

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 February 2017

Public Authority: Crown Prosecution Service
Address: Rose Court
2 Southwark Bridge
London
SE1 9HS

Decision (including any steps ordered)

1. The complainant has requested information relating to Mr Julian Assange. The Crown Prosecution Service applied sections 40(2) (Personal information), 27(1) and (2) (International relations), 30(1)(c) (Investigations and proceedings) of the FOIA to some of the information. It also neither confirmed nor denied holding some information by virtue of section 27(4)(a) (International relations) and applied section 14 (Vexatious request) of the FOIA to the remainder. During the Commissioner's investigation, the CPS also confirmed that it was applying section 21 (information reasonably accessible by other means) of the FOIA to some information.
 2. The Commissioner's decision is that the Crown Prosecution Service has applied sections 27(1) and (2), 27(4), 21 and 14 of the FOIA, appropriately. However the Commissioner considers that the CPS has breached sections 10(1) and 17(1) of the FOIA.
 3. The Commissioner does not require the Crown Prosecution Service to any steps as a result of this decision.
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Request and response

4. On 6 September 2015, the complainant wrote to the Crown Prosecution Service (CPS) and requested information in the following terms:
 - “1) the FULL correspondence between the Crown Prosecution Service and the Swedish Prosecution Authority concerning the criminal investigation against Mr. Julian Assange.*
 - 2) the FULL correspondence (if any) between the Crown Prosecution Service and Ecuador about the case of Mr. Julian Assange.*
 - 3) the FULL correspondence (if any) between the Crown Prosecution Service and the US Department of Justice about the case of Mr. Assange.*
 - 4) the FULL correspondence (if any) between the Crown Prosecution Service and the US State Department about the case of Mr. Assange.*
 - 5) the exact number of the pages of the Julian Assange's file at the Crown Prosecution Service.”*
5. The CPS responded on 6 October 2015. It explained that in relation to question 1, it was withholding the information under sections 40(2), 30(1)(c), 27(1) and (2) and 30(1)(c). In relation to questions 2, 3 and 4, it was neither confirming nor denying whether it held the information by virtue of section 27(4). In relation to question 5 it was applying section 12 (cost of compliance).
6. Following an internal review the CPS wrote to the complainant on 21 December 2015. In relation to question 1, it explained that as the Swedish Prosecution Authority (SPA) may have provided information to the complainant previously, it assumed that she was not asking for copies of that information. It also explained that as the SPA had not disclosed all of the information it held, it had not waived its expectation of confidentiality with regards to the information it did not disclose.
7. In relation to questions 2-5, the CPS upheld its original decision.

Scope of the case

8. The complainant contacted the Commissioner on 22 December 2015 to complain about the way her request for information had been handled. She explained that she considered that the CPS' arguments for withholding the information were totally unfounded and in relation to question 1, she had already requested similar information from SPA and had received some, under its Freedom of Information regime.
9. Regarding the application of section 12, the complainant argued that it was not for the CPS to decide whether it is of public interest to know the precise number of pages of the Julian Assange file at the CPS; it was up to a journalist to evaluate whether this information was relevant.
10. During the Commissioner's investigation, the CPS confirmed that in relation to the application of section 27(1), it was relying upon subsection (a). It also confirmed that it was relying on section 14(1) in relation to question 5 rather than section 12. It also confirmed that it was applying section 21 to the information already disclosed to the complainant by the SPA.
11. The Commissioner will consider the CPS's application of the cited exemptions, section 14 and how it dealt with the request.
12. A member of the Commissioner's staff inspected the withheld information at the CPS' premises on 19 December 2016.

Reasons for decision

Section 21 – Information accessible by other means

13. Section 21(1) provides
14. "Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."
15. The purpose of the section 21 exemption is to ensure that there is no right of access to information via FOIA if it is available to the applicant by another route. Therefore, unlike most exemptions, the circumstances of the applicant may be taken into consideration.
16. Section 21 is an absolute exemption so is therefore not subject to any public interest considerations.
17. Although the information may be available elsewhere, a public authority will need to consider whether it is actually 'reasonably accessible' to the applicant before it can apply section 21. Defining 'reasonably accessible'

is open to interpretation, but where there is another existing, clear mechanism by which the particular applicant can reasonably access the requested information outside of the FOIA, it will be reasonably accessible to them.

