

THE COMPETING RIGHTS OF PRIVACY AND ACCESS TO INFORMATION: DATA PRIVACY UNDER THE FREEDOM OF INFORMATION ACT 2011

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Abstract

The rights to privacy and access to information are internationally recognized rights. Generally, no right can be absolute in nature as there are certain restrictions. Right to privacy and access to information are though complementary to each other, are also competing because the right to access public information is restricted by the need to protect privacy and personal information. The tension between privacy and access to information has always been existent. The conflict arises from the demand of personal information held by public or private bodies. Thus, the paper adopts the doctrinal methodology in exploring questions like what is personal information, to what extent should privacy be protected, what are the prerequisites for the release of personal information, is there a convergent point between the demand for personal information especially as regards public officials and the protection of privacy. Specifically, the paper analyses the protection of privacy under the Nigerian Freedom of Information Act, 2011 (FOIA) and finds that personal information cannot be released except with the consent of the person to whom the information relates. This position has arguably being abused especially by public officials who should be accountable to the citizens whom they are governing. Therefore, the paper recommends that the Act should clearly delineate privacy to ensure that only legitimate personal information are protected.

Keywords: Access to Information, Privacy, Personal Information, Freedom of Information Act, Accountability, Public officials.

1.0 Introduction

The right of access to public information is significantly beneficial to government and the public. In the same vein, the right to privacy benefits both citizens and government alike. The advancement in information technology increasingly intensifies the tension between both rights. Advocates for open access to public information argue that public information is a right of the public. On the other hand, opponents argue that free access to public information gives the public too much access to private information. Thus, the question of how to balance both rights to ensure that neither of them is abused nor exploited for personal gain arises. This paper offers a general framework for balancing the interests between the right to access information and privacy. It focuses on the protection of privacy under section 14 of the Freedom of Information

Act 2011. Oftentimes, public officials withhold information from public access by misrepresenting such information as privacy concerns and use the privacy exemption under section 14 as an excuse to deny important information necessary for public scrutiny.

1 Theoretical Framework of Privacy

Privacy is a fundamental human right enshrined in several international instruments. For instance, the Universal Declaration of Human Rights; the Convention on the Rights of the Child; and the International Covenant on Civil and Political Rights guarantee the right to individual privacy.¹ These instruments safeguard freedom from arbitrary or unlawful interference with privacy, family, home or correspondence. The right of privacy embodies the idea that individuals should have an area of autonomy, a private sphere devoid of arbitrary state intervention or from extreme interference from unsolicited persons.² The right protects against having a society in which the government completely controls the people's lives, and requires the government to protect individuals from privacy invasion by other people.³ It is a broad concept relating to an individual's ability to develop ideas and personal relationships⁴ Privacy forms the basis for the respect for human dignity and is the bedrock of any democratic society.⁵ Furthermore, the right to privacy guarantees other rights like, freedom of information and expression as well as the right to associate. Privacy is a legal term that has remained controversial, partly due to the fact that the concept is not susceptible to any settled definition.⁶ Privacy is concerned with the personal information of an individual in a state of total or limited exclusion to other members of the society. Privacy has been streamlined to four key areas

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¹ See Art 12 of the UDHR, Art 16 of the CRC and Art 17 of the ICCPR Nigeria is a signatory to some of these international instruments protecting privacy. However, the African Charter on Human and Peoples Rights 1981 contains no provision on the right to privacy. Africa has given minimal attention to the issue of data protection within the African human rights system, as there have been no elaborations by the African Commission or Court on the protection of personal information from a human rights perspective.

²Paradigm Initiative and .Privacy International, 'The Right to Privacy in Nigeria' (*Stakeholders Report Universal Periodic Review 31st Session March 2018*) 4.<<https://privacyinternational.org>> accessed 4 October 2023.

³David Banisar, The Right to Information and Privacy: Balancing Rights and Managing Conflicts' *Electronic Journal* (2011) 33 <<https://www.researchgate.net>> accessed 4 September 2023.

