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The International Principles on Access to Information: An Assessment of the Compliancy of the Laws of Nigeria, South Africa and Ghana

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Abstract:
Access to information is increasingly recognized globally and regionally as a topical subject. An effective access legislation is simply one that is engaging and well-written with a good implementation plan. The significance of a well drafted and implemented access or freedom of information legislation cannot be over-emphasized as it is regarded as the oxygen of democracy. Access laws increase government transparency and accountability, which promote better public participation in government. There is no gainsaying that access laws need proper drafting to ensure that all vital requirements for their efficacy are included, otherwise there is a risk of enacting a futile legislation. One way of securing a full-proof law is to ensure that it is in tandem with international principles and best practice. Any access legislation is only as good as the quality of the law, which has the ultimate aim of ensuring access to public information. This paper aims to assess the access to information laws of Nigeria, South Africa and Ghana, with a view to ascertain their levels of compliance with the international principles enshrined in Article 19 Model Principles on Access to Information. The paper finds varying degrees of conformity to international standards and underscores the need to harmonize national laws with international standards for effective access to information.

Keywords: Access to information, freedom of information, transparency, accountability, Article 19, international principles

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1. Introduction

The right of access to public information is a right recognized by several international organizations. International bodies like the United Nations, Organization of American States, Council of Europe, and African Union, with the mandate of promoting and protecting human rights have authoritatively affirmed the right to access information held by public bodies, and the need for effective legislations to guarantee this right in practice.[1] Access to information is increasingly recognized globally and regionally as a topical subject.[2] The concept of access or freedom of information has received world-wide recognition since its inception over a century ago.[3] Sweden was the first country to adopt an access law in 1766 when it adopted the Freedom of the Press Act.

This trend has continued with many more nations adopting similar legislations such as Freedom of Information Act of the United States 1966, the Freedom of Information Act of United Kingdom, 2000, the Promotion of Access to Information Act of South Africa 2002, Freedom of Information Act Nigeria, 2011, the General Act of Transparency and Access to Public Information commonly known as the General Transparency Act of Mexico 2015, and many more. The right to access public information entails the rights of persons to have access to accurate and timely information held by the government or public bodies and other relevant private bodies. The aim is to enable individuals to effectively and fully participate in the democratic process.[4] In other words, a key determinant of productive public participation is the level of availability of information in the public sphere.[5]

Access laws safeguard the right to request information from public bodies and the reciprocal responsibility to publish the information. Furthermore, it guarantees the right

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1 Art 19 of the Universal Declaration of Human Rights 1948; Art 13 of the American Convention, 1969; Art 2 of Council of Europe Convention on Access to Official Documents 2020; Art 9 of the African Charter on Human and Peoples' Rights 1986; Tony Mendel, *Freedom of Information: A Comparative Legal Study* (2nd edn, UNESCO 2008) 7.

2 African Commission on Human and Peoples' Rights, Model Law on Access to Information for Africa, <https://achr.auintnode> accessed 6 February 2024.

3 Anders Chydenius, *The World's First Freedom of Information Act*, (Anders Chydenius's Foundation, 2006), 4.

4 James Mohammed, and others, 'Uses and Challenges of Freedom of Information Act among Journalists in Kogi State, Nigeria' (2023) 10 (1) *Cogent Arts and Humanities* 5.

5 Innocent Daudu and Omolola Fagbadebo, 'Public Participation in Legislative Oversight: A Review of Nature and Practice in Nigeria and South Africa' in Omolola Fagbadebo and Fayth Ruffin (eds.) *Perspectives on the Legislature and the Prospects of Accountability in Nigeria and South Africa,* (Springer Nature, 2019), 239.

of persons to receive the information, and the corresponding obligation on the public bodies to publish information without the need for specific requests. This is also known as proactive disclosure.[6] However, this is achievable only where there exists an effective access law. Efficacy is attainable partly where such laws reflect standard internationals or regional models or principles.

The paper therefore examines the access laws of three African countries, namely Nigeria, South Africa and Ghana with the objective of assessing how compliant they are with the access to information principles of the international organization named Article 19.[7] The paper selects the above jurisdictions because Nigeria is often referred to as the giant of Africa, while South Africa is one of the leading African countries with a progressive legislation with a number of inclusive provisions. The paper also selects Ghana because it is one of the most recent African countries to adopt an access to information legislation in 2019. Furthermore, the paper conceptualizes freedom of information; examines the relevance of international principles on access to information and analyses the compliance levels of the abovementioned laws with international principles and recommends possible amendments to shortfalls in these laws for enhanced efficacy.

2. Theoretical framework of access to information and background study of access to information laws in Nigeria, South Africa and Ghana

Freedom or the right of access to information is a fundamental right and the touchstone of all freedoms.[8] The right is described as an enabling right essential for the actualization of other human rights. The right entails the right to know or have information made available to enable one make free choices and to contribute positively to the advancement of society.[9] The relevance of access to information is fundamental.

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6 Stella Ejitagha,'Challenges in the Implementation of the Freedom of Information Act in Nigeria' (2019)10 (1) *Journal of Information and Knowledge* Management 124.

7 Article 19 is an international think-do organization that propels, protects and promotes the freedom of expression and freedom of information movement both locally and internationally. The organization was established in 1987 and derives its name from Article 19 of the Universal Declaration of Human Rights that guarantees freedom of expression. Article 19,< www.article19.org>what-we> accessed 10 November 2023.

8 Ololade Shyllon, Fola Adeleke and others, The Model Law on Access to Information for Africa and other Regional Instruments: Soft Law and Human Rights in Africa in Shyllon Ololade (ed.) (University of Pretoria, 2018) iv.

9 Ngozi Udombana, 'Addressing the Implementation Challenges of Institutional Obligations and Reporting Requirements under the Nigerian Freedom of Information Act 2011' (2019) 10 *Beijing Law Review* 1307.

