



Privacy vs press: The impact of the Nigeria Data Protection act, 2023 on press freedom and investigative journalism

Dr. Henry Okolie Onyebuolise

Doctoral Researcher, Department of Public Law, Delta State University, Abraka, Nigeria

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Abstract

The Nigeria Data Protection Act 2023 (NDPA) represents a significant turning point within the realm of Nigerian privacy jurisprudence, although its intersection with freedom of the press remains unsettled. This piece evaluates whether the NDPA achieves a fair equilibrium between the privacy guarantees found in Section 37 and the press freedom provisions under Section 39 of the 1999 Constitution, particularly within the framework of investigative reporting. Employing a blend of doctrinal analysis and comparative perspectives, it reviews Section 3(2)(d) of the NDPA, which attempts to carve out a press exemption while simultaneously upholding core requirements under Sections 24, 25, 32, and 40. The study indicates that this limited exemption falls short of international benchmarks established by Article 85 of the GDPR and Schedule 2, Part 5 of the UK Data Protection Act 2018, both of which offer extensive exemptions conditioned on a reasonable belief of serving the public good. Through the lens of the 2024 arrest and detention of Daniel Ojukwu associated with the Foundation for Investigative Journalism regarding his N147.1 million school construction expose, the paper illustrates how consent-oriented lawful criteria, broad data subject entitlements, and penal measures under Section 48 produce a chilling atmosphere detrimental to investigative reporting. It suggests a six-pronged proportionality evaluation derived from European Court of Human Rights jurisprudence in cases like *Von Hannover v Germany* and *Axel Springer v Germany* tailored for domestic courts, alongside endorsing an NDPC Journalism Code, legislative revisions, and anti-SLAPP protections.

Keywords: Data protection, press freedom, investigative journalism, NDPA 2023, Section 37, Section 39, journalism exemption

Introduction

Investigative journalism depends heavily on the collection and processing of personal information. To bring to light systemic corruption, financial misappropriation, abuse of authority, and conflicts of interest, journalists routinely handle identifiers, financial records, medical histories, geospatial data, biometric attributes, and political affiliations of public figures and their associates. In Nigeria, this procedural necessity has grown increasingly precarious. The evolution of media regulation has transitioned from historical seditious libel frameworks and criminal defamation statutes to cyberstalking provisions under Section 24 of the Cybercrimes Act 2015, and now potentially to strict liabilities under the NDPA.

The experiences of Daniel Ojukwu, a correspondent with the Foundation for Investigative Journalism (FIJ), highlight this continuous pattern. In late 2023, Ojukwu published an investigative piece reporting that the Office of the Senior Special Assistant to the President on Sustainable Development Goals (OSSAP-SDGs)—then directed by Princess Adejoke Orellope-Adefulire—disbursed N147.1 million ostensibly for building classrooms into a bank account associated with Enseno Global Ventures, an eating establishment located in Abuja. This report drew upon public procurement documentation, banking transactions, and corporate registry filings, all of which qualify as personal data under the NDPA.

Following a formal petition by the former presidential aide, Ojukwu was apprehended in Lagos in May 2024 by law enforcement elements and held for ten days across detention facilities in Lagos and Abuja under Section 24(1)(b) of the Cybercrimes Act. Although the cited statutory basis

involved cyberstalking allegations, the fundamental grievance centered on the unapproved processing and disclosure of personal financial records. Had the NDPA and its subsidiary enforcement rules been fully activated at that time, those same circumstances could have triggered parallel administrative complaints before the Nigeria Data Protection Commission (NDPC) for alleged breaches of lawful processing principles and data minimization mandates.

The NDPA 2023 stands as Nigeria's inaugural comprehensive federal enactment dedicated to data protection. Promulgated in June 2023, it superseded the 2019 Nigeria Data Protection Regulation (NDPR) and instituted the NDPC as an autonomous regulatory authority. The legislation incorporates recognized global data protection standards: lawfulness, fairness, transparency, purpose limitation, data minimization, storage limitation, accuracy, and security under Sections 24 and 25. It extends rights of access, correction, deletion, objection, and data portability to individuals under Part VI, while establishing severe penal consequences including up to ten years imprisonment or administrative penalties reaching two percent of annual gross turnover under Section 48 for major data controllers.

