IN THE FEDERAL HIGH COURT
HOLDEN AT LAGOS, NIGERIA
ON FRIDAY THE 26TH DAY OF FEBRUARY, 2016
BEFORE THE HONOURABLE JUSTICE
M.B. IDRIS
JUDGE

SUIT NO: FHC/IKJ/CS/248/15

BETWEEN

THE REGISTERED TUSTEES OF THE .... SOCIO-ECONOMIC RIGHTS AND ACCOUNTABLITY PROJECT (SERAP) — **PLAINTIFF**

AND

1. **THE ACCOUNTANT GENERAL OF THE FEDERATION**
2. **THE ATTORNEY GENERAL OF THE FEDERATION**

} **DEFENDANTS**

JUDGMENT

This is an application dated 16th February, 2012 in these terms:-

"MOTION ON NOTICE BROUGHT PURSUANT TO SECTION 20 OF THE FREEDOM OF INFORMATION ACT 2011, ORDER 34 RULES 1, 3(1), (2) AND (6)(B) OF THE FEDERAL HIGH COURT CIVIL

PROCEDURE) RULES, 2009 AND THE INHERENT JURISDICTION OF THE HONOURABLE COURT

TAKE NOTICE that pursuant to the leave of Hon. Justice S. Adah given on the 7th of February 2011, the Honourable Court will be moved on the...day of ... 2012 at 9 O'clock in the forenoon or so soon thereafter as counsel may be heard on behalf of the Plaintiff/Applicant for the following reliefs:-

(a) *A Declaration* that the failure and/or refusal of the Respondents to individually and/or collectively disclose detailed information about the spending of recovered stolen public funds since the return of civil rule in 1999, and to publish widely such information, including on a dedicated website, amounts to a breach of the fundamental principles of transparency and accountability and violates Articles 9, 21 and 22 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

B. A DECLARATION that by virtue of the provisions

of Section 4 (a) of the Freedom of Information Act 2011, the 1st Defendant/Respondent is under a binding legal obligation to provide the Plaintiff/Applicant with up to date information on the spending of recovered stolen funds, including:

(a) Detailed information on the total amount of recovered stolen public assets that have so far been recovered by Nigeria.
(b) The amount that has been spent from the recovered stolen public assets and the objects of such spending.
(c) Details of projects on which recovered stolen public assets were spent.

C. AN ORDER OF MANDAMUS directing and or compelling the Defendants/Respondents to provide the Plaintiff/Applicant with up to date information on recovered stolen funds since the return of civilian rule in 1999, including:

(a) Detailed information on the total amount

of recovered stolen public assets that have so far been recovered by Nigeria.

(b) The amount that has been spent from the recovered stolen public assets and the objects of such spending.

(c) Details of projects on which recovered stolen public assets were spent.

(d) And for such further order or other orders as the Honourable Court may deem fit to make in the circumstances.

AND TAKE NOTICE that on the hearing of this application the said Applicants will use the Affidavit and the exhibits therein referred to."

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

"AFFIDAVIT IN SUPPORT

I, Adetola Adeleke, Male, Christian, and Litigation Clerk of 4 Akintoye Shogunle Street off John Olugbo Street Ikeja Lagos hereby make Oath and state as follows:-

(1) That I am a Litigation Clerk of the Socio-Economic Rights and Accountability Project (SERAP), the Applicant in this suit

(2) That I have the consent and authority of the Applicant herein to depose to this affidavit

(3) That by virtue of my position and the fact stated in paragraph 2 hereof, I am conversant with the facts of this case and with the facts deposed to herein

(4) That the Applicant is a human rights non-governmental organization established in Nigeria and incorporated under Part C of the Companies and Allied Matters Decree, 1990. A copy of the Certificate of Incorporation of SERAP is attached herewith as Exhibit 1

(5) That the Applicant seeks to promote transparency and accountability in government through human rights. A copy of the Constitution of the Plaintiff is hereby attached as Exhibit 2.

(6) That the Federal Government of Nigeria has enacted the Freedom of Information Act, 2011.

(7) That in the pursuit of its mandate and pursuant to the right of access to information guaranteed by the Freedom of Information Act 2011, the Plaintiff/Applicant, by letter dated 26 September 2011, requested the 1st Defendant/Respondent to provide it with up to date information relating to the spending of recovered stolen funds since the return of civilian rule in 1999

(8) But since the receipt of the request/application letter, and up till the filing of this suit, the 1st Defendant/Respondent has so far failed, refused and or neglected to provide the Plaintiff/Applicant with the details of the information requested for. Now produced, shown to me and marked EXHIBIT 3 and 4 are copies of the letter sent to the 1st Defendant/Respondent and the evidence of receipt of the letter by the 1st Defendant respectively

(9) I was informed by Counsel to the Applicant and I verily believe him as follows:

(i) By virtue of Section 1 (1) of the FOI Act 2011, the Plaintiff/Applicant is entitled as of right to request for or gain access to information which is in the custody or possession of any public official, agency or institution

(ii) By the provisions of Section 2(7) and 31 of the FOI Act 2011, the 1st Defendant/Respondent is a public official.

