



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

May 29, 2003

Ms. Kerri T. Galvin  
General Counsel  
Credit Union Department  
914 East Anderson Lane  
Austin, Texas 78752-1699

OR2003-3639

Dear Ms. Galvin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181845.

The Credit Union Department of the State of Texas (the "department") received a request from a former employer for:

1. \*All employee salaries and pay increases given for the last 5 years to date. (this should be simple since there hasn't been much turnover in the last 5 years, a report could be generated of agency employees['] titles and their pay history since employment—the financial records (USPS, DIR system) should indicate whether or not it is longevity pay increase, or merit increase, etc., right?)
2. \*A complete list of employees who have been terminated or resigned since the Department has been under Commissioner Feeney. Please include the race and sex of those persons and their titles.
3. \*Please provide copies of all personal emails and/or correspondence received or sent by the Commissioner, Commissioner's Executive Assistant, Staff Services Officer that are **directly related to personnel issues and any personal business/notes. (please do not include jokes, advertisements, or any of the like)** Include the emails that are directly related to [the requestor] and all correspondence generated on the same by any staff member of the agency.

4. Please provide copies of all time records of the Commissioner, Executive Assistant to the Commissioner and Robert Baxter, Training Manager for the past 3 years.
5. Please provide copies of **all correspondence, electronic or hard copy between the Commissioner, Commissioner's Executive Assistant and Lynette Poole since April 2001 to date that are related to agency policy changes, personnel, evaluations or such related topics.**
6. Please provide the phone records for the following months: October 2002, November 2002 and January 2003.
7. Please provide a copy of the resume and employment applications, absent of personal information of the following persons:
  - a. Harold Feeny
  - b. Lynette Poole
  - c. Robert Baxter
  - d. Cary Cabe
8. \*Please provide the salary increases given in the last 5-6 years to date of all **African-American employees** of the agency. Provide the rating of their performance evaluations for each employee indicated. Also, if applicable, if they are an examiner or if they are in Administration. (this couldn't possibly take long since the employees of color have been few in this agency)
9. \*Please provide the names, dates and postings of all Department personnel that have ever been on extended sick leave or required FMLA or been granted sick leave pool within the last 8 years. Please provide the name of the person that granted and approved the same.
10. \*Please provide **any documentation** initiated by Commissioner Harold Feeny prior to April, 2001, that **shows any policy or procedural change given to office staff or field employees. (this is specifically regarding phone calls, visitors, policy revisions regarding sick leave, LWOP, etc.)** Then provide the documented dates of policy and procedure changes initiated and implemented by the Department since that date.
11. Please provide the agency budget information for the following years: 1990, 1999, 2000-2003.

12. Please provide the names of all those persons involved in the final information and decision to terminate the employment of [the requestor].
13. Please provide the electronic information and/or log in records of those persons using AOL email connections, named, dates and times.

In addition, the requestor made separate requests for:

- [14.] all files regarding employment issues, or various subject matter that pertain to [the requestor and three other individuals] that are held on the H: drive of your computer (Isabel Velasquez), Commissioner Feeney, Linda Clevlen, Robert Baxter or Kerri Galvin for the following years: 2000-2003
- [15.] **the job responsibilities and authority that was given to the Commissioner, Harold Feeney from the time of hire to date. Please provide all sick leave time taken from 2000-2003 on Mr. Robert Baxter.**

The requestor also asks the department to provide the names of “the persons that will be involved in the completion of the request.” Finally, after the department requested a ruling from this office, it received an additional request seeking:

- [16.] notes or correspondence drafted or written by [the department’s general counsel] regarding any and all conversations held between [the general counsel and the requestor] as well as any additional notes of conversations held or conducted by [the general counsel] that are related to [the requestor] and/or any circumstances surrounding the Open Records Request.
- [17.] A complete list of all dates and times General Counsel has spoken with [the requestor] and the context of the conversations.
- [18.] All emails authored by General Counsel regarding [the requestor] since employed with the agency.

