



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

October 29, 2013 Government Records Council Meeting

Scott A. Hodes
Complainant

Complaint No. 2012-225

v.

NJ Department of Human Services, Div. of
Medical Assistance & Human Services
Custodian of Record

At the October 29, 2013 public meeting, the Government Records Council (“Council”) considered the October 22, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian complied with the Council’s July 23, 2013 Interim Order because she submitted nine (9) copies of the records at issue to the GRC and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.
2. The Custodian lawfully denied access to the requested records because same contain proprietary and trade secret information the disclosure of which could give an advantage to competitors. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Additionally, the records contain detailed technical information the disclosure of which could jeopardize Xerox’s systems. Id., See Rogers v. Roxbury Board of Education (Morris), GRC Complaint No. 2008-229 (April 2009). Additionally, because the Custodian lawfully denied access to the responsive records, the Council need not address whether she knowingly and willfully violated OPRA.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the
Government Records Council
On The 29th Day of October, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: November 1, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

***In Camera* Findings and Recommendations of the Executive Director
October 29, 2013 Council Meeting**

**Scott A. Hodes¹
Complainant**

GRC Complaint No. 2012-225

v.

**New Jersey Department of Human Services,
Division of Medical Assistance & Human Services²
Custodian of Records**

Records Relevant to Complaint: Electronic copies of Statement on Auditing Standards (“SAS”) No. 70 audit reports concerning the contract originally awarded to ACS (now Xerox) on December 15, 2004.³

Custodian of Record: Dianna Rosenheim
Request Received by Custodian: June 29, 2012
Response Made by Custodian: July 3, 2012
GRC Complaint Received: July 31, 2012

Records Submitted for *In Camera* Examination: SAS70 reports for 2008 and 2010.

Background

July 23, 2013 Council Meeting:

At its July 23, 2013 public meeting, the Council considered the July 16, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The GRC must conduct an *in camera* review of the two (2) responsive SAS70 reports to determine the validity of the Custodian’s assertion that the reports contain proprietary and trade secret information exempt from disclosure under OPRA. *See Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.*
2. **The Custodian must deliver⁴ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction**

¹ No legal representation listed on record.

² No legal representation listed on record.

³ The Complainant requested additional records that are not at issue in the instant complaint.

Scott A. Hodes v. New Jersey Department of Human Services, Division of Medical Assistance & Health Services, 2012-225 – *In Camera* Findings and Recommendations of the Executive Director 1

index⁵, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,⁶ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order and outcome of the Council's *in camera* review.

Procedural History:

On July 24, 2013, The Council distributed its Interim Order to all parties on. On August 5, 2013, the Custodian submitted the records requested for an *in camera* review as well as a legal certification. The Custodian certifies that she received the Council's Order on July 29, 2013. The Custodian further certifies that the Division of Medical Assistance & Human Services believes that Xerox's asserted exemptions are reasonable based on the detailed content of the reports and the publicly stated purpose of the audits as being intended for a customer's auditors. On August 5, 2013, Mr. Paul P. Josephson, Esq., and Mr. Christopher L. Soriano, Esq., Counsels for Xerox, filed a Motion to Intervene with the GRC. On August 13, 2013, the GRC granted Xerox's Motion to Intervene and advised that it would consider Xerox's submissions as part of the *in camera* review.

Analysis

Compliance

On July 23, 2013, the Council ordered the Custodian to submit nine (9) copies of the SAS70 reports at issue for an *in camera* review and further to provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4, to the Executive Director. On July 24, 2013, the Council distributed its Interim Order to all parties, providing the Custodian five (5) business days to comply with the terms of said Order. The Custodian received the Council's Order on July 29, 2013; thus, August 5, 2013 was the last day to comply. On August 5, 2013, within the prescribed time frame to respond, the Custodian responded submitting to the GRC nine (9) copies of the records and certified confirmation of compliance to the Executive Director.

Therefore, the Custodian complied with the Council's July 23, 2013 Interim Order because she submitted nine (9) copies of the records at issue to the GRC and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.

