

FOISA Guidance

Section 36: Confidentiality

Exemption Briefing



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Glossary and abbreviations

Term used	Explanation
FOISA	Freedom of Information (Scotland) Act 2002
SIC/The Commissioner	The Scottish Information Commissioner, staff of SIC (depends on context)
The Section 60 Code	The Scottish Ministers’ Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002

The exemption

The exemption: the main points

1. Section 36 of the Freedom of Information (Scotland) Act 2002 (FOISA) contains two separate exemptions. Information may be withheld if:
 - (i) it is information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings (for example, if information is “legal privileged”) (section 36(1)); or
 - (ii) the information was obtained by a Scottish public authority and disclosing it would constitute an actionable breach of confidence (section 36(2)). Section 36(2) therefore incorporates the Scots law of confidence into FOISA.
2. Only the exemption in section 36(1) is subject to the public interest test in FOISA. This means that, even if the exemption applies, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Although the exemption in section 36(2) isn’t subject to the public interest test in FOISA, the public interest can play a role in deciding whether the exemption applies.
3. The exemptions in section 36 don’t last forever. In general, they can’t be applied to information that is more than 30 years old.

Steps in applying the exemption

4. Once an authority has located the information it must:
 - (i) Decide, does the exemption apply?
 - (ii) If the exemption does NOT apply, the information cannot be withheld under the exemption (although it might be exempt for other reasons).
 - (iii) If the exemption in **section 36(2)** applies, the information can be withheld.
 - (iv) If the exemption in **section 36(1)** applies, you must go to on apply the public interest test:
 - (a) If the public interest in disclosure outweighs that in maintaining the exemption, the exemption does not apply and the information cannot be withheld under section 36(1).
 - (b) If the public interest in maintaining the exemption outweighs that in disclosing the information, it can be withheld and notice served to that effect.

Section 36(1) – claim to confidentiality of communications

5. In most cases, assessing whether a claim to confidentiality of communications can be maintained in legal proceedings will mean considering whether information is subject to legal professional privilege. This is what the briefing focusses on.
6. It is possible that other categories of information will be covered by this exemption, such as:
 - (i) communications between a journalist and their source

- (ii) communications between priest and penitent
 - (iii) “without prejudice” communications (communications, or records of communications, between two parties involved in a dispute, where the purpose of the communications is to settle the dispute without resort to legal action).
7. With the exception of (iii), it is unlikely that the other categories will ever be relevant when responding to a request for information.

What is legal professional privilege?

8. Legal professional privilege can be split into two main types – “legal advice privilege” and “litigation privilege”.

Legal Advice Privilege

9. Legal advice privilege covers communications between lawyers and their clients where legal advice is sought or given. The communications do not have to be connected with litigation (although they may be). Legal advice privilege will only apply to communications made for the purpose of seeking and giving legal advice.

10. There are certain requirements which must be met for legal advice privilege to apply:

(i) **The information must relate to communications with a legal adviser**

The information must relate to communications with a legal adviser. (Legal professional privilege does not extend to communications in connection with advice given by professionals other than lawyers – even where that advice is legal advice which that professional person is qualified to give – see the *Lloyds TSB* case referred to in **Appendix 1 - Resources**.)

Communications between authorities and their in-house legal advisers are covered, except for the purposes of enforcement proceedings under EU Competition Law (see the *Akzo Nobel* and *Prezes Urzedu Komunikacji Elektronicznej* cases referred to in **Appendix 1 - Resources**).

(ii) **The legal adviser must be acting in their professional capacity and the communications must occur in the context of their professional relationship with their client**

The communication between the client and the legal adviser must take place in circumstances where the legal adviser is acting in their capacity as a legal adviser.

(iii) **The information must be confidential**

Before information can attract legal advice privilege, the document must have been – and must continue to be – confidential between a legal adviser and their client. Privilege will not apply to information known to the legal adviser through sources other than the client, or to information which is not actually confidential.