You assert that some of the requested information is not “public information” for purposes of the Public Information Act (the “Act”). Alternatively you contend that if such information is subject to the Act, it as well as other portions of the requested information are excepted under sections 552.101, 552.102, 552.103, 552.107, 552.111, and 552.117 of the Government Code. We have considered your arguments and reviewed the submitted sample

information.<sup>1</sup> We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

Initially, we address your contention that some of the requested information is not subject to the Act. You contend that e-mails that are "personal" in nature and AOL logs documenting access to employees' personal e-mail accounts do not constitute "public information" and therefore are not subject to public disclosure under the Act. *See* Gov't Code § 552.021 (indicating that Act is only applicable to "public information"). Section 552.002 defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Information that is collected, assembled, or maintained by a third party may be subject to disclosure under chapter 552 of the Government Code if it is maintained for a governmental body, the governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. *See* Open Records Decision No. 462 (1987).

You state that department policy "allows employees to send and receive personal emails and use the internet on a limited basis during their break and lunch periods." You assert that information so created has "nothing to do with the business of the Department." You argue that, under these circumstances, the "personal" e-mails and AOL logs were not collected, assembled, or maintained in connection with the transaction of any official business of the department, nor were they collected, assembled, or maintained pursuant to any law or ordinance. Based on your comments and our review of the submitted sample of such information, we generally agree that those communications do not relate to the transaction of official department business and therefore do not constitute "public information" of the department. Consequently, the department is not required to disclose personal e-mail communications or AOL logs under chapter 552 of the Government Code. *Cf.* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). We note, however, that the requestor seeks e-mails "directly related to *personnel* issues." (Emphasis added.) Because such e-mails pertain to the transaction of official department business, they constitute "public information" under the Act and are subject to release if no exception under the Act applies.

We next address the scope of the information that the department has submitted for our review. Section 552.301(e)(1)(D) provides that "[a] governmental body that requests an

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<sup>1</sup>We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

attorney general decision . . . must . . . not later than the 15th business day after the date of receiving the written request [for information] submit to the attorney general . . . a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested[.]” You state that you have provided the requestor with most of the budgets sought in item 11 of the request. In addition, you have informed the requestor that the budget information for the year 1990 is no longer available and that the department does not maintain any information responsive to category 17 of the request. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (Act does not require governmental body to disclose information that does not exist at time request is received). We note, however, that you have not provided samples of the information sought by items 1, 2, 4, 6, 7, 8, or 10 of the request. As you have not submitted any information responsive to these portions of the request, we assume you have released it to the requestor. If you have not released any such records, you must do so at this time, to the extent such records exist and contain types of information not found to be confidential in this ruling. *See Gov’t Code* §§ 552.301(a), .302.

We note that the submitted information includes medical records, which are confidential under the Medical Practice Act (the “MPA”). *Occ. Code* §§ 151.001-165.160. Section 159.002 of the Occupations Code provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Medical records must be released upon the patient’s signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *Occ. Code* §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). For your convenience, we have marked the document that is a medical record subject to the MPA.

We now address your claimed exceptions for the submitted samples of information responsive to the remaining categories of the request. Because your argument regarding section 552.103 is the broadest, we address it first. This section provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982).<sup>2</sup> Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records

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<sup>2</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), see Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

Decision No. 361 (1983). Having reviewed your arguments, we find that the department has failed to provide this office with concrete evidence for purposes of section 552.103 that litigation was reasonably anticipated when the department received this request. *See* ORD 361 (fact that potential opposing party has hired attorney and made request for information does not establish that litigation is reasonably anticipated). Thus, no information may be withheld pursuant to section 552.103.