For media practitioners, the pivotal statutory provision is Section 3(2)(d). It dictates that obligations outlined in Part V of the statute—excluding Sections 24, 25, 32, and 40—will not apply to controllers or processors if the data processing occurs "in respect of publication in the public interest, for journalism, educational, artistic and literary purposes to the extent that such obligations and rights are incompatible with such purposes". Prima facie, this appears

to establish a journalism carve-out; however, its drafting introduces significant ambiguity.

First, it explicitly preserves the application of Sections 24, 25, 32, and 40, which encompass foundational data protection tenets, technical security safeguards, and breach notification duties. Second, the statute fails to define terms like "journalism," "public interest," or "incompatibility". Third, Section 3(4) grants the Commission authority to issue advisory notices outlining safeguards and best practices even where exemptions apply, thereby retaining extensive administrative discretion over journalistic workflows. This structural approach contrasts sharply with Article 85 of the European Union General Data Protection Regulation (GDPR), which obligates member states to harmonize data privacy with freedom of expression via expansive legislative exemptions, as well as Schedule 2, Part 5 of the United Kingdom Data Protection Act 2018, which creates robust exemptions conditioned upon a reasonable belief of public interest.

This friction is inherently constitutional. Section 37 of the 1999 Constitution protects citizen privacy, while Section 39(1) safeguards freedom of expression—including the freedom to receive and impart ideas—and Section 22 places an affirmative obligation on the press to hold public authorities accountable. Section 45(1) allows restrictions on both rights provided such measures are reasonably justifiable in a democratic society. Domestic courts have yet to formulate a cohesive balancing framework to resolve conflicts between informational privacy and media freedom within a data protection context. Consequently, investigative reporters remain exposed to legal uncertainty regarding whether using leaked banking records or publishing asset declaration filings enjoys legal protection as public interest journalism or attracts liability as unlawful data processing. Addressing these challenges, this study explores three primary inquiries:

- Does the NDPA 2023 offer a journalism exception aligned with international benchmarks under the GDPR and comparative legal systems?
- How ought Nigerian courts reconcile Section 37 privacy protections with Section 39 press freedoms when evaluating data protection claims directed at journalists?
- Is the contemporary Nigerian data protection architecture compatible with the survival of public interest investigative journalism?

Conceptual Clarifications and Theoretical Framework

Privacy is a multi-dimensional construct encompassing personal seclusion, individual autonomy, and informational self-determination. Within the Nigerian legal system, Section 37 of the Constitution secures the privacy rights of citizens, their households, correspondence, telephone conversations, and telegraphic communications. Although Section 37 of the 1999 Constitution does not explicitly reference data protection, judicial interpretations by appellate courts have expanded the scope of privacy purposively to embrace personal data. Internationally, Article 12 of the UDHR and Article 17 of the ICCPR guard against arbitrary interference with privacy, while Article 8 of the ECHR has been construed to incorporate data protection dimensions.

Data protection represents a specialized branch of privacy focusing on fair information processing practices. Section 65 of the NDPA defines personal data as any information

relating to an identified or identifiable natural person, including financial records and online identifiers, whereas sensitive personal data covers financial particulars and political affiliations frequently handled during investigative reporting. The distinction is vital: Section 37 of the 1999 Constitution treats privacy primarily as a negative restraint, whereas the NDPA operationalizes it as a proactive regulatory regime imposing affirmative duties of lawful processing and data minimization under Section 24.

Freedom of the press stems from distinct constitutional roots. Section 39(1) ensures freedom of expression encompassing the liberty to impart ideas, Section 39(2) guarantees ownership of media infrastructure, and Section 22 assigns the press a specific obligation to hold government actors accountable. Despite its structural importance, Section 22 is rendered non-justiciable by Section 6(6)(c), a limitation noted in early jurisprudence such as *Archbishop Okogie v AG Lagos*. Article 19 of both the UDHR and the ICCPR similarly underpins international protections for press freedom.