18. In this case, the Commissioner notes that the SPA has disclosed information to the complainant and that the CPS is applying section 21 to some of the information requested under question 1.
19. Given that the complainant had been provided with information by the SPA at the time request, the Commissioner considers that it is readily available to her. The Commissioner therefore considers that the CPS does not have to provide that information to the complainant.
20. The Commissioner therefore considers that the section 21 exemption has been applied appropriately.

Section 27 – International relations

21. The Commissioner has considered section 27 in relation to the information withheld under question one that was not covered by section 21.
22. The CPS explained that it was withholding this information in relation to question 1 under sections 27(1)(a) and 2. The Commissioner will deal with the application of section 27(1)(a) first.
23. Section 27(1)(a) states:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) relations between the United Kingdom and any other State.”

24. As section 27(1)(a) is a prejudice based exemption, in order for it to be engaged the Commissioner considers that three criteria must be met:
 - The actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed, has to relate to the applicable interest within the relevant exemption;
 - The public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the withheld information and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and

- It is necessary to establish whether the level of likelihood of the prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
25. The applicable interest cited in this exemption is relations between the United Kingdom and any other State. The Commissioner accepts that the arguments made by the CPS set out below address the prejudice at section 27(1)(a).
 26. When considering the second point, the Commissioner must be satisfied that the nature of the prejudice is "*real, actual or of substance*" and not trivia; or insignificant. She must be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.
 27. The CPS explained that the withheld information had been provided to it by the SPA. It explained that during extradition proceedings information is exchanged under established international practice and in line with guidance issued by the Home Office. There is a strong expectation and presumption of confidentiality.
 28. The CPS also explained that in order to conduct extradition proceedings effectively, close cooperation between States is necessary; this relies upon the ability to communicate freely with each other without the fear that such communications could be subsequently disclosed.
 29. Furthermore, the CPS explained that public disclosure of this information could lead to other States feeling less able to liaise freely and frankly with the UK in the future which would have a severe impact on its ability to conduct effective extradition proceedings, and furthermore to maintain functioning relationships with other States more widely.
 30. The CPS explained that, although the SPA had disclosed some information to the complainant, it had not disclosed all of the requested information. It explained that it would be in breach of well-established practice if it disclosed such material without Sweden's consent.
 31. With regard to the third point, the CPS explained that disclosure of the requested information would prejudice relations between the UK and Sweden and would be likely to prejudice relations with other States. It explained that the British Government develops and maintains robust relationships with other nation states which can promote mutual interest in trade, defence, environmental issues, human rights and the fight against terrorism and international crime. It argued that disclosure of the requested information would be detrimental to the UK's relationship with Sweden, as the disclosure would be without prior consent. The CPS also pointed out that disclosure would, in all likelihood, result in other

countries or international organisations reconsidering their affinity with the UK.

32. Taking everything into account, the Commissioner is satisfied that the disclosure of the requested information would be likely to prejudice the UK's relationship with Sweden and would be likely to prejudice its relationships with any other States. The Commissioner therefore considers that section 27(1)(a) is engaged. She will go on to consider the application of section 27(2).

Section 27(2)

33. Section 27(2) states:

"Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court."

34. Section 27(3) clarifies section 27(2) as follows:

"For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held."

35. Although section 27(1) is a prejudice based qualified exemption, section 27(2) is a class based qualified exemption therefore the CPS does not have to consider whether disclosure of the information would, or would be likely to, prejudice confidentiality. If the requested information is considered as confidential for the purposes of the section 27(2) exemption, it will be engaged. As it is a qualified exemption, it is subject to the public interest test
36. In support of its reliance upon section 27(2) the CPS explained that, although the SPA had disclosed some information to the complainant, it had not disclosed all of the requested information. The CPS argued that this showed that Sweden clearly considered that the remaining information was still confidential. It explained that it would be in breach of well-established practice if it disclosed such material without Sweden's consent.
37. The complainant argued that as Sweden had already disclosed information to her, the remaining information could not be considered as 'confidential' for the purposes of section 27(2). She argued that this meant that the CPS should disclose the remaining information to her.
38. As section 27(3) explains, information will be exempt under section 27(2) as long as the terms on which the information was obtained

require to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it would be so held. In the Commissioner's view this requires a consideration of both the content of the information and the context within which it was provided. In the circumstances of this case, the Commissioner's view is that it is important to consider whether, as Sweden has disclosed some information, the duty of confidence in relation to the remaining information held by the CPS, no longer applies.

