

FOI Act Versus Official Secrets Act: An Appraisal of Conflicting Statutory Obligations on Public Officers

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Abstract

This paper appraises the conflicting statutory obligations imposed on public officers by Nigeria's Freedom of Information Act 2011 and Official Secrets Act 1962. While the FOI Act, anchored on Section 39(1) of the 1999 Constitution, guarantees citizens' right to access public information and promotes investigative journalism, the Official Secrets Act criminalizes unauthorized disclosure and sustains colonial-era secrecy. This contradiction creates legal uncertainty where officers risk prosecution for disclosure under one law and sanction for denial under the other. Using conceptual and comparative analysis of the UK, US, India, Ghana and South Africa, the study finds the conflict is sustained by the lack of an express overriding clause, vague definition of classified matter, and absence of a public interest and harm test. It recommends harmonization through amendment of both Acts, insertion of an overriding clause like India's RTI Act, and enactment of whistleblower protection.

Keywords: FOI Act, Official Secrets Act, Investigative Journalism, Right to Know, Public Officers

Introduction

In a democracy, the public has a right to know how power is used, but the State must also preserve information that harms national security. At the heart of this conflict is Nigeria's Official Secrets Act of 1962. The Act, which was passed before the onset of current democratic regime, sets harsh penalties for disclosing State information without authorisation. However, it predates both the Freedom of Information Act of 2011 and the 1999 Constitution's guarantee of press freedom. As a result, there is a legal dilemma: the Freedom of Information Act and the Constitution require transparency, yet the Official Secrets Act requires secrecy. The main challenge presented in this introduction is how Nigeria may protect legitimate national security objectives without impeding investigative journalism, accountability, and the public's right to knowledge. The primary aim of the Freedom of Information Act was to guarantee press freedom as enshrined in the constitution – freedom to investigate, gather and report news without undue interference. It also makes access to public information easy. In Nigeria, the struggle for press freedom began from the colonial era in the early 190's. It was reported that the British Colonial Government became very uncomfortable with tone and editorial content of indigenous Nigerian newspapers, which criticism they perceived to be anti-government. In

a bid to subvert and checkmate this perceived excess, the colonial administration promulgated the obnoxious Newspaper Ordinance of 1903, which was followed by Seditions Offences Ordinance of 1909 (Ayuba, Yahaya, Bulamu and Ibrahim, 2011, p. 79). All these laws were anti-press and kicked against the doctrine of press freedom.

This gesture, perhaps, stimulated a determined fight by indigenous journalists not only to gain press freedom, but also to rid the country from the domineering shackles of the colonial masters. As aptly observed by Ayuba, et al (2011, p. 79):

The Nigerian Press began to struggle for press freedom as rightly served that most of the press laws enacted in Nigeria from colonial time were obnoxious impositions by those in power to protect themselves from legitimate searchlight of a dutiful and patriotic press. Incidentally, the struggle for press freedom in Nigeria was tied to political independence.

Even with the attainment of political independence in 1960, there was no specific provision granting press freedom by the independence constitution; although, it made provision for freedom of expression. This was not enough to guarantee substantial press freedom. Therefore, the struggle continued. At this time, it became an exclusive clamour for the enactment of a specific law that will guarantee press freedom.

Given that the Colonial Power Lords have been sacked and a new government, mounted by Nigerians has been instituted, the press had the renewed vigour to push their demands through. Nevertheless, the zest was short-lived as a more despotic press intolerant and highly suppressive regime, called the military government, took over the governance of the country.

Conceptual Analysis

FOI Act and Investigative Journalism

Investigative journalism is distinct from routine daily reporting. It is systematic, in-depth and often adversarial, aimed at unearthing matters of public interest that powerful actors deliberately conceal. It goes beyond reporting events to exposing wrongdoing, corruption and abuse of office. Through this function, journalism fulfills its social responsibility role of holding power to account. In Nigeria, investigative journalism has historically thrived despite legal constraints. From Dele Giwa to more recent exposés by independent online platforms, journalists have uncovered certificate forgeries and grand corruption that led to resignations and prosecutions (Sonaïke, 2003; Antai & Umoren, 2023). However, this form of journalism is resource-intensive, risky and requires access to credible documentary evidence, which was often denied under the Official Secrets Act (Okon & Omodunbi, 2014; Yusuff, 2022).

