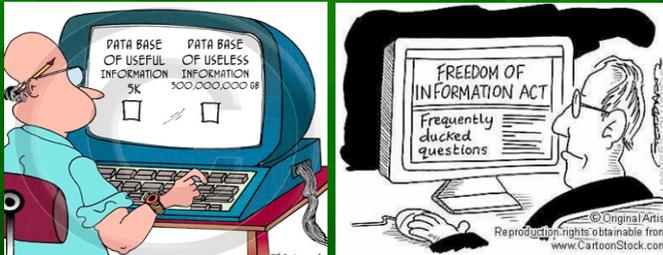


GUIDELINES

FOR ACCESSING PROCUREMENT INFORMATION FROM FEDERAL MINISTRIES, DEPARTMENTS AND AGENCIES



USAID
FROM THE AMERICAN PEOPLE

DEVELOPED BY:
PUBLIC AND PRIVATE DEVELOPMENT
CENTRE (PPDC)

Guidelines

For Accessing Procurement Information from Federal Ministries, Departments and Agencies

Developed by:

**Public and Private Development Centre
(PPDC)**

First Published in Nigeria in 2010

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About Public and Private Development Centre Ltd By Guarantee

The Public and Private Development Centre Limited by Guarantee (PPDC) which commissioned this assessment is a Nigerian Citizenship sector organisation, which was established in 2001. PPDC promotes citizens participation in governance and development in a way that prevents corruption. It singularly secured inclusion of the clause requiring civil society monitoring of procurement in the Public Procurement Act 2007. It initiated the formation of the National Procurement Watch Platform (NPWP), and midwife commencement of procurement monitoring by citizens organizations in Nigeria. PPDC has continued to increase the number of citizen's organizations and professional bodies participating in procurement monitoring and advocacy for improvements in public expenditure management in Nigeria. It has excelled in building capacity of individuals and organizations to perform their obligations under the PPA 2007. PPDC has become the strongest CSO voice for procurement reforms in Nigeria. It has developed and deployed several tools for procurement monitoring including an online, real time tool for collation and analyses of procurement reports based on a standard checklist. See www.procurementmonitor.org.

Recently PPDC through its procurement monitors list-serve initiated a broad consultative process on issues surrounding the fuel subsidy removal which it continues to support. This initiative has led to the formation of the Citizens Wealth Platform by major players in the Nigerian citizens sector, this process has produced a published citizens evaluation of the

2012 National budget and broad budget heads and policies in general and specific recommendations for improving budgetary allocations, and for full and effective implementation of the Fiscal Responsibility Act 2007, Public Procurement Act 2007 and the Nigerian Extractive Industries Initiative Act 2007 see www.procurementmonitor.org. It is increasingly being adopted as an important advocacy tool by some local citizen's initiatives in Nigeria. This is in line with PPDC's strategy of activating partnerships that improve citizen's participation in governance, and support citizen's efforts to hold their leaders accountable.

PPDC, in 2009, received support from the United Nations Democracy Fund (UNDEF) to carry out an assessment of the levels of implementation of the Public procurement Act 2007 for the period 2010-2011. In a capacity building workshop session for the immediate past House Committee on Public Procurement supported by UNDEF under this program in October 2011. It was agreed that the assessment of levels of compliance with the Public Procurement Act 2007 within the legislature, should be carried out. This is the report of that assessment activity.

Preface

Over the last two years, following the signing of the Public Procurement Act into Law in June 2007, the Public and Private Development Centre (PPDC) has trained hundreds of representatives of civil society organizations and professional associations as well as media practitioners to observe procurement activities and processes in Federal Ministries, Departments and Agencies (MDAs).

Most of these trained observers have subsequently been accredited by the public procurement oversight body, the Bureau of Public Procurement (BPP), to enable them observe procurement activities.

However, a major challenge which these observers have faced in trying to monitor procurement activities and processes has been the difficulty of obtaining access to procurement information, records and documents held by various MDAs, in addition to the fact that in the vast majority of cases, appropriate or adequate notices are not issued to enable representatives of civil society organizations and professional associations, as well as other interested members of the public, know where and when bid opening sessions are scheduled to take place.

The challenge of lack of access to procurement records has been attributed in a large measure to the absence of comprehensive guidelines which outline procedures for accessing such procurement information.

However, the lack of access to procurement records has greatly

hampered the effectiveness of monitoring of procurement activities and processes by civil society organizations and professional associations as they are frequently unable to get a comprehensive and accurate picture of the procurement process without such records.

These Guidelines are therefore necessitated by this reality and the need to improve public procurement observation and monitoring as intended under the Public Procurement Act.

It is hoped that these Guidelines will help to remedy the current situation and enable civil society organizations, professional bodies and other interested members of the public to play a more effective role in the public procurement process.

Chibuzo .C.Ekwekwuo

Public and Private Development Centre (PPDC)

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1.0 Introduction

These Guidelines are issued to assist representatives of civil society organizations, professional bodies and associations, media practitioners and other members of the public engaged in observing public procurement proceedings and processes in requesting and obtaining procurement records and information from relevant Federal Ministries, Departments and Agencies.

The Guidelines are issued in the spirit of Section 16(14) of the Public Procurement Act, 2007, which provides that “All unclassified procurement records shall be open to inspection by the public at the cost of copying and certifying the documents plus an administrative charge as may be prescribed from time to time by the Bureau.” And section 38(2) of the PPA 2007, which grants access to procurement records to any person after a winning tender has been selected or a procurement proceeding terminates without a contract.

The Guidelines have also been prepared in full cognizance of the Freedom of Information Act 2011 which states in Section 30(1) that it is “intended to complement and not replace existing procedures for access to public records and information and is not intended to limit in any way access to those types of official information that have been normally available to the general public.”

In addition, the Guidelines have taken into account Section 30(2) of the Freedom of Information Act which provides that: “Where the question whether any public record or information

is to be made available, where that question arises under this Act, the question shall be determined in accordance with the provision stated herein, unless otherwise exempted by this Act.”

Since procurement documents and information are public records within the meaning of the Freedom of Information Act, efforts have been made to ensure that the Guidelines are consistent with the provisions of the Freedom of Information Act as the FOI Act may also be applied in obtaining procurement records and information.

