Email: info@aiia.com.ng , Website: www.aiia.com.ng
Tel: 0805 532 6477, 0802 760 4957, 0805 547 7646

"A FREEDOM OF INFORMATION ACT FOR NIGERIA – TO BE OR NOT TO BE?" BEING A MEMORANDUM PRESENTED BY BARRISTER IME AKPAN, PARTNER, A.I.I. ASSOCIATES IN RESPONSE TO THE CALL FOR SAME BY THE SENATE COMMITTEE ON INFORMATION TOWARDS THE PUBLIC HEARING ON THE PROPOSED FREEDOM OF INFORMATION BILL FOR NIGERIA HOLDING AT THE NATIONAL ASSEMBLY, ABUJA, TUESDAY APRIL 26, 2005

Distinguished Senate President (in absentia, but nevertheless ably represented by)

Distinguished Chairman of the Senate Committee on Information

Distinguished Members of the Senate Committee on Information

Distinguished Members of the 4th Estate of the Realm

Distinguished Invitees to this historic hearing

Distinguished Compatriots here present,

All Protocols observed

I consider it a unique privilege to be invited to address this gathering this afternoon. As we have been reminded, this is about the third attempt at holding this public hearing. Having come this far today, we all can safely assume that the hearing's day has at last come. And what a day it may well turn out to be – the day we may face a choice between a Freedom of Information Bill for the sake of it or a Freedom of Information Bill that will considerably elevate the profile of the country before its peers. Difficult as it may be, for the simple reason that House Bill 6 (alias HB.6) has passed five readings and one public hearing already and was supposed to scale through its last hurdle today. Unfortunately or otherwise, the postponements have spawned an alternative Bill that, while taking HB. 6 into account has gone further to break fresh ground by providing amply for the enforcement of its provisions, to guarantee that should a Freedom of Information Bill become law in Nigeria, the law will not lapse into one of those enactments in our statute books, honoured more in their breach, than in their observance.

A number in the audience may have received their copy of the alternative. But for any who may have been left out, the comforting news is that if the Pressroom next door has Internet connectivity, the alternative is available on the website http://foia.blogspot.com . Failing that, if such delegates either meet me at their convenience, during one break or the other, or have subscribed their e-mail addresses on the attendance sheet doing the rounds, they can check their e-mail boxes for it, from tomorrow onwards. At this point it may be permissible to treat you to some of the highlights of the alternative. And genuine modesty requires that one start will its latent blemishes, trusting that they will not tarnish the whole. And for that purpose, we might as well make a rear entry, and to that end attention is directed to

- The Schedule: last page, that is count 1, 2, 3, and enter the word "here" after the word "provided" in paragraph 3 of the Schedule.
- Next the Interpretation section: Introduce the term "Minister" as a footnote, more or less, and add the definition "in relation to Government means the Minister to whom responsibility for the institution is assigned, and in relation to every other institution, the chief executive office of such institution'.
- S.78(2): At the beginning of the sub-section, introduce the phrase "Save as provided in S.75 herein"
- S.77: Delete "s" in the word "performances" towards the end of the second line of that section.
- S.75(1) line 3: Introduce the word "or" between the words "institution" and "an" to now read "institution or an authority"
- S.74(1)(b) second line: Introduce the word "the" between the words "at" and "expense" to now read "at the expense"
- S.74(1)(d) last line: Delete phrase "the publication date of the first of the three apologies" and substitute the phrase "one hundred and twenty days after the date of the application in issue"
- S.74(2)(d) last line: end the sentence with the phrase "as the case may be."
- S.73(2) lines 1 and 2: Delete the phrase "an applicant" substitute the word "him"
- S.73(5) line 1: Delete the words "private" and "particulars" substitute "information" for particulars to now read "personal information"
- S.73(16): Enter "aggrieved" before the word "applicant"
- S.69 line 1: Substitute 68 for 72

- S.60(5) line 1: Delete “institution” replace with “institutes”
- S.60(6) line 3: Delete “institution” replace with “instructed”
- S.60(17) line 1: Rewrite “anyone” to read “ any one”
- S.60(21) line 2: Rewrite “maybe” to read “may be”
- S.60(23) line 1: Replace “**B**ill” with “Act”
- S.60(24): Replace “Bill” with “act”
- S.55(1)(d): Delete the last “not”
- S.53(1)(e): Enter “applications” as the last word
- S.48(2): Make “interval” plural, by adding “s”
- S.29(1) e line 3: Delete the last word ie “public”
- S. 28© & (d): Convert the alphabet “d” to “c” and delete the bracket for “c”
- S.25 line 2: Change “29” to “30”
- S.20(b) line 2: Delete “the”
- S.16(1)(a)(vii) first two lines: Delete everything after the word “by” replace with “an applicant”

End of blemishes.

