff and the three Appeal judges unanimously agreed that the bank owed a duty of secrecy to its customers.

Bankes, L.J. however held that the duty of secrecy is not absolute but qualified. This means that it is not a duty that is binding in all circumstances or that must be observed at all times. There are situations under which the bank may disclose and these circumstances are classified into four:

a. Where disclosure is under compulsion of law;
b. Where there is a duty to the public to disclose;
c. Where disclosure is made by the consent of the customer, expressed or implied;
d. Where the interest of the bank requires disclosure.

The four conditions will be discussed in turns.

(a) Disclosure under Compulsion of Law

Examples of compulsion of law which may facilitate disclosure without customer's consent are:

(i) Where the bank is served with summons to attend Court and disclose its customer's affairs;

(ii) Where the bank is required under the provisions of Banker's Books Evidence Act 1879 to deliver copies of a customer's account or other documents to the Court or to an investigating police officer. However, the job of the bank in complying with orders under this Act was simplified by the following cases: In **Yesufu v. African Continental Bank Limited, (1976) NCLR 118, (1976) NCLR 118** the Supreme Court of Nigeria held that "Books of Account" do not include vouchers but may include ledger cards. Specific orders will be required if vouchers are to be inspected or delivered to the Court. Also, in **State v Olomo (1970) Supreme Court of Nigeria October 29, 1970 Unreported** the Supreme Court of Nigeria affirmed that (i) 'where it is not possible to produce the books of the bank, a certified copy of the account is enough to satisfy that Court that there is a book in existence from where copies were made (ii) if certified by an official giving evidence, this presupposes that he had compared the original with the certified copy before he certified it and (iii) if the books of the bank were produced by the Manager or the Accountant, this must have been in the custody or control of the bank. Notice, however, that the order compelling the bank to disclose to a police officer or court must have been signed by a Magistrate, a High Court judge or similar judicial officer;

(iii) Where a bank is summoned by a tribunal duly constituted by the government or is directed by the Central Bank, acting on government directives, it will appear there is a legal duty to disclose;

(iv) Where in an application for foreign exchange, especially under letters of credit, a bank is required to disclose to the Exchange Control Authorities, details of previous transactions;

(v) Where the bank is required to disclose to tax authorities details of customers having interests on deposits or sayings account liable to taxation

(vi) Where affairs of a company are under investigation, Section 638(2) Of the Companies and Allied Matters Act 1990 makes it a duty for all officers' and agents of the company to preserve intact and to produce to the Inspector as and when required by him all books and documents of or relating to the company as the case may be which are in the custody or under the control or disposition of the officer or agent. The word 'agent' here includes the bankers;

(vii) in dealing with delinquent officers and members of a company under Section 508(5) of the Companies and Allied Matters Act 1990, it is the duty of every officer and agent of the company past and present, to give the Attorney-General all assistance in connection with the prosecution and the expression 'agent' in relation to a company here also includes any banker or solicitor or any person employed by the company as auditor; if the bank is summoned to appear before the

Court with his customer's account under Section 516(b) (iii) of the Companies and Allied Matter Act to produce documents in his custody or under his control relating to liquidator's dealings with the properties of a Company;

(viii) where a receiving order has been made under the Bankruptcy Act 1990 the bank is obliged to make full disclosure to the receiver and/or trustee;

(ix) where the bank is required to disclose under a garnishee order or a writ of sequestration (both discussed fully later);

(x) Where disclosure is required under the Bankings (Freezing of Accounts) Act 1990

Disclosure under compulsion of law must be handled with care but once compelled to disclose under this heading, the consent of the customer is not required. However where a police officer calls at the bank to raise enquiries on a customer, the bank must refuse unless appropriate Court order, issued under the Bankers' Book Evidence Act, is produced. If the customer is in any way connected with the matter under investigation, it will not be difficult for the police officer to obtain die necessary Court order. The Court will usually issue orders on specific accounts and in that wise, blanket information or information of general nature, apparently outside the specifications made in the court order, need not be given. This is because although the bank is bound to respond positively under compulsion of law, there is a limit to which the bank can be pressurised. Though not binding on Nigerian Courts, the decision of the Supreme Court of The Gambia in **Standard Bank of West African Limited v Attorney General of the Federation (1972) All NLR** is very sound and relevant. In this case, the learned judges granted a declaration that

> banks should not be subjected to a search warrant for statement of account, letters, mandates and vouchers of their customers just because there is reasonable ground for believing that they will afford evidence as to the commission of any offence.

The facts of the ease are that on I2th February, 1972 a Magistrate, upon declaration under oath by a police officer that he had reasonable grounds to believe that there were at the premises of the plaintiff bank in Buckle Street, Barthust, things which would afford evidence as to the commission of offence or offences, granted the police power to search the said premises. The bank then applied for injunction to restrain the police from conducting the search. The Supreme Court affirmed that a prosecutor, and indeed any litigant, can avail himself of ample powers to compel production of banking books. The court, however, referred to the observation of **Lord Widgery in William & Others v Summerfield (1972)** that: the Courts have set their face against Section 7 of the Bankers books of Evidence Act being used as a kind of searching inquiry or fishing expedition in the hope of finding some material on which a charge can be hung. His Lordship likened it to an application for search warrant which can be a very serious interference with the liberty of the individual. As it can be a gross invasion of privacy, it is an order which clearly must only be made after the most careful thought and on the clearest ground. Where a court is asked to issue a search warrant against a bank, the Court must be fully satisfied before granting it and in any case, the application will be refused if an order under Bankers Book of Evidence Act will suffice. The *Court* will not issue search warrant only on the ground that such a search will afford evidence of the commission on an offence.