2.0 Objectives of the Public Procurement Act 2007

The main objectives of the Public Procurement Act 2007 (PPA) and the fundamental principles guiding all public procurements under the Act include:

- Ensuring **probity** in the procurement process
- Ensuring **accountability** in the procurement process
- Attainment of **transparency** in the procurement process
- Attainment of **competitiveness** in the public sector procurement system
- Ensuring **fairness** of the procurement system
- Application of **value-for-money** standards and practices for the procurement and disposal of public assets and services
- Attainment of **cost-effectiveness** in the procurement system
- Attainment of **professionalism** in the procurement system

In order to achieve these objectives, particularly the

transparency and accountability objectives of the Act, it prescribes a number of broad measures and principles, including:

- A rigorous and systematic documentation of procurement proceedings and maintenance of procurement records as well as collation and maintenance of a variety of other records and information related to the procurement process.
- The requirement for proactive release of certain types of information, including through advertisements in newspapers and other publications, the use of official websites and notice boards by Federal Ministries, Departments and Agencies to which the Act applies, as well as other mechanism.
- The requirement that bid opening sessions are open to the public as well as to stakeholders and interested parties.
- A regime of access to procurement information based on request by stakeholders and interested members of the public.
- Mandatory requirement that citizen's organizations be invited to observe procurement proceedings.
- The requirement that all communication relating to public procurement shall be in writing.

3.0 The Freedom of Information Act 2011

The Freedom of Information Act 2011 (FOI Act) was signed into Law by President Goodluck Jonathan on May 28, 2011, about four years after the coming into force of the Public Procurement Act 2007.

The objectives of the FOI Act are to:

- Make public records and information more freely available,
- Provide mechanisms for public access to public records and information
- Protect public records and information to the extent consistent with the 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 these purposes.

The Act gives every person a legally enforceable right of access to information, whether contained in a written form or not, which is in the custody or possession of any public official, agency or institution, no matter how described.

The FOI Act supersedes any other Act, Law or Regulation, including the Official Secrets Act, the Criminal Code, the Penal Code or any other enactment where the right of access to information is involved.

4.0 Institutions Covered by the Guidelines

These Guidelines apply to the Federal Government and all public institutions that are covered by the Public Procurement Act 2011, including Ministries, Extra-Ministerial offices, government agencies, parastatals and corporations.

It also applies to other entities outside those listed above, in any

particular case, where they derive at least 35 per cent of the funds appropriated or proposed to be appropriated for any type of procurement described in the PPA from the Federation share of the Consolidated Revenue Fund.

The FOI Act has a far broader scope than the Public Procurement Act but nonetheless covers all of the institutions covered by the PPA. The FOI Act applies to all public institutions. A public institution is defined by the Act as *“any legislative, executive, judicial, administrative or advisory body of the Government, including boards, bureau, committees or commissions of the State, & any subsidiary body of those bodies, including but not limited to committees & sub-committees which are supported in whole or in part by public funds or which expend public funds & private bodies providing public services, performing public functions or utilizing public funds.”*

5.0 Documentation and Record-Keeping

The FOI Act stipulates that all public institutions should record and keep information about their activities, operations and businesses. It requires that all public institutions must ensure the proper organization and maintenance of all information in their custody in a manner that facilitates public access to such information. (See Section 2(1) and (2) as well as Section 9(1) and (2) of the FOI Act)

In principle, therefore, all procuring entities are required to record and keep information about all their activities and operations and do so in a manner that will make it easy to process

applications for information from members of the public and generally retrieve any information, record or document. A list of potentially available procurement records which will be required at various stages of the procurement exercise are contained in Section 5.0 of these Guidelines under “Documentation and Record-Keeping”.

However, under the PPA, every procuring entity to which the Act applies must maintain both file (hard copies) electronic records of all its procurement proceedings made within each financial year. (See Section 16(12) of the PPA)

All procurement records relating to any contract must be maintained for a minimum of 10 years from the date of the award of the contract. (See also Section 16(12) of the PPA)

Copies of all procurement records must be sent to the BPP not later than three months after the end of each financial year, namely by March 31 of the following year. (See Section 16(13) of the PPA). Such procurement records required to be sent to the BPP should contain:

- Information which identifies the procuring entity
- The date of the contract award
- The value of the contract
- The names of the persons, companies, institutions or other entities to which the contracts were awarded
- The number of contracts awarded
- The types of contracts awarded
- Any other information or records that the BPP may from time to time require.

The procuring entities must also maintain for all contracts, other information and records (in hard and electronic copies) which should include:

- Copies of Procurement Plans and Information, including needs assessment and evaluation; identification of goods, works or services required; market and statistical survey; cost implications of proposed procurement and other related documents or information
- Copies of pre-qualification documents, including instructions on how to prepare and submit pre-qualification application and/or Expression of Interest; a summary of the main terms and conditions required for qualification and the procurement contract; and any documentary evidence or other information that is required to be submitted by suppliers, contractors and consultants
- Information or instructions about the manner and place for submission of applications for pre-qualifications and/or Expressions of Interest
- Information or instructions about deadline for the submission of applications for pre-qualifications or Expression of interest which should be a specific date and time.
- Copies of all submissions of bidders pursuant to requests for pre-qualification and or Expression of Interest, including all required certificates and evidence of relevant qualification, experience or expertise, minutes of meeting to evaluate and pre-qualify bidders and shortlist consultants, and

list of pre-qualified bidders and short listed consultants.

- Copies of advertisements of invitation for bids published in *at least two national newspapers and one relevant internationally recognized publication, any official websites of the procuring entity and the procurement journal in all cases of international competitive bidding. This should contain the date, place and time for collection of bidding documents, the date on which the advertisement was published and the deadline proposed for the submission of bids for the goods and works. Or evidence of issuance of bidding documents to all pre-qualified bidders or shortlisted consultants.*
- Copies of advertisements or invitation for bids issued or published, as the case may be, *on the notice board of the procuring entity, any official websites of the procuring entity, at least two national newspapers and in the procurement journal in all cases of national competitive bidding. This should contain the date on which the advertisement was published and the deadline proposed for the submission of the bids for goods and works.*
- *Copies of the bid documents issued to bidders including but not limited to the Special Instructions to Bidders (SIB); the Special Conditions of Contract (SCC), the Schedule of Requirements; Technical Specifications, including schedule of works and Drawings. If required; Standard Bid and Contract Forms attached etc.*
- *Copies of Request For Proposal (RFP) issued to solicit proposals to offer consulting services whether a full or abridged RFP including but not limited to; Information to Consultant; Technical Proposal Standard Form; Financial Proposal - Standard Forms; Terms of*

Reference (TOR); Standard Form of Contract, Standard Bid and Contract Forms attached, etc . Copies of Requests for Clarification and or any responses made by the MDA to such requests.