39. The Commissioner notes that in its responses to the complainant, the CPS explained that disclosure of the withheld information would prejudice the UK's relations with Sweden. The Commissioner recognises that determining whether information can be withheld under section 27(2) is likely to involve some consideration of the effects of disclosure. However, section 27(2) cannot be engaged only on the grounds that disclosure would prejudice relations with other States; section 27(1)(a) provides an exemption from disclosure if disclosure would, or would be likely to, prejudice relations with another State. The Commissioner has already considered the CPS's application of section 27(1)(a) and finds that it is engaged.
40. The CPS explained to the Commissioner that Sweden had not consulted the UK before it disclosed some information to the complainant. It also submitted further arguments relating to this point. The Commissioner considers that these are confidential and has discussed them further in a confidential annex, which has been sent to CPS.
41. The CPS argued that if Sweden had consulted it initially regarding the disclosure of the requested information, it would have presented arguments in support of non-disclosure of any of the requested information.
42. The CPS explained that it operates within information law derived from the UK; therefore a disclosure made under Swedish law should not set precedent for policy in the UK. The CPS also argued that this argument had special weight as the Swedish provisions in its Freedom of the Press Act and the Public Access to Information and Secrecy Act provide a wider access to official documents than in many other countries.
43. Having considered both submissions by the parties and the withheld information, the Commissioner is persuaded that the withheld information not covered by section 21 is still confidential. She notes that the information forms part of the CPS' investigation into Mr Assange. Furthermore, this information is not, as far as the Commissioner is aware, already in the public domain. Therefore, in the Commissioner's view, even though some information has been disclosed by the SPA, the remaining information held by the CPS would still be considered as confidential information for the purposes of section 27(2).

44. The Commissioner therefore considers that the section 27(2) exemption is engaged. She will go on to consider the public interest arguments in relation to both section 27(1)(a) and (2).

The public interest test

45. Section 27 is a qualified exemption and is therefore subject to the public interest test: whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner will consider the public interest arguments in relation to sections 27(1)(a) and (2).

Public interest arguments in favour of maintaining the exemptions

46. The CPS argued that the public interest in maintaining sections 27(1)(a) and (2) outweighs the public interest in disclosure. It pointed out that the SPA had provided the information to the UK in confidence under established international practice and published Home Office guidance.
47. In addition, the CPS argued that there was a strong public interest in not disclosing information that was provided to the UK in confidence under this established international practice; to do so would damage the close cooperation necessary for the effective conduct of extradition proceedings. The CPS also pointed out that disclosure without the SPA's consent would damage the close cooperation needed for the effective conduct of extradition proceedings.
48. The CPS explained that although the SPA had disclosed some information under its own Freedom of Information regime, it had not disclosed all of the requested information and therefore had not waived its expectation of confidentiality regarding any other communications held by the CPS.

Public interest arguments in favour of disclosure

49. The CPS acknowledged that there is a public interest in increased transparency of public bodies generally. It also acknowledged that disclosure of the requested information could increase public understanding of how States cooperate to progress extradition proceedings.
50. The complainant argued that there was a strong public interest in the Julian Assange case and that it was in the public interest for the requested information to be disclosed.

Balance of the public interest argument

51. The Commissioner recognises the wider public debate about the position of Julian Assange, which is relatively unique, including his confinement in the Ecuadorian embassy since 2012. There has been considerable public debate about legal and other issues related to his extradition. His confinement has also been debated in the context of human rights, including a finding by the United Nations in his favour. The cost to the public purse of policing Mr Assange's presence at the Embassy has also been considerable. The Commissioner accepts that the disclosure of the requested information would shed some light on how the UK is dealing with Julian Assange and in a broader sense, help the public understand how States cooperate in order to progress extradition proceedings.
52. However, the Commissioner also accepts that there is a clear public interest in protecting the requested information.
53. In relation to section 27(1)(a), the Commissioner accepts the CPS' argument that disclosure could lead to other States feeling less able to liaise freely and frankly with the UK and that there would be a severe impact on the UK's ability to conduct effective extradition proceedings. The Commissioner also accepts that disclosure would have an impact on the UK's ability to maintain functioning relationships with other States more widely.
54. In relation to section 27(2), the Commissioner notes the CPS' explanation regarding the requested information being provided to it under established international practice and in line with guidance issued by the Home Office. She also notes that there is a strong expectation and presumption of confidentiality.
55. The Commissioner also notes the complainant's point that as the SPA had disclosed some information to her, confidentiality cannot exist in relation to the rest of it. However, she also notes the CPS' argument that, given that the SPA had not disclosed all of the requested information to the complainant it considered that Sweden had not waived confidentiality with regard to the remaining information.
56. The Commissioner attaches significant weight to this argument by the CPS. She accepts that fact that the SPA did not disclose all of the information requested in relation to point 1 of the request, to the complainant. The Commissioner accepts the strong public interest in protecting such confidential information.
57. Furthermore, the Commissioner considers that the quality of this particular information, when considered in the context of its confidential nature, makes a strong argument for maintaining section 27(2).
58. Whilst acknowledging the significant arguments in favour of disclosure the Commissioner finds that the countervailing arguments for maintaining the exemptions are stronger, particularly noting the wide

effects of the likely prejudice, which would not just be confined to this case.