You also contend that some of the requested information is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This exception is designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982); *see also* Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101: the information must 1) contain highly intimate or embarrassing facts about a person's *private* affairs, such that its release would be highly objectionable to a reasonable person, *and* 2) be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision No. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure). In addition, this office has found that the following types of information are excepted from required public disclosure under privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 545 (1990), 523 (1989) (individual's mortgage payments, assets, bills, and credit history), certain personal choices relating to financial transactions between the individual and the governmental body, *see* Open Records Decision No. 600 (1992) (federal tax Form W-4; designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

Having reviewed the submitted documents, we agree that some of the information you have marked is highly intimate or embarrassing and not of legitimate public interest and must therefore be withheld pursuant to section 552.102. We conclude, however, that other information you have marked is of legitimate public interest and thus may not be withheld on pursuant to section 552.102. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). We have marked the types of information that must be withheld pursuant to this exception.

You also assert that portions of the requested information are excepted under section 552.107. Section 552.107(1), which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the

governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

Having considered your arguments and the information you seek to withhold under this exception, we agree that some of the information constitutes privileged attorney-client communications that may be withheld under section 552.107(1). However, the documents you seek to withhold also include handwritten notes. These notes do not reflect privileged communications. In addition, the notes themselves do not indicate, and you have not otherwise explained, whether they were communicated among privileged parties. We therefore conclude that such handwritten notes may not be withheld on the basis of section 552.107.

You also assert that the handwritten notes constitute attorney work product. A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *Open Records Decision No. 647* (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *Open Records Decision No. 647 at 4* (1996). The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions, and legal theories.

The first requirement that must be met to consider information "attorney work product" is that the information must have been created for trial or in anticipation of litigation. In order for this office to conclude that information was created in anticipation of litigation, we must be satisfied that

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

*See National Tank*, 851 S.W.2d at 207. A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204.

The second requirement that must be met is that the work product “consists of or tends to reveal the thought processes of an attorney in the civil litigation process.” Open Records Decision No. 647 at 4 (1996). Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *Id.* Having considered your representations and reviewed the information at issue, we agree that the handwritten notes constitute attorney work product and may therefore be withheld pursuant to section 552.111.

You also contend that some of the requested information is excepted from disclosure under section 552.117 of the Government Code. This section excepts from disclosure the home addresses, home telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, pursuant to section 552.117(1), the department must withhold the above-listed information for all current or former officials or employees who elected, prior to the district's receipt of this request, to keep such information confidential. The department may not withhold such information under section 552.117 for anyone who did not make a timely election. We have marked the types of information that must be withheld if a timely election was made.

Regardless of whether the employees at issue made timely elections under section 552.024, their social security numbers may be excepted from disclosure under section 552.101. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security numbers, the department should ensure that such numbers are not obtained or maintained pursuant to any provision of law enacted on or after October 1, 1990.

Finally, we note that the submitted information includes e-mail addresses of members of the public. Section 552.137 of the Government Code provides that “[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act].” We note that section 552.137 does not apply to a government employee’s work e-mail address or a business’s general e-mail address or website address. Unless the individual members of the public have affirmatively consented to release of their e-mail addresses, the department must withhold the types of e-mail addresses that we have marked. *See* Gov’t Code § 552.137(b).

In summary, personal e-mails that do not relate to department business and AOL logs indicating that employees have accessed their personal e-mail accounts do not constitute public information and are therefore not subject to disclosure under the Act. Medical records such as those we have marked may only be released in accordance with the MPA. In addition, we have marked the types of information that must be withheld under sections 552.102 and 552.137 as well as under section 552.117, if a timely election was made. We have also marked the types of information that may be withheld pursuant to sections 552.107 and 552.111. Social security numbers obtained or maintained pursuant to a law enacted on or after October 1, 1990 must be withheld. All other types of requested information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

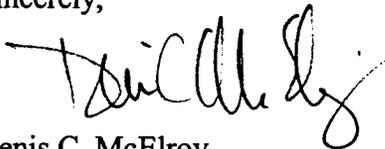
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General  
Open Records Division

DCM/lmt

Ref: ID# 181845

Enc. Submitted documents

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