- Copies of bid submission register and duplicate copies of receipts issued to bidders on submission of bids, pre-qualification or Expression of Interest documents, indicating the title of bids, date and time of submission, person submitting, etc .
- Copies of the Attendance Registers at bid opening sessions, which should include or contain the date of the bid opening session as well as the names and addresses of all those present at the bid opening and the organizations, institutions or entities that they represented, bid sums announced, etc.
- The minutes of public bid opening sessions for Financial Proposals, and or requests for correction of minor deviations and responses if any.
- Extract of minutes of bid evaluation meetings, records of bid examinations, recommendation of bid evaluation committee (Bid Evaluation Report) and minutes of minutes of meeting of tender board awarding the contract.
- Copies of the notification issued by the procuring entity to each supplier, contractor or consultant which submitted an application to pre-qualify, indicating whether or not the supplier, contractor or consultant, as the case may be, has been pre-qualified or publication indicating contractors or consultants pre-qualified.

- Copies of any notification issued by the procuring entity to any supplier, contractor or service provider requesting it to demonstrate its qualifications again and copies of any notification to such supplier, contractor or service provider indicating whether or not it has demonstrated its qualifications to the satisfaction of the procuring entity.

- Copies of advance payment or performance guarantees obtained from the winning bidder.

- Copies of bid rejection letters or notices, if any

- Copies of the notification issued to consultants whose proposals did not meet the minimum qualifying mark or were non-responsive to the invitation for proposals and Terms of Reference after a decision has been taken by the procuring entity. The notification should include or contain the date on which it was issued as well as the date on which a decision was taken by the procuring entity

- The list containing the names of the qualifying consultants, the quality of scores for the technical component of the proposal and the price proposed by each consultant or service provider in the financial proposals which the procuring entity is required to read out during the selection of proposals.

- Copies of Notices of Acceptance of Bid issued by the procuring entity to the successful bidder immediately after a winner is selected

- Copies of the Details of Contracts Awarded published in two national dailies with a description of the contract, the name of contractors or supplier and stating the contract price
- Copies of the Notification sent to the BPP by the procuring entity notifying it of the award of all contracts
- Formal appeals by bidders (protest letters) and the decisions in such appeals/complaints. Records of claims and dispute resolution
- The award letter and signed contract documents and any addendums and/or any amendments
- Records of the time taken by the procuring entity to complete the key steps in the procurement process
- Comprehensive information, records and data on disbursements and payments under any contract
- Request by the TendersBoard or procuring entity for certificate of “No Objection” and BPP certificate of No Objection where applicable.

These are obviously an enormous amount of procurement documents, records and information which are potentially available to representatives of civil society organizations, professional associations or bodies, media practitioners and

other members of the public that are engaged in observing public procurement proceedings and processes, subject of course to the relevant timelines under the Public Procurement Act and the exemptions under the Freedom of Information Act

6.0 Structure for Implementation

To meet the requirements of the Public Procurement Act and the Freedom of Information Act, each MDA needs to have a dedicated unit that collates gathers and maintains in an accessible form records and procurement related information. Such personnel may or may not be engaged with other activities.

Indeed, as part of his oversight functions in the implementation of the FOI Act, the Attorney-General of the Federation and Minister of Justice, Mr. Bello Adoke (SAN), issued a Circular dated January 29, 2012 with the subject “*Implementation of the Freedom of Information Act 2011 and the Reporting Requirements under Section 29 Thereof*”, on compliance with some duties and obligations of public institutions under the Act. The Circular with Reference No. HAGF/MDAS/FOIA/2012/I, was issued to all Ministries, Departments and Agencies; and all public institutions for the purpose of the Freedom of Information Act 2011 (FOIA).

In the Circular, the Attorney-General of the Federation asked all public institutions covered by the Act to “consider designating a senior official (at the Assistant Director level or its equivalent) or establishing an FOI Unit with direct responsibility for determinations and compliance with the Act”

In furtherance of this, MDAs implementing the Public Procurement Act may also establish in their procurement departments a Procurement Document Registry as a Unit of not more than three staff, that will have primary responsibility to seek out, collate, arrange, keep and maintain all procurement related information in a retrievable manner in one location, reporting directly in respect of procurement information to the MDA's information officer, in accordance with the Freedom of Information Act.

7.0 Procurement Document Registry

The availability and completeness of procurement records is critical under the Public Procurement and the Freedom of Information Acts.

In addition to overall data on numbers, types, values and dates of contracts awarded and names of awardees, the registry shall maintain for all contracts, a record which includes, inter alia:

- (a) Full records of User Division Procurement Planning submissions, starting with needs assessment, market surveys, cost analysis etc.
- (b) Record of decisions of the Procurement Planning Committee (PPC) and its minutes and documentations.
- (c) Public notices of tendering opportunities.
- (d) Bid tendering documents and any addendums, requests for clarification and responses etc.
- (e) Bid Submission documents (Register, Receipts, etc)
- (f) Bid opening information (Register, Minutes, etc)
- (g) Technical Sub-Committee minutes, reports and memoranda, Bid evaluation reports, and Tenders Board Minutes and documentation.

- (h) Any records of pre- or post qualification or verification of documents or disqualification of any bidder, regarding all aspects of required qualification, assets and or experience.
- (i) Notifications of award, or failure to win, requests for correction of minor deviations etc
- (j) All requests for debriefing, and access to information and action taken on them.
- (k) Complaints and formal appeals by bidders and outcomes
- (l) Signed contract documents and any addendums and amendments.
- (m) Advance payment or performance guarantees.
- (n) Records of claims and dispute resolutions
- (o) Records of time taken to complete key steps in the process
- (p) Performance certificates issued, reports in case of consulting services
- (q) Comprehensive disbursements data in relation to payments, vouchers and approvals
- (r) All procurement proceeding records.