59. Therefore the Commissioner considers that for sections 27(1)(a) and 27(2), the public interest in maintaining each exemption outweighs the public interest in disclosure.
60. The Commissioner will go on to consider the CPS' application of section 27(4)(a) to points 2-4 of request.

Section 27(4)

61. Section 27(1)(a) provides:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice

(a) relations between the United Kingdom and any other State".

62. Section 27(4)(a) provides:

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 27(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)".

63. The CPS specified that the relevant matters are those set out at sections 27(1)(a). Section 27 is a qualified exemption and is therefore subject to the public interest test.
64. The issue for the Commissioner to consider is whether confirming or denying that the requested information is held would, or would be likely to, prejudice relations between the United Kingdom and any other State.
65. The CPS explained that during extradition proceedings, information is exchanged under established international practice and in line with guidance issued by the Home Office. It went on to explain that there was both a strong expectation and presumption of confidentiality with regard to these proceedings.
66. The CPS also explained that close cooperation was necessary between States in order to conduct extradition proceedings effectively. It pointed out that this relied upon the ability to communicate freely with each other without fear that such communications could be subsequently disclosed.
67. In the case of a prejudice-based exemption, for it to be engaged it is necessary to establish a 'causal link' between confirming or denying that the information is held and the prejudice claimed. The CPS has claimed that the higher level of prejudice (ie that prejudice "would" occur) applies. It explained that confirming or denying that it holds the

requested information would be confirming whether the named States were involved in any extradition proceedings regarding Julian Assange and this would prejudice the UK's relations with these States.

68. Furthermore, the CPS explained that disclosure of the requested information could lead to States feeling less able to liaise freely and frankly with the UK in the future; it argued that this would have a severe impact on its ability to conduct extradition proceedings effectively.
69. In cases where there may be extradition proceedings involved, it is important that cooperation between the UK and other States should not be prejudiced by disclosing information which is considered to be confidential, as this may lead to States not fully cooperating with the UK in the future.
70. The CPS explained that confirming or denying whether it holds the requested information would effectively reveal whether the States identified in the request, had communicated with it or not. It argued that the confidential practice adopted in extradition proceedings would be undermined by confirming or denying whether it held the requested information.
71. The CPS also explained that it is a well-established practice to neither confirm nor deny the existence of an extradition request until the person has been arrested. It explained that this practice exists to avoid tipping-off wanted suspects prior to arrest. In addition, the CPS argued that confirming or denying whether it held the requested information, could damage relations between the UK and all the States it has extradition arrangements with, if the UK was perceived to pose a risk of disclosing information which could assist fugitives to avoid being extradited.
72. Taking everything into account, the Commissioner is satisfied that to confirm or deny holding the information would prejudice the matters identified at section 27(1)(a) and therefore that the section 27(4)(a) exemption is engaged. She will go on to consider the public interest.

Public interest

73. The Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.
74. The CPS recognises that there is some public interest in transparency with regard to extradition proceedings. It also acknowledged that the Julian Assange case is a very high profile case which has resulted in high expenditure to the public purse and that this increases the public

interest in organisations being accountable for the actions they have taken.

75. In favour of issuing a neither confirm nor deny response, the CPS referred to the need to maintain confidentiality when dealing with extradition proceedings.
76. The Commissioner also notes the CPS' explanation that it is a well-established practice to neither confirm nor deny the existence of an extradition request until after the requested person has been arrested in order to avoid tipping-off wanted suspects prior to arrest. Furthermore, she notes the explanation that it would damage relations between the UK and other States with which the UK has extradition arrangements, if the UK was perceived to pose a risk of disclosing information which could assist fugitives to avoid being extradited.
77. The Commissioner accepts that there is a public interest in confirming or denying that the information is held, to allow the public to know whether the UK is involved in extradition proceedings regarding Julian Assange and that it is transparent in its handling of such matters.
78. However, she finds that there is a stronger public interest in not prejudicing relations between the UK and the States named in the request. She considers that the confidential practice adopted regarding extradition proceedings would be undermined by confirming or denying whether such information is held; this in turn would prejudice the UK's ongoing relationships with these States.
79. Furthermore, the Commissioner considers that either confirming or denying that the CPS holds the information would impact on the UK's relations with other States not named in the request. She also considers that it would lead these States to feel less able to liaise freely and frankly with the UK whenever necessary in the future.
80. Since the Commissioner considers that the public interest in issuing a neither confirm nor deny response outweighs that in confirming or denying, she is satisfied that the CPS was entitled to issue such a response under section 27(4)(a).
81. The Commissioner will go on to consider the application of section 14 in relation to question 5.