11. The scope of legal advice privilege is wide. Below is a list of the types of information which may be covered in addition to the legal advice itself.
 - (i) Advice about how best to present evidence falls within the scope of legal advice privilege (see the *Three Rivers District Council* case referred to in **Appendix 1 – Resources**);
 - (ii) Communications where legal advice is sought (including where a client copies a legal adviser in to a piece of correspondence);
 - (iii) Notes made by a legal adviser;
 - (iv) Precognitions (notes of an interview with someone who may be called to give evidence at trial or hearing).
12. Legal advice privilege continues to operate even after the professional relationship between the lawyer and the client has terminated (see the link to the *Hunter* case referred to in **Appendix 1 – Resources**).

Litigation Privilege

13. Litigation privilege (also known as “communications *post litem motam*”) is a distinct aspect of legal professional privilege. It is wider than communications between solicitor and client. It applies to documents created in contemplation of litigation (legal action) and to communications when litigation is either pending or being considered.
14. Litigation privilege applies to documents created by the party contemplating legal action, to expert reports prepared on their behalf and to legal advice given in relation to potential legal action. (Note, however, that there is a specific exception to the rule relating to routine accident reports prepared as a matter of course at the time of, or shortly after, an accident.)
15. The timing of the creation of the information is very important when deciding if litigation privilege applies: a general apprehension of future litigation or possibility that someone might, at some point in the future, raise a court action, is **not** sufficient. See **Appendix 1 - Resources**.
16. Litigation does not actually need to take place for the privilege to apply, and the privilege continues to apply after any litigation has been concluded.

Requests for legal files

17. The scope of litigation privilege is wide, but authorities shouldn't just withhold the entire contents of a legal file on the basis of section 36(1). While the file is likely to include material which is exempt in terms of section 36(1), it does not necessarily follow that every item within the file consists of information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. This means authorities should consider each piece of information in a file to make this assessment.

Who can claim legal professional privilege?

18. It is only the client who has sought or received advice, or on whose behalf documents have been prepared in contemplation of litigation, who can claim legal professional privilege. Legal professional privilege cannot be claimed by the legal adviser who gave the advice or who prepared the document, nor can the legal adviser refuse to disclose it under section 36(1) if the client is happy for the information to be disclosed.

Exceptions to legal professional privilege

19. There are some situations in which legal professional privilege will not apply.

Loss of Confidentiality

20. Privilege in a document may be lost as a result of a previous disclosure. Where the whole of the advice, or a comprehensive summary of the advice, has been disclosed, the advice will no longer be confidential. Where only a part of the advice has been disclosed, the rest will remain privileged. See **Appendix 1 - Resources**.

Waiver

21. Loss of confidentiality is to be distinguished from the more restricted concept of “waiver”. Strictly speaking, waiver exists only in the context of litigation, where one party “deploys” privileged information in support of a particular position or line of argument. This will generally lead to loss of privilege in the whole of that information.

Disclosure for a limited purpose

22. If advice has been disclosed to another person for a particular, limited purpose, the advice may still be privileged. This may be the case where privileged information is disclosed on the condition that it will remain confidential (e.g. where one public authority shares legal advice in confidence with another authority).
23. Authorities can disclose privileged information to others with a common interest in the information without losing confidentiality or waiving privilege. This will arise only where the common interest existed at the time the privileged information was created. See **Appendix 1 - Resources**.

Where does the public interest lie in relation to the information?

24. Where section 36(1) applies, the authority must go on to consider the public interest in relation to the information. The public interest test assesses whether, in all the circumstances of the case, the public interest is better served by disclosing the information or by maintaining the exemption. This involves a balancing exercise. There is an in-built presumption in FOISA that it is in the public interest to disclose information unless a public authority can show why there is a greater public interest in withholding the information.
25. FOISA does not define the term “public interest”, but it has been described as “something which is of serious concern and benefit to the public”. The public interest does not mean what is of interest **to** the public, but what is in the interest **of** the public.
26. The Commissioner has produced separate guidance to assist with the consideration of the public interest test. This is available from the Commissioner’s website. See **Appendix 1 - Resources**.
27. There will always be a strong inherent public interest in maintaining the right to confidentiality of communications between a legal adviser and their client on administration of justice grounds. This was emphasised by the (English and Welsh) High Court in a freedom of information context in *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O’Brien* (see **Appendix 1 - Resources**).
28. Despite the strong inherent public interest in maintaining the right to confidentiality, there may well be circumstances where the public interest in disclosure of information outweighs the public interest in withholding it. In the *Mersey Tunnel Users Association* case (see **Appendix 1 – Resources**), the (UK) Information Rights Tribunal took into account the fact