All departments, units, divisions and personnel in the procuring entity, shall as a matter of course, supply the procurement document registry with soft and hard copies of every information and records required to be kept at the registry at all times. Every public servant who in his job generates any related record or information shall be required to not later than five working days of generating the record, submit a hard and soft copies to the procurement document registry, except it is a document exempted from disclosure under the Freedom of Information Act.

8.0 Types of Procurement Information that can be Accessed by the Public

The PPA requires that “All unclassified procurement records shall be open to inspection by the public at the cost of copying and certifying the documents plus an administrative charge as may be prescribed from time to time by the Bureau.” (Section 16(14) of the PPA)

However Section 38 of the PPA allows for the disclosure of all procurement information, leaving only the period from the point of bid opening to selection of a winner as a period during which bid related (bidders submissions) should not be released to any person not involved in the procurement proceeding. This provision makes it clear that as soon as a winning bidder is identified all procurement records should be available for any person requesting them.

This requirement under the Public Procurement Act is consistent with Section 15(1) of the FOI Act which exempts from disclosure information whose disclosure could reasonably be expected to interfere with the contractual or other negotiations of a third party; and proposal and bids for any contract, grants, or agreement, including information which if it were disclosed would frustrate a procurement or give an advantage to any person.

Also, regarding the issue of classified and unclassified documents, since the PPA does not indicate which procurement records are classified and having regard to the provisions of the FOI Act, all information held by every procuring entity that is

covered by the Act are subject to disclosure to the public, unless the information falls within one or more of the categories that are exempted from disclosure to the public under the FOI Act.

Information that can therefore be accessed, as per the FOI Act, include all records, documents and information stored in whatever form, including written, electronic, visual images, sound, audio recording, etc. Members of the public and stakeholders or interested parties in any particular procurement process are therefore entitled to access information, records and documents, including:

Paper records in the form of any written material such as books, files, letters, papers, diaries, forms, post-it notes, labels, cards, markings, personal notes scribbled in a note book or sheet of paper or other substance, computer print-outs, or any other writing that identifies or describes anything of which it is a part of or to which it is attached by any means.

- Electronic records, including information contained in or recorded or stored in any computer, disk, external drive, server, database, or any other device. This includes emails, text messages, etc.
- Audio recordings contained in, recorded or stored in any tape, CD, DVD, computer, external drive, disk, voicemail, or any other device.
- Audio-visual records, including films and similar materials contained in, recorded or stored in any tape, video, DVD, CD, computer, disk, external drive, server, or any other device.

□ Photographs and graphics, including maps, plans, drawings, x-rays, microfiche, microfilm, negative, charts, graphs, images, pictures, artworks, sketches, or other visual images that can with or without the aid of some other equipment be produced or reproduced.

Any information, record or document, in any form whatsoever, can be access from any particular procuring entity covered by the PPA or any public institution covered by the FOI Act or any private entity to which the FOI Act applies, if:

- The information, record or document was prepared or created by the institution or entity.
- The information, record or document has been used by the institution or entity
- The information, record or document is being used by the institution or entity
- The information, record or document has been received by the institution or entity
- The information, record or document is in the possession or custody of the institution or entity
- The information, record or document is under the control of the institution or entity.

The above clearly includes all the information and records listed under documentation and record keeping above.

9.0 Types of Procurement Information that may be Exempted from Public Access

Although the PPA implies that classified procurement information may not be accessible to the public, the Act does not indicate which procurement records and information are

classified or may be classified.

However, under the FOI Act, some categories of information, records and documents may be exempted from public access, except where there is an overriding public interest in disclosing them despite the harm that such disclosure might cause.

Regardless of the exemptions, where an application is made to a public institution for information which is exempted from disclosure by virtue of the FOI Act, the institution must disclose any part of the material that does not contain exempted information. (See Section 18 of the FOI Act)

Besides the categories of information that are specifically exempted from public access under the FOI Act, the Act also does not apply to certain materials, namely:

- Published material or material available for purchase by the public;
- Library or museum material made or acquired and preserved solely for public reference or exhibition purposes; or
- Material placed in the National Library, the National Museum or the non-public section of the National Archives on behalf of any person or organization other than a government or public institution.

The information, records and documents exempted from public access include:

9.1 Information which may be injurious to the conduct of international affairs or the defence of Nigeria:

Information whose disclosure may be injurious to the conduct

of international affairs and the defence of Nigeria. (See Section 11(1) of the FOI Act. However, even such information must be disclosed where the public interest in disclosing the information outweighs whatever injury disclosure would cause. (See Section 11(2) of the FOI Act)

9.2 Information which may jeopardize law enforcement activities or investigations or the right to a fair trial:

Information compiled by any law enforcement or correctional agency for law enforcement purposes or for internal matters of a public institution, whose disclosure would interfere with pending, actual or reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency; or interfere with pending administrative enforcement proceedings conducted by any public institution; or deprive a person of a fair trial; or disclose the identity of a confidential source; or constitute an invasion of personal privacy under the Act; or obstruct an ongoing criminal investigation; or which could reasonably be expected to be injurious to the security of penal institutions; or could reasonably be expected to facilitate the commission of an offence. However, the information must be disclosed where the public interest in disclosing it outweighs whatever injury the disclosure would cause. (See Section 12(1) of the FOI Act)

9.3 Personal Information: Materials that contain personal information, including files and personal information about clients, patients, residents, students, or other individuals receiving social, medical, educational, vocational, financial, supervisory or custodial care or services directly or indirectly from the public institutions; personnel files and information

about employees, appointees or elected officials of any public institution or applicants for such positions; files and personal information maintained about any applicant, registrant or licensee by any public institution cooperating with or engaged in professional or occupational registration, or discipline; information required of any tax payer for the assessment or collection of any tax unless disclosure is otherwise required by Law; and information revealing the identity of persons who file complaints with or provide information to administrative, investigative, law enforcement or penal agencies on the commission of any crime. (See Section 14(1) of the FOI Act)

However, a public institution must disclose any material containing personal information if:

- The individual to whom it relates consents to the disclosure; or
- The information is already publicly available. (See Section 14(2) of the FOI Act)