(iii) By virtue of Section 4 (a) of the FOI Act when a person makes a request for information from a public official, institution or agency, the public official, institution or urgency to whom the application is directed is under a binding legal obligation to provide the Applicant with the information requested for, except as otherwise provided by the Act, within 7 days after the application is received.

(iv) The information requested for by the Plaintiff/Applicant relates to the spending of recovered stolen funds since the return of civilian rule in 1999.

(v) By Sections 2(3)(d)(V) & (4) of the FOI Act, a public official or institution is under a binding legal duty to ensure that documents containing information relating to the receipt or expenditure of recovered stolen funds are widely disseminated and made readily available to members of the public through various means.

(vi) The information requested for by the Plaintiff/Applicant does not come within the purview of the types of information exempted from disclosure by the provisions of the FOI Act.

(vii) Up till the time of filing this action the Defendants/Respondents have failed, neglected and/or refused to make available the information requested by the Applicant.

(viii) The Defendants/Respondents have no reason whatsoever to deny the Plaintiff/Applicant access to the information sought for. .

(ix) The information requested for, apart from not being exempted from disclosure under the FOI Act, bothers on an issue of National interest, public concern, social justice, good governance, transparency and accountability.

(10) That the information the Applicant requested for do not form part of records compiled by the Defendants/Respondents for law enforcement purposes.

(11) That the Defendants/Respondents will not suffer any injury or prejudice if the information is released to the Applicant.

(12) That the information the Applicant requested for is not privileged in any way or manner.

(13) That the information the Applicant requested for do not concern any research material.

(14) That the information the Applicant

requested for is not in respect of a scientific material, or matter kept in the National Museum or the National Library.

(15) That it is in the interest of the public that the information be released.

(16) That I was informed by Counsel to the Applicant and I verily believed him that in view of the above actions by the Defendants/Respondents, the Applicant has been denied access to the information requested for

(17) That unless the reliefs sought herein are granted, the Defendants/Respondents will continue to be breach of the Freedom of Information Act, and other statutory responsibilities.

(18) That it is in the interest of justice to grant this application as the Defendants /Respondents have nothing to lose if the application is granted.

(19) That I make this declaration in good faith"

The 1st Defendant filed a Counter Affidavit and a written address in opposition. In the Counter Affidavit, it was declared as follows:-

"COUNTER-AFFIDAVIT TO THE MOTION FOR JUDICIAL REVIEW DATED 16TH FEBRUARY, 2012

I, Edema Pius, Male, Christian and Nigerian Citizen of Block 142, Flat 23/24, Area C, Nyanya, Abuja do hereby make oath and state as follows:-

(1) That I am a staff in the Legal Department of the Office of the 1st Defendant/respondent and by virtue of this position I am conversant with the facts and circumstances herein deposed.

(2) That I have the consent and authority of my Employers to depose to this affidavit.

(3) That I have carefully read the affidavit of a Adetola Adeleke of 17th February, 2012.

(4) That the 1st Defendant denies paragraphs 7 and 8 of the affidavit in support to the extent that by her letter dated 11th October, 2011 she informed the Plaintiff that she was still studying the Freedom of Information Act.

(5) That I was informed by Olugbenga Sheba of Counsel at our Office on 22nd March, 2012 at about 3:30pm and I verily believe his information to be true and correct that paragraphs 9, 10, 12, 13, 14, offend the relevant provisions of the Evidence Act as amended as they contain extraneous matters by way of legal argument and prayers.

(6) That contrary to the averments in paragraphs 11,15,16,17,18 and 19 of the affidavit in support I was also informed by Olugbenga Sheba of Counsel at the same place and time and I verily believe his information to be true and correct as follows:-

(a) That the Plaintiff/Applicant has no interest howsoever in the subject matter.

(b) That it will be in the interest of justice if the application is refused.

(7) That I swear to this affidavit in good faith"

At the hearing, Learned Counsel for the Plaintiff relied on the processes filed and adopted the written addresses filed. Counsel for the Respondents were absent, and the process filed in response and the written address in opposition were deemed adopted.

The 1st Defendant had filed a Notice of Preliminary Objection which had not been argued and/or moved. It is deemed abandoned and it is struck out. See generally **OKEKE VS. NWOKOYE (1999) 3 NWLR (PT. 635) 495; SCOA VS. DANBATA (2003) FWLR (PT. 178) 1001; APP VS. OGUNSOLA (2002) FWLR (PT. 117) 1120; CONSOLIDATED BREWERIES PLC VS. AISOWIEREN (2002) FWLR (PT. 116) 959; SOCIETE BIC SA VS. CHARZIN IND. LTD (2006) ALL FWLR (PT. 297) 1109.**

In the Plaintiff's written address, the issue formulated for determination was whether by virtue of the provision of section (4) (a) of the Freedom of Information Act 2011, the Defendants are under an obligation to provide the Plaintiff with the information requested for?

