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An Assessment of the Freedom of Information Act (2011) based on Article 19 Model of International Principles and Standards

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Abstract
Freedom of information (FOI) is a fundamental right established under international law which guarantees access to government information, subject to stringent exemptions. Nigeria enacted the Freedom of Information Act (FOIA) in 2011, as a key tool in securing democracy and responsible governance. However, there is serious risk in creating a futile law and to ensure that the law is more than emblematic; it should be drawn to express international principles and best practice. The law is only as good as the quality of the law, which is to assure access to public information. The doctrinal methodology was adopted with the aim of evaluating the FOIA vis-a-vis the Article 19 model of International Principles in order to determine its level of compliance with international standards. The evaluation reveals that the FOIA falls to measure up to international standard requirements such as, narrow scope of exemptions, effective dispute resolution mechanism and promotional measures. These shortfalls should be addressed through legislative reforms, to ensure that the object of the Act, which is to guarantee full access to public information, is attained.

Keywords: Freedom of Information, Freedom of Information Act, Public Information, Access to information, International Principles.

1.0 Introduction
Freedom of Information (FOI) also known as access to information or right to information is recognized as the rudiments for good governance, which comprises accountability, transparency and openness.[1] FOI empowers persons with the right to access information in the possession of the government.[2] This further engenders participatory democracy, as more access to quality information allows citizens to engage more effectively with the government.[3]

Freedom of Information laws have existed for more than 200 years. In Sweden, Freedom of the Press Act has been in existence since 1766.[4] The United States Freedom of Information Act was

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[1] Anne Thurston, 'Access to Reliable Public Records as Evidence for Freedom of Information in Commonwealth Africa' [2015](104)(6) *The Commonwealth Journal of International Affairs*, 706.

[2] Angela Migally, 'Freedom of Information: A Cornerstone of Egypt's Democratic Transition' <https://www.right2info.org>publications> accessed 12 May, 2021.

[3] Richard Calland, and Kristine Bentley, 'The Impact and Effectiveness of Transparency and Accountability Initiatives: Freedom of Information' [2013](31)(1) *Development Policy Review*, 571.

[4] Sweden Freedom of the Press Act 1766<www.ilo.org>natlex> accessed 1 May 2021.

passed in 1966.[5] Other countries like France (The Declaration of the Rights of Man and the Citizen 1978);[6] Canada (Access to Information Act 1982);[7] New Zealand (Official Information Act 1982);[8] India (Right to Information Act 2005);[9] and Nigeria (Freedom of Information Act, 2011) have followed suit.[10] As of May 2019, 129 States guarantee a right of access to information in National/ Federal laws. Ghana is one of the recent countries that passed a Right to Information Act in 2019.[11] The Nigerian FOIA was signed into law on May 28, 2011, by President Goodluck Jonathan.[12] The law gives legal standing to anyone regardless of age, gender, nationality, disability, to request information from public bodies, except such information is exempted by law.[13]

International bodies like the United Nations, Organisation of American States, Council of Europe, with the mandate of promoting and protecting human rights have authoritatively acknowledged the crucial right to access information held by public bodies, as well as the need for effective legislature to secure respect for this right in practice. [14] Therefore several attempts have been made to formulate principles/rules, aimed at enforcing the right to freedom of information. Some of the daunting challenges faced in the process of drawing up an effective FOI legislation include what denotes information for the purpose of the law? How should privacy of the individual be protected? What should be the gamut of the law? What should regulate the cost of operating a freedom of information system? Should users be made to bear the entire cost, or should the system be subsidized by the tax payers?[15] What bodies should the law not be applicable to and why? Should the law cover data held by private bodies along with public bodies? What information should be exempt? How does the individual enforce this right to information and is the enforcement route accessible?

The determination of these issues is pertinent, in ascertaining the efficacy of the law. It is risky creating a law for no particular reason. Therefore, to ensure that the FOI laws are effective, they should be drawn to express international principles and best international practice.[16] These

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[5] U.S.A FOIA 1996<https://www.cms.gov>FOIA accessed 1 May 2021.