Also, where disclosure of any personal information would be in the public interest, and if the public interest in the disclosure of such information clearly outweighs the protection of the privacy of the individual to whom the information relates, the public institution to which a request for disclosure is made must disclose such information subject to section 14(2) of the FOI Act. (See Section 14(3) of the FOI Act)

9.4 Information containing trade secrets, commercial or financial information that are proprietary, privileged or confidential: Information that contains trade secrets and commercial or financial information obtained from a person or

business where such trade secrets or information are proprietary, privileged or confidential, or where disclosure of the information may cause harm to the interests of the third party. However, the third party is entitled to consent to the disclosure, in which case the information must be disclosed. Also exempted is information whose disclosure could reasonably be expected to interfere with the contractual or other negotiations of a third party; and proposal and bids for any contract, grants, or agreement, including information which if it were disclosed would frustrate a procurement or give an advantage to any person. (See Section 15(1) of the FOI Act). A public institution must, regardless of subsection (1), refuse to disclose any part of a record if that part contains the result or product of environmental testing carried out by or on behalf of a public institution. (See Section 15(2) of the FOI Act)

However, a public institution must disclose any information described in Section 15(1) of the FOI Act if that disclosure is in the public interest relating to public health, public safety or the protection of the environment and, if the public interest in disclosing it clearly outweighs in importance any prejudice, financial loss or gain to the competitive position of or any interference with contractual or other negotiation of a third party. (See Section 15(4) of the FOI Act)

9.5 Information subject to professional privilege:

Information that is subject to Legal Practitioner-client privilege; Health Workers (doctor)-client (patient) privilege; Journalism confidentiality privileges; and any other professional privileges conferred by an Act. (See Section 16 of the FOI Act)

9.6 Information containing research materials by an academic institution: Information containing course or research materials prepared by faculty members. (See Section 18 of the FOI Act)

9.7 Information containing examination data, architectural plans and library circulation: Materials that contain information on test questions, scoring keys and other examination data used to administer an academic examination or determine the qualifications of an application for a license or employment; architects' and engineers' plans for buildings not constructed in whole or in part with public funds and for buildings constructed with public funds where the disclosure would compromise security; and library circulation and other records identifying library users with specific materials. (See Section 19(1) of the FOI Act)

However, even where the information requested falls within any of these categories, the application for the record or information must not be refused if the public interest in disclosing the information outweighs whatever injury that disclosure would cause. (See Section 19(2) of the FOI Act)

10.0 Designation of Information Officer

Each procuring entity to which the FOI Act apply is required to designate an appropriate officer of the institution to whom an application for information should be sent. Each procuring entity must publish the title and address of the appropriate officer on its notice board, website and through any other means. However, the failure of any procuring entity or public institution to

publish this information will not affect the public's right of access to information in the custody of such an institution. (See Section 2(3)(f) of the FOI Act)

In addition to designating an Information Officer, as required by the FOI Act, the Head of each procuring entity to which the PPA applies is encouraged to appoint a Decision Maker, who should be an employee of the institution concerned with sufficient seniority, authority and understanding of the PPA and the FOI Act to review applications for procurement information, assess whether the information requested is exempted under the FOI Act and take a decision whether to release the information, record or document requested.

As indicated earlier, the Attorney-General of the Federation, Mr. Mohammed Bello Adoke (SAN), has directed all public institutions in his January 29, 2012 Circular to “consider designating a senior official (at the Assistant Director level or its equivalent) or establishing an FOI Unit with direct responsibility for determinations and compliance with the Act”

Such a person must be able to provide appropriate and justifiable reasons for a decision not to disclose any information that has been requested with proper references to the relevant provisions of the FOI Act under which any information, record or document is being withheld.

11.0 Persons/Entities Entitled to Request Information

Having regard to the PPA and the FOI Act, any natural or legal person, including suppliers, contractors, consultants, companies, the BPP or an investigator appointed by the Bureau, the Auditor-General of the Federation, donor agencies or officials, representatives of the civil society organizations, professional associations or the media, and ordinary citizens are entitled to apply to a procuring entity for any procurement record or information.

No person, individual or corporate, may also be denied access to procurement records on the ground that they are not citizens of Nigeria or resident in Nigeria.

Having regard to the FOI Act, no person applying for procurement records or information should be required to demonstrate a specific interest in the information being applied for or to provide a reason or an explanation on why he or she requires the information. (See Section 1(2) of the FOI Act)

The BPP may review and recommend for investigation by any relevant authority any matter related to the conduct of procurement proceedings by a procuring entity, or the conclusion or operation of a procurement contract if it considers that a criminal investigation is necessary or desirable to prevent or detect a contravention of the PPA. (See Section 53(1) of the PPA)

The relevant authority is entitled in the course of any such investigation to ask any officer, employee or agent of the procuring entity or a bidder, supplier, contractor or consultant to produce any books, records, accounts or documents. (See Section 53(2)(a) of the PPA) The relevant authority is also

entitled in the course of any such investigation, to search premises of the procuring entity for any books, records, accounts or documents. (See Section 53(2)(b) of the PPA)

The relevant authority is entitled in the course of any such investigation to examine and make extracts from or copies of books, records, accounts or documents of any procuring entity, bidder, supplier, contractor or consultant. (See Section 53(2)(c) of the PPA)

The relevant authority is entitled in the course of any such investigation to remove books, records, accounts or documents of the procuring entity, a bidder, supplier, contractor or consultant for as long as necessary to examine them and make extracts from or copies of them, provided that the investigator gives a detailed receipt for the books, records, accounts or documents removed. (See Section 53(2)(d) of the PPA)

The relevant authority is entitled in the course of any such investigation to ask any officer, employee or agent of the procuring entity or a bidder, supplier or contractor or consultant to explain any entry in the books, records, accounts or documents; or to provide the investigator with information about the management or activities of the procurement entity or bidders as the investigator may reasonably require. (See Section 53(2)(e) of the PPA)

12.0 Proactive Disclosure

In order to reduce the amount of time and resources spent in attending to each individual application for access to information, it would be advisable for each procuring entity to

make an effort to publish as much of its information and documents as possible on its website. It can then simply refer applicants for information to its website, where the information is available on the website.