It was argued that by virtue of Section 1 (1) of the FOI Act 2011, the Plaintiff is entitled as of right to request for or gain access to information which is in the custody or possession of any public official, agency or institution, and that by the provisions of Section 2(7) and 31 of the FOI Act 2011, the 1st Defendant/Respondent is a public official.

It was argued that by virtue of section 4 (a) of the FOI Act when a person makes a request for information from a public official, institution or agency, the public

official, institution or agency to whom the application is directed is under a binding legal obligation to provide the Applicant with the information requested for, except as otherwise provided by the Act, within 7 days after the application is received, and that the information requested for by the Plaintiff relates to the spending of recovered stolen funds since the return of civilian rule in 1999. That by Sections 2(3)(d)(V) & (4) of the FOI Act, a public official is under a binding legal duty to ensure that documents containing information relating to the receipt or expenditure of recovered stolen funds are widely disseminated and made readily available to members of the public through various means, and that the information requested for by the Plaintiff does not come within the purview of the types of information exempted from disclosure by the provisions of the FOI Act.

It was contended that up till the time of filing this action the Defendants/Respondents have failed, neglected and/or refused to make available the information requested by the Applicant, and that the Defendants/Respondents have no reason whatsoever to deny the Plaintiff/Applicant access to the information

sought for.

That the information requested for, apart from not being exempted from disclosure under the FOI Act, bothers on an issue of National interest, public concern, social justice, good governance, transparency and accountability.

The Court was urged to grant the application. The cases of **ANIBI VS. SHOTIMEHIN (1993) 3 NWLR (PT.282) 461** and **GOV. EBONYI STATE VS. ISUAMA (2003) FWLR (PT. 169) 1210** were relied on.

In the 1st Defendants' written address it was argued that the Plaintiff lacked the locus standi to institute this action became no sufficient interest had been shown.

It was argued that the application was statute barred having been brought three months after the cause of action accrued contrary to Order 34 Rule 4 of the Rules of this Court.

It was argued that paragraphs 9, 10, 11, 12,13 and 14 were extraneous matter contrary to section 115 of the Evidence Act, and that this application be dismissed. The cases of **FAWEHINMI VS. IGP (2002) 8 MJSC 1 and THOMAS VS. OLOFOSOYE (2004) 49 WRN 37** were relied on.

I have read the processes filed and I have carefully

considered the submissions made. Is the Applicant entitled to the reliefs sought herein this application?

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

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

In Nigeria the House of Representatives passed the bill on the 16th day of February, 2011 and the Senate on the 16th day of March 2011. The harmonized version of the bill

was signed into law by the President on the 28th day of May 2011.

The highlights of this law is as follows:-

- It guarantees the right of access to information held by public institutions, irrespective of the form in which it is kept and is applicable to private institutions where they utilize public funds, perform public functions or provide public services;
- It requires all institutions to proactively disclose basic information about their structure and processes and mandates them to build the capacity of their staff to effectively implement and comply with the provisions of the Act;
- It provides protection for whistleblowers;
- It makes adequate provision for the information needs of illiterate and disabled Applicants;
- It recognizes a range of legitimate exemptions and limitations to the public's right to know, but it makes some of these exemptions

subject to a public interest test that, in deserving cases, may override such exemptions;

- It creates reporting obligations on compliance with the law for all institutions affected by it. These reports are to be provided annually to the Federal Attorney General's Office, which will in turn make them available to both the National Assembly and the public;
- It requires the Federal Attorney-General to oversee the effective implementation of the Act and report on execution of this duty to Parliament annually.

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

Under the FOI Act, any individual is able to make a request to a public institution for information . An Applicant is entitled to be informed in writing as to whether the information is held and have the information communicated to them. If any of the information is refused, the organization must provide the Applicant with a Notice

which clearly states the reasons why it is withholding the information that has been requested.

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

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

There are two general categories of exemption : (a) Absolute exemptions :- those where there is no duty to consider the public interest; and (b) qualified exemptions:- those where, even though an exemption exists, an authority has a duty to consider whether disclosure is required in the public interest. Briefly, the public interest

test requires an authority to determine whether the public interest in withholding the information outweighs the public interest in disclosing it by considering the circumstances of each particular case in the light of the potential exemption which might be claimed. The balance lies in favour of disclosure since withholding outweighs disclosure, imperatively.

The public interest test applies to the exemptions contained in section 15 (1) and 16 of the FOI Act. I shall now deal briefly with the issues of information provided in confidence under section 15 (1) (a); legal professional priviledge under section 16 (a); and information expected to interfere with the contractual or other negotiations of third party under section 15 (1) (b) of the FO1 Act.

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

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

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

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

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

This exemption only applies if a breach of confidence would be 'actionable'. A breach of confidence will only be

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

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

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

If a request includes information which may fall within this exemption, three questions must be asked. If the

answer to any of the questions is 'no', the information will not be exempt under section 15:

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

Each of these questions is examined below.

Was the information obtained by the public authority from any other person?