⁴Ibid 6

⁵Right to Know and Privacy International, 'The Right to Privacy in South Africa' (Stakeholders Report, 27th Session of the South Africa Universal Periodic Review, October 2016) <<https://privacyinternational.org>> accessed 19 October 2023.

⁶E.S.Nwauche, 'The Right to Privacy in Nigeria' *Review of Nigerian Law and Practice* (2007) 1(1) 64.

namely bodily, territorial, information and communication.⁷ The focus of this paper is on privacy relating to personal information. The concept of privacy is not defined in the Freedom of Information Act (FOIA), Data Protection Act (DPA) 2023 and even the 1999 Constitution. The right to privacy is a constitutionally recognized right as contained in Section 37 of the Nigerian Constitution. It is contended that this right has not been accorded the attention it deserves.⁸

The protection of privacy under section 37 of the Constitution has wider connotation, perceived to go beyond personal information; that is the individual is free from disturbance and interference with the manner in which he lives in his home, which include his sexual life and other aspects of his family life. Here privacy is equated with being left alone.⁹ This provision protects the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communication. The right protects personal information held by an individual from being invaded. The right to privacy is arguably one of the most marginalized rights under the Constitution in terms of research and development.¹⁰

The privacy of individuals is being jeopardized constantly since the advancement in technologies, such as the Internet.¹¹ The rapid technological advancement in technology are enhancing the capability of organisations to accumulate, store, process and disseminate personal data¹² With the aid of modern gadgets like computers and mobile phones, large quantities of personal data are inadvertently being released and transferred via the internet on a daily basis. Considering the speed at which sensitive personal data go viral, it has become a necessity for persons to have control over how their personal information are collected and handled.

Hence, the essence of an efficient data protection regime to safeguard privacy cannot be over-emphasized. In Nigeria, data collecting agencies, such as the National Identity Management

⁷OloladeShyllon, 'The Right to Privacy and the Protection of Personal Information in Africa: Challenges and Prospects' (*Centre for Human Rights, University of Pretoria, South Africa*) <<https://aanoip.org>>2018/07 accessed 11 October 2023.

⁸Ibid 66.

⁹Ibid 84.

¹⁰Aaron Salau, 'Data Protection in an Emerging Digital Economy: The Case of Nigerian Communications Commission Regulation without Predictability?' (7th International Conference on Information Law and Ethics, 22 February 2016) <<http://icil.gr/download.php?>> accessed 6 October 2023.

¹¹ShrutiVerma, 'Contemporary Relevance of Right to Information Act and Right to Privacy' <<https://cic.gov.in/sites/default/files>> accessed 30 November 2023.

¹²Michelle de Bruyn, 'The Protection of Personal Information (POPI Act) – Impact on South Africa' *International Business and Economics Research Journal* (2014) 13 (6) 1318.

Commission (NIMC), The Independent National Electoral Commission (INEC) and The Central Bank of Nigeria (CBN) collect large quantity of data like individual names, medical and biometric data on behalf of millions of Nigerians. Abuse is inevitable where processing of data fails to measure with international standards.¹³ For instance, under the NIMC Act, there is general restriction of personal information contained in the database to third party access. Such information can only be disclosed with the consent of person whose information is sought and NIMC.¹⁴ However personal data can be released under certain circumstances including for the purpose of national security interests, to expose or prevent crimes and in the interest of the public.¹⁵ Also the management of data by the CBN for BVN (Bank Verification Number) purposes is crucial in order to guard against abuse. This is as a result of the fact that the CBN maintains a large database of biometric information of Nigerians.

A number of countries including Nigeria have enacted comprehensive laws that give individual certain rights to manage the collection, processing and use of their personal information by public and private bodies. Nigeria enacted the Data Protection Act 2023 as the first comprehensive legal framework regulating the processing and protection of personal data in Nigeria. Its primary aim is to guarantee the constitutional right of freedom of privacy.¹⁶ Prior to the passage of the DPA in 2023, there was the Nigeria Data Protection Regulation (NDPR) 2019. The Act regulates the processing of personal data within Nigeria, the personal information of a data subject in Nigeria by both foreign and local data controllers and processors. Furthermore, the Act establishes a Commission as the body in charge of regulating data protection related matters as opposed to the Bureau established under the NDPR.¹⁷ The DPA strengthens and broaden the scope covered by the NDPR on data processing, data security, penalties for breach of data regulations, cross border transfers of data, data subject rights etc.¹⁸ The Act does not cover data processing for household or personal purposes, provided that such processing does not breach the right of privacy of the data subject, or law enforcement, national security or to

¹³Paradigm, 'The Right to Privacy' (n2) 13.