Inaccessibility to information deprives one of any meaningful public participation, including the unavailability of the option to vote in accordance with one's interests and belief, low-level transparency and accountability thus, promoting incompetence and public distrust.[10] Furthermore, the right of access is not only concerned with the right to demand and receive information; but also encompasses the right to access one's history. Citizens are entitled to have access to past history, policies and programs previously enacted.[11] For instance, the Promotion of Access to Information Act (PAIA) was widely utilized by South Africans in exposing the injustice and high-handedness of the past apartheid government.[12]

The right to access public information finds expression in several International Treaties. [13] Information in this context refers to a democratic tool for regulating government bodies. In other words, it empowers the public control of government.[14] Access to information laws entitle persons to request public information for any reason. It is globally recognized that access to public information is the bedrock of any real democracy.[15] These laws are further described as an integral part of safeguarding the rights of the people to information.[16]

Access laws increase government transparency and accountability, which promotes better public participation in government. It guarantees the enjoyment of socio-economic rights, exposes corruption, misappropriation and maladministration, as well as the eradication of poor development especially in African nations, including Nigeria. In contemporary times, the scope of the right of access to information has been expanded to accommodate the concepts of transparency, accountability and responsiveness of public officials. The mandate presently is that governments open their archives and records to public scrutiny.[17] Several countries across the globe have acknowledged the necessity of

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10 ibid 1306.

11 Sergio Adorno and Nancy Cardia, 'The Importance of Access to Information, Past and Present: Human Rights in Contemporary Brazil' (2013) 2 (8) *American International Journal of Social Science* 24.

12 Mukelani Dimba and Richard Calland, 'Freedom of Information Laws in South Africa' <www.humanrightsinitiative.org> accessed 11 January 2024.

13 Art 19 of the International Covenant on Civil and Political Rights 1966; Art 9 of the African Charter

14 Adorno and Cardia, (n11) 24.

15 David Pozen, 'Freedom of Information Beyond the Freedom of Information Act' (2017) 165 *University of Pennsylvania Law Review* 1097.

16 African Commission (n2).

17 Adorno and Cardia, (n11) 24.

access laws and enacted laws to that effect.[18] The African continent is lagging behind in the global trend of adopting access laws. For instance, only about 22 African countries out of the 54 have enacted access laws.[19] South Africa was the first to enact an access law in 2001 (Promotion of Access to Information Act), Nigeria passed the Freedom of Information Act in 2011, Ghana followed suit by enacting its Right to Information Act in 2019. Others include, Angola (Access to Administrative Documents 2002); Zimbabwe (Access to Information and Privacy Protection Act 2002); Uganda (Access to Information Act 2006); Ethiopia (Freedom of the Mass Media and Access to Information Proclamation No. 590/2008); Liberia (Access to Information and Privacy Protection Act 2010); Niger (Charter on Access to Public and Administrative Documents 2011); Rwanda (Access to Information Law 2013); and Tunisia (Right to Access Information Act 2013).

It is contended that despite the fact that some African countries have adopted access laws, the right to access basic public information remains problematic in Africa. This is due to the fact that enacting an access law is the easier task, while developing it into a tool for genuine access to government information is the challenging endeavor.[20] As earlier stated, South Africa is the first African country to enact an access law in 2000 which came into effect in March 2001. The South African access legislation is known as the Promotion of Access to Information Act (PAIA).[21]

The law was enacted following the constitutional provision that national legislation must be enacted to give effect to the right of access to information. It is well noted that the South African constitution makes provision for the right to access information.[22] The need for an access to information legislation was galvanized by the fact that prior to South Africa's democratization, secrecy was the hallmark of the anti-democratic character of the

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18 Asadu Ikechukwu and Ozioko Chidozie, 'Freedom of Information: 'A Key to Transparent and Accountable Government in Nigeria' (2020) iv (iv) *International Journal of Research and Innovation in Social Science* 152.

19 Fola Adeleke, *The Impact of the Model Law on Access to Information for Africa* in the Model Law on Access to Information for Africa and other Regional Instruments: Soft Law and Human Rights in Africa Shyllon Ololade (ed.) (University of Pretoria, 2018) 16

20 Chidi Odinkalu and Maxwell Kadiri, Making Progress on Freedom of Information in Africa (Open Society Justice Initiative) <https://www.justiceinitiative.org> accessed 3 January 2024.

21 Tammy 0' Connor, 'PAIA Unpacked' (A Resource for Lawyers and Paralegals, 2013) <https://foia.saha.org.za>static> accessed 10 January 2024.

22 S32 of the Constitution states that every person shall have the right of access to all information held by the state as far as such right is required for the exercise or protection of any right. < https://www.gov.za> accessed 10 January 2024.

apartheid system. Public information was denied citizens even when it was their right to know about government activities as it was a purely controlled relationship.[23]

Nigeria's Freedom of Information Act (FOIA) took more than a decade to implement. The struggle for an access to information legislation began in 1993 and was finally passed in 2011. Nigeria is the ninth African country to adopt a right to information law.[24] The law provided a right to request or access information held by public officials, agencies, or institutions.[25] It became essential for Nigeria to have a law that affirms the right of citizens to access information held by government especially in view of the country's past decades of oppressive military rule. Thus, it was a reassurance for Nigerians when the Freedom of Information Act was enacted. The military era was characterized by an entrenched culture of secrecy around the conduct of government affairs in Nigeria.[26]

Apart from some constitutions which expressly provide for the right to access information such as those of South Africa and Ghana, some other constitutions infer this right from the freedom of expression.[27] The Constitution of Nigeria does not expressly mention the right of access to information. Nevertheless, the right of access to information is a derivative of the general provision of freedom of expression in section 39 of the Constitution.[28] Thus, the right to information is an inalienable part of the freedom of expression recognized in the Nigerian Constitution.

The right to access information in Ghana has been established since 1992 under the Ghanaian constitution.[29] This became the basis for the passage of the Right to Information Act in 2019.[30] Prior to this time, the government in a bid to operationalize

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23 Ralph Mathekoya, *Enforcement of Anti-Corruption Agencies* In *Southern Africa, Angola, Botswana, DRC, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia, Zimbabwe,* (OSISA, 2017).

24 Oluwanfemi Kolawole, 'Despite Enacted Laws, Access to Basic Information Remains a Luxury in Africa' (Governance and Policy 28 September 2021) <http:www.un.org>accessed 19 December 2023. Countries like South Africa, Angola and Niger had earlier enacted access laws.

25 Alex Hannaford, 'Why the Nigeria's Freedom of Information Act is Even Less Effective than Ours' (Columbia Journalism Review, 24 November 2015).

26 Fumilayo Omotayo, 'The Nigeria Freedom of Information Law: Progress, Implementation Challenges and Prospects' [2015]1(6) *Library, Philosophy and Practice* 2.