The FOI Act fundamentally alters the information power dynamic. Section 1(1) of the Act establishes the legally enforceable right of any person to access information in the custody of any public institution, while Section 1(3) empowers citizens to seek judicial redress when access is denied (Federal Government of Nigeria, 2011; Media Rights Agenda, 2011). For investigative journalists, this provision removes the culture of discretionary disclosure and replaces it with a statutory obligation. More importantly, Section 27(2) provides whistleblower protection, stating that no public officer shall be prejudiced for disclosing information which reasonably shows mismanagement or abuse of authority, and Section 16 protects journalism confidentiality privilege (Tejumaiye, 2021; Malemi, 2022). This legal shield is critical because it encourages insider sources to come forward and allows journalists to protect them, thereby strengthening evidence-based reporting and reducing reliance on anonymous leaks (Dunu & Ugbo, 2014; Akinyemi, 2020).

However, the existence of legal protection does not automatically translate to journalistic courage. This is where the problem of self-censorship becomes relevant. Baridole et al. (2025) note that self-censorship in media is the voluntary suppression or alteration of content by creators, often due to external pressures or internal ethical considerations. They argue that

media professionals engage in self-censorship for various reasons, including legal, cultural, and commercial pressures. In the Nigerian context, this suggests that even with the FOI Act's guarantees, journalists may still voluntarily avoid filing FOI requests or pursuing sensitive investigations not because the law fails them, but because of anticipated victimization, newsroom commercial interests, or a deeply ingrained culture of deference to authority. Thus, self-censorship acts as an invisible barrier to the full utilization of the Act.

Despite its progressive provisions, empirical studies show gross underutilization of the Act by Nigerian journalists. Many journalists admit they have fair knowledge of the Act but have never filed a formal FOI request, preferring informal contacts due to fear of bureaucratic delay (Dunu & Ugbo, 2014; Oso et al., 2020).

The challenges are structural and cultural. They include the continued use of the Official Secrets Act by officials to deny access, absence of sanctions for defaulting institutions, unwillingness of many state governments to domesticate the Act, and poor welfare and safety measures for investigative reporters (Tejumaiye, 2021; Impact International Journals, 2025). Furthermore, lack of newsroom investment in investigative journalism means many media houses cannot afford the lengthy litigation process required to enforce compliance.

The Right to Know Under Section 39 Of The 1999 Constitution.

The concept of the right to know in Nigeria does not exist in isolation. It is derived from the broader guarantee of freedom of expression as provided under Section 39 of the Constitution of the Federal Republic of Nigeria 1999 as amended. Section 39(1) states that every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference. This provision is the constitutional foundation for citizens' demand for access to government information. Without the freedom to receive information, the freedom to hold and express an opinion becomes illusory (Nwabueze, 2013; Egbewole & Imam, 2015). A careful reading of Section 39 shows that the Constitution does not expressly mention the Right to Information. However, Nigerian legal scholars have argued that the phrase "to receive and impart ideas and information" is expansive enough to accommodate the right to know. In other words, the Constitution impliedly guarantees that citizens can seek and obtain information from public institutions. This interpretation aligns with democratic principles where sovereignty belongs to the people and government is held in trust for them. As Ojo rightly observed, transparency is not a gift from government but a constitutional expectation arising from the social contract (Ojo, 2019; Aina, 2012).

The courts have also given life to this provision. Although judicial pronouncements on Section 39 have largely centered on press freedom and freedom of speech, the same reasoning has been extended to access to information. The right to know has been described as the oxygen of democracy because an uninformed citizenry cannot meaningfully participate in governance. As noted in Malemi, (2016) In. Akande, (2018), "The Supreme Court in cases bordering on freedom of expression has consistently held that any law that unduly restricts the flow of information must be subjected to strict scrutiny."