¹⁴S26 NIMC Act 2007.

¹⁵ S 26 (2) – (4).

¹⁶ B. O Aluko and G. Oyeboode, 'An Overview of the Nigeria Data Protection Act 2023' <<https://www.aluko-oyebode.com>> accessed 4 October 2023.

¹⁷S 64 DPA. Data controller or processor means one who processes or intends to process personal data of data subjects. Data subject means an individual to whom personal data relates. See S 65 of the DPA.

¹⁸SSKOHN Notes, 'What is New: A Comparison Between the Data Protection Act 2023 and the Nigeria Data Protection Regulations 2019' <<https://sskohn.com/what-is-new->> accessed 4 October 2023.

prevent or control public health emergency or in respect of a publication in public interest or in court proceedings.¹⁹ In other words, the right to privacy is circumscribed where the processing or release of personal information is necessary for law enforcement, national security and public interests.

1.2 What is Personal Information?

Information/data is the lifeblood of the digital economy.²⁰ Robust data protection is essential for consumer protection and empowerment. The law must therefore be capable of effective regulation of personal information management as to how data is collected and used. The definition of personal information determines the scope of what is regulated and protected. Personal Information is defined as recorded information about an identifiable individual.²¹ It is concerned with information about a person in a personal capacity that reveals information of a personal nature. It entails being identifiable from information such as ethnic origin, colour, address, age sex, name, education, medical history etc. The Modern scope of personal information includes online identifiers such as MAC address, IP address, metadata, cookies, IMEI number etc.²² The Nigeria DPA 2023 defines personal data as information relating to an individual that can be identified or is identifiable directly or indirectly by reference to an identifier such as a name, identification number, location data, an online identifier etc.²³ Furthermore, the Act defines sensitive personal data as data relating to an individual's genetic and biometric data; race or ethnic origin, religious beliefs, health status, sex life etc.²⁴ Meanwhile, the FOIA define personal information as official information held about an identifiable person, but does not include information that bears on the public duties of public employees and officials.²⁵

Generally, information about a person in a professional or official capacity is not considered personal information. However, it may still be considered as personal information, if it reveals something of a personal nature about the person. Consideration must be given to the context in

¹⁹S 3 (1) and (2) DPA.

²⁰Anna Johnston, 'The Definition of Personal Information (Research Paper for the Office of the Australian Information Commissioner, February 2020)<<https://www.salingerprivacy.com>> accessed 4 October 2023.

²¹Information and Privacy Commissioner of Ontario, 'What is Personal Information?' (Fact Sheet October 2016). <<https://www.ipc.on.ca/what>> accessed 5 October 2023.

²²Johnston, n (20) 10.

²³S 65 DPA.

²⁴Ibid.

²⁵S 30 (3) FOIA.

which the information appears. Attempts have been made to distinguish between private information and personal information by stating that personal information is a broader concept which embodies all private information like family, marriage, motherhood etc. Personal Information on the other hand has also been interpreted to mean identity details of individuals including public officers like date of birth, identification numbers etc.²⁶

As earlier stated, the relationship between access to information and privacy is complex.²⁷ There is no consensus about which information is categorized as personal or non-personal. Although it is widely recognized that information relating to official capacities as against personal life are not considered personal information for the purpose of withholding.²⁸ For instance, medical records and criminal records related to the position are considered non-personal information and need not be withheld. With respect to elected or high ranking public officers, protection of data is less restrictive. Information relating solely to a public official's personal life rather than to his or her public actions is less likely to be disclosed. Medical records of non-elected officials are generally considered sensitive and are not released in any system. Similarly, criminal records not related to their official positions are often withheld.