⁴ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

⁵ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

⁶ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful. N.J.S.A. 47:1A-6.

OPRA provides that:

A government record shall not include the following information which is deemed to be confidential ... trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure ... information which, if disclosed, would give an advantage to competitors or bidders ... administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security ...

N.J.S.A. 47:1A-1.1.

The GRC conducted an *in camera* examination on the submitted records and considered Xerox’s submissions as part of its review. The review reveals that these comprehensive reports contain extremely sensitive information that meets the exemptions set forth by the Custodian as well as exemptions set forth by Xerox. N.J.S.A. 47:1A-1.1. In essence, disclosure of these reports could be detrimental to Xerox’s system and further could effectively give a competitor a blue print to developing an adequate rival system. The GRC is thus satisfied that the reports are exempt from disclosure under OPRA.

Thus, the Custodian lawfully denied access to the requested records because same contain proprietary and trade secret information the disclosure of which could give an advantage to competitors. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Additionally, the records contain detailed technical information the disclosure of which could jeopardize Xerox’s systems. *Id.*, See Rogers v. Roxbury Board of Education (Morris), GRC Complaint No. 2008-229 (April 2009). Additionally, because the Custodian lawfully denied access to the responsive records, the Council need not address whether she knowingly and willfully violated OPRA.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian complied with the Council’s July 23, 2013 Interim Order because she submitted nine (9) copies of the records at issue to the GRC and submitted certified confirmation of compliance to the Executive Director within the prescribed time frame to comply.

2. The Custodian lawfully denied access to the requested records because some contain proprietary and trade secret information the disclosure of which could give an advantage to competitors. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-6. Additionally, the records contain detailed technical information the disclosure of which could jeopardize Xerox's systems. Id., See Rogers v. Roxbury Board of Education (Morris), GRC Complaint No. 2008-229 (April 2009). Additionally, because the Custodian lawfully denied access to the responsive records, the Council need not address whether she knowingly and willfully violated OPRA.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

October 22, 2013⁷

⁷ This complaint was prepared for adjudication at the Council's September 24, 2013 meeting; however, the complaint could not be adjudicated due to lack of quorum.



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

INTERIM ORDER

July 23, 2013 Government Records Council Meeting

Scott A. Hodes
Complainant

Complaint No. 2012-225

v.

New Jersey Department of Human Services,
Division of Medical Assistance & Human Services
Custodian of Record

At the July 23, 2013 public meeting, the Government Records Council ("Council") considered the July 16, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The GRC must conduct an *in camera* review of the two (2) responsive SAS70 reports to determine the validity of the Custodian's assertion that the reports contain proprietary and trade secret information exempt from disclosure under OPRA. See Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order and outcome of the Council's *in camera* review.

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Interim Order Rendered by the
Government Records Council
On The 23rd Day of July, 2013

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: July 24, 2013

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 23, 2013 Council Meeting**

**Scott A. Hodes¹
Complainant**

GRC Complaint No. 2012-225

v.

**New Jersey Department of Human Services,
Division of Medical Assistance & Human Services²
Custodian of Records**

Records Relevant to Complaint: Electronic copies of Statement on Auditing Standards (“SAS”) No. 70 audit reports concerning the contract originally awarded to ACS (now Xerox) on December 15, 2004.³

Request Made: June 14, 2012

Response Made: July 3, 2012

GRC Complaint Filed: July 31, 2012⁴

Background⁵

Request and Response:

On June 14, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian. On July 3, 2012, the second (2nd) business day after receipt of the OPRA request,⁶ the Custodian responded in writing stating that Division of Medical Assistance & Human Services (“DMAHS”) staff gathering the responsive records seeks clarification as to whether two (2) years of records is sufficient. The Custodian stated that it would be easier to gather the most recent records as opposed to gathering all records from 2004 to the present. On the same day, the Complainant confirmed that records for the last two (2) years would be sufficient. On July 11, 2012, the Custodian responded that DMAHS staff identified the two (2) most recent SAS70 reports from 2008 and 2010 as responsive to the Complainant’s OPRA request. The Custodian stated that DMAHS staff is checking with Xerox because the reports are marked “confidential.” On July 13, 2012, the Custodian responded stating that Xerox has

¹ No legal representation listed on record.