Now to the more positive aspects of the alternative. I must confess from the onset that I am quite at a loss here what to do. And why? Because of my pet notions about social justice, equity and air play. My understanding is that every one with a presentation to make is entitled to 20 minutes. With 80 plus sections to this alternative, that translates as less than fifteen seconds to a section, and how much justice can even an orator do to a multi-paragraph section within such a cramped time frame? But if my Distinguished Chairman can offer some guidance, it can make a whole world of difference in terms of staying within my slot. Can my Distinguished Chairman kindly bail me out at this point?

From the Arrangement of Sections, you will discover that the draft is divided into thirteen PARTS as follows:

PART I

Part 1 is headed “Preliminary” and spans eight sections including the following, namely – [HIGHLIGHT THEM.] Time constraints disallowed, we intend to drill down to the value-add of the provisions of each of those sections, particularly the one having to do with “OBJECTS”, “NON-APPLICATION” “THE STATE” “LIMITATIONS PROHIBITING OR LIMITING

DISCLOSURE", MEANING OF RECORDS and of INSTITUTIONS and the overall thrust of the draft, namely "overriding "PUBLIC INTEREST"

PART II

Part II goes to Fundamental Presumptions, Burden of Proof and Appeals. It creates three fundamental presumptions – Presumption of Right, Presumption of Severability and Presumption of Bad Faith. And it is not difficult to guess why. Institutions are supposed to be ***agencies*** of their stakeholders, and accordingly, like the agents they are, accountable. Regrettably, however, agencies have not only failed to live up to their billings, they have typically evolved into laws unto themselves, and their stakeholders have been effectively alienated, typically, that is. The presumption of right seeks to restore the supremacy of the stakeholder – in this case the citizen in particular and the public, through the media, in general.

What about the Presumption of Severability? Various coinages, including "Secret" "Top Secret" "Confidential" "Strictly Private and Confidential" and "Classified" have come into being to keep the citizen and the public effective outsiders as far as the business of institutions they contributed, in one way or another, to their founding are concerned. Under these cloaks, seas of water flow under the bridge. The draft concedes that some information held by institutions may indeed need to be reserved from general scrutiny, at least for a time. To provide for genuine cases of such, the principle of severability had to be elevated to the status of a presumption operating in favour of the stakeholders on the outside, with the insider stakeholder saddled with proving his case for keeping the information to himself and away from you and me. This presumption should, it is presumed, put paid to the usual proclivity to hoard information under one guise or the other.

The Presumption of Bad Faith is intended to more or less re-inforce the twin claims of right and severability operating in favour of the outsider stakeholder. It will indeed be in utter bad faith for the authority of an institution to sit on information to which an outsider has a fundamental right to start with, but has conceded to the party, who, by sheer happenstance, holds that information, the discretion to blur those portions of it that could figuratively "blind" him, to hold back the dregs as well.

In addition to the foregoing presumption, Part II provides in Section 13 that the applicant is not required, as a condition precedent for exercising his right, to either demonstrate or declare any particular interest in the information he seeks to access . That is only too proper given the very meaning of democracy, which again imports the agency principle of accountability. Democracy, as an institution stands to fare much better where elected officers, for example, not only claim to owe a duty to but do carry themselves as indeed owing a duty to the electorate that gave them its mandate in the first instance. And, outsider Stakeholders in the organized private sector would be spared the trauma of the Enron –style scenario and its likes, surfacing in different jurisdictions across the globe, with possibly more to manifest, as the world economy tethers on the verge of imminent collapse.

Part II also provides for the summary determination of decisions, whether or trial or appeal,. A judge or judges as the case may be, sitting in Chambers, hand down reviews of the decisions of authorities in institutions

PART III

Part III captioned "Duty to Publish Certain Information and Records" has three sections (sections 16 – 18) Their combined effect is to impose a duty on institutions to make public the information and records they hold, for the guidance of an applicant and in certain cases for inspection and possible purchase, and to disentitle a defaulting institution from holding an applicant to ransom for its own lapse in causing the public to proceed blindly as it were when it could well have spared him the trouble if it had published the relevant rules, guidelines and practices in the first instance.