that there were legitimate questions as to whether the course of action taken by Merseytravel was correct. The Tribunal also considered the age of the legal advice, and the context within which the advice had been given, in coming to its decision. The Tribunal commented that if the issues addressed in the advice do not affect individuals significantly, there is less weight attached to the public interest in non-disclosure.

29. In *Decision 109/2010*, the Commissioner considered in detail where the public interest would lie in disclosing the Scottish Ministers' legal file on the Shirley McKie case. In that case, a fingerprint at a murder scene was identified as belonging to Ms McKie, then a serving police officer. Ms McKie denied the fingerprint was hers and was prosecuted for perjury. The evidence before the jury included evidence that the fingerprint was not that of Ms McKie. The jury unanimously found her not guilty. A number of inquiries subsequently took place into the efficiency and effectiveness of Scotland's fingerprinting service and Ms McKie raised court proceedings against the Ministers for damages. See **Appendix 1 - Resources**.

Section 36(2): actionable breach of confidence

30. Section 36(2) incorporates the Scots law of confidence into FOISA. There are two main tests which have to be fulfilled before the exemption can be applied:
- (i) was the information obtained the information from another person?
 - (ii) would disclosure result in an actionable breach of confidence?

Was the information obtained from another person?

31. In this case, the term "person" has a legal meaning, and includes both living individuals and other legal "persons", such as companies, public authorities, etc.
32. Given that the information must have been obtained from another person, a public authority's internal documents won't be exempt under section 36(2). However, there may be cases where employees of a public authority can be considered to be a separate legal "person" from the public authority, for example in a grievance procedure. See **Appendix 1 - Resources**.
33. Where a contract has been negotiated, the Commissioner is unlikely to consider that the information held by the public authority has been obtained from a third party. The public authority is likely to have actively participated in the creation of the information and the information will not have been "obtained by" the public authority from that third party. See **Appendix 1 - Resources**.

Would disclosure result in an actionable breach of confidence?

34. Disclosure of the information by the public authority must constitute an **actionable** breach of confidence. The fact that information is marked "confidential" will not be enough to show that its disclosure would constitute an actionable breach of confidence. For a claim for breach of confidentiality to be established, there are three main requirements which must be met. All three must be met for a breach of confidence to be actionable. The requirements are as follows:

The information must have the "necessary quality of confidence"

35. The information which can be protected by the law of confidence is wide-ranging (from personal data to information about trade and business) and there will be many relationships

which give rise to duties of confidence. These are some of the things which will need to be considered when deciding whether information has the necessary quality of confidence:

- (i) the information must not be common knowledge; a member of the public would have to apply skill and labour to produce the information;
- (ii) the passage of time will be relevant, particularly for contractual information relating to pricing, which often loses relevance (and any element of confidentiality) with the passage of time;
- (iii) where the information can be ascertained from other information which is in the public domain with relative ease, the necessary quality of confidence may not exist, even if the information was, at one point, confidential. See **Appendix 1 - Resources**.