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

While this exemption may apply where a duty of confidence is owed by one public authority to another, it will not apply where both of those public authorities are government departments. Although government departments are treated as separate persons for the purposes of freedom of information, a government department cannot claim that the disclosure or any information by it would constitute a breach of confidence actionable by any other government department.

The phrase 'from a person', will usually require the information to have been obtained from outside the department and not from an employee. However, this will not always be the case. Section 15 may apply where disclosure would breach a duty of confidence which a public authority owes to an employee in their private capacity. On the other hand, if the information is disclosed in the course of employment, when an employee is acting on behalf of the public authority and solely in the capacity of employee, there will be no duty of confidentiality for the purposes of section 15.

The person from whom the information was obtained may not be the same person whose confidence is being protected; the information may have passed through the

hands of another person before reaching the public authority.

Is the Information held subject to a duty of confidence?

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

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

For information to be 'confidential' it must also be 'inaccessible' in the sense of not being in the public

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

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

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

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

obtained imply that the person should keep the information confidential: there is an implied duty of confidence.

These two types are discussed below.

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

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

While it will usually be a question of fact whether a public authority has agreed to or undertaken a duty of confidence, there are important policy considerations involved in the question of whether it is appropriate for a public authority to agree to a duty of confidence. As explained above, public authorities must consider the application of this exemption not only when disclosure of confidential information is requested but also when

potentially confidential information is obtained. If information does not need to be kept confidential but a public authority expressly agrees to keep it confidential when it is obtained, this may result in the information being exempt from the Act under section 15. In light of the public interest in open government and freedom of information, public authorities must consider carefully whether it is appropriate to agree to keep information that it receives confidential.

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

- the nature of the interest which is to be protected and whether it is necessary to hold the information in confidence in order to protect that interest.
- Whether it is possible to agree to a limited duty of confidentiality, for example by clearly stating the circumstances in which a public authority would disclose information.
- Whether the information will only be provided on the condition that it is kept confidential

and, if so, how important the information is in relation to the functions of that public authority.

- The nature of the person from whom the information is obtained and whether that person is also a public authority to whom freedom of information and the Code of Practice applies (where the person supplying the information is also a public authority, departments must be particularly cautious is agreeing to keep the information confidential).

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

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

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

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

certain extent, depend on the circumstances at the time that disclosure is requested.

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

This may also apply where information is provided under 'threat of compulsion' – where a person provides information to a public authority in the knowledge that if they did not do so, the public authority would use its powers to compel disclosure. Additionally, when a public authority obtains information for a particular purpose, a duty of confidentiality may arise which prevents that information being used for a different purpose. For example, confidentiality attaches to information which is given to the Police during the course of a criminal

investigation, whether it is given by a suspect under caution or by a potential witness. See **FRANKSON and Others VS. HOME OFFICE; JOHNS VS. OFFICE (2003) 1 WLR 1953,** in particular per Scott Baker LJ at 35.

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

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

Whether an implied duty of confidence arises is essentially a question of law. If a public authority has not expressly agreed to keep information confidential but

suspects that a duty of confidence may be implied, it will often be necessary to seek legal advice.

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

UNAUTHORISED DISCLOSURE

For a disclosure to breach a duty of confidence it must be unauthorised. Unauthorised disclosure could take place where disclosure runs contrary to the express wishes of the person to whom the duty is owed or where a department does not have the consent of the person concerned. If a person has sanctioned disclosure of the information, for example if they have expressly consented to disclosure, section 15 will not apply as disclosure would not be a breach of confidence actionable by that person.

PUBLIC INTEREST TEST

The English Courts have recongnised that disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential. When considering the

application of section 15, departments must consider whether the public interest in disclosure of the confidential information concerned means that it would not constitute an actionable breach of confidence to disclose that information to the public.

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

- Where a duty of confidence exists, there is a strong public interest in favour of keeping that confidence.
- There is no general public interest in the disclosure of confidential information in breach of a duty of confidence. If the public interest in keeping the confidence is to be outweighed it will be necessary to identify a specific interest in favour of disclosure.
- There is a public interest in ensuring public scrutiny of the activities of public authorities. If disclosure would enhance the scrutiny of the activities of public authorities then this will be a factor in the balancing exercise. However, where the interests of a private person are protected by a

duty of confidence (whether an individual or an organization), the general interest in public scrutiny of information held by a public authority is unlikely in itself to override the public interest in keeping the confidence.

- The Freedom of Information Act itself has no influence on the weight which attaches to the public interest in the disclosure of information for the purposes of section 15.
- The English Courts have traditionally recognised that the defence to breach of confidence in the public interest applies where disclosure would protect public safety, or where there has been wrongdoing, such as misfeasance, maladministration, negligence or other iniquity on the part of the public authority.
- When considering the balance of interests, public authorities must have regard to the interests of the person to whom the duty of confidence is owed; the public authority's own interests in non-disclosure are not relevant to the application of this exemption.

- No regard may be had to the identity of the person who is requesting the information nor to the purpose to which they will put the information. The question is whether disclosure 'to the public' would be a breach of confidence, and not whether disclosure to the particular person requesting the information would be a breach. A request for information from a journalist or pressure group must be treated in the same way as a request from a person who is conducting historical research.