Matters required to be published include –

- its details which are understood to mean its name, contact and mailing addresses (both e-mail and snail mail) telephone and fax numbers, website, etc.
- its functions
- its decision-making and other powers
- details of any provisions made for consultation with and representations by outsider stakeholders – whether individual or institutional – in respect of the institution's policy-formulation process as well as its administration
- the various categories of record it holds

- its approved budget including its expenditure
- recipients of its subsidies
- its proposed development activities
- publication of the institution's holdings available for inspection and possible purchase by the public
- the different outlets where such can be inspected and purchased
- the procedure to be adopted by an applicant seeking access to its holdings
- manuals or other information containing interpretations, rules, guidelines and practices or precedents in the form of letters advising or informing outsiders
- details of the schemes or particular law it administers which details include the applicable rights, privileges or benefits and the obligations, penalties or other detriments under the scheme or particular law and are not provided otherwise for instance in any other law, but where otherwise so provided or otherwise published, say by another institution, then there is no duty to publish.
- details of the manner in which it manages or intends to manage or enforce the scheme or enactment

About the only exemptions are those records the contents of which include exempt information and such records, far from being withheld because of their contraband content are to be published devoid of such contraband.

An institution is to update its Gazette and website publication of the specified records annually. In effect then, the commencement year publication amounts to no less than a first edition. Applicants can therefore confidently look forward to subsequent editions. Institutions established after the commencement of the Act are obligated to commence compliance as soon as practicable after their establishment.

Due allowance is made that despite its best endeavours, an institution may have an uphill task discharging its duty to publish within the time limited for the exercise – twelve months in the case of the Gazette and three years in the case of the website, but encouragement is provided to comply just as soon as practicable. Besides publication in the Gazette and on its website, an institution is obligated to adopt any other appropriate mode of publication

so long as it can facilitate the free exercise by the public of its rights under the Bill.

PART IV

Right of Access To Information and Records is the caption of Part IV. It defines the right to information under the Bill as absolute.

In its section 20, the Bill preserves the right of access already enjoyed by the public under any other law or arrangement . Section 21 goes a step further, to protect any right of access to even exempt records granted by any other enactment.

Section 22 requires that to exercise his right, an applicant has to write to the institution concerned either precisely identifying the record of his choice or providing sufficient details to enable the institution identify the record. Section 29 (in the same Part) lists "a reasonable opportunity to inspect the record", a hard copy of the record or its electronic counterpart, an opportunity to listen to an audio or watch a video recording, or a written transcript – for example in the case of shorthand – among the forms in which access is to be granted, but leaves the choice of which particular form up to the application. The Bill is on the liberal side as far as an applicant is involved, imposing on him no limitation as to the range but allowing him access to all records of a particular description even though they contain one specific information or relate one particular subject matter and even though it may be cumbersome for the institution concerned, except that if the attendant workload on the institution will unreasonably interfere with its normal operation, it should lend a helping hand to him to reformulate his application to minimize if not utterly eliminate such interference. Wrongly directed applications should be properly re-directed for the applicant. And for the purpose of complying within the thirty days an institution is allowed to dispose of a regular application, a re-directed application takes effect, not from its original date - courtesy of the applicant, - but from the date it is re-directed by the institution to which it was wrongly addressed in the first instance. The original institution is required to formally inform the applicant of the institution to which his application has been referred.

The receiving institution is allowed the same time – thirty days – it would have taken it to dispose of the application, had it been regular on the face of it, to inform the applicant of the transfer or deferral. But where an applicant

has properly directed his application and paid the requisite fees, access is to be granted without any delay. Any exempt content of a record is to be deleted before granting an applicant access, and in that case, the applicant has to be informed both of the fact that the record is castrated of its exempt content and the relevant section of the Bill enabling the authority to treat the record in that way.

Section 28 gives an institution the power to determine both its tariff for the service of granting an applicant access. The same section in its proviso exempts the press, radio, television and other agencies of the mass media from payment of any fees under this Bill.

According to S. 32 and the Interpretation section the decisions on an application are the prerogative of an authority, who should be a member of the management of an institution immediately below the Chief Executive officer of institution. Section 51(2) makes the authority the head of the Help Desk Unit of the institution, to be assisted by at least two subordinates, although the Bill holds the authority solely and wholly liable for any sanctions under the Bill, and to that extent introducing the concept of **personal rather than official responsibility** for any failure to live up to its expectations. His duty includes keeping an applicant posted on all developments regarding his application including his reasons for any decision unfavourable to the applicant, including that the record does not exist, if that indeed is the case, and even to keep reminding the applicant of his right of redress, if aggrieved by his decision.