27 UNDP, 'Right to Information Practical Guidance Note', 2004 <https://www.undp.org>dam>publications> accessed 20 November, 2023.

28 Constitution of the Federal Republic of Nigeria (As amended) 1999, CAP C 23 LFN 2010.

29 Art 21(f) of the Constitution of the Federal Republic of Ghana 1992 grants every person living in Ghana the right to access information regarding the public sector. <https://constitutionnet.org> accessed 10 January 2024.

30 RTL Act 989

the constitutional right of access to information had drafted the first Right to Information Bill in 2003.[31] Unlike South Africa and Nigeria, Ghana has had a stable democracy. In Ghana, access to information is not as challenging as it is in other African countries. Yet government information is not readily available due to the wide discretionary powers of public officials to provide information and the poor system of managing records.[32] Therefore, as access to information is an inalienable constitutional right, the Act is not the actual basis for exercising the right to access information in Ghana, but is essential only for handling the procedural and administrative technicalities involved in doing so.[33]

3. The significance of model laws or principles

A model law on access to information is basically one that provides a detailed embodiment of international, regional or sub-regional standards on access to public information, designed to facilitate the enactment of national laws.[34] A model law on access to information serves as an already-made example for national laws, for the adoption, review or amendment of existing laws. This may however be varied according to the peculiarities of nation states, such as legal systems and constitutional frameworks.[35]

This would prevent a cookie-cutter approach to legislation as countries can adapt access laws to suit their individual realities. Unlike treaties, a model law or regulatory principle on access to information does not create a binding obligation but instead serves as a guide for the legislature to transform obligations emanating from international standards into national laws. The adoption of model laws or principles developed from several efforts at guaranteeing effective access laws.[36] Usually, government or public

[31] Cletus Kuunifaa, 'Access to Information Legislation as a means to achieve Transparency in Ghanaian Governance: Lessons from Jamaican Experience '(2012) 38 (2) *IFLA Journal* 23.
[32] ibid 7.
[33] ibid 3.
[34] African Commission, (n2) 7.
[35] ibid, 11
[36] Andrew Puddephatt and Rebecca Zausmer, 'Towards Open and Transparent Government: International Experiences and Best Practice' <www.gp.digital.org> accessed 9 December 2023.

bodies are in the habit of granting access to public information on their own terms, such that its form and content are controlled by government.[37]

Essentially, the right to access information entails the release of public information to requesters without tampering with its form and content. Therefore, an ideal access to information system is guaranteed when there exists guiding rules and principles to guard against manipulation of public information by government or public bodies. Some of the intricacies arising from drawing up effective access laws include the nature and scope of the information covered by the laws; the bodies included, the cost of accessing information; where necessary, the options for enforcing the laws, whether the enforcement option is operative, and the scope of restricted information.

The resolution of these impediments is pertinent to determining how effective the access laws will be. For access laws to be effective, they have to be drafted in compliance with standard models or guiding international principles. These guiding principles are vital to ensure that information, that has not been altered in form or content, is accessible to requesters.[38]

Several international or regional bodies have developed principles and model laws to regulate drafting of access to information laws, to ensure that they realize their goals which include strengthening information disclosure as a matter of precedence. These include Commonwealth Freedom of Information Principles and Commonwealth Model Laws;[39] the United Nations Standards;[40] Global Principles on National Security and the Right to Information (Tshwane Principles);[41] Declaration of Principles on Freedom of Expression and Access to Information;[42] Inter-American Declarations on Freedom of Expression and Model Inter-American Law on Access to Public Information,[43] African

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37 Oluf Jorgensen, *Access to Information in the Nordic Countries: A Comparison of the Law of Sweden, Finland, Denmark, Norway, Iceland and International Rules*, trans Steve Harris (Nordicon, University of Gothenburg, 2014), 38.

38 Ibid.

39 Commonwealth Model Laws <https://thecommonwealth.org> <www.commonwealth.org<files> accessed 7 December 2023.

40 <www.un.org >accessed 1 December 2023.

41 <www.justiceinitiative.org>up> accessed 1 December 2023.

42 <www.coe.int>web>freedom-of-ex> accessed 1December 2023.

43 Model Inter-American Law on Access to Public Information<https:// www.rti-ratings.org> accessed 7 November, 2023.

Union Model Law on Access to Information for Africa and Declaration of Principles on Freedom of Expression in Africa;[44] and Article 19 Model of International principles.[45]

For the purpose of this study, we adopt the Article 19 Model of Access to Information Laws, drawn from both international and regional laws and standards, progressive state practice, laws and judgments of national courts, and the general rules of law recognized by the states.[46] Moreover, Article 19 principles and standard are the fulcrum for attaining optimal government transparency and openness in line with best international standards and practices. The work also makes references to the African Model Law because of its pivotal role in the development of right of access to public information on the African continent and the fact that the model law reflects the Article 19 international principles on access to public information.

The African Commission developed a model law on access to information for Africa in 2013, which was later reviewed in 2018. The model law is developed as a guide for African nations in the adoption of new access laws, or the review of existing access laws.[47] It is argued that even though the model law is not binding on African nations, it has left a significant impact on the access to information landscape.[48] The number of African nations with access laws has increased from 5 to 22 nations since its development in 2013.

Many factors are adduced for weak access laws. They include poor implementation plans, poorly drafted laws, political bureaucracy and underdevelopment, particularly in Africa. While it is important to adopt an access law, merely adopting it is inadequate. What is paramount is the effectiveness of the law in ensuring that access to information is given priority. For access laws to be effective, they have to be properly drafted and implemented. Otherwise, the objective of access to information will be thwarted. The focal point of access laws is obtaining information from the government.[49]

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44 African Commission on Human and Peoples' Rights, <https://achpr.au.in> accessed 1 December 2023.

45 Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation' (2016) <www.article19.org>standards> accessed 2 December 2023.

46 Mendel, (n1) 30.

47 Shyllon Ololade, *The Model Law and its Influence on Access to Information in Africa'* in Shyllon Ololade (ed.) The Model Law on Access to Information for Africa and other Regional Instruments: Soft Law and Human Rights in Africa, (University of Pretoria, 2018) 4

48 ibid.