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

- If a Court would conclude that the public interest in disclosure to the public outweighed the public interest in keeping the confidence then the information will not be exempt under section 15; unless another exemption applies, the information must be disclosed.
- If a Court would conclude that the public interest in disclosure did not outweigh the public interest in keeping the confidence, the information will be exempt and the request should be refused on the basis of section 15.

When considering the public interest test, one should not consider the motive for the freedom of information request nor the effect which disclosure to that particular requester would have. However, one must consider the effect that disclosure to the public would have. Examples of cases where there may be a public interest in the disclosure of confidential information include:

- Information revealing misconduct/mismanagement of public funds

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

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

- Where disclosure would provoke some risk to public or personal safety.
- Where disclosure would be damaging to effective public administration.
- Where there are contractual obligations in favour of maintaining confidence.
- Where the duty of confidentiality arises out of a professional relationship.

- Where disclosure would affect the continued supply of important information (for example, information provided by whistle-blowers)
- Where information was provided under compulsion.

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

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

Section 16 is subject to a public interest balance. However the English High Court have recognised that there is generally a very substantial public interest in maintaining the confidentiality of legally privileged material, and that as such equally weighty factors in favour of release must be present for the public interest to favour disclosure. See **DR. JOHN PUGH MP VS. INFORMATION COMMISSIONER AND MINISTRY OF DEFENCE**

(EA/2007/0055) 17TH DECEMBER, 2007 and DEPT. OF BUSINESS AND REGULATORY REFORM VS. O'BRIEN (2009) EWHC 164 (QB)

WHAT INFORMATION MAY BE COVERED BY THIS EXEMPTION?

LEGAL PROFESSIONAL PRIVILEGE

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

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

individuals being able to consult their lawyers in confidence, there is public interest in public authorities being able to do so.

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

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

Waiver may also result from unintentional or erroneous disclosure. For example, revealing the substance of legal advice when explaining a decision may constitute

waiver. Where LPP is waived, the advice is no longer privileged and section 16 cannot be relied upon.

What material is subject to LPP?

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

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

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

Just because a document has been to or comes from a lawyer does not necessarily mean it will be protected by

LPP. It will need to come within one of the two categories of LPP: advice privilege and litigation privilege.

- *Advice privilege* relates to communications between a person and his lawyer provided they are confidential and written for the purpose of obtaining legal advice or assistance in relation to rights and obligations. The leading judgment is that of the House of Lords in Three Rivers. See **THREE RIVERS DISTRICT COUNCIL & ORS VS. GOVERNOR AND COMPANY OF THE BANK OF ENLAND (2004) UKHL 48**

- *Litigation privilege* attaches to confidential communications that come into existence when litigation is in reasonable prospect or is pending, for the dominant purpose of giving or getting advice in regard to the litigation or collecting evidence for use in the litigation. It applies to communications between the client and his lawyer, whether direct or through an agent, or between any one of them and a third party.

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

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

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

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

THE PUBLIC INTEREST TEST

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

The Courts have historically recognised the important public interest in the proper administration of justice, and have noted the key role LPP plays in maintain this. See **R. VS. DERBY MAGISTRATES' COURT , EX P.B. (1996) AC**

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

In the case of **MR. CHRISTOPHER BELLAMY V. THE INFORMATION COMMISSIONER AND DTI (EA/2006/0023),** the Tribunal considered the case law on LPP, finding that '... there is a strong element of public interest inbuilt into the privilege itself. A least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest'. The Tribunal has consistently followed this approach in further cases. See **MR. T. KITCHENER VS. THE INFORMATION COMM. AND DERBY COUNTY COUNCIL (20 DECEMBER**

2006) EA/2006/0044) AND MR. F. ADLAM VS. INFO. COMMISSIONER AND HM TREASURY (5 NOVEMBER 2007) (EA/2006/0079). In February 2009, the High Court found in the case of the **DEPARTMENT OF BUSINESS AND REGULATORY REFORM V O'BRIEN (2009) EWHC 164 (QB)** that the section 42 exemption has two key features: (a) it recognises the in-built public interest/the weight with which must be given to LPP itself, and(b) the strength of the public interest in-built in to LPP itself.

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

Public interest in protecting legal advice/communication.

It is in the public interest that the decisions taken by government are taken in a fully informed legal context where relevant Government departments therefore need high quality, comprehensive legal communication for the

effective conduct of their business. That Communication/advice needs to be given in context, and with a full appreciation of the facts.

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

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

Disclosure of legal advice/ communication has a high potential to prejudice the government's ability to defend its legal interests - both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice/ communication having

been fully considered and presented without fear or favour. Neither of these is in the public interest. The former could result in serious consequential loss, or at least in a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because decisions themselves may not be taken on a fully informed basis.

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

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

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

Public interest in disclosure of legal advice

In some circumstances the public interest will require the disclosure of LPP material. This is likely to be in those circumstances where the government would waive its privilege if litigation were in progress.