The public authority must have received the information in circumstances which imposed an obligation on the authority to maintain confidence

- 36. The second part of this test is whether the public authority is under an obligation to maintain confidentiality. This obligation can be either “*express*” or “*implied*”.
- 37. An express obligation will normally be recorded, e.g. in a contract (although it can also be made orally - see **Appendix 1 – Resources**).
- 38. Where an express obligation of confidence exists, it will generally be easy to evidence this. However, it is important to look carefully at the text of a contract or agreement. Sometimes the obligation to keep information might be on the other party, not on the public authority. Often, confidentiality clauses cover only some, but not all, of an agreement.
- 39. The Commissioner expects public authorities to be able to demonstrate good reasons for accepting confidentiality clauses (or other confidentiality restrictions) and to show that its decision to accept the confidentiality obligation was taken in good faith and for proper purposes. Where a public authority has not complied with the Section 60 Code (see **Appendix 1 - Resources**), the Commissioner has the power to issue a practice recommendation under section 44 of FOISA.
- 40. It is also possible that an actionable claim of confidentiality may be *implied* without there being any express statement that the information was provided in confidence. In these circumstances, public authorities should consider things such as:
 - (i) The nature of the information: there may be circumstances where it is generally accepted that certain information is confidential, for example the agreed sale price of a property before the conclusion of missives.
 - (ii) The relationship between the parties: this is also likely to be relevant in considering whether information has been shared in confidence. If the relationship between the parties is, for example, one of doctor/patient or social worker/client, then this makes it more likely that the information was provided in confidence. See **Appendix 1 - Resources**.

Unauthorised disclosure must be to the detriment of the person who communicated the information

- 41. For a breach of confidence to occur, the disclosure must be *unauthorised*, i.e. without the consent of the person who communicated the information. Consent can be express (e.g. through an agreement to disclose) or implied (e.g. where the body which asked for the information to be kept confidential has already put the information into the public domain).

42. Where a request is made for confidential information, public authorities should consider discussing with the person who provided the information whether the information should still be regarded as confidential. (Remember, however, that a request will still have to be responded to within 20 working days, and that it is for the authority to decide whether the exemption should be applied.)
43. Public authorities must also be able to provide evidence that disclosure of the information would cause *detriment* or damage. See **Appendix 1 - Resources**.
44. While detriment will frequently be expressed in financial terms, it does not have to be restricted to such terms. For example, emotional distress may fall within the meaning of detriment. See **Appendix 1 - Resources**.

Defences to an action for breach of confidence

45. The exemption under section 36(2) refers to an “actionable” breach of confidence. The Commissioner takes the view that “actionable” means that the basic requirements for a **successful** legal action appear to be fulfilled. This means that, for the exemption to apply, it should not reasonably be expected that the action would be defeated by one of the established defences to an action for breach of confidence, such as:
 - (i) the obligation relates to information that is useless or trivial;
 - (ii) it can be shown that the information in question was known to the recipient before it was communicated to him/her in confidence;
 - (iii) the information has subsequently become public knowledge; or
 - (iv) withholding the information would be contrary to the public interest

Public interest defence

46. The exemption in section 36(2) is not subject to the public interest test in section 2(1)(b) of FOISA. However, as can be seen from 45(iv) above, the public interest is relevant: the law of confidence provides that an obligation of confidence cannot apply to information where the public interest requires it to be disclosed.
47. The law of confidence recognises that there is a strong public interest in ensuring that people respect confidences (and, unlike the public interest test in FOISA, there is no presumption in favour of disclosure). However, the public interest in maintaining confidences may be outweighed by the public interest in the disclosure of information, for example if enforcing an obligation of confidence would:
 - (i) cover up wrongdoing
 - (ii) allow the public to be misled, or
 - (iii) unjustifiably inhibit public scrutiny of matters of genuine public concern.
48. As a result, where an authority is satisfied that the disclosure of information would lead to an actionable breach of confidence, the authority must go on to consider whether a court would hold that there is a public interest defence in disclosure of the information. If it considers that there would be, the authority should disclose the information.

“Commercial confidentiality”

49. The phrase “commercial confidentiality” is often used when talking about confidential business information, but it is important to note that there is no single exemption in FOISA which covers “commercial confidentiality”.
50. Instead, FOISA draws a distinction between information which is “confidential” in terms of the law, and where disclosure would have a detrimental effect on “commercial interests”. This briefing deals with FOISA’s “confidentiality” exemption only. A separate briefing is available which considers the “commercial interests” exemption under section 33 of FOISA. See **Appendix 1 - Resources**.