Investigative journalism involves systematic, in-depth, and original inquiry aimed at uncovering matters of public significance that have been intentionally concealed. It relies on confidential human sources, document reviews, and data analytics. In Nigeria, prominent examples include the FIJ's classroom inquiry, the Panama Papers reporting by media coalitions, and asset declaration investigations by independent newsrooms. These activities frequently entail processing personal data without explicit consent, often facilitated by whistleblowers or freedom of information requests.

The theoretical framework draws upon the Four Theories of the Press formulated by Siebert, Peterson, and Schramm: Authoritarian, Libertarian, Social Responsibility, and Soviet-Communist.

- The Authoritarian theory subordinates media institutions to state objectives, shedding light on historical sedition laws and modern counterparts like Section 24 of the Cybercrimes Act.
- The Libertarian theory views the press as an open marketplace of ideas requiring minimal state oversight, supporting the core ethos of Section 39.
- The Social Responsibility theory, stemming from the 1947 Hutchins Commission, accepts media freedom while attaching duties of social accountability and justifying proportional regulation to protect privacy rights, aligning closely with Section 45(1) limitations and Article 85 of the GDPR.
- The Soviet-Communist theory treats media as an instrument of state policy, reflected in instances of extrajudicial journalist detention.

This paper adopts the Social Responsibility framework. It offers a normative justification balancing data protection and press freedom, requiring proportional balancing rather than rigid absolutism, and supporting the argument that Section 3(2)(d) of NDPA Act should operate as a qualified privilege conditional on public interest and professional ethics, mirroring the UK model.

Legal Framework for Data Protection and Press Freedom in Nigeria

Data protection governance in Nigeria has transitioned from administrative guidelines to a primary statute. The NDPR 2019, promulgated under the NITDA Act 2007, established

the initial compliance framework but faced enforcement limitations. The NDPA 2023, enacted in June 2023, established the NDPC as an independent regulatory body under Sections 4 and 5. Its jurisdictional reach covers controllers domiciled in Nigeria or those processing data belonging to subjects located within the country, echoing Article 3 of the GDPR. Personal data is broadly construed under Section 65, and data controllers encompass newspaper organizations, publishers, editors, and individual journalists.

Part V codifies core operational principles. Section 24(1) mandates principles of lawfulness, fairness, transparency, purpose limitation, data minimization, accuracy, storage limitation, and security. Section 25 outlines six legal bases for processing: consent, contractual necessity, legal obligations, vital interests, public interest tasks, and legitimate interests. Consent must meet strict standards of being freely given under Section 26, while sensitive personal data requires explicit consent pursuant to Section 30. Section 32 establishes data security obligations, and Section 40 requires breach notifications within a 72-hour window. Section 48 introduces penal provisions ranging from administrative fines to corporate revenue percentages and custodial sentences.

Section 3 provides the statutory exemption framework. Section 3(1) excludes purely household processing activities. Section 3(2) stipulates that obligations under Part V—except for Sections 24, 25, 32, and 40—shall not apply when processing is conducted for crime prevention, public health emergencies, national security, publication in the public interest for journalistic, educational, artistic, or literary purposes, or legal claims. Unlike the UK Data Protection Act 2018, which excuses journalistic processing from nearly all data protection principles, the Nigerian statute retains Sections 24, 25, 32, and 40. Consequently, media practitioners remain bound to satisfy core processing principles. Furthermore, Section 3(4) authorizes the Commission to issue guidance notices even where exemptions apply.

Constitutional parameters include Section 37 protecting privacy, Section 39(1) guaranteeing freedom of expression, Section 22 tasking the press with governmental accountability, Section 45(1) permitting permissible derogations, and Section 6(6)(c) rendering directive principles non-justiciable.

RQ1: Does NDPA 2023 Provide a Journalism Exception Consistent with Global Standard?

Section 3(2)(d) incorporates four undefined legal concepts: publication, public interest, journalism, and incompatibility. None of these terms are clarified within Section 65 interpretations, and subsequent implementation guidelines fail to resolve the ambiguity. This vagueness risks running afoul of the principle of legal certainty mandated under Article 19(3) of the ICCPR.