However, the right guaranteed under Section 39 is not absolute. Section 39(3)(a) provides a derogation clause which states that nothing in Section 39 shall invalidate any law that is reasonably justifiable in a democratic society for the purpose of preventing the disclosure of information received in confidence. This subsection is the constitutional anchor for the continued existence of secrecy legislation such as the Official Secrets Act of 1962. It creates a legal paradox where the same Constitution that grants the right to receive information in subsection 1 permits a law that restricts it in subsection 3. This internal conflict is what has created the tug of war between openness and secrecy in Nigeria.

To cure this defect, the National Assembly enacted the Freedom of Information Act in 2011. The FOI Act does not create a new right but provides the procedural framework for enforcing the right already guaranteed in Section 39(1). It lays down the process for requesting information, the time frame for compliance, and the exceptions to disclosure. In effect, the FOI Act translates the lofty constitutional provision into an actionable right for the ordinary Nigerian. Without it, Section 39 would remain largely aspirational and unenforceable for the average citizen seeking government records (Abioye, 2020; Anya, 2014).

Comparative Perspective of How Other Democracies Resolved the Conflict Between Secrecy and Openness.

The tension between secrecy and openness is not unique to Nigeria. Every democratic state has had to grapple with the question of how much information government should keep away from the people in the name of national security. What makes the difference is how each country has attempted to resolve this tension through legislative reform and judicial interpretation.

The United Kingdom is the origin of Nigeria's Official Secrets Act. Nigeria inherited the 1911 Act which later became the Official Secrets Act 1962. The UK itself, however, realized that absolute secrecy was no longer sustainable in a modern democracy. The UK reformed its secrecy regime with the Official Secrets Act 1989 which narrowed the categories of protected information, and then enacted the Freedom of Information Act 2000. The UK FOI Act introduced a public interest test, meaning that even if information falls within an exempt category, it must still be disclosed if the public interest in disclosure outweighs the interest in secrecy. This single provision shifted the burden from the citizen to the state (Banisar, 2011; Roberts, 2016). In addition, the Public Interest Disclosure Act 1998 gives protection to workers who expose wrongdoing, thereby giving public officers a safe channel to disclose without being criminalized. In the United States, openness is presumed. The Freedom of Information Act of 1966 as amended provides that all federal agency records must be made available to any person who requests them, unless they fall within nine clearly defined exemptions. Unlike Nigeria's Official Secrets Act which criminalizes disclosure merely because a document is marked "classified", American courts have insisted on a harm test. The government must demonstrate that disclosure will cause identifiable and specific harm to national defence or foreign policy, not just that the document bears a stamp (Piotrowski, 2017; Halstuk & Chamberlin, 2015). Furthermore, the US has developed a comprehensive whistleblower protection framework through the Whistleblower Protection Act of 1989 and subsequent amendments. This ensures that a public officer who in good faith discloses evidence of fraud, waste, abuse or illegality is shielded from retaliation. India provides the closest lesson for Nigeria because both countries share a colonial past and both operated the Official Secrets Act 1923. When India enacted its Right to Information Act in 2005, it confronted the conflict directly. Section 22 of the Indian RTI Act expressly states that its provisions shall have effect notwithstanding anything inconsistent contained in the Official Secrets Act, 1923 and any other law for the time being in force. Section 8(2) goes further to provide that even if information is exempt under the Official Secrets Act, it can still be disclosed if public interest in disclosure outweighs the harm to protected interests. This overriding clause removed the dilemma that Nigerian public officers face and gave statutory confidence to civil servants to disclose (Sharma, 2019; Naib, 2013). The result is that India is today regarded as having one of the most progressive access to information regimes in the world. Within Africa, Ghana and South Africa have shown how to harmonize secrecy and openness. Ghana passed its Right to Information Act in 2019 after 22 years of debate. The Ghanaian law specifically provides under Section 42 that in considering whether to exempt information, the agency must apply a harm test and a public interest override. More importantly, Section 72 protects public officers from criminal liability where