Appendices

Appendix 1: Resources

SIC Decisions

Reference	Decision number	Parties	Summary
Section 36(1) Paragraph 10(ii)	087/2006	Elizabeth Marriott and Glasgow City Council	The communication between the client and the legal adviser must take place in circumstances where the legal adviser is acting in their capacity as a legal adviser. The legal adviser may either be in private practice or an in-house solicitor. There may be instances where public authority official is a qualified solicitor but also has other duties (e.g. as a manager). Where advice is sought from that official in the capacity of manager, rather than as legal adviser, then that advice will not be privileged.
Section 36(1) Paragraph 10	132/2006	John Egan and West Dunbartonshire Council	An email to a solicitor in the Council's legal department seeking legal advice attracted legal professional privilege, as did a document copied to the solicitor with additional information on the subject about which the advice was being sought.
Section 36(1) Paragraph 10	001/2007	Lynn Fulton and West Dunbartonshire Council	Notes of telephone calls and summaries of a case file with opinions and suggestions made by a legal adviser are likely to be covered by section 36(1). This might not be the case for covering notes or memos relating to administrative matters which are not confidential in nature.
Section 36(1) Paragraph 10	096/2007	John Sexton and the Scottish Ministers	Precognitions (witness statements) can be privileged.
Section 36(1) Paragraph 15	213/2007	Rory Speirs and East Renfrewshire Council	Mr Speirs asked for a report prepared by the Council in response to an insurance claim he had made. The Council argued that the report was prepared in contemplation of litigation, in that it had previously been informed

Reference	Decision number	Parties	Summary
			by Mr Speirs that he intended to seek legal advice regarding his claim against the Council. We accepted the report was created by the Council after it had received Mr Speirs' insurance claim and after it had been advised that Mr Speirs was considering legal action. We were satisfied the report had been prepared in contemplation of litigation.
Section 36(1) Paragraph 17	146/2007	Alexander Doherty and the Common Services Agency for the Scottish Health Service	The Commissioner concluded that some information contained within a legal file relevant file, including press releases, did not fall within the scope of the section 36(1) exemption.
Section 36(1) Paragraph 20	056/2010	William Lonsdale and the Scottish Further and Higher Education Funding Council	Where legal advice has been partially released into the public domain, that part of the advice will no longer be confidential and so will cease to be privileged.
Section 36(1) Paragraph 23	020/2008	Robert Henery and the Scottish Ministers	A local authority provided a summary of legal advice to COSLA, who then passed it to the Scottish Ministers. It was apparent that the information was shared between these parties on the basis that each had a common interest in it, and there was no expectation that the advice would be further shared beyond these parties. It remained privileged.
Section 36(1) Paragraph 29	109/2010	Iain McKie and the Scottish Ministers	This decision looks at whether the Scottish Ministers' legal file relating to Shirley McKie should be disclosed. Paragraphs 162 to 184 look at the public interest in favour of disclosure and in favour of withholding information which is legally privileged and weigh up the arguments. On balance, the Commissioner concluded that the public interest favoured withholding the information.
Section 36(2) Paragraph 32	001/2007	Lynn Fulton and West Dunbartonshire	A public authority's internal documents will not be exempt in terms of section 36(2), even if they are prepared by one section or department and given to