The retention of mandatory compliance with Sections 24, 25, 32, and 40 creates significant operational hurdles. Section 24(1)(c) mandates data minimization, yet investigative reporting frequently requires casting a broad net to establish systemic patterns of wrongdoing. Section 25 demands a lawful basis—typically consent—which corrupt public officials will rarely provide. Although legitimate interests under Section 25(1)(b) (v) offer an alternative, subsection (2) restricts reliance where fundamental rights

override those interests. The NDPC has yet to issue formal interpretive guidance on how journalists can safely rely on legitimate interests. Moreover, while the exemption applies to the extent obligations are incompatible with journalistic goals, the lack of clarity on who determines "incompatibility"—whether the media house via reasonable belief (as in the UK) or the NDPC ex post facto—creates a chilling effect.

From a comparative perspective, EU GDPR Article 85(1) requires member states to reconcile data protection with freedom of expression and information, while Article 85(2) mandates necessary exemptions, with Recital 153 clarifying the broad scope of journalism. The Court of Justice of the European Union in *Buivids v Datu Valsts Inspekcija* held that recording police officers and publishing the footage online could constitute journalistic activity, and in *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* accepted that publishing large-scale tax data qualified as journalism subject to proportionality.

The UK Data Protection Act 2018 (Schedule 2, Part 5) establishes a comprehensive special purposes exemption, relieving journalistic processors from numerous statutory obligations provided the processing is undertaken for journalism, the controller reasonably believes publication is in the public interest, and compliance would be incompatible with journalistic purposes. This reasonable belief standard must be objectively supportable. Similarly, Kenya's Data Protection Act 2019 exempts journalism subject to appropriate safeguards and data protection impact assessments. In contrast, the United States relies on First Amendment protections safeguarding truthful publication of lawfully obtained information.

Nigeria's framework falls short across four key criteria:

- **Narrowness:** It retains core statutory provisions that journalists routinely breach during investigations.
- **Vagueness:** It lacks statutory definitions comparable to those found in UK legislation.
- **Procedural Safeguards:** It omits clear mechanisms like a reasonable belief defense or a statutory code of practice.
- **Regulatory Overreach:** It permits administrative interference via Section 3(4).

Under the existing text, journalistic processing of financial records without explicit consent remains legally vulnerable despite public interest justifications.

RQ2: How Should Courts Balance Section 37 Privacy Rights v Section 39 Press Freedom?

- While domestic courts have yet to rule directly on NDPA-specific press disputes, relevant jurisprudence exists in adjacent areas. In *Incorporated Trustees of Digital Rights Lawyers Initiative v National Identity Management Commission* the Court of Appeal recognized that privacy yields where overriding public interests demand disclosure. *Abdulmalik Muhaimin Onimisi v GTCO*, the court distinguished between intrusive commercial marketing and public interest communications. Furthermore, defamation jurisprudence and regional human rights rulings, such as the ECOWAS Court decision in *SERAP v Nigeria* invalidating vague cyberstalking provisions, emphasize the need to protect expressive freedoms against overbroad legislative restrictions.

Drawing insights from European human rights jurisprudence (*Von Hannover v Germany* (No 2) and *Axel Springer v Germany*), this paper proposes a six-factor balancing test for Nigerian courts:

- a. **Contribution to a debate of public interest:** Does the publication address matters of public accountability, such as the misuse of public funds? Financial transparency involving public allocations constitutes a quintessential public interest matter.
- b. **Degree of notoriety of the data subject:** Is the individual a public office holder or political figure with a reduced expectation of privacy under codes of conduct?
- c. **Method of obtaining information and veracity:** Was the information gathered through lawful channels like freedom of information requests or verified leaks, and is it factually accurate?
- d. **Content, form, and consequences:** Does the publication disseminate excessive personal data, or is the disclosure proportionate to the story being told?
- e. **Severity of sanction and chilling effect:** Would administrative penalties or custodial sentences under Section 48 impose disproportionate deterrence on free expression?
- f. **Compliance with professional ethics:** Did the journalist adhere to ethical standards, such as seeking a right of reply prior to publication?