Even though an investigating police officer may be granted power to inspect documents under Section 7 of the Bankers Books of Evidence Act, the right of inspection is regulated by the general rules relating to inspection of document and could normally be 'resisted if there are grounds to do so. The person so objecting has to make application to the Court and such application may be successful if, for example, it can be proved that the entries in the banker's books are irrelevant to the issue under consideration, **Sough Staffs Tramways v Ebbsmith (1895)**.

(b) Disclosure under Duty to the Public

What may be seen as 'duty to public' was summed up by Lord Finlay in **Weld-Blundel v Stephen (1920) AC 956; 89 L.J.B. 703** as situations where "duty to the state or public supersedes the duty of agent to his principal". In this wise, a bank may disclose to prevent crimes and to the extent that it is

reasonably necessary for the protection of the bank or the public against crime or fraud. Thus, if a customer is making dangerous use of his cheque leaves e.g. duping the public with dud cheques, the bank may circularize such information among other banks - or may even refer the matter to the police. Also, during time of war, a bank will be in position to disclose dealings on an account that is being maintained to promote interests of the enemies. In these circumstances, the bank's duty to the public to prevent fraud or not to assist an enemy supersedes die duty of secrecy owed to its customers and the bank needs not wait for any court order as duty to the public is a valid and usually tenable defense for any action on breach of duty of secrecy that customer may raise.
Caution however needs to be exercised very much here and the bank must be sure of its facts. In view of the need for greater care and discretion, it may be necessary that approval of head Office be obtained before disclosure under this condition.

(c) Disclosure under Customer's Consent

Disclosure under customer's consent is perhaps the most common. The consent may be in writing or may be implied. The customer may, for example, direct his bank to forward to his auditors, balances on his accounts aid details of securities deposited. In many instances, such requests are prepared by the auditor and customer merely signs to signify his consent. The bank can then validly furnish the auditor with such information but it may be prudent to send a copy to the customer. In all cases of written instructions from the customer, the signatures must be duly verified as evidence that the instruction complies with the mandate which the bank holds.

Also, the customer may ask the bank to disclose his balance to any other person and the bank must be very careful and ensure that the instruction is clear and unambiguous. An instruction to send balance through the bearer or to "deliver" the balance to the bearer should not be interpreted to signify authority to disclose. Rather than disclosing to the person, the balance should be written on a piece of paper or specially designed form, properly enveloped, addressed, sealed and marked "Private and Confidential" before forwarding same to the customer through the "bearer".

It has occurred many times in practice where-the customer will sign blank cheque and requests his agent to go 19 the bank, obtain the balance and fill it up. Unless a letter is written to the bank separately, the specific instruction that the balance be made known to the agent, the bank should not disclose as signing a cheque in blank does not constitute authority to disclose the balance on the account.

Where the customer comes to the bank in person and asks for his balance verbally over the counter, the prudent banker will write the balance on a piece of paper, fold it and deliver it to him as shouting the balance to him over die counter, to the hearing of other people, may constitute unauthorized disclosure. However, if the situation is such that only the customer is within hearing distance, verbal, communication may be quicker.

Bank balances or other confidential information should not be relayed by telegram or telex as disclosure to others, at least to postal workers, will be inevitable. There is also danger in disclosing over telephone unless the customer can be identified without any mistake and where the customer cannot be well identified, telephone disclosure should be resisted.. The other danger is the possibility of lines jamming each other when there are faults. However, if the customer's voice is well known, disclosure over the telephone may be all right as it is fast and direct. If the customer hands the receiver over to a third party, without the banker's awareness, such that information is unwittingly released to the third party, the bank will not be responsible, **Sunderland v Barclays Bank Limited (1938) The Times 24th and 25th November**.

(d) Disclosure under Bank's Interest

Where a customer is indebted to the bank and if, despite persistent pressure, the customer fails to repay, the bank may have to place the matter in "other hands". Depending upon the size of the debt and other factors, the matter may have to be placed in the hand of a debt collector or a solicitor. In some cases,

security needs only be realized after due notice. Whatever be the course of action to be adopted, some matters which have been kept confidential between the bank and its customer will have to be divulged to third parties. The amount involve time of borrowing repayment programme agreed upon, interest rate, etc. will have to be disclosed, for example, in Court summons.

It is this and other kindred situations that constitute disclosure under bank's interest and this view was one of the point successfully pleaded by the bank in the case of **Sunderland v. Barclays Bank Limited (1938) The Times 24th and 25th November.**

This is no doubt a most difficult period for the bank as the bank would wish that confidentiality prevails throughout and the matter be resolved in the spirit of amity with which the account was initially conceived. However, if the customer proves difficult and bad debt is imminent, the need to protect depositors funds may push the bank to this rather painful course of action.

6. Conclusion

There is no doubt that right to privacy and confidentiality is one of the protected rights known to Nigeria Laws as in other jurisdictions. However, these rights are not absolute as there are some limitations. There are circumstances under which they are protected and denied respectively. These circumstances have been explained and stated in this paper for appreciation. Nigerians shall be sensitized on these rights and limitations for their protections. This is the crux of this paper.

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