49 Commonwealth Human Rights Initiative,' Implementing Access to Information: A Practical Guide for Operationalizing Access to Information Laws' (2008) <https://www.humanrightsinitiative.org> accessed 10 December 2023.

The effectiveness of access laws depends on a number of factors such as effective implementation, freedom of the press, effective accountability systems and a well drafted law.[50] The importance of a well drafted law compliant with recognized international standards is the threshold for any successful access law. This is because there is an imminent peril in enacting a vapid or a sterile law. To guard against this challenge, it is vital that access laws are drawn to reflect international principles or model laws. An access law is as capable as its mettle. In other words, access laws should as a matter of fact guarantee access to public information. However, the scope of the paper is restricted to ensuring effective drafting of access laws to the exclusion of other factors pivotal for effectual access laws like good implementation plan and accountability system.

4. The determinants for measuring the capacity of the access laws of Nigeria, South Africa and Ghana

A key consideration when undertaking measurement of the capacity and productivity of access laws relates to their level of compliance with laid down international standards. The higher the level of compliance of access laws to these principles, the higher the capacity, and vice versa. An access law of high capacity is one that is well drafted or written, one that is operative and has a high propensity to succeed in terms of implementation. Therefore, this section undertakes a comparative analysis between the access laws of Nigeria, South Africa and Ghana vis-à-vis Article 19 Model of International Principles which encapsulates the minimum standard for access laws.[51]

4.1 Principle 1: Maximum disclosure

This principle presumes that all information held by public officials should be published unless under very restricted limits.[52] That is, government information should mandatorily be disclosed to the public and this right should be made available to all

[50] Maira Martini, 'Right to Information Laws: Impact and Implementation' (U4 Anti-Corruption Resource Center. May, 2014) <https://www.u4.no/publications/right-to-information-laws-impact-and-implementationp > accessed 10 December 2023.

[51] A.O Salau, 'The Right of Access to Information and National Security in the African Regional Human Rights System' (2017) 17 *African Human Rights Law Journal* 372; Article 19, (n45) The Article 19 principles were originally developed in 1999 and reviewed in 2015. These principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in its 2000 Session of the UN Commissions on Human Rights.

[52] ibid.

persons regardless of citizenship and residence. Further, the exercise of the right should not require persons to give reasons for demanding public information. The definitions of both 'information' and 'public bodies' should be broad. 'Information' in this context should include all records regardless of its form of storage, for example, audio, video, electronic recording, computer file, etc. Public bodies should be defined to include all branches and levels of government, such as elected bodies like parliaments, public corporations, judicial bodies, private bodies which execute public functions, or utilize public resources.

Furthermore, private bodies which hold information that is necessary for the exercise and protection of human rights fall within the definition of public bodies. Other bodies like security and inter-governmental organizations should be included within the scope of public bodies for the purpose of disclosure. Also, the principle of maximum disclosure stipulates that access laws should impose sanctions on any person who willfully obstructs access or destroys information.

The FOIA (Nigeria), PAIA (South Africa) and RTL (Ghana) are basically compliant with the above principle as the right of access is guaranteed to all persons, without the obligation of showing reasons for requesting the information.[53] However the RTL (Ghana) mandates the requester to state reasons for the urgency of any request where the application is tagged as being 'urgent.'[54] Furthermore, the access laws contain a broad definition of 'public bodies.' The definition encompasses all public bodies at the local and national levels and private bodies utilizing public funds and carrying out public services and performing public functions.[55] Notably, the PAIA (South Africa) is the only law under consideration that extends its definition to include private bodies (when the information requested is for the protection and exercise of any right).[56] It is however noted that the RTL (Ghana) empowers the minister to extend the application of the access law to private bodies by legislative instrument.[57]

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53 S 1(1) and (2) FOIA, S1 PAIA and S1 (1) and (3) RTL entitles any person to request information without specifying reason for the request.

54 S 1(4) RTL.

55 S 2 (7) and s 30 (3) FOIA, S 11 PAIA and S 84 RTL.

56 S50 –73 PAIA protects the right to access information held by private bodies. In *Claase v Information Officer of South African Airways,* (2006) 39/2006, a retired pilot was entitled under the PAIA to records held by private airlines because he was able to establish that he needed the information to protect a right under section 50(a).

57 S 83 (2)(3) RTL.

It is commendable that the FOIA (Nigeria) covers a wide range of bodies such as the executive, legislature, judiciary, advisory or administrative body of government.[58] On the other hand, the PAIA (South Africa) and RTL (Ghana) exclude certain bodies from their purview. For instance, the PAIA excludes certain records of public bodies like the cabinet and its committees, judicial functions of a court and judicial officers or an individual member of parliament.[59] Similarly, the RTL exclude records relating to the president and vice president, cabinet records and internal working information of public bodies; that is, opinions, deliberations or consultations, advice made or given to a public body likely to undermine the deliberative process. [60] However, there are no such exclusions in many other access laws. [61] All the access laws under review stipulate sanctions for any person, who willfully destroys, falsifies or alters any record for the purpose of denying a right of access.[62]

The model law for Africa extends its coverage to private bodies that may assist in the exercise or protection of any right.[63] The reason for requesting information need not be justified. [64] Section 88 of the law imposes sanctions on any person who destroys, damages, falsifies, conceals or alters information with the intent to deny a right of access to information. It is recommended that the FOIA (Nigeria) should be expanded to include private bodies where the information requested is for the protection and enforcement of rights.

Meanwhile, the PAIA (South Africa) and RTL (Ghana) should comply with international principles by reviewing the scope of records excluded from public access, such as records related to the president, vice president, cabinet and judicial functions of a court. These exclusions are not in tandem with international standards, as they infringe on the right of access to information.

58 S 30 (3) FOIA.
59 S 12. PAIA.
60 Ss 5, 6 and 13 RTL respectively.
61 Mendel, (n 1) 95.
62 S10 FOIA, S 90 (1) PAIA and S 82 RTL.
63 S 2(a) and (b), S 3 (a) Model Law. S 12 grants the right of access to information held by both public and private bodies where the information may assist in the exercise of rights.
64 S 13 (5) Model Law.

4.2 Principle 2: Obligation to publish

Public bodies are obligated not only to receive and respond to information requests but should also proactively publish and widely disseminate information of significant public interest. The duty here is to publish general information and key categories of information.[65] Section 2 of the FOIA (Nigeria) provides for proactive disclosure of information by public bodies and specifies the categories of information to be published and reviewed periodically.