[6] France Declaration on the Right of Man and the citizen 1978<https://www.i.curriculum.edu.au> accessed 1 May 2021.

[7] Canada Access to Information Law 1982 <https://laws.lois.justice.gc.ca> accessed 1 May 2921.

[8] New Zealand Official Information Act 1982 <www.legislation.government.nz> accesses 1 May 2021.

[9] India Right to Information Act 2005<https://rti.gov.in>rti> accessed 1 May 2021.

[10] Cap F43 LFN 2013; see alsoTony Mendel, *Freedom of Information: A Comparative Legal Study* (2nd edn, UNESCO, 2008), 22.

[11] www.right2info.org, accessed December1, 2020.

[12] Jacob Agba, Eric Ogri and Kwita Adoni, 'The Nigerian Freedom of Information Act and the Right to Know: Bridging the Gap Between Principle and Practice [2018](73) *New Media and Mass Communication*, 24.

[13] S 1 of the FOIA; Chike Duru, 'The Relevance of Nigeria's Freedom of Information Act (2011) to the Country's Anti-Corruption War' [2016](6)(12) *Journalism and Mass Communication*, 759.

[14] Mendel, note 10 p 7.

[15] Iyer Venkat, 'Freedom of Information: The Principles for Legislation '<https://unpan1.un.org/intradoc/groups/public/documents> accessed 14 April 2021.

[16] Andrew Puddephatt and Rebecca Zausmer, 'Towards Open and Transparent Government: International Experiences and Best Practice' 11 <www.gp.digital.org> accessed 9 October 2021.

guiding principles are essential to guarantee that timely, accurate information, not altered in form or content are accessible to the requesters.[17]

Article 19 has developed a set of principles to govern an effective FOI regime and, the aim is to serve as a guide for countries in the quest of enacting FOI laws, or to modify such laws already in existence.[18] The aim of this paper, therefore, is to assess the FOIA vis-a-vis the Article 19 model of international principles, in order to determine whether the FOIA is compliant with the international standard requirements and to propose ways to address any shortfall if any. These principles are nine in number and discussed below:[19]

2.0 International Principles on Freedom of Information

2.1 Principle of Maximum Disclosure: This principle sets up an assumption that all information held by public bodies should be disclosed and this assumption may be overcome in very restricted conditions. This principle also requires that the law should be extensive and should apply to everyone (not restricted to citizens) and without the need to show a reason for the specific information.[20] There must be a broad definition of 'information' and 'public bodies.' Public bodies include all branches and levels of government; private bodies which carry out public functions or expend public funds or hold decision making authority. Also private bodies should be included if they hold information whose disclosure is likely to affect key public interests such as, the environment, human rights and public health.[21]

Section 1 of FOIA guarantees the right to access information to anyone without the need to demonstrate any specific interest or purpose in the requested information. The relevance of this provision is that anyone (without the restriction of geographical location or citizenship) can apply for information in all public institutions and private ones utilizing or performing public services under the Act. The definition of public bodies in the Act covers the executive, legislative and judiciary. Also, all corporations established by law and companies wherethe government has controlling interest, as well as private bodies utilizing public funds, providing public services or performing public functions are inclusive.[22] This definition is robust.

Meanwhile, some scholars like Agba *et al* argue that the exclusion of the private sector from the purview of the Act is tantamount to denying key public information from disclosure. Their

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

[18] Article 19, 'The Public's Right to Know: Principles on Right to Information Legislation'[2016] <www.article19.org>standards> accessed 2 May, 2021. Article 19 is a human rights organisation with a special mandate and has its focal point on the safeguarding of freedom of information and expression globally. The organisation was established in 1987 and draws its name from Article 19 of the Universal Declaration of Human Rights, which authorizes the right to freedom of opinion and expression. See also,John Ackeman and Irma Sandoval-Ballesteros, 'The Global Explosion of Freedom of Information Laws'{2006}(58)(1) *Administrative Law Review*,94.

[19] Article 19, note 18 p 4.

[20]Ibid; Puddephatt and Zausmer, note 16 p 12.

[21]Mendel, note 10 p 32.