Courts should rigorously apply constitutional proportionality under Section 45(1): ensuring measures are prescribed by law, pursue a legitimate aim, are necessary in a democratic society, and remain proportionate *stricto sensu*. The burden should rest on regulators to demonstrate a lack of public interest rather than forcing journalists to prove an exemption post-publication, and regulatory enforcement should align with international guidelines protecting press freedom.

RQ3: Is Nigeria's Data Protection Framework Compatible with Investigative Journalism?

Three primary areas of incompatibility exist between the NDPA and investigative journalism:

1. Consent-Centric Processing Bases

Section 25(1)(a) prioritizes consent as a primary legal basis, which is structurally incompatible with investigative inquiries targeting corruption or wrongdoing. Alternative bases—such as contractual necessity, legal obligations, or vital interests—are largely inapplicable, while legitimate interests under Section 25(1)(f) require complex balancing tests that collapse if fundamental rights override them. Unlike the GDPR, the NDPA lacks a tailored public interest basis specifically dedicated to journalism.

2. Data Subject Rights as Potential Prior Restraints

Part VI grants data subjects extensive rights of access, erasure, and objection. A targeted public official could invoke data erasure provisions to demand the deletion of leaked financial records prior to publication, functioning as a *de facto* injunction. While European frameworks explicitly

exempt journalistic expression from erasure rights, the NDPA limits its exemptions strictly to Part V, leaving Parts VI and VII fully applicable to media organizations.

3. Criminalization and Chilling Effects

Section 48 imposes severe penalties, and the expansive definition of major data controllers under Section 65 easily captures standard media publishing houses. Historical instances involving the detention of journalists under national security pretexts illustrate the risk of statutory weaponization. International bodies like the UN Human Rights Committee consistently warn that overly punitive data protection laws must not be permitted to stifle independent journalism.

Applying these statutory realities to cases such as Daniel Ojukwu's reporting reveals deep vulnerabilities. Even when reporting factual matters of immense public importance verified by subsequent police investigations, journalists risk running afoul of data minimization and consent requirements without adequate statutory protection. Achieving genuine compatibility requires promulgating a dedicated NDPC Journalism Code, amending Section 3 to exempt Sections 24 and 25 where a reasonable belief of public interest exists, and introducing anti-SLAPP safeguards.

Conclusion and Recommendations

This analysis demonstrates that Section 3(2)(d) of the NDPA provides an overly narrow and vague exemption that diverges from established international benchmarks. Unlike the robust protections found in the GDPR and the UK Data Protection Act, Nigeria's legislative design preserves core obligations for journalistic processing. Domestic courts lack a structured balancing framework, though existing jurisprudence confirms that privacy is not absolute. Adopting a six-factor proportionality test provides a pathway to harmonize Section 37 1999 Constitution privacy rights with Section 39 of the 1999 Constitution press freedom under Section 45(1) of the 1999 Constitution.

To resolve these tensions and safeguard investigative journalism, the following recommendations are advanced:

- a. **Regulatory Guidance:** The NDPC should issue a dedicated Journalism Code pursuant to Sections 67(1) and 3(4) that broadly defines journalism, recognizes public interest criteria, and incorporates a reasonable belief standard.
- b. **Legislative Amendments:** Section 3(2) should be amended to exempt journalistic processing from Sections 24 and 25 where there is a reasonable belief that publication serves the public interest, and Part VI should be revised to exempt erasure requests where necessary for freedom of expression.
- c. **Anti-SLAPP Safeguards:** Enact clear anti-SLAPP protections that prohibit strategic, meritless data protection claims against media actors and require administrative screening or court orders prior to regulatory enforcement against news organizations.
- d. **Judicial Training and Justiciability:** Pursue constitutional reforms to make Section 22 justiciable while conducting specialized training for jurists regarding the protection of press freedom in digital contexts.

The Nigerian press boasts a rich history predating the modern state, originating with publications like *Iwe Irohin* in 1859. Its continued survival depends on preventing regulatory instruments from being co-opted into tools for media suppression. While data privacy represents a legitimate societal goal, an inadequate journalism exemption risks turning data protection into a modern iteration of seditious libel.

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