Similarly, sections 2 and 3 of the RTL (Ghana) list the basic class of information to be proactively disclosed. It is noted that while the duty to publish under the RTL relates majorly to information about the Information Officer or the Information Unit; the FOIA is more comprehensive as it covers a wide range of information relating to public officers. Examples of such information to be published include the names, designation, dates of employment and salaries of all public officials within that public body; a description of the organization and responsibilities of the public body, including details of the programs and functions of each division, branch and department of the public body.

However, the PAIA (South Africa) neglects to include the duty to proactively publish information without the need for request. This is a grave omission which compares poorly with the international principle of obligation to publish. Section 7 of the Model law gives a detailed provision for proactive disclosure by public or relevant private bodies. This study submits that the obligation to publish information held by public or private bodies should be included in the PAIA (South Africa). This is a grave omission as this principle is essential in safeguarding the free flow of public information without the necessity of prior requests.

4.3 Principle 3: Promotion of open government

It is argued that for an effective access law, measures should be put in place to promote a culture of openness within government.[66] Evidence from many countries including developed ones demonstrate that secrecy has been firmly established over time, within the government, based on deep-rooted practices.[67] In achieving a shift from the

[65] Article 19, (n45)
[66] ibid.
[67] Mendel, (n 1) 33.

culture of secrecy to openness, there is a need to persuade public officials, rather than coerce them to acknowledge that open government activities is vital for a fortified access to information regime.

Thus, the essence of promoting open government measures cannot be over-emphasized in any effective information regime. However, the specific measures will vary from country to country and depend on factors such as literacy level and public awareness level, etc.[68] These measures include formal and informal public education on the right of access to information, comprehensive training for public officials on how to administer an effective access to information system, encouraging an efficient records management system, protection of whistleblowers, launching initiatives that foster openness, such as imposing penalties on those who clog access to information; and providing incentives for those who perform well in furthering access to information. Also, public bodies should provide annual reports on their activities relating to the problems and achievements in the preceding year to parliament.

The promotional measures provided in the FOIA (Nigeria) are scant in comparison with the access laws of some other countries such as Mexico.[69] The FOIA (Nigeria) provides for the proper organization and maintenance of records to facilitate easy access to information and records.[70] There is room for the training of public officials on the public right to access information.[71] Also, Section 29 mandates the submission of annual reports of the fiscal year by public bodies to the Attorney-General of the Federation and an onward submission by the Attorney General to parliament before 1 April each calendar year.[72] Whistleblowers are protected within the ambit of the law.[73]

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68 ibid 34.

69 The General Transparency Act GTA (Mexico) has an impressive array of promotional measures. Article 13 of the GTA provides that information must be accessible in a simple language and translated into indigenous languages. Others include specialized training of staff of the Transparency Committee (Article 24 (iii)), training of public servants on transparency and access to information (Article 42 (vii)), establishment of training programs on transparency, access to information for all public servants (Article 44 (vi)), include the social importance of right to access information in the curricula of preschool, primary, secondary and training of basic education teachers, develop training programs for users of the right to information to increase the use of the law (article 54(iii and vii)). Other promotional measures are to establish measures to facilitate access and search for information for people with disabilities (article 65), public bodies shall make available to interested persons, computer equipped with Internet access, allowing them to consult for information at the offices of the Transparency Units (Article 66).

70 S 9 FOIA.

71 S 13 FOIA.

72 S 29 (7) FOIA.

73 S 27 FOIA.

There are a number of promotional measures in the PAIA (South Africa) and these include, the publication of a manual in at least three official languages and the manual must be updated annually.[74] Other measures to promote open government include publication of users' guide in eleven official languages by the Human Rights Commission, the development and conduct of educational programs to advance the understanding of the Act and, of how to exercise the rights contemplated in the Act, and the promotion of timely and effective dissemination of accurate information by public bodies about their activities.[75] One unique attribute of the PAIA is that it enables requesters to have access to the information or record requested in the language of their preference, except where such records do not exist in the preferred language.[76] The Human Rights Commission has an obligation to submit annual reports to the National Assembly.[77]

The promotion of open government measures in the RTL (Ghana) is not as robust as the PAIA (South Africa). The RTI in section 45 encourages the promotion of awareness and education of the public on the right of access; training of public officials is inclusive. Sanctions are imposed on offenders who fail or neglect to perform their functions under the Act.[78] The Minister shall submit an annual report covering the activities of public bodies to Parliament.[79] Furthermore, public bodies are obligated to maintain records in good and accessible conditions in order to facilitate access to information.[80]

However, it is unconventional for the RTL not to extend protection to whistle-blowers, that is, those who disclose information even within the restricted exceptions when done in good faith. Instead, the Act is emphatic on sanctioning willful disclosure of information within the scope of exemptions.[81] This constitutes a setback on the furtherance of access to information. Notably, all of the access laws under review do not

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74 S 14 PAIA. The manual contains information like the structure of the public body, how to make information requests, etc. S 51 contains a similar provision for private bodies.

75 Ss 10 and 83 PAIA respectively.

76 S 31 PAIA.

77 S 84 PAIA. Furthermore, S 89 protects whistleblowers, while S 90 imposes sanctions on persons with intent to clog access to information.

78 S 82 RTL.

79 S77 (4) RTL.

80 S 83 (1) RTL.

81 S 81 RTL. It is however noted that a feeble attempt at protecting whistle-blowers is made in s 17 (2) which stipulates that any person who discloses information or authorizes such disclosure of information under the public interest domain is not liable under any criminal or civil proceedings. Usually, whistle-blowers are protected for disclosing any public information which they reasonably believe is true and is done in good faith.

stipulate the provision of incentives to well-deserving public bodies that promote access to information.

The model law contains a number of promotional measures which include the duty to keep, organize and maintain information in a manner that facilitates easy access.[82] Others include the publication of information manual and implementation plans.[83] One outstanding provision in the model law is the power of the oversight body to impose sanctions on defaulting public or private officers.[84] Following this discussion, it is recommended that whistleblowers be protected under the RTL (Ghana). Furthermore, the inclusion of more incisive promotional measures especially in the FOIA and RTL will go a long way in strengthening the access laws.