Indeed, in Paragraph 8 of his aforementioned Circular of January 29, 2012, the Attorney-General of the Federation and Minister of Justice, Mr. Mohammed Bello Adoke (SAN), advised public institutions as follows: *“Open government requires agencies to work proactively and respond to requests promptly. Public institutions are enjoined to use modern technology to inform citizens of what is known and done by their Government. Accordingly, agencies should readily and systematically post information online in advance of any public request. Providing more information online reduces the need for individualized requests and may help reduce existing backlogs.”*

●The FOI Act makes it obligatory for each public institution to publish certain types of information proactively. Each procuring entity is therefore under an obligation to comply with the proactive disclosure requirement of the Act. Public institutions are required to publish the following types of information proactively:

- A description of the organization and its responsibilities, including details of the programmes and functions of each division, branch and department;
- A list of all classes of records under its control in sufficient detail to facilitate the exercise of the right to

information under the FOI Act.

- A list of all manuals used by its employees in administering or carrying out any of its programmes or activities;
- A description of documents containing final opinions including concurring and dissenting opinions as well as orders made in the adjudication of cases;
- Documents containing its substantive rules;
- Documents containing statements and interpretations of policy which it has adopted.
- Documents containing final planning policies, recommendations and decisions;
- Documents containing factual reports, inspection reports and studies, whether prepared by or for the institution;
- Documents containing information relating to the receipt or expenditure of public or other funds of the institution;
- Documents containing the names, salaries and titles and dates of employment of all employees and officers of the institution;
- Documents containing the rights of the state, public institutions, or of any private person(s);
- Documents containing the name of every official and the final records of voting in all proceedings of the institution;
- A list of files containing applications for any contract, permit, grants, licenses or agreement;
- A list of reports, documents, studies, or publications prepared by independent contractors for the institution;

- A list of materials containing information relating to any grant or contract made by or between the institution and another public institution or private organization; and
- The title and address of the appropriate officer of the institution to whom an application for information under the FOI Act should be sent.

Section 2(6) of the FOI Act gives every person who is entitled to the right of access to information under the Act the right to also institute proceedings in court to compel any public institution to comply with its proactive disclosure obligations under Section 2 of the Act.

13.0 Procedure for Making Requests for Procurement Records or Information

Procurement records and information are of critical importance for any meaningful observation of public procurement proceedings. An important first step in being able to observe a public procurement process is awareness that such a process is going on.

Such awareness may come about through an invitation from a procuring entity to observe a public procurement process or from newspaper advertisements indicating that such a procurement process is taking place.

One of the several positive features of the regime of public procurement created by the Public Procurement Act, 2007 is

that bid opening sessions be open to the public. However, this feature is somewhat weakened by the failure of the Act to make provisions to ensure that bid opening sessions are indeed public.

Ideally, there should have been provisions in the Act mandating the issuance of public notices by procuring entities on bid opening sessions to ensure awareness among members of the public. In addition, such notices ought to be issued well in advance of the sessions to give the public a real opportunity to prepare and participate in the meeting.

As things stand, there is a risk procuring entities may simply invite only bidders and those who may be identified as stakeholders to such bid opening sessions.

However, representatives of civil society organizations, professional bodies and associations, media organizations as well as the general public, have a right to attend such bid opening sessions and need not wait for formal invitations once they become aware of such session, either through newspaper reports or advertisements or through other sources.

Anyway, interested in monitoring a procurement activity should strive to attend the bid opening session, put his or her name as well as the name of the organization being represented on the attendance register for the bid opening session. The observer should then identify the various procurement documents, records or other information that he or she will require to effectively monitor various stages and aspects process and set about obtaining those documents, records or other information, using the Public Procurement Act or the Freedom of

Information Act.

The PPA requires that all communication on any matter relating to the Act or proceedings of public procurement should be in writing. (See Section 16(11) of the PPA)

An application for procurement records or information may be made under the Public Procurement Act or under the Freedom of Information Act. Although both options are available to the applicant, it is advisable that as much as possible the Freedom of Information Act should be used and that when requesting any information, record or document, the applicant should state clearly in the application that it is being made under the FOI Act.

Although an application would still be a valid request for information even if it does not state that it is made under the FOI Act, by stating clearly that the application is being made under the FOI Act, the applicant would remove any room for doubt in the event of any dispute later on. This is important for several reasons, including the following:

Firstly, Section 30(2) of the FOI Act provides that: *“Where the question whether any public record or information is to be made available, where that question arises under this Act, the question shall be determined in accordance with the provision stated herein, unless otherwise exempted by this Act.”* By making it clear that the application for procurement records or information is made under the FOI Act, any dispute over the applicant's right of access to information will have to be resolved in accordance with the provisions of the FOI Act, which is far more robust in granting a right of access to information.

Secondly, despite the fact that the PPA obviously provides for access to procurement records and information, the procedures and enforcement mechanism contained in the Act are not as clear and as strong as those in the FOI Act.

The FOI Act gives applicants a stronger right of access to information than the PPA, with clearer timeframes, a right of access that can be exercised irrespective of whether the applicant is a contractor or supplier or a party to the procurement exercise, strong sanctions for non-compliance, etc.

By stating that the application is being made under the FOI Act, the applicant can take advantage of the strong enforcement mechanisms and sanctions for wrongful denial of access to information under the FOI Act.

Thirdly, the FOI Act is explicitly made superior to secrecy laws and instruments or laws with secrecy provisions such as the Official Secrets Act, the Criminal Code, the Penal Code, the Federal Public Service Rules, etc. These other laws cannot be used to withhold information from an applicant when it is made under the FOI Act.

By mentioning that the application is being made under the FOI Act, the public officials dealing with the requests would be reminded that they have to take this fact into account and deal with the application much more seriously.

The Federal Ministry of Justice has issued “*Operational Guidelines for Public Authorities on the Implementation of*

the Freedom of Information Act, 2011”, to assist public institutions in their implementation of the Law. The Guidelines provide in Paragraph 10(3) that: “*Requests for information or records under the Act must be in writing, stating the name, address and signature of the Applicant; date of the application, a good description of information or record requested; the form the requested information may be transmitted; and any other information as may be considered appropriate from time to time.*”

Any application for procurement records or information should therefore be made in writing. The application should be simple and straightforward.