Reference	Decision number	Parties	Summary
		Council	another. This is because a public authority is a single legal "person". Documents which are generated by an authority will not, therefore, be "obtained from another person" for the purpose of section 36(2).
Section 36(2) Paragraph 32	166/2007	Mr A and the University of Paisley	Employees giving evidence in a grievance procedure are not viewed as "the public authority" when deciding if information had been obtained from a third party, but as an individual in their own right.
Section 36(2) Paragraph 33	088/2007	Association of Dumfries and Galloway Accommodation Providers and Visit Scotland	Information in a contract negotiated between Visit Scotland and the contractor could not be said to have been provided to Visit Scotland by the contractor.
Section 36(2) Paragraph 33	013/2008	Millstream Associates Ltd and East Renfrewshire Council	The price quoted and subsequently paid for the establishment of a procurement portal was information provided to the Council by the supplier, and was not a figure which was subject to negotiation. However, the quote provided to the Council did not indicate what maintenance charge would be levied. The quote listed three pricing options for the annual licence, and the option chosen by the Council could not be determined from the information in the quote. We did not accept that the ongoing cost of the portal was information which was provided by a third party.
Section 36(2) Paragraph 35	073/2007	Orkney Pre-School and Play Association and Orkney Islands Council	We did not accept that a report prepared by an independent consultant had the necessary quality of confidence given that the fact that it was being compiled was common knowledge, and a draft of the report had been discussed with the applicant.
Section 36(2) Paragraph 35	180/2006	Alfred Weir and Fife Council	Mr Weir asked the Council for information from tenders. We were satisfied that the passage of time meant

Reference	Decision number	Parties	Summary
			that the information was much less sensitive than it once had been and that it no longer had the quality of confidence.
Section 36(2) Paragraph 35	049/2006	Western Ferries (Clyde) Ltd and Caledonian MacBrayne Ltd	We were satisfied that the disposal value of a vessel could be accurately determined from information already in the public domain and so did not have the quality of confidence.
Section 36(2) Paragraph Error! Reference source not found.	202/2006	Angus Macdonald and Greater Glasgow NHS Board	We accepted that there had been an oral agreement that no information provided by a private sector hospital in connection with an audit would be shared elsewhere. The information therefore had the quality of confidence.
Section 36(2) Paragraph 40	048/2007	Stella Stephen and Aberdeenshire Council	The agreed sale price of a property had the necessary quality of confidence, and had been supplied in a context which imposed an implied duty of confidentiality, at least until the missives were concluded.
Section 36(2) Paragraph 40	029/2008	Mrs G and Aberdeen City Council	Mrs G asked the Council for information from her late son's social work records. We were satisfied that the son had provided the information to his social worker in confidence – and that the duty of confidence survived the death of her son.
Section 36(2) Paragraph 43	073/2007	Orkney Pre-School and Play Association and Orkney Islands Council	We did not accept that disclosure of a report would cause detriment: the people referred to in the report were either acting in an official capacity or could not be identified.
Section 36(2) Paragraph 43	165/2007	Mr S and the City of Edinburgh Council	We were satisfied that disclosing information from a deceased person's social work record could cause distress – and, as a result, detriment – to surviving relatives.

All of the Commissioner's decisions are available on the Commissioner's website. To view a decision, go to www.itspublicknowledge.info/decisions and enter the relevant decision number (e.g. 032/2014).

If you do not have access to the internet, contact our office to request a copy of any of the Commissioner's briefings or decisions. Our contact details are on the final page.

Other Resources

Paragraph	Resource	Link
10	Lloyds TSB Foundation for Scotland v Lloyds Banking Group	https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0042_Judgment.pdf
10	Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission	http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:62007CJ0550
10	Prezes Urzedu Komunikacji Elektronicznej v European Commission	http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62011CJ0422
11(i)	Three Rivers District Council and Others v Governor and Company of the Bank of England	http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm
12	Hunter v Douglas Reyburn & Co Ltd	1993 SLT 637
26	Commissioner's Guidance - The public interest test	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx
27	Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien	https://www.bailii.org/ew/cases/EWHC/QB/2009/164.html
28	Mersey Tunnel Users Association and Information Commissioner and Merseytravel	http://www.informationtribunal.gov.uk/D/Files/Decision/i46/MerseyTunnelDecision_website.pdf
39	Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs (2016 version)	https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/

Paragraph	Resource	Link
49	Commissioner's Guidance - Section 33: Commercial interests and the economy	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.aspx x

Appendix 2: The exemption

Section 36: Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.
- (2) Information is exempt information if –
 - (a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

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