[22] S 2 (7) and s 30 (3).

argument is premised on the fact that, the private sector is the greatest employer of labour in Nigeria and most of these companies handle government contracts and therefore called for a review of the Act to incorporate the private sector.[23] We disagree with this point of view, based on sections 2(7) and 30 (3) which gives a broad definition of public bodies to include private companies, in which government has controlling interest, as well as private bodies utilizing public funds, providing public services or performing public functions. The focus is, therefore, on the services that they render and not on the nomenclature. In other words, private bodies that handle government contracts are covered.

This implies that most large private companies fall within the ambit of the law, as long as they utilize public funds, provide public services or the government has some measure of control over them. For instance, Shell Petroleum Development Company is the largest private-sector oil and gas company in Nigeria; but because it is involved with public services such as the exploration, production and refining of petroleum products and the Government controls some of its interests then, it is covered by the FOIA. Unfortunately, the law omits the inclusion of private bodies for the protection of rights and public safety.

2.2 Principle of Obligation to Publish: This principle infers that public bodies should not only accept requests for information, but they must disclose and disseminate broadly documents/information of considerable public interest, subject only to rational limits based on available resources and capacity.[24]

Section 2 requires public bodies to maintain information about all their activities, operations and businesses and went on to specify certain categories of information that fall within this provision. These include statements of policy, names, salaries, dates of employment of all employees etc. Public bodies are to disseminate widely information under this head and to update and review such information periodically. The goal of this provision is to give effectual access to as many persons as public bodies actively disclose and disseminate vital categories of information, even in the absence of a request. [25] This principle also known as 'Proactive disclosure' is beneficial because it decreases the number of requests by citizens; it helps alleviate the burden of processing individual requests for information and information reaches a wider range of persons.[26] Proactively disclosing information encourages active participation of citizens in decision making in governance, by promptly availing them of relevant information to reflect their concerns and make meaningful contributions.[27] The FOIA is therefore compliant with the international requirement.

2.3 Principle of Promotion of Open Government: In many nations, secrecy has been firmly established over time within the government based on deep-rooted practices.[28] Fundamentally, the access/right to information depends on changing the culture. It is laborious to coerce public officials to be open, rather an abiding success would hinge on persuading public officials that

[23] Agba, and Ogri and Adomi, 'note 12 p29.
[24]Mendel, note 10 p 33.
[25] Ibid.
[26]Puddephatt and Zausmer, note 16 p 18.
[27]Ibid, 17.
[28] Mendel, note 10 p 33.

openness is not just a fundamental obligation, but also a human right. Promotional measures are accordingly, important in tackling the culture of secrecy. Although the specific measures will vary from country to country and depends on factors such as, the literacy level and public awareness level, etc.

These measures include; public education; imposing penalties on those who clog access to information; training of the work force on how to administer an effective FOI regime; providing incentives for those who perform well in furthering access to information and exposing erring ones. Promotional measures are essential in administering an effective FOI regime. Other measures include proper record keeping, training of public officials and enlightenment of the general public on how to utilize the FOI law. Also public bodies are to provide annual reports to Parliament on their activities with focal point on their setbacks and achievements.[29]

The FOIA has a few promotional measures like section 13, which states that every public body should ensure appropriate training for its officials on public's right to access information or records; section 9 provides for appropriate organisation and maintenance of all information in a way that promotes public access to such information and Section 29 which requires public bodies to submit annual reports to the Attorney General of the Federation. Any effective FOI system will benefit immensely from good records management. In consequence, requests for speedy delivery of public information are reliant on effective and proficient record-keeping system. Unfortunately, the FOIA would be rendered unproductive, as Nigeria has a deficient record management system, which seriously compromises the release of prompt and accurate information.[30] Although the FOIA on the face of it complies with the international principle, the Act is generally scant on promotional measures; thus undermining the successful implementation of the law. This amounts to another shortfall in the Act, which needs to be addressed to guarantee effective access to public information.