1.3 Conceptual Framework of Access to Information

Right to information or Access to information is a fundamental right that entrusts citizens with the legal right to access the information held by government or public bodies and private bodies utilizing public funds or performing public functions or rendering public services.²⁹ The right is internationally protected as a human right by numerous international conventions.³⁰ Freedom or access to information is a fundamental feature of any democratic nation.³¹ It fosters the dissemination of accurate information, which in turn facilitates active participation of the citizenry in government or public affairs. More importantly the right serves as a vital tool for curbing corruption and overall promoting an efficient and effective government. The Right to information entails that anyone can request for information from a public or private body holding public interest information. Information requested can only be denied on certain grounds, such as

²⁶*Union Public Service Commission v. R.K. Jain, Delhi high Court, W.P.(C) 1243/2011 & C.M. NO.2618/2011.*

²⁷Banisar, (n3).

²⁸Ibid.

²⁹Verma (n11) 3; See s 2(7) FOIA.

³⁰Art 19 of both the UDHR and ICCPR, Art 9 of both the African Charter on Human and Peoples' Rights and African Union Convention on Cyber Security and Personal Data Protection etc.

³¹Friedrich-Ebert-Stiftung, 'Right to Information in Africa' (Manual for Civil Society 2017) 10 <<https://library.fes.de/bueros>> accessed 4 October 2023.

personal information, national security threats and sensitive commercial information.³² In Nigeria, access to information is protected by the Section 39 of the Constitution. The right/access to information is recognized as being an inalienable part of the Freedom of Expression. Furthermore, the United Nations defined freedom of expression to include the freedom of accessing, obtaining and circulating information.³³ Specifically the Freedom of Information Act 2011 protects the public's right to access information and restricts access to information on grounds of privacy.

1.4 The Competing Rights of Privacy and Access to Information

The right to access information is premised on the fact that public bodies are only custodians of information and thus, it is the right of the public to access information except within narrow scope of exemptions recognized by law.³⁴ Contemporaneously, right to privacy protects persons from unauthorized access to their personal information. Here, persons have a right to control the collection of data, access to personal information, and use of such information held by organizations.³⁵ Both the Right to Information and Right to privacy are intertwined and supplemental to each other and are described as being two sides of the same coin.³⁶ For instance, privacy laws complement access laws by extending the right to access information to private bodies (Most access laws cover only public bodies). Individuals are authorized to obtain personal information from private and public bodies.³⁷ However, there exist conflicts between these two rights where there is a demand for personal information held by public or private bodies. Right to Information and Right to privacy both have been globally recognised and more than 100 countries have adopted laws for the protection of these rights.³⁸ Also, some countries like United Kingdom, South Africa, and Mexico among others, entrusts the implementation of both access laws and privacy laws on a single body. This re-affirms the need to clearly define the scope of both rights.³⁹

³²S 11, 14 and 16 FOIA.

³³UN General Assembly on calling of an International Conference on Freedom of Expression 14 December 1954 Resolution 59(1) UN DOC <<https://refworld.org/docid/>> accessed 1 July 2023.

³⁴Nwauche, (n6) 66.

³⁵Banisar, (n3) 10.

³⁶Verma, (n11) 3.

³⁷Banisar, (n3)11

³⁸Ibid 5.

³⁹Shyllon, (n7)

The tension between privacy and freedom of information has always been existent.⁴⁰ Despite the fact that free exchange of information has many benefits, the law also acknowledges the need for privacy. Access to information and the protection of privacy are both rights intended to help the individual in making government accountable.⁴¹ Most of the time, the laws complement each other. However, there are conflicts and in resolving these conflicts, the tension can be mitigated through the enactment of clear definitions in legislation, guidelines, techniques and oversight systems. Specifically, care should be taken when drafting the laws to ensure that the access to information and data protection laws have compatible definitions of personal information.⁴²

As a result of the grave tension between these two rights, it is important to regulate personal information. Many countries have done so, by consolidating comprehensive laws to protect personal information held by both public and private bodies.⁴³