PART V

I trust that My Distinguished Committee Chairman finds that Part V address his concern about classification. It identifies fifteen instances in which portions of a record can be legitimately withheld from an applicant. Executive Council records, records required for the formulation of policy, records affecting national security, defence and foreign affairs, records affecting the enforcement or administration of law, records having to do with trade secrets and business affairs generally, records affecting the national economy, records containing materials obtained in circumstances of confidentiality, records the disclosure of which would amount to contempt of court or contempt of the Ntional Assembly, private records in the custody of a public institution all belong in this category. Be that as it may, all exempt

records yield their exempt status to overriding public interest in their disclosure.

PART VI

The Bill provides for its joint implementation, both by institutions concerned and by the Fund. Part VI defines the role of the Fund – meaning The Right to Information Trust Fund. We will be getting there shortly, but the focus presently is on Implementation by Institutions, the drift of Part VI

Duties of Institutions under the Bill include the following –

- The establishment of a Help Desk Unit
- The compilation, widespread circulation in an accessible form and regular updating, in consultation with the Fund and in each official language, of a clear and simple guide containing practical information facilitating the effective exercise by an applicant of his rights under the Bill,
- The maintenance of records in accordance with a Code of Practice issued and regularly updated by the Fund in a manner as to facilitate exercise of rights
- The provision of adequate measures for correcting personal information
- The provision of training for its Help Desk personnel
- The publication in hard copy and on its website of Annual Reports providing certain statistical data
- The submission of copies of its Annual Report to certain functionaries both in the Executive and in the Legislature
- The compliance with a Code of Practice issued by the Fund

PART VII

Part VII creates a corporation aggregate by the name Right to Freedom of Information Trust Fund, insulates it from government bureaucracy and charges it with responsibility partly for the implementation and partly or the monitoring of the implementation by an institution of the provisions of the Bill. That way, the Bill guarantees that it will neither be blithely consigned to the dust heap or honoured more in its breach than in its observance.

Funding of the Fund is to be provided by the press, radio, television and other agencies of the mass media, on whom the duty of a watchdog

devolves, both in logic and in law, courtesy of S.22 of the Constitution. Accordingly, membership of the Fund is drawn from its financiers. Service on the Fund is both a call to national duty of sorts and a labour of love, for members are not entitled to any piece of the national cake in consequence thereof.

In recognition of some in attendance in person or by proxy at this hearing and their contribution to the cause of Freedom of Information, two slots have been provided to accommodate them, just in case they do not happen to come within the narrow definition of "the press, radio television and agencies of the mass media". They have undertaken a meritorious crusade and deserve to be recognized for it. A solicitor has been thrown in for good measure. We trust that a thirteen-man Board of Trustees for the Fund will neither be too slim nor too unwieldy to serve the purpose of keeping alive the noble ideals of a Freedom of Information Act

The Fund is expected to come into being once Mr. President signs the Bill into law.

PART VIII

As already hinted, the fund draws its life blood from the press, radio, television and other agencies of the mass media, who are accordingly exempt from paying any fees to secure access to information from any of the institutions constituting the jurisdiction of the Bill. They are required to contribute five per cent of their surplus or profit before tax to sustain the Fund. Additional funding sources include dividends from investments of surplus funds and contribution from well meaning individuals and organization sympathetic to the cause of the Fund.

PART IX - ADMINISTRATION OF THE FUND

Part IX goes to proceedings of the Board of Trustees of the Fund, covering matters like quorum, frequency of sittings etc etc.

PART X

Part X is a one section Part defining what amounts to offences and there are twenty three of them including falsification, obliteration and destruction of records, impersonating an applicant or and fronting for an ineligible applicant

PART XI

Part XI covers SANCTIONS against an erring authority. The basic sanction is of course a public apology. We trust that careful consideration will be given to selecting persons assigned the duty of headship of the Help Desk Unit in each institution so that they will be men of honour, who value their name and reputation, and will allow nothing to tarnish it. For such men of honour, an apology was considered sufficient sanction. But an apology too many will ultimately cost such an officer his job, and before entering upon his duties as Head/Coordinator of the Help Desk Unit of an institution, he is required to file an undated letter of resignation which will be retrieved and dated, with sufficient notice to his institution of course, once he's cup is full

PART XII

Part XI provides immunities both civil and criminal for errors of commission or omission as long as they are grounded in good faith, and/or in the public interest. The provisions are calculated to deprive the unscrupulous of any cover for nefarious activities, in the expectation that more and more actors in both the private and particularly public arena will become increasingly aware that nowadays, with the advent o the Information age, there really is no place to hide under the sun and that honesty transparency and accountability are the pillars on which lasting progress can be built.