Applicants should ideally include the following information in their applications:

- Name and contact details of the applicant (e.g. physical address, post office box, telephone number and email address)
- A clear and precise description of the information, record or document sought. This may include specific information which will make the information, record or document easier to locate, such as the title of the document (if known), the date the document was issued (if known), the file reference number of the document (if known), the name of the author of the document (if known), etc. However, the provision of such specific information is not a mandatory requirement for applications and applicants who do not have such information do not have to include them.

□ An applicant may also indicate the form in which the information is required (e.g. photocopy, certified true copy, transcript, etc.)

However, illiterate or disabled applicants who by virtue of their illiteracy or disability are unable to make an application for access to information or record in writing, may make the application orally or through a third party. (See Section 3(3) of the FOI Act)

Where an oral application is made by an illiterate applicant or an applicant with a disability which renders him or her unable to make an application in writing, an authorized official of the procuring entity concerned to whom an oral application for a record or information is made, must reduce the application into writing in the prescribed manner and give a copy of the written application to the applicant.

In order to reduce the pressures on the relevant officials of the procuring entities and the burden on members of the public and other stakeholders requesting procurement records and information, it would be advisable for procuring entities to dispense with the need for applicants for procurement records and information to appear in person to submit their applications and for them to allow applications for such information to be sent by post, courier or by fax or email, where the procuring entity has facilities for receiving faxes and emails. Applicants seeking procurement records and information should explore these options for the submission of their applications and for receiving responses.

Under the FOI Act, public institutions are required to designate

an appropriate officer to whom applications for information may be directed. However, applications for procurement records and information may also be addressed to the Accounting Officer of the procuring entity concerned. Accordingly, applications for procurement records may be addressed to the Permanent Secretary, in the case of Ministries; to the Director-General, in the case of public agencies and parastatals; and to the Managing Director or General Manager, in the case of public corporations. In other cases, the application for procurement records may be directed to the head of the institution.

The applicant should describe the information or record required in sufficient detail to enable the procuring entity concerned understand what records or information are being requested and to be able to identify the required record or information.

However, where the procuring entity is not clear what records or information are being requested, the relevant officer of the procuring entity should assist the applicant to make the request in such a way that the record or information sought can be identified. The procuring entity should explain the records and information it holds in such manner as will assist applicants to clarify their requests for information.

14.0 Handling and Processing Applications for Procurement Records and Information

It would be advisable for every procuring entity to which the PPA applies to open a Register into which details of all

applications for information received should be entered. The Register should, for instance, provide for:

- A serial number for the application
- The name of the applicant
- The date and time of receipt of the application
- A description of the information requested; and
- The name, designation and signature of the official who received the application.

Every applicant for procurement records of information should ideally also be issued with an acknowledgment receipt for each application submitted. The receipt should contain:

- The registration number of the application on the Register
- The date and time of submission of the application
- The name and contact details of the applicant
- A brief description of the information requested and the name, designation and signature of the official who received the application.

The Attorney-General of the Federation and Minister of Justice, Mr. Mohammed Bello Adoke (SAN), has in fact suggested in his 29 January 2012 Circular a number of measures to facilitate the receipt and processing of requests for information by public institutions under the FOI Act as follows:

- That public institutions should assign a tracking number to each request and provide that tracking number to the person making the request.
- That public institutions must establish a telephone line

or Internet service that persons requesting information under the Act may use to inquire about the status of their requests.

Applicants who are seeking procurement records and information, using the FOI Act, should therefore ask for the tracking numbers assigned to their applications whenever they make a request for information.

In addition, such applicants should also ask for the telephone number and the website or email address through which they can follow up on their applications to find out the status of their requests.

A procuring entity must then make a decision within seven days on whether to grant the application for access to the information or record or not and inform the applicant accordingly. This time limit may be extended as provided for under the FOI Act, where the circumstances warrant an extension and those circumstances are consistent with the conditions or grounds stipulated in the FOI Act.

15.0 Timeframe for Granting Requests for Information or Records

Under the FOI Act, a procuring entity should provide the information or record requested by an applicant no later than seven days from the date of the request. (See Section 4 of the FOI Act)

A procuring entity may extend this time limit for a further period of not more than seven days; if:

- The application is for a large number of records and meeting the original time limit would unreasonably interfere with the operations of the institution; or
- Consultations are necessary to comply with the application that cannot reasonably be completed within the original time limit.

Under such circumstances, the procuring entity is required to give a notice of the extension to the applicant with the reason or reasons for the extension. (See Section 6(a) and (b) of the FOI Act.

The Attorney-General of the Federation and Minister of Justice, Mr. Mohammed Bello Adoke (SAN) is encouraging public institutions, including procuring entities, to be as open as possible and disclose as much information as they possibly can.

In his January 29, 2012 Circular to all public institutions, he said in Paragraph 6 as follows: “His Excellency President Goodluck Jonathan, GCFR instructed at the signing of the Act that *'The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails.'*

Indeed, whenever a Public Institution determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Public Institutions should always be mindful that the Act requires them to take reasonable steps to segregate and release non-exempt information. Even if some parts of a record must be withheld, other parts may either not be covered by a statutory exemption, or may be covered only

in a technical sense unrelated to the actual impact of disclosure.”

The Attorney-General of the Federation said further in Paragraph 7 of the same Circular: “As the President has emphasized, *'The government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.'*”

16.0 Fees to be Charged for Disclosure of Procurement Records

Having regard to the PPA and the FOI Act, the fees charged for disclosure or release of procurement records and information should be limited to standard cost for photocopying or otherwise duplicating documents and the cost of transcription, where it is necessary to transcribe the information.

However, it would be advisable for procuring entities to waive the charging of fees if the costs of collection or processing of the fee are likely to be equal to or higher than the amount to be charged as fees.

17.0 Where Access to the Information or Record is not Granted

Even where the procuring entity decides not to grant the request for information, it must respond to applicant within seven days, if the application is made under the FOI Act.