2.4 Principle of Limited Scope of Exceptions: Exceptions to the right to access information should be clearly and narrowly drawn and should be subject to strict harm and public interest test.[31] Any justification for refusal by a public body must conform to a strict three-part test – the information must relate to a legitimate aim; disclosure must threaten to cause substantial harm to that aim and the harm to the aim must be greater than the public interest in having the information.[32]

Also exempted information must have a time limit and should not exceed 15 years except in unusual circumstances. This is to ensure that exempted information is not classified indefinitely. It is not sufficient that the information fall within the stipulated exemptions, the public body must establish that the disclosure of the information would substantially cause damage to that legitimate aim. Even in cases where it can be shown that damage would be caused to the legitimate aim, the information should still be disclosed where it is established that it would be

[29] Article 19, note 18 p 7.
[30] Brendan Asogwa and Ifeanyi Ezema, 'Freedom of Access to Government Information in Africa: Trends, Status and Challenges' [2017](29)(3) *Records Management Journal* 335.
[31] Article 19, note 18 p7 ; Paddephatt and Zauster, note 16 p 12.
[32] Article 19, note 18 p 7 and 8.

more beneficial to the public interest to have access to the information than the harm it would cause.[33].This is referred to as the public interest override.

The FOIA has numerous exemptions as contained in sections 11 – 19; though virtually all the exemptions are subject to the public interest test; which is commendable. The FOIA contains broad scope of exemptions. For instance, Section 11 which provides for the exemption of national security fails to further define the categories of information under the broad head. This could effortlessly result in exploitations by some public officers for mischievous purposes. Furthermore, section 14 is couched in such a way that no personal information can be released without the consent of the person. This is regardless of the public interest test contained in subsection 3. It is contended that the exemption clauses in the Act countermand almost the whole of what it gives.[34] The FOIA also neglects to stipulate a time limit to exempted information. No room is given for routine review of exempted information. The implication is that information classified cannot be declassified even when the cause that gave rise to the exemption ceases to exist or expires.

2.5 Principle of Processes to Facilitate Access: The international requirement is that the dispute resolution process for information requests should be rapid and fair and there should be an independent review of any refusal. This process should be set out on three levels – within the public institution, appeals to an independent administrative body and appeals to courts.[35] The administrative body should be granted full powers to investigate any appeal and have the authority to mandate the public body to disclose where necessary. The independence of the administrative body must be guaranteed, both formally and in practice.

Appeal to court is essential, as it is empowered to lay down binding decisions in contentious cases and is the final umpire of appeals in disclosure matters.[36] The jurisdiction of the courts may be limited to legal issues in countries where they have Independent administrative appeals.[37] It is pertinent to state that the mode of resolving disputes arising from FOI is a vital part of evaluating the effectiveness of the FOI laws. It is important that the appeal procedure is readily accessible, as excessive delays and costs could defeat the aim of requesting the information in the first place.[38]

Unfortunately, the only mode of redress in the FOIA is a direct recourse to the court.[39] This is a clog. The FOIA has a serious defect in providing for appeals directly to court, considering the expense involved and the amount of time consumed in litigation in Nigeria. In other words, the cumbersome and time consuming process of dragging requests for information through the courts has a potentially negative effect on the utility of the information requested because of the time

[33]Ibid.
[34] Uchechukwu Nwoke, 'Access to Information under the Nigerian Freedom of Information: Challenges to Implementation and Rhetoric Radical Change' [2019](63)(3) *Journal of African Law* 450.
[35] Article 19, note 18 p 9.
[36]Mendel, note 10 p 36.
[37] World Bank Governance and Public Sector Group, 'Legal Framework for Establishing Freedom of Information' 13 <https://siteresources.worldbank.org> accessed 2 November 2021.
[38] Article 19, note 18 p 10.
[39] S 7

value of information.[40] One of the merits of taking an appeal to an independent administrative body, like the Information Commissioner or Ombudsperson is that the process is swift and does not depend upon the services of a professional lawyer. On the other hand, the demerit is that the decision of the independent body may not be binding on the authority that failed to release the information.[41] This reasoning is in line with Mendel's position that the courts must be resorted to for obvious reasons.[42]