Consideration will need to be given to other factors which need to be balanced against the public interest in the continuing confidentiality of legal advice. There is a

public interest in public authorities being accountable for the quality of their decision making. Ensuring that decisions have been made on the basis of good quality legal advice is part of that accountability. Transparency in the decision making process and access to the information upon which decisions have been made can enhance accountability.

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

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

It is to be understood that the principle of privileged communications embraces two concepts- the confidentiality of communications between a legal adviser

and client, and the privilege of communications made post litem motam (in contemplation of litigation)

Confidentiality of communications between legal adviser and client:

- The privilege covers communications by solicitors, advocates, solicitor-advocates and advocate-clerks. It probably covers in-house lawyers and lawyers working for one public authority providing advice to another public authority.

- The legal adviser must be acting in his professional capacity and the communications must occur in the context of his professional relationship with his client.

- It is likely that communications are privileged whether or not they relate to pending or contemplated litigation.

- The privilege does not extend to matters known to the legal

adviser through sources other than the client or to matter in respect of which there is no reason for secrecy. Communications which are intended to b 'confidential' in a non-legal sense are likely to attract the privilege.

- The privilege does not extend to communications which relate to fraud or the commission of an offence.

- Documents held by the legal adviser but prepared by others are not privileged (including communications between the client and third parties), but legal advice given by the legal adviser to client concerning the same documents is privileged.
- The fact that advice was sought is not necessarily privileged.

Section 15 (1) (b) imposes an obligation on a public institution to deny an application for information whose

disclose could reasonably be expected to interfere with the contractual or other negotiations of a third party. It is my view that "a third party" includes a legal practitioner in the context of his professional relationship with his client. What could severely prejudice the function of parties to a contract "could reasonably be expected to interfere with the contractual or other negotiations" of the said parties.

It is not the case of the Defendants that the information requested is exempted by law.

The argument of the 1st Defendant that because the Plaintiff has not shown sufficient interest or any interest at all on the subject matter of the information requested or that the Plaintiff did not tell the Court how or in what way the non-disclosure or non-release of the requested information has directly affected the Plaintiff as a basis for concluding that the Plaintiff/Respondent has no locus standing to institute the present action would be disregarded, rejected and jettisoned by the Court.

The reason for this is that the argument of the 1st Defendant's Counsel fails to appreciate the fact that the Freedom of Information Act 2011 is a very special and specific legislation which seeks to liberalize and expand

the access to information to any Nigerian, whether a natural person or an artificial person (like the Plaintiff/Respondent's organization). There is nowhere in the entire gamut of the provisions of the Freedom of Information Act, 2011, where the requirement of interest is imposed on the Applicant for information in the custody of a public official or public institution. The argument of the 1st Defendant Counsel is contrary to the spirit and intendment of the Freedom of Information Act is clearly stated in the explanatory note to the Act. The intendment and spirit is to make information more freely available. For the avoidance of doubt, the Explanatory Note reads as follows: "*An Act to make public records and information more freely available, provide for public access to public records and information, Protect Public records and information to the extent consistent with public interest and the Protection of Personal Privacy, Protect Serving Public Officers from adverse consequences for disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and for related matters*".

The underlined portion of the content of the Explanatory Note to the Freedom of Information Act 2011 makes it contextual the reason why no restriction of disclosure of the Applicant's interest or sufficient interest must not be made a condition precedent for the request for information or a condition precedent for the institution of action when the information requested is denied.

It is already established by a plethora of judicial authorities that an explanatory note to legislation is a reliable interpretational aid to any statute or legislation. It is also the law that a statute must not be interpreted in a way that will defeat the object and intendment of the statute. See the case of **ONOCHIE VS. ODOGWU (2006) 2 S. C. (PT II) page 153**.

The further and final reason why the locus standing argument of the 1st Defendant's Counsel must be discountenanced by the Court is to be found in the tenor of Section 1 of the Freedom of Information Act 2011 itself. This Section puts it beyond doubt especially in its sub-section (2) that the Applicant for information need not show any interest in the information being

requested. For the avoidance of doubt, the entire provision of Section 1 of the Freedom of Information, 2011. Is produced verbatim as follows:

> 1. (1) Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution however described, is established.
>
> (2) Any applicant under this Act needs not demonstrate any specific interest in the information being applied for.
>
> (3) Any person entitled to the right to information under this Act, shall have the right to institute proceedings in the court to compel any public institution to comply with the provisions of this Act".

It is my view that the Plaintiff in the instant case

qualifies as an Applicant anticipated or envisaged by the Freedom of Information Act, 2011. This is so because the interpretation or definition Section of the Freedom of Information Act has defined an Applicant "*as any person who applies for information under this Act*" and the same definition section proceeded to define a person as *"including a corporation sole and body of persons whether corporate or incorporate, acting individually, or as a group."* It is clear that the Plaintiff in this case is incorporated and registered under Part C of the Companies and Allied Matters Act 1990 as evidenced by the Certificate of Incorporation Exhibit 1 attached to the originating application, which already forms part of the record of the" Court.