they disclose information in good faith in compliance with the RTI Act (Adu-Gyamfi, 2020; Asare, 2022). South Africa, with its Promotion of Access to Information Act 2000, takes a similar approach. It repealed the restrictive parts of apartheid-era secrecy laws and created a presumption in favour of disclosure. The South African Constitutional Court has also held that secrecy must be reasonably justifiable and not used as a cloak for corruption (Klaaren & Penfold, 2012; O'Brien, 2018). The comparative experience therefore reveals three clear principles for resolving the conflict. First, the access to information law must have an overriding effect over secrecy legislation. Second, there must be a public interest and harm test before information can be withheld. Third, public officers who disclose in good faith must be protected by law. Until Nigeria incorporates these three principles by amending or repealing the Official Secrets Act 1962, the tug of war between transparency and secrecy will persist.

FOI Act versus Official Secrets Act

The central difference between the two laws is their orientation. The FOI Act is principally concerned with **access**, while the Official Secrets Act is principally concerned with protection of classified information.

Area	FOI Act, 2011	Official Secrets Act
Main objective	Promote access to public information	Protect classified official information
General orientation	Openness and transparency	Confidentiality and security
Beneficiaries	Citizens, journalists, organisations and the public	Government and legitimate security interests
Key concern	Right of access	Unauthorised disclosure
Democratic value	Accountability and public participation	Protection of national/public safety interests
Major risk	Disclosure of legitimately exempt information	Excessive or unjustified secrecy

Areas of Conflict between the Two Laws

The principal conflict occurs when a citizen or journalist requests information that a government institution considers confidential or classified. The FOI Act creates an expectation of disclosure, while secrecy laws may be invoked to prevent disclosure.

Moreso, area of tension concerns public-interest disclosure. Information may be withheld because officials classify it as sensitive even where citizens believe that disclosure would expose corruption, administrative abuse or misuse of public resources. This creates a difficult balance between the public interest in transparency and the public interest in protecting legitimate state secrets. There is also a potential conflict where public officials fear disciplinary or legal consequences for disclosing information. The FOI framework seeks to provide legal protection for certain authorised disclosures, while secrecy legislation historically places emphasis on preventing unauthorised disclosure of classified information. The Federal Ministry of Justice notes that one objective of the FOI Act is to protect serving public officers from adverse consequences for disclosing certain kinds of official information without authorisation.

The Way Forward: Harmonization, Not Confrontation.

The Nigerian legal system cannot continue to sustain two laws that give contradictory instructions to the same public officer on the same subject matter. The Freedom of Information Act 2011 commands disclosure while the Official Secrets Act 1962 punishes disclosure. This

statutory contradiction has left public officers in a state of legal confusion and has provided a convenient excuse for Ministries, Departments and Agencies to deny citizens access to information. The solution is not to allow both laws to continue fighting each other in court, but to harmonize them through deliberate legislative reform that aligns Nigeria with global best practices on transparency (Adeyemi & Ojo, 2020; Dada, 2021). The first step towards harmonization is the repeal or fundamental amendment of the Official Secrets Act. The Act is a colonial legislation enacted to protect British colonial interests and not to promote accountable governance in a democracy. Its language is overly broad and vague. For instance, Section 1(1) makes it an offence for any person to transmit any classified matter, yet the Act nowhere defines what constitutes classified matter. This leaves the determination of secrecy to the subjective discretion of a superior officer. Such wide discretion is antithetical to Section 12 of the FOI Act which requires that exemptions must be specifically justified. Nigeria must follow the path of the United Kingdom which narrowed its Official Secrets Act 1989 to cover only specific categories like security and intelligence, defence, and international relations (Eze, 2019; Okeke & Nwosu, 2022). Secondly, the Freedom of Information Act itself must be strengthened to resolve the conflict expressly. A major lacuna in the FOI Act is the absence of a clear overriding clause. Section 27 of the Act protects persons who release information in good faith, but it does not state in unequivocal terms that the FOI Act shall prevail over the Official Secrets Act in case of inconsistency. This silence is what MDAs rely on to insist that the oath of secrecy taken under the Official Secrets Act prevails. Drawing from the Indian experience, Section 22 of the Indian Right to Information Act 2005 provides that the RTI Act shall have effect notwithstanding anything inconsistent contained in the Official Secrets Act. Inserting a similar provision in Nigeria's FOI Act will remove all doubt and give public officers statutory confidence to disclose (Sharma, 2019; Ogbu, 2020). The third pillar of harmonization is the introduction of a public interest and harm test. Not every government information should be disclosed. Genuine national security information deserves protection. However, the decision to withhold should not be based merely on the fact that a document is marked secret. Government must demonstrate that disclosure will cause real and identifiable harm to national security and that such harm outweighs the public interest in disclosure. This approach, adopted in Ghana under Section 42 of its RTI Act 2019 and in the United States through judicial interpretation, ensures that secrecy is not used as a shield for corruption, inefficiency and abuse of office (Adu-Gyamfi, 2020; Piotrowski, 2017).