Generally when a country has both the Right to access information law and DPA, usually, the DPA will apply to individuals' request for personal information; while request for personal information about other parties are handled under the Access to information laws. This is the position in Nigeria. Also in the United Kingdom there are both the FOIA, which guarantees access to information and, Data Protection Act which was designed to protect personal data.⁴⁴ The FOI Act of UK covers information held by public bodies but excludes requests for one's personal information; that is, information about the person making the request. This is treated as a subject access request under the Data Protection Act (DPA). The DPA gives the legal right to access one's personal information and also helps to protect personal information from being accessed by third parties. However, any request about a third party's personal information, via the FOIA, consideration must be given to whether there would be a breach of the DPA in the event of disclosure.⁴⁵ In *ZXC v Bloomberg L.P.*⁴⁶ there was a claim for misuse of private

⁴⁰Solveig Singleton, 'The Freedom of Information Versus the Right to Privacy: A Pro-Market Framework for Arizona,' (Arizona Issue Analysis, 24 May 2002) <<https://cei.org/.../freedom-information-vs-right-privacy>> accessed 18 September 2023.

⁴¹Banisar, (n3)

⁴²Ibid.

⁴³Verma, (n11).

⁴⁴It is noted that the Data Protection Act 1998 has been repealed by the Data Protection Act 2018.

⁴⁵See s 40 of the FOIA (UK) See also <www.gov.uk>Government> accessed 11 May 2023. In essence, request for someone else's personal information will be handled under the FOIA, but the principles of the DPA will be applied to decide whether the information can be released. If releasing the information would be breaching the DPA, the information must be refused. There is a stronger legal protection for more sensitive information under the DPA, such as religious beliefs, ethnic background, health, sexual life, criminal convictions and political opinions. See s 10 and 11 of the DPA 2018 <<https://www.leg.gov.uk/ukpga/2018/12/pdfs>> accessed 11 May 2023.

information on the grounds that, those investigated by law enforcements, have the right to privacy under the Data Protection Act. The central issue was whether or not the claimant had a reasonable expectation of privacy in information relating to criminal investigations into his activities. It was held that the claimant had a right to privacy and that there was no public interest justification in publishing the information. Similarly, the Court held in *Bull v Desporte*⁴⁷ that the Claimant was entitled to damages as well as, a permanent injunction to restrain the publication of his private information.

In Nigeria, the Freedom of Information Act and the Data Protection Act regulate access to information and privacy respectively. Both laws contain definitions of personal information as noted earlier. Furthermore Section 14 of the FOIA delineates information that constitutes personal information.

1.5 Privacy under the Freedom of Information Act

Section 14 provides that request for personal information of a third party should be denied. Personal information entails files and personal information maintained with respect to clients, patients, residents, students, employees, appointees or elected officials of any public institution or applicants for such positions; 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 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. Personal information is protected such that the proviso in subsection 3 which provides for the release of personal information in the face of overwhelming public interest is rendered inane. This is because the consent of the person to whom the information relates must be sought at all times.⁴⁸ This provision guarantees the protection of personal information held by public/private bodies from invasion. The implication of the provision is that the consent of the individual to whom the information relates, must be obtained, even when there is an existent overwhelming public interest. For elucidation, section 14 (1) provides for exemption of disclosure of personal information. Subsection (2) states that the public institution shall disclose personal information only with the consent of the individual it relates to, or where the information is already publicly available. Subsection (3) provides that there shall be disclosure, where the public interest in such

⁴⁶(2019) EWHC 970 (QB).

⁴⁷(2019) EWHC 1650 (QB).