All the cases cited by Counsel to the 1st Defendant such as **CHIEF GANI FAWEHINMI VS. INSPECTOR GENERAL OF POLICE & ORS (2002) 8 M. J. S. C. PAGE 1** and the case of **CHIEF DR. IRENE THOMAS & ANOR VS. THE MOST REVEREND TIMOTHY OMOTAYO OLUFOSOYE (2004) VOL. 49 WRN PAGE 37** are not exactly opposite to the facts and circumstances of this present case. The reason for this is that in the two cases the Supreme Court

of Nigeria was not faced with a situation where a substantive and actual legislation liberalized locus and stated categorically and without equivocation as contained in Section 1, particularly subsection 2 of the Freedom of Information Act, 2011. Once a statute is clear and ambiguous as to its intendment, a restriction or inhibition or limitation not contained in the statute cannot be imposed on the person who comes before the Court pursuant to the statute. Once the provision of an enactment is clear and unambiguous as in the case of Section 1 (2) of the Freedom of Information Act, 2011 no extrapolation is allowed. The statute must be given its clear and ordinary meaning. See the cases of **IBRAHIM VS. OJOMO (2004) 1 S.C (PT 11) PAGE 136, OBASANJO VS. YUSSUF (2004) 5 SC (PT 1) PAGE 27.**

It is on the strength of the above that the Court holds that the Plaintiff has locus standi to institute the present action.

Resorting to the provision of the Federal High Court Rules 2009, Order 34 Rule 4 to contend that the Plaintiff action is statute barred is absolutely inappropriate and must be disregarded. It is my view

that the only law that can give a time bar for the purpose of the proceedings filed pursuant to the Freedom of Information Act, 2011 (the Present Proceeding is such) itself is the Freedom of Information Act.

The proceedings filed pursuant to the Freedom of Information Act, 2011 is a very special one and it is the content, spirit and tenor of the Freedom of Information Act, 2011 that must specify within what time the action pursuant to a refused request must be filed.

It is my view that if none filing of the court action after the refusal of application within thirty (30) days will constitute a bar to the subsequent filing of the action, the substantive legislation- the Freedom of Information Act, 2011 would have expressly stipulated so. There is no provision in the Freedom of Information Act, 2011 which mandatorily states that an application that is not filed after the refusal of access to the information will still be statute barred.

Every other limitation Law or Act for instance the Limitation Law of Lagos State or the Limitation Law of every other state in Nigeria make specific provisions stating clearly and unequivocally that if actions are not filed in respect of various subject matters contract, land, tort,

negligence etc within stipulated period, the action shall be barred statutorily forever. There is no such similar provision in the Freedom of Information Act, 2011.

It is clear that when the 1st Defendant was communicated with, its reply was that it was still studying the provision of the Freedom of Information Act, 2011. This was by the 1st Defendant's letter of 11th October, 2011. It is my view that the cause of action cannot be deemed to have arisen then. The Plaintiff is entitled therefore to decide to give the 1st Defendant sufficient time to study the Freedom of Information Act, 2011 pursuant to the content of the letter from the 1st Defendant. A cause of action will be deemed to arise after the break in correspondence when the Plaintiff received no response to the Reply written by the Plaintiff to the 1st Defendant dated 14th of October, 2011.

Furthermore, even going by the position of the 1st Defendant, the substantive/originating application commencing this case was filed on the 6th December, 2011, even if the base date is taken from the date of the letter to the 1st Defendant is taken as the 25th of September, 2011 in the extreme (as the case on which the cause of action arose) the Plaintiff is still within the three (3) months when it filed

the present suit on the 6th December, 2011.

It is therefore my view that on the strength of the above findings, the contention of the 1st Defendant that the present action is statute barred must be rejected. It is accordingly rejected.

I have read paragraphs 9, 10, 12 13 and 14 of the supporting affidavit and it is clear that they offend section 115 Evidence Act. The particulars of the informant were not provided, including the time and place of the information. And other paragraphs contained conclusions. The said paragraphs contained conclusions. The said paragraphs are therefore hereby struck out. See **OJUKWU VS. MIL. GOV. LAGOS STATE (1986) 1 NWLR (PT. 18) 621.**

I am of the view that paragraphs 5 and 6 of the Counter Affidavit contain extraneous matters, being conclusions contrary to Section 115 of the Evidence Act, and are also hereby struck out.

It is my view that notwithstanding the above, the remaining paragraphs of the Affidavit in Support are capable of sustaining the prayers sought in this application.

I am of the view that on receipt of the Plaintiff's

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

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

The judiciary has no choice but to enforce compliance with the Freedom of Information Act. The judiciary cannot shirk its sacred responsibility to the nation to maintain the rule of law. What is done officially must be done in accordance with the law. Obedience to the rule of

law by all citizens but more particularly by those who publicly took oath of office to protect and preserve the Constitution is a desideratum to good governance and respect for the rule of law. In a constitutional democratic society, like ours, this is meant to be the norm.

