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[The Impact of the Freedom of Information Act 2011 on business](#)

One can be excused for thinking that the recent Freedom of Information Act (FOIA) 2011 affects only disclosure of information held by government or government departments. Most of the comments and analysis of the Act have been with reference to the government and its officials. But a careful reading of the FOIA shows that certain private companies and non- governmental bodies are also covered and affected by the provisions of the FOIA. These bodies therefore also have a duty to

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give access to information to any person who requests for it.

The private companies and non- governmental bodies affected are those who come within the definition of public institutions given by the FOIA. These are private bodies providing public services or which perform public functions or utilise public funds. The statute does not define any of these phrases, 'public service,' 'public functions,' or 'public funds' and so there may be some controversy over the organisations actually covered by the FOIA. But a review of the authorities (local and international) suggests the following guidelines:

- Public service is not to be interpreted by a reference to constitutional provisions. The meaning of the term 'Public service' used in the FOIA is much wider than that given in the Constitution.
- 'Public service' refers to those services which are provided for or used by the public in general or by a class of the public. They are services on which members of the public rely when not relying on private facilities of their own.

Examples will be power generation and distribution, postal/courier services, transportation, banking, insurance, telecommunications & hospital services.

- Bodies which accept a loan or grant from government or any of its agencies. Thus anybody who, for example, is funded by a loan from Central Bank of Nigeria, Bank of Industry, National Agricultural Co-operative and Rural Development Bank or the National Youth Service Corp (NYSC) Scheme or who disburses such loans is bound to comply with the Act and grant access to information in their possession.
- Any person who carries out public functions is also within the ambit of the FOIA. Such will include tax consultants used by the State Revenue services to assess or collect taxes etc or private waste collectors contracted by the state.

These bodies are by the FOIA required to ensure that they keep every information or record about the institution's operations, personnel, activities and other relevant or related information or records. They are further required to ensure that they organise and maintain all information or record in their custody in a manner that facilitates public access to such information or record.

A few information may however rightly be denied by the bodies concerned. These include

- Information the disclosure of which may be injurious to the conduct of international affairs and defence of Nigeria
- Information that will interfere with pending administrative or enforcement proceedings or which will deprive any person of a fair trial

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- Information which is reasonably be expected to facilitate the commission of an offence
- Information relating to personal information, except where the individual to whom it relates consents or the information is publicly available
- Proprietary privileged or confidential information relating to the trade secrets and commercial or financial information obtained from third parties
- Information relating to proposals and bids for any contract grants or agreement where if the information were disclosed it would frustrate procurement or give advantage to any person
- Information relating to legal practitioner-client privilege or health worker-client privilege, journalism confidentiality privilege or any other privilege conferred by Act
- Information which contains course or research materials prepared by faculty members
- Architects and engineering plans for buildings not constructed with public funds and in case of buildings constructed with public funds where the information would compromise security
- Library circulation and their records identifying library users with specific materials

The bodies concerned may impose reasonable fees for the procurement of the information by any person interested but the fees shall not be

calculated to make a profit or deter access. Rather only standard charges for document duplication and transcription where necessary may be covered by the fees.

There is a penalty for wrongful denial of access to information sought. The offence is punishable with a fine of ₦500, 000. Imprisonment of up to one year is imposed on any person who willfully destroys any records kept in his custody or attempts to doctor or otherwise alter same before they are released to any person applying for it. In this wise it is wise to remember that any person who aids or counsels or helps to procure the alteration is an accomplice and will be equally punished for the crime.

The effect of all these is that private businesses will come under greater scrutiny and will feel greater pressure to keep their business in order if they must avoid litigation and sanctions for violating the FOIA.

Taxation: VAT and Choses in action

A recent decision of the Courts relate to imposition of Value Added Tax (VAT) on choses in action. In that case, CNOOC E&P Nig Ltd V A.G. of the Federation, suit no FHC/ABJ/CS/605/07 decided on 22/3/2011, the Federal High Court decided that a supply of Choses-in-Action is not a supply of goods and services and therefore not liable to payment of VAT.