⁴⁸S 14 (1) – (3) FOIA.

information far outweighs the protection of the privacy of the person to whom the information relates to. However, this disclosure is subject to subsection (2) of the FOIA. It is noted that the DPA acknowledges certain grounds for processing personal data where it is necessary for public interest, national security, law enforcement, court proceedings, control of health emergencies.⁴⁹

It is well established that there is a compelling need to protect individual privacy, especially as regards unauthorized access to personal information. Somewhere in between lies the exigency of accessing public information, even personal information, particularly with respect to public officials who are elected to be representatives of the citizens. This is buttressed by the point that while both access to public information and privacy are recognized rights; the right to privacy should not be exploited as a cover for malfeasance. As public officials, accountability is consequential for a smooth running of society. Elected public officials like the President cannot be cocooned like private citizens. Their affairs while in office remains vital in the public sphere.⁵⁰ Personal information including medical or criminal reports becomes paramount for public officials specifically where such information is hinged on the position.

For purposes of emphasis, the protection of data for elected or high ranking officers are less restrictive. There is a narrower constitutional protection for elected public officers, as compared with private citizens. In *Editions Plon v France*⁵¹ the European Court of Human Right (ECHR) ruled that the medical report of the President be released in the interest of the public. In like manner, the Supreme Court in India ruled that the criminal records of persons contesting for parliamentary seats be released.⁵²

From the foregoing, section 14 of the FOIA which protects privacy of individuals has been a haven for public officers to deny vital public information. As pointed out earlier, the section permits access to personal information only with the consent of the data subject or where the information is already publicly available. The Act defines Personal information as any official information held about an identifiable person but does not include the information that relates to the public duties of public employees and officials.⁵³ It is however stated here that sometimes, official information of a person may become a subject of public interest which needs to be disclosed. For instance, during the 2008 presidential elections in the United States, questions

⁴⁹S 3 (1) and (2) DPA.

⁵⁰Eddy Odivwri, 'Buhari's Ill Health and Matters Arising' *This Day Newspaper* (19 August 2017).

⁵¹(2004) Application No. 58148/99.

⁵²*Secretary General Supreme Court of India v Subhash Chandra Agrawal* (2010) LPA No.501/2009.

⁵³S. 32 FOIA.

arose as to whether Barack Obama was an American citizen, to qualify him to aspire for American presidency. The demand for the information of his birth place bothered on public records involving privacy issues. Arguments were that, there was sufficient public interest to justify the release of such information. The information containing the place and date of his birth was eventually released in 2012.⁵⁴

Furthermore, crucial information has been denied on the basis of privacy safeguarded by section 14 of the FOIA. For instance, the mystification surrounding the request for information on President Buhari's state of health and medical bills for his medical treatment abroad in 2017; as well as the expenses incurred as parking fees for the aircraft of the Presidency in the United Kingdom.⁵⁵ The request was made based on reasons that the President is a public figure and his medical expenses were paid from the treasury.⁵⁶ The Federal High Court refused the application on the grounds that section 14(2) of the Act did not provide for such personal information to be disclosed about the President, without his consent.⁵⁷ This standpoint is erroneous, in view of the fact that the President is a public figure and, his right to privacy is not as delicate as those of private citizens. Moreover disclosure of the information about his state of health was material for public scrutiny in determining his capacity to pilot the affairs of the nation.⁵⁸ Also, in the case of *Incorporated Trustees of the Citizens Assistance Centre v Hon. Adeyemi Ikuforiji and ors*,⁵⁹ the applicant sought information on government overhead costs from 1999 to 2011 from the Lagos State House of Assembly. The respondents contended that overhead costs are classified under section 14(1)(b) which provides for exemption of personal information of elected officers, appointees, employees of any public body.. The Court in upholding the application held that, the personal information contained within the requested information rendered it subject to the exemption in section 14. Since the public interest in disclosure in this case did not outweigh the protection of privacy, the information need not be disclosed. It is not clear how information

⁵⁴Paul Adujie, 'Freedom of Information: Causes and Consequences: A Comparative Analysis' in Epiphanny Azing and Fatima Waziri (eds) *Freedom of Information Law and Regulation in Nigeria* (Nigerian Institute of Advanced Legal Studies, 2012), 157 and 158; Anthony Zurcher, 'The Birthplace of Obama: Birther Conspiracy' *BBC News*, (16 September, 2016) < www.bbc.com > accessed 2 May 2023.

⁵⁵ASRADI v FRN FHC/ABJ/CS/1142/2017.