Overall, I am of the view and do hold that this action should and does succeed in whole.

In the case at hand, the information requested for by the Plaintiff relates strictly to the spending of recovered stolen funds since the return of civilian rule in 1999.

By the clear provisions of Section 2(3)(d)(V) of the FOI Act 2011, documents containing information relating to the receipt or expenditure on the recovered stolen funds constitute part of the information which a public institution is obligated to published, disseminate and make available to members of the public. Since the 1st Defendant has no legally justifiable reason for refusing to provide the Plaintiff with the information requested for, this court ought to compel it to comply with the

provisions of the Act as he is not above the law.

Again, the creation of a right of access to information by Section 1 (1) of the FOI Act has imposed on the 1st Defendant and other public officials, institutions and agencies alike, a corresponding duty to give or provide any Applicant, access to any public record or information in their custody when applied for by the latter. Therefore, the 1st Defendant must conform to the legally binding obligation imposed on him by Section 4(a) of the FOI Act.

Again, Section 4(a) of the FOI Act 2011 is a mandatory and absolute provision which imposes a binding legal duty or obligation on a public official, agency or institution to comply with a request for access to public information or records except where the FOI Act expressly permits an exemption or derogation from the duty to disclose. Nigerian courts have consistently held that the use of mandatory words such as "must" and "shall" in a statute is naturally prima facie imperative and admits of no discretion. See **ANIBI VS. SHOTIMEHIN (1993) 3**

NWLR (PT. 282) 461 @ 472 - 473. It is my view that the use of the word "shall" in Section 4 of the FOI Act connotes that the provision is mandatory and must be complied with to the extent provided by the Act.

In **GOVERNOR OF EBONYI STATE & ORS VS. HON. JUSTICE ISUAMA (2003) FWLR [PT. 169] 1210 @ 1227-1228**, the Court of Appeal while stressing the need for public officials to obey rules of law held as follows:

> *"Obedience to the rule of law by all citizens but more particularly those who publicly took oath of office to protect and preserve the constitution is a desideratum to good governance and respect for the rule of law. In a democratic society, this is meant to be a norm; it is an apostasy for government to ignore the provisions of the law and the necessary rules made to regulate matters."*

In the light of the exposition of the Court of Appeal above highlighted, it is my view that this Court ought to

make an order compelling the 1st Defendant to comply with the provisions of the FOI Act by providing the Plaintiff with the information requested for by the latter.

Judgment is therefore hereby entered in favour of the Plaintiff against the Defendants as follows:-

(a) A DECLARATION is hereby made that the failure and/or refusal of the Respondents to individually and/or collectively disclose detailed information about the spending of recovered stolen public funds since the return of civil rule in 1999, and to publish widely such information, including on a dedicated website, amounts to a breach of the fundamental principles of transparency and accountability and violates Articles 9, 21 and 22 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

b. A DECLARATION is hereby made that by virtue of the provisions of Section 4 (a) of the Freedom of Information Act 2011, the 1st Defendant is

under a binding legal obligation to provide the Plaintiff with up to date information on the spending of recovered stolen funds, including:

(a) Detailed information on the total amount of recovered stolen public assets that have so far been recovered by Nigeria.

(b) The amount that has been spent from the recovered stolen public assets and the objects of such spending.

(c) Details of projects on which recovered stolen public assets were spent.

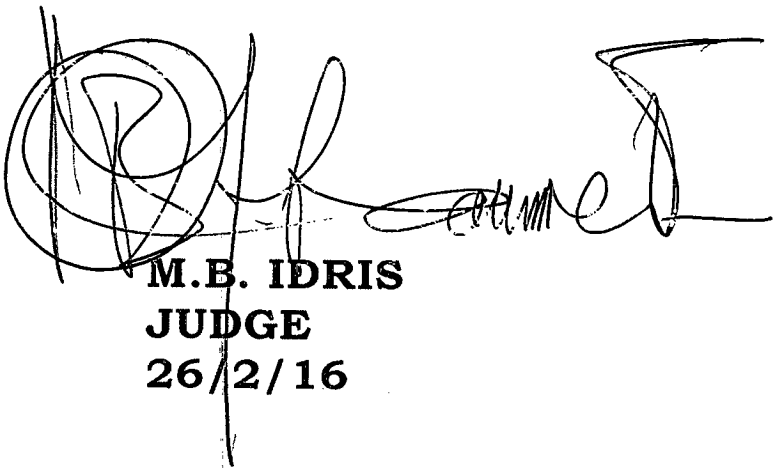
c. AN ORDER OF MANDAMUS is made directing and or compelling the Defendants to provide the Plaintiff with up to date information on recovered stolen funds since the return of civilian rule in 1999, including:

(a) Detailed information on the total amount of recovered stolen public assets that have so far been recovered by Nigeria.

(b) The amount that has been spent from the recovered stolen public assets and

the objects of such spending.

(c) Details of projects on which recovered stolen public assets were spend.



M.B. IDRIS
JUDGE
26/2/16

O.O. Majekodunmi for the Plaintiff