Finally, there must be a comprehensive whistleblower and public officer protection law. At the heart of this tug of war is the civil servant. If he discloses information, he faces prosecution under Section 1 of the Official Secrets Act and dismissal under the Public Service Rules for breach of oath of secrecy. If he refuses to disclose, he faces a fine or imprisonment under Section 7(5) of the FOI Act for wrongful denial. No officer should be placed in such a precarious position. A Whistleblower Protection Act that guarantees immunity from criminal, civil and administrative liability for officers who disclose information in good faith and in compliance with the FOI Act is imperative. Until this is done, the culture of secrecy will persist and the lofty ideals of transparency and accountability will remain a mirage.

Theoretical Framework

This study shall be anchored on the public sphere and the Principal-Agent Theories of communication.

The Public Sphere Theory was developed by Jurgen Habermas in 1962. The main idea is that democracy cannot work if government hides information from the people. For democracy to work, there must be a public space where ordinary citizens can freely meet, get correct information, and discuss issues that affect everyone without fear. This public space is what he

calls the public sphere. For this public sphere to survive, Habermas said four things must happen. First, everyone must have access, not just powerful people. Second, discussions must be about serious public issues and must be based on reason, not gossip. Third, information must be open and public, because people cannot debate what they don't know. Fourth, this space can be destroyed when government and powerful people control information and turn citizens into just listeners of government propaganda. This theory explains the problem between the two Nigerian laws. The Official Secrets Act of 1962 is a colonial law that says any public officer who reveals government information can go to prison. It promotes secrecy and makes officers loyal to the government bureaucracy instead of the people. It kills the public sphere.

The Freedom of Information Act of 2011 does the opposite. It says information belongs to the people and every citizen has the right to ask for it, and it protects officers who reveal information about mismanagement. So the public officer is confused - one law says if you talk you will be punished, the other law says if you don't talk you are blocking the people's right. Because of this conflict, most officers choose secrecy to protect themselves, and the public sphere remains weak.

The Principal-Agent Theory

The theory is a simple way to understand the relationship between citizens and government workers. It was introduced by Stephen Ross in 1973. The theory says that the citizens are the principals, meaning they are the owners of power, and the public officers are the agents employed to work for them and manage public affairs.

The theory has some key ideas. First is information asymmetry, which means the agent always knows more than the principal because he handles the daily files and budgets. Second is self-interest, which means the agent may choose to protect himself instead of serving the principal when he knows nobody is watching him. Third is agency loss, which is the loss the principal suffers when the agent hides information, so the principal must spend money and create laws to monitor the agent. When we apply this to Nigeria, the problem becomes clear. The Official Secrets Act of 1962 gives power to the agent to hide information and says any officer who discloses government information can go to prison. This makes officers choose secrecy to protect their jobs, even when hiding information harms the citizens.

The Freedom of Information Act of 2011 was made to correct this problem. It gives citizens the right to ask for information and protects officers who reveal corruption. So the public officer now has two conflicting instructions - one law says don't talk, the other says you must talk. Because the punishment under the old secrecy law is heavier and there is no clear protection, most officers choose to remain silent and protect themselves.