4.4 Principle 4: Limited scope of exceptions

The scope of exemptions or exceptions contained in any access law must be clearly and narrowly drawn.[85] The exemptions must meet the three –part test namely: the exempted information should relate to a legitimate aim recognized by international law; disclosure of such information must threaten to cause substantial harm to the aim, and the harm to the aim must outweigh the interest of the public in accessing the information.

The access law should list out legitimate aims recognized by international law which may justify non-disclosure; such as law enforcement, privacy and national security interests. Importantly, information deemed to be clearly exempted can be severed and the part not likely to cause any harm to the aim may be disclosed. Non-disclosure of information should be justified on a case-by-case basis. Also, it is essential that exempted or classified information are done on a time basis and subject to periodic review to ensure that the classification is still justified.[86]

The FOIA (Nigeria), PAIA (South Africa) and the RTL (Ghana) comply with this international principle in varying degrees. The FOIA contains a list of exempted information.[87] The lists include national security, privacy matters, privileged

82 S 6 Model Law.
83 Ss 64 – 69 Model Law contains promotional measures.
84 S 70 Model Law.
85 Article 19, (n 45).
86 ibid.
87 Ss 11, 12, 14 -19 FOIA.

information, and commercial interests. Similarly, the PAIA provides a comprehensive list of exemptions, including national defence and security, protection of law enforcement, privileged information, economic and commercial information and privacy.[88] The RTL exempts information from disclosure such as information for the president or vice president, cabinet, law enforcement and public safety, national security and privacy.[89] The PAIA (South Africa) has the most comprehensive and narrowly defined scope of exemptions compared to the other two jurisdictions. For instance, national security and defence is clearly defined in the Act and the exemption is further defined more specifically in section 41 (2) (a) – (h).

This is dissimilar to the vague and nebulous exemption of national security contained in section 11 FOIA and section 9 of the RTL. It is nevertheless commendable that all the access laws subject the class of exemptions under the public interest test or override. This means that there is mandatory disclosure of information particularly, classified information, where disclosure would benefit the public and such public interest is higher than the contemplated harm the disclosure will cause.[90] In the same vein, all the access laws make provision for severability of requests. The implication is that any part of exempted information or record not considered to be risky can be severed and disclosed. For instance, section 18 FOIA provides that public bodies shall disclose any part of the information that does not contain such exempted information.[91]

Remarkably, the FOIA (Nigeria) and PAIA (South Africa) have failed to stipulate a time frame for declassification of exempted information. Ordinarily, classified information should have a time limit subject to periodic reviews to forestall the risk of denying information indefinitely even where the justification for classification has lapsed. This positive initiative is however provided in section 78 of the RTL (Ghana). The Act declassifies exempt information at the expiration of thirty years. Thus, such information can be accessed except where disclosure of the information will endanger life, national

88 Ss 34-45 PAIA.

89 Ss 5-16 RTL.

90 It is noted that all the sections dealing with exemptions under the FOIA contain the public interest override, such as Ss 11, 12, 14 etc. Meanwhile the PAIA (South Africa) and the RTL (Ghana) stipulate a general provision for public interest override in Ss 46 and 17 PAIA and RTL respectively.

91 Likewise, S 28 PAIA provides for the severability of records for the purpose of disclosure. See also S4 (b) FOIA; S18 (6) RTL mandates public officers to disclose as much as the information as can reasonably be separated without disclosing the exempt part.

security, public safety, national economic interest and international relations.[92] Arguably, the time frame of thirty (30) years is too long for the declassification of records. A more effective approach would be to provide shorter classification terms, such as a five (5) year term subject to a periodic review.

The model law has a well-defined scope of exemptions subject to overriding public interests. Provision is made in the law for severance of information; where a part of the exempted information is severed or redacted from the part that is fit for public access.[93] This paper suggests that the scope of exemptions should be narrow and well-defined under the FOIA (Nigeria).

Specifically, the exemptions of national security and privacy should be narrowly drawn to forestall abuse and unjustifiable denial of access to information. More importantly, it is recommended that a classification term should be included in the FOIA and the PAIA to ensure that vital information is not kept under the classification system indefinitely. This is a key requirement under international principles.

4.5 Principle 5: Processes to facilitate access

The goal of this principle is to establish an open and accessible system for safeguarding the right to access information. Here, assistance should be given to applicants whose requests are vague, overtly broad or need reformulation. Also public bodies may be able to turn down requests that are frivolous or vexatious intended to disrupt the activities of the public body. Importantly, the access laws should guarantee full access to information for disadvantaged groups, such as illiterates, blind persons and persons who do not understand the language of the record or information.

Within the purview of this principle lies the need to provide strict time limits for the processing of requests, usually not more than 1 month. The most essential thrust of the principle to facilitate access is the appeal system. That is, the process for deciding upon requests for information should be specified at three levels. First, provision should be made for an appeal to a designated higher authority within the public body to review the original decision. Second, room should be made for appeal to an independent body

92 S 78 (2) RTL.

93 Ss 27–35 Model Law contain narrow classes of exemptions. For instance, the exemption of national security and defence is clearly defined in s 30 of the Law. Severance of requests is provided for in s 36.

from a refusal by a public body to disclose information. The independent body may be an administrative body or an ombudsman with certain powers and its independence must be guaranteed. Third and last, the applicant should be entitled to appeal to the courts against the decisions of the independent administrative body.

The rationale of the above principle is that the appeal system for seeking redress for information denial should be swift and cost effective. Consequently, the public can utilize the appeal system with ease and the excessive delays associated with court disputes are obviated or minimized.[94]

All three access laws under consideration conform significantly to the above international principle. The FOIA (Nigeria) does not make provisions for assisting requesters with requests that are defective, that is wide-ranging or unclear requests, nevertheless the needs of illiterates and disabled persons are taken care of.[95] In the same vein, the Act omits the provision that public bodies can turn down frivolous or vexatious requests. Such a provision is vital to guard against abuse of the access to information system.

Meanwhile, the PAIA guards against disclosure of information if the request is manifestly frivolous or vexatious, or where the work involved in processing the request would substantially and unreasonably divert the resources of the public body.[96] It also includes the vital provisions of giving assistance to requesters unable to conform to the standard of requests for information.[97] Specifically, the Act acknowledges illiterates and disabled requesters. [98] The provision of rendering assistance is comprehensively contained in section 18 of the RTL (Ghana) and provision is made for turning down vexatious requests.[99]

The access laws of Nigeria, South Africa and Ghana insert different time frames for response to information request. The FOIA provides a period of seven (7) days within which a public body should respond to a request for information. An extension of seven

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94 Article 19, (n45).