Where it decides to refuse the application, a written notice

should be given to the applicant that access to all or part of the information will not be granted, with reasons for the denial and the section of the FOI Act under which the refusal is made. (See Section 4(b) of the FOI Act)

Where part or all of the application is refused, the notice must include the grounds for the refusal and the provision of the FOI Act that it relies on. It must also state that the applicant has a right to challenge the refusal in Court. (See Section 7(1) of the FOI Act)

The notice must contain the names, designation and signature of each person responsible for the refusal. The procuring entity must also indicate in the notice whether the information or record applied for actually exists. (See Section 7(3) of the FOI Act)

Although applicants who are denied access to information or records have an automatic right of access to the courts to challenge the decision, such applicants are encouraged to first explore an administrative mechanism by channelling their complaints to the SERVICOM desk. However, the availability of this administrative mechanism should be adequately publicised by the procuring entities to encourage members of the public to use it as it will also serve to reduce the cost of litigation to the procuring entities.

Where the applicant is not satisfied by the decision of the SERVICOM desk or the outcome of his or her complaint, he or she may also lodge a complaint to the BPP.

Other administrative mechanisms that are also open to an applicant who is refused access to information include the National Human Rights Commission (NHRC) and the Public Complaints Commission (PCC), both of whose mandates are to protect or assist citizens whose rights are violated and both of which have offices around the country. Both institutions have the power under their enabling laws to intervene on behalf of a citizen who is denied access to information and to institute legal proceedings in court to vindicate the rights of such a citizen, should the need arise.

Applicants who remain dissatisfied with the outcome of any or all of these processes may then approach the courts directly.

18.0 Offences and Sanctions under the Public Procurement Act 2007

The PPA creates a number of offences relating to information, records and documents under the Act and imposes strict penalties for any breach of the provisions.

Any natural person, who is not a public officer, who contravenes any of the provisions of the PPA is liable on conviction to imprisonment for not less than five calendar years and not more than 10 calendar years without an option of a fine. (See Section 58(1) of the PPA)

Any person who while carrying out his duties as an officer of the BPP or of any procuring entity, contravenes any of these provisions is liable on conviction to a cumulative punishment of imprisonment for not less than five calendar years without an

option of fine; and summary dismissal from government service. (See Section 58(5)(a) and (b) of the PPA)

A legal person (that is, a corporate body) that contravenes any of these provisions is liable on conviction to a cumulative punishment of debarment from all public procurements for not less than five calendar years (See Section 58(6)(a) of the PPA); a fine equivalent to 25% of the value of the procurement in issue (See Section 58(6)(b) of the PPA); and every director of the company as listed on its records at the Corporate Affairs Commission (CAC) shall be guilty of an offence and liable on conviction to imprisonment of not less than three calendar years and not more than five calendar years without an option of fine. (See Section 58(7) of the PPA)

The offences are:

18.1 Altering Procurement Documents: It is an offence under the PPA to alter any procurement document with intent to influence the outcome of a tender proceeding. (See Section 58(4)(f) of the PPA)

18.2 Uttering or using fake documents or encouraging their use: It is an offence under the PPA to utter or use fake documents or encourage their use. (See Section 58(4)(g) of the PPA)

18.3 Willful refusal to allow the BPP or its officers to have access to any procurement records: It is an offence under the PPA to willfully refuse to allow the BPP or its officers to have access to any procurement record. (See Section 58(4)(h) of the PPA)

19.0 Offences and Sanctions under the Freedom of Information Act 2011

The FOI Act creates two offences, namely:

19.1 Wrongful denial of access to information; Under the FOI Act, where a case of wrongful denial of access is established, the defaulting officer or institution commits an offence and is liable on conviction to a fine of N500,000.00. (See Section 7(5) of the FOI Act)

19.2 The wilful destruction or falsification of any records; It is a criminal offence punishable on conviction by the Court with a minimum of one year imprisonment (without option of a fine) for any officer or the head of any public institution to which the FOI Act applies to wilfully destroy any records kept in his custody or attempt to doctor or otherwise alter the records before they are released to any person, entity or community applying for it.

**Sample Application to MDAs
(For Access to Procurement Records or Information)**

Your Name
Organization
Address
Telephone Number
E-mail Address

Date

The Permanent Secretary (in the case of a Ministry); the Director-General (in the case of an Agency); or the Managing Director (in the case of a public corporation)

Name of Procuring Entity
Address of Procuring Entity

Dear Sir/Madam,

Application for Procurement Records and Information

I am writing pursuant to the provisions of the Public Procurement Act, 2007 and the Freedom of Information Act, 2011, to apply for copies of the following procurement records and information:

1. Copies of the advertisements or solicitations for bids by the Federal Ministry of Public Affairs, published in *at least two national newspapers and the website of the Ministry as well as the Procurement Journal, regarding the proposed contract award for the establishment of a multi-media centre in each of the 774 Local Government Areas in Nigeria. The document should contain the date of publication and the newspapers in which they were published.*
2. The bidding documents issued to all bidders in respect of this procurement.
3. A list of all the contractors that submitted bids for the proposed contract for the establishment of a multi-media centre in

each of the 774 Local Government Areas in Nigeria. The list should indicate the value (i.e. the contract sum) of each bid.

4. Copy of the Bid evaluation report by the Sub Technical Committee of the tenders Board and Minutes of the Tenders Board approving the winning bidder.

5. Copies of letter of award, and the final contract award documents for the award of the contract for the establishment of a multi-media centre in each of the 774 Local Government Areas in Nigeria to Playboy and Sons (Nigeria) Ltd. The contract documents should indicate the contract sum, the conditions of contract, and the payment terms for the contract. I would like to receive all attachments to the contract award document and all other documents references in the contract award document.

I would be grateful if you could supply me with photocopies of these documents.

Should you require any clarification regarding this application, please let me know by telephone (your phone number) or via email (your email address).

I will appreciate it if the documents can be made available to me promptly but in any event, not later 7 days from the date of receipt of this application, as required by the Freedom of Information Act, 2011.

Yours sincerely,

Signature
Your Name

Poverty persists in Nigeria because of mismanagement of resources and corruption, found particularly but not exclusively in the public sector. Besides the pilfering of public funds, the amassing of fortunes by illegal and corrupt means does not seem to necessarily disturb the average Nigerian as to make him lose sleep over it. DFID Country Strategy paper 2000.

Over 80% of this corruption it is said occurs through Public Procurement.

**Decide for yourself. Do you need to keep Watch?
(PPDC)**