⁵⁶Odivwri, (n 50).

⁵⁷FHC/ABJ/CS/1142/2017.

⁵⁸Banisar, (n3) 13. There is a consensus that information about elected officials or high-rank public officers is less restrictive; even when it relates to their personal lives. Also most countries agree that most information relating to official capacities is not considered personal, for the purpose of withholding. Generally, information not related to his personal or family life and is less likely to be sensitive should be disclosed.

⁵⁹Unreported Suit no FHC/ABJ/CS/1016/2011.

concerning overhead costs of the House of Assembly is categorized as exempted personal information. Moreover, the information requested is basically about the cost for administering a state, even though it could border on personal information. Nonetheless, the information should have been released on grounds of public interest. In any case, section 14 is couched in such a way that the relevance of the public interest test is irrelevant. The right to privacy ordinarily, does not preclude public officials or ex-officials from disclosing certain information such as, management of public funds and office, and even personal information especially in the face of overwhelming public interest.

Meanwhile in *Uzoegwu v. C.B.N and ors*⁶⁰ the applicant sought information on the monthly salaries of the Governor, Deputy Governor and Director of Central Bank of Nigeria (CBN). The respondents objected on grounds that the information was within the purview of section 14(1)(b). The Court ordered the release of the information, and held that it is not logical to say that payments of public officers from the public funds for their services to the public, amounts to personal information.

We find that the two cases discussed above are similar in facts, yet the Courts arrived at different judgments. We, therefore disagree with the decision reached in the prior case (*Incorporated Trustees*). This is because it is illogical to categorize overhead costs for the administration of a state as personal information. The cost for administering the state is clearly different from the private or personal lives of the officers.⁶¹

Also the case of *Legal Defence and Assistance Project v Clerk of the National Assembly of Nigeria*⁶² demonstrates how section 14 has been exploited for selfish and mischievous reasons. A request for information on the details of the salary, emolument and allowances paid to members of the National Assembly was denied on grounds of privacy and personal information under section 14 (1). The Court held that the information requested was not related to any personal information listed under section 14 and what was requested was the entitlements of public officers paid from public purse. The Court further elucidated that personal information of elected officials will include personal data required to be filled in by persons seeking electoral positions. It was noted that even personal information protected by this subsection can still be disclosed

⁶⁰(2011) FHC/ABJ /CS/1016/2011. The Federal High Court held that the salaries of high officials of the Central Bank of Nigeria was not personal information and should be disclosed under the FOIA.

⁶¹IyabadeOguniran, 'The Freedom of Information Act, 2011: Unwieldy Piece of Legislation for the Nigerian Courts' (2016) 42 (3) *Commonwealth Law Bulletin* 439.

⁶²Suit No FHC/ABJ/CS/805/2011

under the circumstances stated in sub-section 2; that is with consent of the individual or where the information is publicly available. The stance of the Court re-affirms that information contained in the above section cannot be released except with consent of the person the information relates to, not even under overwhelming public interest concerns. Although the Court stated while interpreting subsection 3 that its provisions are crystal clear, as the Act places the interest of the public above all else, including private interest/protection. Similarly, Justice Balkisu Aliyu in *Uzoegwu's* case reiterated that the intention of the legislature is clear as to where there is a clash between public and personal privacy, the collective/public interest is held paramount. Depending on the circumstances, public interest is pivotal where it outweighs individual interest. Unfortunately, there is yet no pronouncement by the courts upholding the public interests concerns over private ones, nor any interpretation on section 14 (2) and (3) read together. Instead, the focus has been on the obtaining the consent of the person to whom the information relates under all circumstances.

The question arising from the above reasoning is why subsection 3 which establishes the supremacy of public interest over personal concerns is subject to subsection 2. The public interest test allows for disclosure of information, even if it is personal and its release could cause harm, when it is found that the public interest in its release is more important than the privacy interest.⁶³ The essence of the public interest is to serve as a check on the abuse of the right to privacy. The implication is that personal information cannot be released not even where there is a public interest override, except with the consent of the person to whom the information relates.