95 S3 (3) FOIA. All such applications by illiterates and disabled persons are made through a third party. It is however noted that the Guidelines on the Implementation of the FOIA acknowledges the need for consultation with the applicant if clarification is needed in order to identify and locate the information.

96 S 45 PAIA.

97 S 18 PAIA.

98 S 18 (3) PAIA.

99 S 27 RTL.

(7) days is provided for in cases where the application or request is for a large number of records or where consultation is necessary to comply with the request.[100] The PAIA (South Africa) provides for a time limit not exceeding thirty (30) days and this period may be extended for a further thirty (30) days, under special circumstances.[101] A period of fourteen (14) days is stipulated in the RTL (Ghana) within which response should be given to an application for information. An extended period of seven (7) days is provided for when dealing with a large volume of records or where the information has to be gathered from more than one source, or where consultation is necessary.[102]

The highpoint of the international principle of processes to facilitate access to information is the three-tiered appeal system. Unfortunately, this principle is grossly flawed under the FOIA (Nigeria). Notably, the Act omits the internal appeal to a higher authority in the public body, and the appeal to an independent oversight body for review of disputes arising from the denial of information requests or applications.[103] Thus, when there is a denial of information by a public body, the only recourse is to seek redress in court.

This constitutes a formidable hurdle in the wheels of effective access to information. This is so in the light of the fact that court proceedings are onerous and costly to follow through.[104] This will resultantly impact negatively on the right of access to information as a result of the time-critical nature of information.[105] The pile-up of cases and other incidentals are primarily responsible for the inordinate delays in litigation.[106]

On the other hand, South Africa's PAIA provides for three levels of appeal. First is the internal appeal (appeal within the public body); second, to the Information Regulator (independent body) and finally to the court.[107] This is an integral feature of any access to

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100 Ss 4 and 6 FOIA respectively.

101 Ss.25 and 26 PAIA. Extension of response time frame are allowed in cases, such as where the request is for a large number of records and to comply within 30 days would unreasonably interfere with the activities of the body, or where a search must be conducted in a different city, or where inter-agency consultation is required, that cannot reasonably be completed within the original 30 days.

102 S 23 (9)(b) and S 25 (2) RTL.

103 Ss 7 and 1 (3) FOIA. See also s 20–25 which lays the procedure for enforcing the right of access under the Act.

104 Omotayo, (n26).

105 Udombana, (n 9) 1320.

106 Nurhan Kocaoglu and Andrea Figari, *Using the Right to Information as an Anti-Corruption Tool* (Transparency International, 2006) 12; Mendel, (n 1) 36.

107 S 74 PAIA and S 77(A) - (K) of the Promotion of Access to Information Amendment Act 2002. contains details of appeal procedure to the Information Regulator. Appeal lies from the Information Regulator to the courts. See S 82. The office of the Information Regulator is also established by S 39 of the Protection of Personal Information

information system because the hurdles of court proceedings can frustrate the objectives of the law. The RTL is also compliant by accommodating appeals of applicants for information on three levels, namely appeal to the head of the public body that denied access (internal appeal); appeal to the Right to Information Commission and appeal to the court.[108] The Model Law acknowledges the need to assist requesters to make request in ensuring conformity with the Act and caters to the need of persons with disability.[109]

The response time frame for information is twenty-one (21) days and 48 hours where the request relates to the safeguard of the life or liberty of a person. There is an extension of the 21-day time frame by another 14 days under special circumstances.[110] The model law recognizes the three-level appeal system namely; internal appeal, appeal to an independent oversight body and judicial appeal to court.[111] Sequel to the foregoing discussion, this paper recommends the inclusion of the three-tiered appeal system in the FOIA (Nigeria). The resort to courts for settlement of disputes is a divergence from established international principles.

4.6 Principle 6: Costs

The goal of the principle of costs is to ensure that the fees for information applications are not exorbitant as to discourage potential applicants. Access laws are in place to promote openness in government; therefore, the principle is that information is provided at low or no cost and it should be restricted to the actual cost of reproduction and delivery. In certain circumstances, cost should be waived or removed altogether; for instance, in the cases of request for public interest or personal information and request for information by indigent persons.[112]

While the FOIA (Nigeria) complies with a part of the principle whereby the cost of accessing information is limited to the actual cost of reproduction and delivery; there is

2013. The PAIA which originally provided for just internal appeal and appeal to the courts has been amended by the above statutes to create the office of an Information Regulator bringing the law into conformity with international standard.

108 Ss 31-39 RTL. The Right to Information Commission known as the Commission is an independent body with the mandate to resolve complaints among others. Ss 40 – 44 make provisions for the establishment, object, independence, powers and functions of the Commission.

109 S 14 Model Law.

110 Ss 15 and 16 Model Law.

111 Ss 40-44, Model Law (internal appeal); Ss 45 – 68 (appeal to oversight body); Ss 83-84 (appeal to court).

112 Article 19, (n45).

no provision safeguarding the rights of indigent persons or persons with disability. Nor does the Act exclude personal and public interest information from the fee regime.[113] For the PAIA (South Africa) the Minister is authorized to exercise discretion in apportioning fees for application of information. Here, certain persons may be exempted from paying fees. Certain categories of records may also be exempted from the fee regime.

The Minister may also waive fees where the cost of collecting the fee would exceed the value of the fee. While this approach is commendable, the problem of abuse cannot be completely eliminated where there are wide discretionary powers. Applicants under the PAIA (South Africa) may be charged fees for requests, for reproduction, search and preparation of records.[114] This provision is not consistent with international principles.

In contrast, the RTL (Ghana) has an impressive provision on fees or costs. Fees for personal information and public interest information are not payable. Furthermore, indigent persons and persons with disability are excluded from the fee regime. Moreover, the actual fee charged is restricted to reproduction and transcription where necessary. The amount of time spent on reviewing, searching and preparing the records are excluded from the purview of fees.[115] The Act clearly spells out the categories of persons and records exempted from the fee regime. It is therefore, the access law which complies most with the above international principle.