Also, public bodies must designate a person to be responsible for processing information requests and ensuring compliance with the law. In addition, public bodies must provide assistance for applicants/requesters and also ensure full access to information to disadvantaged groups, like illiterates and blind persons. The law should also provide for strict time limits for the processing of requests, not later than one month.[43]

The FOIA provides persons with disabilities and illiterates with full access to information. It prescribes 7 days time limit within which request for information be granted and empowers applicants to apply to court where an application for information is denied.[44] Also, Section 29 entrusts the Attorney of the Federation with the oversight responsibility of enforcing the Act. The FOIA is, however, largely defective on the appeal procedure as there is no provision for an internal or independent review of refusal of access to information as specified by international principles on FOI. The only means of redress is a direct application to the court;[45] which makes the Act deficient in relation to international standards.

2.6 Principle of Costs: The primary point of this principle is that persons should not be precluded from making requests for information due to excessive costs; considering that the whole rationale behind the freedom of information law is the furtherance of open access to information.[46] Generally, the cost of accessing information should be restricted to the actual cost of reproduction and delivery. Furthermore, costs should be waived or drastically reduced for personal information, public interest information and indigent persons.

Section 8 provides that fees shall be limited to the standard charges for document duplication and transcription where necessary. This provision makes the law conform to international requirements. Nevertheless, the Act fails to cater for circumstances that warrant waiver or subsidization of costs. This is a grave omission, as indigent persons are dissuaded from utilizing the law in accessing public information, thereby deflating the effectiveness of the FOIA.

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[40] Funmilola Omotayo, 'The Nigeria Freedom of Information Law: Progress, Implementation Challenges and Prospects' [2015](1 – 6) *Library, Philosophy and Practice* 10.

[41] Nurhan Kocaoglu and Andrea Figari, *Using the Right to Information as an Anti-Corruption Tool* (Transparency International, 2006), 12.

[42] Mendel, note 10 p 36.

[43] Article 19, note 18 p 9.

[44] See Ss 3, 4 and 7 respectively. The Act also provides for an extension of time limit when necessary but does not exceed 7 days. See S 6.

[45] S 7.

[46] Article 19, note 18 p 10. It stipulates that cost should be at the barest minimum, restricted to the cost of reproduction and delivery.

2.7 Principle of Disclosure Takes Precedence: The underlying factor of this principle is that laws which are incompatible with the rule of maximum disclosure should either be amended or repealed.[47] In other words, secrecy laws should not make it unlawful to disclose information, which the FOI law permits to be divulged. Any FOI law that painstakingly considers the set of exceptions does not need accompanying secrecy laws.[48] The FOI laws should be the primary consideration in matters of disclosure and where there is a conflict between the FOI and any other law prohibiting disclosure, the FOI law supersedes. It is contended that since the Official Secrets Act 1962[49] has not been expressly repealed; it is oftentimes responsible for the obscurity in government activities in Nigeria. This law is considered as one of the laws that inhibit free access to information in Nigeria.[50]

However, our view is that the coming into effect of the FOIA supersedes the Official Secrets Act, as it is in direct conflict with sections 1, 27 and 28 of the FOIA. Section 1 establishes the right of citizens to access information and this right is guaranteed notwithstanding anything contained in any other Act, Law or Regulation. Section 28 establishes the supremacy of the Act over the Official Secrets Act (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; rather the application for information shall be determined based on the exemptions contained in the Act. This could be expounded to mean that the FOIA supersede the Official Secrets Act.[51] Going by these provisions, it is deduced that the FOIA is in line with the international principle.

2.8 Principle of Protection for Whistle-blowers: Individuals who release information on wrongdoings [whistle-blowers] must be protected. Whistle-blowers should be shielded provided, that they acted in good faith and the reasonable belief that the information is considerably true and revealed proof of wrongdoing.[52] This principle is fundamental, in displacing a culture of secrecy where openness begets sanction. Individuals who release information should be protected. Creating this kind of security guarantees that information, particularly about wrongdoing will be made public.[53]

Section 27 protects public officers from being punished or prosecuted for disclosing certain kinds of information without authorization. These public officials or persons, in general, are known as whistle-blowers. This is a vital provision of the Act, as it would facilitate the disclosure of vital public information without fear of victimization or harassment. This would help to tackle the