Section 14(1) – vexatious requests

82. Section 14(1) of FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

83. The term “vexatious” is not defined in the FOIA. The Upper Tribunal (UT) considered the issue of vexatious requests in the *Information Commissioner v Devon CC & Dransfield* (UKUT 440 (AAC), 28 January 2013).¹ The UT commented that “vexatious” could be defined as the “*manifestly unjustified, inappropriate or improper use of a formal procedure*”. This definition clearly establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
84. The Commissioner considers the key question for public authorities to consider when determining if a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
85. The Commissioner has identified a number of “indicators” which may be useful in identifying vexatious requests. These are set out in his published guidance on vexatious requests.² The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is, or is not, vexatious.

Evidence from the parties

86. The Commissioner notes that the complainant requested the number of pages. The complainant explained that she considered that it was not for the CPS to decide whether it is of public interest to know the precise number of pages of the Julian Assange file. She also explained that she considered that it was up to a journalist to evaluate whether this information was be relevant to their investigative journalism. In addition, the complainant explained that she considered that it was in the public interest to disclose all of the information she had requested.
87. The CPS explained that it was very difficult to provide the number of pages in the Assange investigation. It pointed to the Commissioner’s guidance on section 14(1) which states that ‘disproportionate effort’ is

¹ <http://www.osspsc.gov.uk/Aspx/view.aspx?id=3680>

²

http://ico.org.uk/~media/documents/library/Freedom_of_Information/Detailled_specialist_guides/dealing-with-vexatious-requests.ashx

one of the things to consider when deciding whether a request is vexatious. The CPS set out the relevant section from the guidance:

"Disproportionate effort

The matter being pursued by the requester is relatively trivial and the authority would have to expend a disproportionate amount of resources in order to meet their request."

88. The CPS explained that the manual exercise necessary to count the number of pages within this file would fit into this category. It also explained that it had completed a balancing exercise to ascertain whether the purpose and value of the information requested provides sufficient grounds to justify the disruption that would be caused. The CPS explained that it would take a significant amount of time to provide the figure and the information would not in any way contribute towards public debate.
89. Furthermore, the CPS acknowledged that section 16 (Duty to advise and assist) places an obligation on an authority to advise and assist where possible. It explained to the Commissioner that it was in the process of going through the Assange file; once the exercise has been completed it was likely to be able to provide information regarding the number of volumes without putting an excessive burden on to it.
90. Having viewed the withheld information in relation to point 1, the Commissioner is satisfied that the CPS would not be able to provide the number of pages in the Assange file, without placing an excessive burden on it, at the time of the request. However, she notes that the CPS has explained that once it has finished going through the Assange file, it was likely that it will be in a position to provide the number of pages.
91. The Commissioner therefore considers that the CPS has applied section 14(1) appropriately.

Procedural issues

Section 17 – refusal of a request

92. The Commissioner notes that the CPS relied on the section 21 exemption.
93. Section 17(1)(b) provides that when a public authority is claiming that information is exempt, it must specify which exemption it is relying on.
94. In this case, the CPS did not explain that it was relying upon section 17 in its refusal notice.

95. The Commissioner therefore considers that the CPS has breached section 17.

Section 10 – Time for compliance

96. Section 10 provides that a public authority must reply to a request for information promptly but no later than the twentieth working day following the date of receipt.
97. Given that the CPS did not cite section 21 until after the twentieth working day, the Commissioner considers that it has breached section 10(1).

Other matters

98. Part VI of the section 45 Code of Practice makes it good practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information. The Commissioner considers that the procedure should encourage a prompt determination of the complaint.
99. Furthermore, she considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
100. The Commissioner is concerned that it took over 20 working days for the internal review to be completed and will be monitoring the time taken by the CPS to deal with future requests for internal reviews.

Right of appeal

101. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

102. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

103. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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