² Dianna Rosenheim, Custodian of Records. No legal representation listed on record.

³ The Complainant requested additional records that are not at issue in the instant complaint.

⁴ The GRC received the Denial of Access Complaint on said date.

⁵ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

⁶ The Custodian certified in the Statement of Information that she received the Complainant’s OPRA request via facsimile on June 29, 2012.

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verbally asserted that the reports fall under the proprietary/trade secret exemption and will send a written response to the Custodian.

On July 27, 2012, Counsel for Xerox submitted a letter to Jennifer Driscoll Petrino, Contract Compliance, advising that the responsive reports contain details regarding trade secret solutions as well as system security. Counsel stated that disclosure of this information would reveal confidential proprietary information that would threaten Xerox's delivery of services and security of systems. Counsel further noted that disclosure of proprietary information would provide an advantage to bidders and competitors by disclosing details of Xerox's proprietary New Jersey Health Benefits Coordinator ("HBC") system and services solution. Counsel states that Xerox spent millions of dollars developing the solution and a competitor would be able to obtain these efforts for the cost of copies.

On July 27, 2012, the Custodian advised the Complainant that she received Xerox's letter asserting that the reports are exempt from access under OPRA as proprietary information; thus, access to the responsive reports is denied. N.J.S.A. 47:1A-1.1. In support of her denial of access, the Custodian further provided the Complainant with a summary of the Appellate Division's holding in Newark Morning Ledger Co. v. NJSEA, 423 N.J. Super. 140 (App. Div. 2011)(*citing Lamont Burns & Co. v. Waters*, 167 N.J. 285, 299-301 (2011)).

Denial of Access Complaint:

On July 31, 2012, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant disputes the Custodian's denial of access, arguing that disclosure of the reports will not give any advantage to bidders or competitors. The Complainant asserts that the issuance of a service auditor's report in accordance with SAS No. 70 signifies that an organization has had an examination by an independent accounting and auditing firm. The Complainant contends that a service auditor's report, which includes the auditor's opinions, is issued to the organization at the conclusion of the examination and will only reveal whether or not the organization is in compliance with SAS No. 70. The Complainant argues that the reports should be disclosed, with redactions, if necessary.

Statement of Information:

On September 19, 2012, the Custodian filed a Statement of Information ("SOI"). The Custodian certifies that she received the Complainant's OPRA request on June 29, 2012. The Custodian certifies that she denied access to the responsive reports (54 and 65 pages respectively) because they are marked "confidential" on every page and are provided only to customers needing to see a review of internal controls. The Custodian further certifies that Xerox objected to disclosure of the reports both verbally and in writing.

The Custodian certifies that Xerox submitted the responsive SAS70 reports to DMAHS on a confidential basis for the purpose of providing assurance of the internal controls of the service business provided to DMAHS under its publically available contract. The Custodian contends that these reports are exempt from access under OPRA. The Custodian contends that

Xerox's expectation is that the reports would remain confidential because they contained proprietary information that could cause significant security issues and provide an advantage to bidders and competitors. The Custodian contends that a review confirms that the reports contain pages of detailed information regarding Xerox's systems used to carry out commercial duties and commercial and proprietary trade secret information that can be used by competitors or bidders to gain an advantage.

The Custodian states that in determining when commercial financial information is proprietary and confidential, one must analyze the relationship of the parties at the time of disclosure, the intended use of the information and the expectation of the parties. *See Newark Morning Ledger, supra; Communications Workers of Am. v. Rousseau*, 417 N.J. Super. 341 (App. Div. 2010); *Mamorte Burns and Co. v. Walters*, 167 N.J. 285 (2001). The Custodian argues that Xerox's expectation of confidentiality is specific and clear and DMAHS believes that the reports are confidential. The Custodian asserts that SAS70 reports are not intended for wide dissemination; rather, the reports are meant for customers needing verification regarding internal controls. The Custodian asserts that her denial of access should be upheld so that DMAHS can continue to access SAS70 reports of its contractors in the future without same becoming disclosable under OPRA.