[47] Ibid
[48] Mendel, note 10 p 40.
[49] CAP O3 LFN 2010.
[50] 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.
[51] Section 27 of the Act provides that notwithstanding anything contained in the Criminal Code, Penal Code, the Official Secrets Act, or any other enactment, no civil or criminal proceedings shall lie against an officer of any public institution, or against any person acting on behalf of a public institution, for the disclosure in good faith of any information, or discloses information without authorization believing same to be true.
[52] Article 19, note 18 p 12.
[53] Paddephatt amd Zausmer, note 16 p13.

culture of secrecy in government and give public servants the tenacity to disclose information under the freedom of information law.[54]

2.9 Principle of Open Meetings: The public have a right to scrutinize what the government is doing on its behalf and to participate in decision-making processes.[55] It is on this presumption, that all meetings of governing bodies should be open to the public. Governing bodies in this context refers primarily to the exercise of decision making powers.[56] Adequate notice of the meeting must be given to enable the public to participate. Meetings may be closed under certain circumstances and reasons for closed meetings must be disclosed to the public. These circumstances include public health, public safety, privacy and national security matters. Although this is an uncommon feature in most FOI laws, it is a vital principle.[57] Information disclosure should not be restricted to documents only but to actual decision making meetings. The FOIA makes no provision for open meetings.

3.0 Recommendations and Conclusions

The essence of having legislation on the freedom to access government information is motivated by the desire of people to actively participate in issues affecting them.[58] The FOI law is to foster the availability and accessibility of government information to citizens, which engenders transparency, openness and accountability.[59]The full potential of the FOIA will not be realized unless the law is strengthened to comply substantially with international principles. While some of the provisions of the Act comply with international principles in areas such as maximum disclosure, proactive disclosure and the protection of whistle-blowers; there are some fundamental gaps. These gaps include as follows:

1 The failure of the Act to include private bodies within its purview, particularly for the purpose of protecting human rights and public safety, which is a requirement for the furtherance of the right of access.

2 The inadequate provisions for promotional measures impede the effective implementation of the law.

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[54] Tony Mendel, 'National Security Vs Openness: An Overview and Status Report on the Johannesburg Principles' in *National Security and Open Government: Striking the Right Balance,* (Campbell Public Affairs Institute, 2003), 22. <https://www.maxwell.syr.edu/uploaded/files/campbell/events/NSOGpdf> accessed 3 May, 2021; Mendel, note 10 p 40.For further reading on whistle-blowing see Sylvester Anya, and Gabriel Iwanger, 'The Role of Whistle- blowing Policy as an Anti-Corruption Tool in Nigeria' [2019](7)(1)*Journal of Law and Criminal Justice* 35 – 50. A whistle-blower is an individual who discloses illicit or non-compliant activities harmful to the public interest. See also, Oluwakemi Omojola, 'Whistleblower Protection as an Anti-Corruption Tool in Nigeria [2019](92) *Journal of Law, Policy and Globalization*174.

[55]Mendel, note 10 p 4.

[56] Article 19, note 18 p 11.

[57] Paddephatt and Zausmer, noye 16 p13.

[58]Asogwa and Ezema, note 28 p 318.

[59] Thurston, note 1 p 704.

3 The non-compliance with the three levels of dispute resolution is a major setback to the actualization of the right of access. Bearing in mind the hurdles associated with litigation in Nigeria.

4 The broad scope of exemptions contained in the Act undermines the quintessence of the right to access public information

5 The Act excludes provisions for waiver or subsidization of costs/fees for accessing public information by indigent persons. This omission disenfranchises the economically disadvantaged persons of their right of access. These gaps identified in this paper would need to be addressed through legislative reforms to ensure that the Act is compliant with international principles and in the long run, guarantee effectual access to public documents and information in Nigeria. It follows that for the FOIA to be an effective mechanism for access to public information, the Act must incorporate narrow scope of exemptions; the three levels of dispute resolution; waiver/ subsidized access fees for the indigent and provide for more promotional measures.

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