The facts of the case were that the Claimant was the assignee for valuable consideration of an Oil Mining Lease (OML) and the FIRS sought to subject the transaction to VAT. Claimant sued to prevent this being done contending that a supply of choses in action such as the OML is, is not a supply of goods and services within the meaning of the VAT Act. The court upheld this contention.

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Guidelines for implementation of Employee Compensation Scheme

The National Social Insurance Trust Fund (NSITF) recently published guidelines for the implementation of the Employee Compensation Scheme under the new Employee Compensation Act. It will be recalled that the new Act abolished the workmen's compensation Act and the scheme established under it for the compensation of injuries suffered at work.

The highlight of the guidelines is the stipulation of a commencement date for the scheme, which is July 2011. The guidelines also stated that the review and classification of employers which the Act directed the NSITF to carry out will be done in two years time in consultation with all relevant stakeholders.

Enforceability of the CBN directive on maximum daily cash withdrawal limits

Recently the Central Bank of Nigeria by its circular of April 28 2011, indicated that effective June 2012, the maximum amount of cash that may be withdrawn per day from a bank account shall be as follows: individuals- ₦150, 000 and companies ₦ 1,000,000. The CBN also stipulated the same limits for payments on third party cheques with the effect that one cannot pay for anything above those limits by cash. While the directive continues to generate a lot of comments on the convenience and operability of the system, little has been said about the more sublime but fundamental issues such as the existence and or extent of the CBN's powers or jurisdiction to make these regulations.

According to the CBN there is no law that 'explicitly and exclusively' deals with

payment system in Nigeria¹. It however hinges its efforts in this regard on sections 17 & 47 of the CBN Act as amended². But it appears that the CBN's view that its powers derive from the provisions of the CBN Act mentioned does not give a complete picture. First the Objects of the Bank are stated in section 2 of the CBN Act to include promotion of 'monetary stability and a sound financial system in Nigeria. Second, section 42 of the same ACT also gives it the powers to co-operate with other banks in Nigeria to promote and maintain adequate and reasonable financial service for the public and to further such policies not inconsistent with the CBN Act as shall in the opinion of the CBN be in the national interest. Furthermore, the Banks and Other Financial Institutions Act³ also invests the Governor of the CBN with power to make rules and regulations for the operations and control of all institutions under the CBN's supervision⁴.

However despite these powers it appears that the CBN is still severely limited in the directives it may give, such as its recent circular on maximum daily cash withdrawal limits and the persons to whom such directives are addressed. This is because the CBN does not have any powers to regulate or control any person other than the banks and financial institutions in Nigeria. Now, if it has no such power and in fact the circular did not purport to be addressed to any one other than the banks and financial institutions, the question is to what extent can this its directive be legally enforced. In other words can the banks simply on the authority of the CBN directive begin implementation of the directive and purport to apply to their customers the penalties stipulated by the CBN for infraction of its said directive? It appears there are challenges in the way of its implementation since banker-customer relationship

is a matter of contract. The terms and conditions of the contract are generally agreed by the parties at the beginning and so the first challenge is ensuring that the bank can vary the terms midway to implement the CBN directive. A second challenge relates to the penalties imposed for infractions of the directive; for instance it stipulates N100 penalty for every ₦1000 collected above the limit in the case of individuals and ₦ 200 for every ₦ 1000 collected above the limit in the case of companies. Since penalty payments are generally frowned upon in contracts and in any case are construed strictly in favour of the person to be penalised, the banks and the CBN will find it difficult to justify the imposition of the payments.

In the light of these challenges, banks and financial institutions seeking to implement this directive will have to tread carefully in this area. Ultimately however, there is a need to have a law 'explicitly' dealing with payment systems in Nigeria in order to obviate the kind of challenges we have highlighted here and many others.

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¹ See its note on Payment System at <http://www.cenbank.org/Paymentsystem/evolution.asp>

² Ibid; See CBN Act 2007

³ Cap B3 LFN 2004

⁴ Ibid section 57(2)