The Custodian further argues that a trade secret is a compilation of information used to give a business an advantage over other businesses that do not have similar information. The Custodian contends that consideration is given to whether the information is known to persons outside the business, the extent the information is known by employees within, the measures taken to guard the secrets, the difficulty by which the information can be duplicated and whether the information is a product of years of experience. The Custodian contends that trade secrets are only valuable when confidential and disclosure strips trade secrets of their value.

The Custodian finally contends that the responsive SAS70 reports are not records made by or for the State and are thus not government records under OPRA. The Custodian asserts that Xerox's documents provided to the State as additional support for work performed under a contract should not be considered government records. The Custodian contends that redaction is moot because the reports are not the property of the State; rather, the reports are Xerox's confidential records.

Analysis⁷

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

⁷ There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

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OPRA provides that:

A government record shall not include the following information which is deemed to be confidential ... trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure ... information which, if disclosed, would give an advantage to competitors or bidders ...

N.J.S.A. 47:1A-1.1.

In Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the Complainant appealed a final decision of the GRC⁸ in which the GRC dismissed the complaint by accepting the Custodian's legal conclusion for the denial of access without further review. The Court stated that "OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records...When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." *Id.* The Court also stated that:

The statute also contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the 'Open Public Meetings Act,' N.J.S.A. 10:4-6 to -21, it also provides that the GRC 'may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.' N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the Court stated that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

⁸ Paff v. NJ Department of Labor, Board of Review, GRC Complaint No. 2003-128 (October 2005).

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Here, the Complainant disputed the Custodian's denial of access to the responsive SAS70 reports. The Complainant contended that the reports should be disclosed, with redactions if necessary. In the SOI, the Custodian contended that the responsive SAS70 reports are exempt from disclosure because the records are confidential and contain proprietary and trade secret information that disclosure thereof would give an advantage to bidders and competitors. The Custodian further argued that disclosure of the reports could cause significant security issues.

However, the record lacks a thorough analysis of the confidentiality of an SAS70 report. In the absence of this information, the GRC cannot accurately determine whether every page of the responsive reports is exempt from disclosure. For example, the inclusion of a title page or table of contents likely would not fall under the exemptions cited. In fact, the Custodian supported this position by attaching title pages to the SOI. The GRC does not discount Xerox's argument against disclosure of confidential information. Based on the July 27, 2012 letter from Xerox Counsel, it is likely that these reports do contain confidential information that would be exempt under OPRA. However, it is also possible that certain pages contain disclosable information and that the reports should be disclosed with redactions.

Therefore, the GRC must conduct an *in camera* review of the two (2) responsive SAS70 reports to determine the validity of the Custodian's assertion that the reports contain proprietary and trade secret information exempt from disclosure under OPRA. See Paff, supra, and N.J.S.A. 47:1A-1.1.

The GRC finally notes that the Custodian erroneously argued in the SOI that the responsive SAS70 reports are not records made by or for the State and are thus not government records under OPRA. The definition of a government record is not limited to records made by a public agency; rather, the definition of a government record includes records "... *maintained, kept on file ...* or that has been *received ...*" (Emphasis added) in the course of government business. N.J.S.A. 47:1A-1.1.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order and outcome of the Council's *in camera* review.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The GRC must conduct an *in camera* review of the two (2) responsive SAS70 reports to determine the validity of the Custodian's assertion that the reports contain proprietary and trade secret information exempt from disclosure under OPRA. See Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005) and N.J.S.A. 47:1A-1.1.

2. **The Custodian must deliver⁹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see No. 1 above), a document or redaction index¹⁰, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,¹¹ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order and outcome of the Council's *in camera* review.

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Brandon D. Minde, Esq.
Executive Director

July 16, 2013

⁹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

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