Methodology

The study adopts a descriptive research design based on documentary analysis. The design is appropriate because the study examines the legal and institutional relationship between the Freedom of Information Act and official-secrecy provisions in Nigeria. The study relies principally on secondary data. Sources include the Freedom of Information Act, the Official Secrets Act, government FOI portals, legal documents, academic literature, journal articles, books and relevant institutional publications.

Data were collected through documentary review. Relevant provisions of the FOI Act and Official Secrets Act were examined and compared according to their objectives, scope, disclosure requirements, exemptions, protection of official information and implications for government transparency.

Data Presentation and Analysis

The documentary findings can be summarised as follows:

Issue	FOI Act	Official Secrets Act	Implication
Access to information	Encourages public access	Restricts access to classified information	Creates tension over disclosure
Government transparency	Promotes openness	Permits confidentiality	Requires balancing
Classified information	Recognises lawful exemptions	Protects classified matter	Legitimate secrets remain protected
Journalism	Supports access to government records	Restricts unauthorised disclosure of protected information	Journalists must distinguish public information from classified material
Accountability	Facilitates public scrutiny	Can limit access where secrecy applies	Excessive secrecy can weaken accountability
National security	Allows exemptions for protected interests	Directly protects sensitive official information	Security considerations justify some secrecy
Legal hierarchy concerning access	FOI Act supersedes other Acts relating to access to information	Older secrecy framework remains relevant to classified matters	Harmonisation is important

The analysis indicates that the two legal approaches are not necessarily completely incompatible. The FOI Act establishes a general presumption favouring access, while legitimate exemptions recognise that some information should not be disclosed. Nigerian government guidance confirms that the FOI Act does not create an unlimited right to every government record.

Discussion of Findings

The major finding is that the FOI Act has significantly strengthened the legal basis for government transparency in Nigeria. It changed the traditional assumption that government records should generally remain inaccessible and established procedures for citizens to request information. The Federal Ministry of Justice identifies public access to government records as one of the Act's central objectives.

Official secrecy remains relevant because government possesses information whose disclosure may legitimately threaten national security or public safety. The Official Secrets Act specifically addresses the unauthorised handling of classified matter.

The major challenge is the boundary between legitimate secrecy and unnecessary secrecy. When secrecy is applied to information that does not genuinely require protection, it can frustrate the objectives of the FOI Act and undermine accountability.

The findings show that the FOI Act has legal superiority concerning access to information. The Central Bank of Nigeria states that the FOI Act supersedes other legislation pertaining to access to information. Nevertheless, uncertainty can remain where officials invoke separate secrecy provisions to justify non-disclosure. The continuing consideration of proposals to amend the Official Secrets Act demonstrates that lawmakers recognise the need to reconcile secrecy provisions with contemporary transparency requirements. The 2025 National Assembly proposal specifically sought to align the Official Secrets Act with the FOI Act and strengthen whistle-blower and press protections.

Conclusion

The study concludes that the conflict between the Freedom of Information Act and official secrecy represents a fundamental struggle between the public's right to know and the government's responsibility to protect legitimate confidential information. The FOI Act, 2011 has provided an important legal foundation for transparency, accountability and public participation in Nigeria. At the same time, secrecy laws remain relevant for protecting national security, public safety and genuinely classified government information.

The problem therefore is not that government should choose between complete openness and complete secrecy. Rather, there is a need for a clear and consistent framework that distinguishes information that deserves protection from information that should be disclosed in the public interest. Where secrecy is unnecessarily used to frustrate legitimate requests for information, transparency and democratic accountability are weakened.

A balanced approach should consequently maintain legitimate secrecy while ensuring that classification is not used as a mechanism for concealing corruption, maladministration or information that citizens are legally entitled to access.

Recommendations

The National Assembly should fix this clash between the two laws clearly. Right now, the Freedom of Information Act says it is superior to other laws, but it did not clearly cancel the old Official Secrets Act that says officers should not disclose information. This leaves public officers confused about which law to obey.

The government should therefore amend the FOI Act to clearly cancel the secrecy sections of the Official Secrets Act and add a public interest rule. This means if revealing the information will benefit the public more than hiding it, the officer should be allowed to reveal it without fear of punishment.

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