Therefore, it suffices that information relating to accountability for public resources should not be categorized as personal under the guise of privacy. This is because elected public office holders are answerable to the persons on whose behalf they act. Even so, personal information of such persons should be released where there is an overwhelming public interest in the information sought.

Certain factors are to be taken into consideration when attempting to strike a balance between access to information and protection of privacy in cases involving request of personal information from public bodies. These factors include whether the information is deemed private unrelated to the individual's official capacity; whether the reason for disclosure of personal

⁶³Banisar, (n3) 20.

information is to ascertain the proper performance of the individual's official duties; whether the disclosure will aid in establishing accountability and transparency in the utilization of public resources.⁶⁴ It follows that some of the cases discussed above are not justified when juxtaposed with the factors to be considered before personal information can be released on public interest grounds. For instance in *Incorporated Trustees' case*, the request for overhead costs of the House of Assembly is unrelated to the private information of the respondent, the information requested will enable an efficient assessment of the performance of official responsibilities and also would foster accountability and transparency.

1.6 Recommendations

- a) Section 14 should be amended to unequivocally guarantee that the public's interest in personal information should supersede any private interest/personal concerns especially as regards elected public officials or high ranking public officers. The section while protecting privacy should also provide a safety check against abuse through the instrumentality of the public interest test.
- b) The definition of privacy under section 14 should be made compatible with the definition under the DPA as the DPA acknowledges some grounds for derogating from the protection of privacy, such as public interests and health emergencies.
- c) Specifically, subsection 3 prescribing public interests override should not be made subject to subsection 2 which only allows for disclosure of personal information with the consent of the concerned person. Each subsection should stand alone to guard against exploitation and abuse by public officials, particularly elected ones.
- d) The courts should not be hesitant in releasing personal information of elected public officers like the president, in cases where the interest of the public in the information overrides personal or privacy interests.

1.7 Conclusion

Right to information and Right to privacy are often described as complimentary. Both are focused on ensuring that public bodies and officials are accountable in the information era.⁶⁵ The Right to Information and Right to privacy both provide individuals with access to their own personal information held by the government bodies. In the same vein, the rights are also mutual,

⁶⁴*Union Public Service Commission v. R.K. Jain* (2012) LPA No.618/2012.

⁶⁵Verma, (n 11).

as privacy laws are used to obtain policy information in the absence of an access law, and access laws are used to enhance privacy by revealing abuses.⁶⁶ However, the tension is existent in identifying the line between the right to access information and the right to protect individual privacy. One right cannot be protected at the expense of the other. That is the right to access information should not be exercised without restrictions as to infringe on privacy. In the same vein, the right to individual privacy should be not exercised to the extent of denying key information that would be beneficial to the public in the long run. The misuse of privacy exemptions often leads to needless conflict as it is assumed that any privacy law is an attempt to conceal misfeasance. There is a constant problem of misuse of privacy exemptions in the access to information laws. The right to privacy cannot be a smokescreen for misfeasance particularly of elected public officers. The problem arises from attempts by public officials to conceal decision making from public scrutiny by misrepresenting their demand for secrecy as a privacy interests. Documents and information are withheld, claiming privacy of officials or of third parties.⁶⁷ It is however noted that sometimes the arguments for privacy made by officials are legitimate. It is acknowledged that the FOIA and DPA adequately protect the right to privacy in Nigeria. Nevertheless, the protection of privacy under the FOIA is arguably absolute as no room is created for the release of personal information under any circumstances. This is an aberration as the section is easily exploited for selfish purposes. The section should be amended to permit the disclosure of personal information where necessary especially as regards elected public officials. Many nations including developed ones often use the privacy exemption as an excuse to deny important information necessary for development. Many of these records or data when released publicly play a significant role in checking public misfeasance and misappropriation.⁶⁸ Section 14 should not be leveraged on to promote unscrupulousness. Therefore, while a certain amount of privacy is essential to good government, the exemption should be manipulated for personal gains.

⁶⁶Ibid, 22.

⁶⁷Banisar, (n3) 19.

⁶⁸Banisar (n3) 20.