PART XIII

The last Part, Part XII is headed Miscellaneous. It provides for the correction of any errors in the details in personal information, the judicial review of unfavourable decisions, the shelf life of exempt information and an elaborate Interpretation that seeks to clarify any ambiguities that may have cropped into the Bill mainstream. The Miscellaneous Part concludes with a three paragraph Schedule that makes additional provisions for the functioning of the Fund.

A concluding Explanatory Note highlights the Constitution, in both its section 22 and 23 but particularly the former as the inspiration for the Bill as it stands.

Email: info@aiia.com.ng , Website: www.aiia.com.ng
Tel: 0805 532 6477, 0802 760 4957, 0805 547 7646

AND NOW, THE BIG QUESTION: "WHICH FOI BILL IN 2005?

At the beginning of this presentation, the hint was given that the National Assembly may be faced with a choice – namely which Freedom of Information Bill to adopt as an Act of the National Assembly, HB No. 6 or the alternative here highlighted? That may not be the easiest of choices to make. But one or two additional hints might help.

The United Kingdom passed its first Freedom of Information Act only on New Year's Day, 2005! Its former colony, the United States of America passed its first Freedom of Information Act in 1966! What that means is that come 2006, the US Freedom of Information Act will be celebrating its golden jubilee. It is tempting to want to compare the strides made in both jurisdictions and debate the question – could there be a correlation between openness and the pace of progress of a society? Today, it cannot be a question who is the senior partner of the US-UK combine! And we may be reminded here that while it is said that "Knowledge is power" it is however added that "Knowledge shared is progress". How much more progress could this country not have made, if instead of plotting coups to unseat people from power, we devised strategies to unseat them from information!

Another hint, which is no big deal, come to think of it, is that technology has reduced the planet into a global village, approaching a global street! And what is happening on one side of that street is being closely watched by residents on the opposite side of the street. The website from which this alternative can be downloaded (http://foia.blogspot.com) has to do with open government. The alternative made that website shortly after the draft got into the hands of my Distinguished Committee Chairman. As a result, anticipation may be mounting in some circles outside Nigeria's territory and air space, what the Assembly will be doing faced with a choice not merely to claim to go for the open society but to be seen by the world to be going for it. And things like the flow of FDI (Foreign Direct Investment), ODA (Overseas Development Assistance) and outsourcing of ICT-related jobs may depend, to a large extent, on the form and content of Nigeria's municipal laws. Considerations such as these should be present to the mind of the Assembly, if Nigeria is to be successfully repacked to attract the world. Food for thought!

In conclusion, I crave the indulgence of the Senate Committee on Information, the eminent sponsors of this hearing to acknowledge the contributions of certain persons to the Bill and this presentation, and for that, one would like to start with –

The Distinguished Senate President, Senator Ken Nnamani, ably represented by …….

Distinguished Senator T. U. Wada, Chairman, Senate Committee on Information to whom much has been given, and to whom much will be demanded in return.

The Distinguished Members of the Senate Committee on Information who have by their presence and attention, encouraged the amplification of the provisions of the Bill.

Members of the press, radio, television and agencies of the mass media, whose concerns for a Freedom of Information regime in Nigeria that fired the crusade that culminated in this hearing

Mr. Osaro Odemwingin, Media Rights Agenda and Senior Program Officer/Coordinator of Freedom of Information, sponsor and prime mover of HB. 6, the raison d'etre for our gathering here today,

My able associates at A.I.I. ASSOCIATES law firm, without whose support and encouragement, mentally, emotionally, physically and spiritually the draft alternative would have been much the poorer for it, and last but not least, **all in attendance** at this hearing who have not allowed my oratory or the lack of it to lull them to sleep, despite everything.
Finally, finally, with the leave of the High Table, this delegate is available to answer any questions that may be popping up relevant to the contribution just about to end.

THANK YOU ALL
BARRISTER IME AKPAN
imeakpan@aiia.com.ng
APRIL 26, 2005
ABUJA, NIGERIA