There are vibrant provisions on fees in the model law, for instance, the fees for lodging request is restricted to actual cost of reproduction and delivery. Fees are exempted where the request is for personal or public interest information, or requests made by indigent persons, where the public or private body fails to comply with the request within the stipulated time frame or extended time frame as the case may be.[116]

This paper recommends that costs of accessing information under the FOIA should be excluded for certain categories of persons and records, such as the indigents and persons with disability. Furthermore, requests for personal and public interest information should also be exempted from the fee regime. There should be an

[113] S 8 FOIA. Notably, the Guidelines on FOIA Implementation provides for a waiver where the cost of reproduction or transcription is negligible or where the cost of collecting or recovering the fees would be equal to or greater than the amount being collected.
[114] S.22 PAIA; Mendel, (n1) 96.
[115] S 75 RTL.
[116] S 23 Model Law.

amendment of the PAIA to ensure that the cost of accessing information is strictly within the scope of fees for reproduction and transcription where necessary. These amendments will ensure that persons are not denied access to public information. They will also ensure that the laws comply with international standards.

4.7 Principle 7: Open meetings

This principle establishes the presumption that all meetings of governing bodies are open to the public. The public should have a right to know about government activities and to participate in the decision-making processes of governing bodies. Adequate notices of meetings should be issued to enable the public participate effectively in such meetings. Meetings may be closed under special circumstances in accordance with established procedures and where there are sufficient reasons to justify the closure.[117]

The frontiers of this principle can be expanded to accommodate the exploration of 21st century virtual meeting technologies, such as the internet, Zoom, Google Meet and WhatsApp. Foreseeably, none of the three access laws under consideration conform to the principle of open meeting for public participation. It is noted that the Model Law acknowledges open meetings to the general public. Here it is mandated that there should be a proactive disclosure of whether meetings of the public or private body are open to members of the public and if so, the process for engagement.[118]

4.8 Principle 8: Disclosure takes precedence

The above principle envisages that other statutes inconsistent with the right of access to information should be interpreted to be consistent or repealed where necessary. In other words, such statutes like secrecy laws should not be permitted to extend the scope of exemptions provided for in the access laws. The rationale for this is that the scope of exemptions in any access law should be painstakingly drawn, such that there is no need for accompanying secrecy laws.[119] It is contended further, that since the Official Secrets Act (OSA) 1962[120] has not been expressly repealed, the interpretation of its provisions

117 Article 19, (n45).
118 S 7 (e) Model Law.
119 Mendel, (n1) 40.
120 Cap O3 LFN 2010.

may sometimes be responsible for the obscurity and secrecy in government activities in Nigeria This law is considered as one of the laws that inhibits free access to information in Nigeria.[121]

There are arguments that the potency of access laws is subverted by secrecy laws. These laws restrict disclosure of information and make it unlawful for officials to disclose information. Therefore, it is essential that laws that restrict disclosure of information should be evaluated and made compatible with access laws.[122] The FOIA (Nigeria) is compliant with this principle as it clearly provides that the provisions of the Act supersede the OSA. It provides that any information kept under security classification within the meaning of the OSA does not preclude it from being disclosed under the provisions of the Act. Instead, the application for information shall be determined based on the exemptions contained in the Act.[123]

Going by these provisions, it is deduced that the FOIA is in line with the international principle. Although the secrecy law is not specifically mentioned in the PAIA, the law excludes any provision of others legislation that prohibits or restricts the disclosure of information or record of a public or private body, and is materially inconsistent with an object or provision of the Act.[124] This provision is lacking in the RTL (Ghana). This paper recommends the revision of the RTL (Ghana) to meet international standards by the inclusion of a provision guaranteeing the superiority of the RTL over secrecy laws.

4.9 Principle 9: Protection for whistleblowers

There should be legal and administrative protection for persons who release information on wrongdoing by public or private bodies. This should be established clearly

[121] Paul Ocheje, 'Law and Social Change: A Socio-Legal Analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000' (2001) 45 (2) *Journal of African Law* 172.

[122] Ndubuisi Madubuike-Ekwe and Joseph Mbadugha, 'Obstacles to the Implementation of Freedom of Information Act, 2011 in Nigeria' (2018) 9 (2) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence,* 96-111.

[123] S 28 FOIA. This is buttressed by s 27 which provides that notwithstanding anything contained in the Criminal Code, Penal Code or OSA, no legal proceedings shall lie against a person who without authorization releases information in good faith. Also, s 1 establishes a person s right of access notwithstanding anything contained in any other Law, Act or Regulation. Furthermore, the FOIA Implementation Guidelines reiterates the primacy of the FOIA. The Act supersedes provisions in other existing legislation including the OSA, Criminal Code and other laws inconsistent with the FOIA.

[124] S 5 PAIA

by law. Both the FOIA and the PAIA protect whistle-blowers.[125] This vital provision which aims to promote access to information is regrettably omitted in the RTL (Ghana). Section 87 of the Model Law protects whistle-blowers. In consequence, this paper recommends a fundamental review of the RTL (Ghana) to include a provision for safeguarding the rights of whistleblowers. Without this provision, an efficient information system will be stifled due to the fear of harassment, victimization and sanctions for release of vital information in the public sphere.

5. Conclusion

This comparative analysis reveals that the access laws of the countries under review, namely the FOIA (Nigeria), PAIA (South Africa), and RTL (Ghana) conform either partially or wholly to international principles. In order to achieve a vibrant access to information system, which actually guarantees the public right to access information held by government, the laws should be consistent with international principles. A well-functioning access to information system enhances transparency, accountability and greater public participation by improving information management. Access laws are only as good as they are written and implemented. In other words, the laws should actually guarantee the right of access to information.

This is attainable where access laws are painstakingly drafted to reflect international principles and best practices. The evaluation of the access laws of Nigeria, South Africa and Ghana with the Article 19 International Principles reveals that each of these laws do not wholly conform to recognized international principles. It is thereby argued that only total compliance with recognized international principles can render the access laws of these countries effective in actualizing the rights of the public to access information held by government or private bodies. For instance, the failure of the FOIA (Nigeria) to comply with the three-tiered dispute resolution system is one of the factors inhibiting access to information, due to impediments associated with litigation.

[125] S 27 FOIA and S 89 PAIA respectively.