REQUEST UNDER THE FREEDOM OF INFORMATION ACT

March 3, 2015

Office of Information Programs and Services
A/GIS/IPS/RL
U.S. Department of State
Washington, D.C. 20522-8100

BY FAX — (202) 261-8579

RE: Request for Certain Agency Records — IT Training confirmation for Hillary Clinton

Dear State Department FOIA Staff,

On behalf of the Competitive Enterprise Institute (CEI), please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq. CEI is a non-profit public policy institute organized under section 501(c)3 of the tax code and with research, investigative journalism and publication functions, as well as an active transparency initiative seeking public records relating to how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

Please provide us within twenty working days[1] copies of copies of all records meeting the description below that are dated from January 1, 2009 through February 1, 2013, inclusive:

1) all documentation in State's possession that training on State information technology (IT) systems was provided to and/or completed by Hillary Clinton. These include but are not limited to, *e.g.*, performance awards, certificates of completion of and/or signed acknowledgement of receiving training on, *e.g.*, Outlook, Oracle Collaboration Suite, IBM Sametime, Skillport, or other email and/or IT policy and practice.

2) similarly, we request any documentation indicating that Mrs. Clinton acknowledged, understood, accepted or otherwise agreed to State Department policies regarding use of electronic communications and/or otherwise information technology.

3) all documentation in State's possession that Mrs. Clinton at any time at State had text messaging capabilities on her phone/personal data assistant (PDA). One page from her State Department phone bill indicating text messaging activity is sufficient.

4) all documentation in State's possession that Ms. Clinton at any time at State had instant message (IM) client software installed on her computer(s)/workstation(s) or other equipment.

5) All documentation in State's possession that Mrs. Clinton was ever a registered user of any State IM system(s)/network(s) or system(s)/network(s) that include or provide IM.

According to information in the public record these IT certifications of federal employees occur annually.

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[1] *See Citizens for Responsible Ethics in Washington v. Federal Election Commission,* 711 F.3d 180, 186 (D.C. Cir. 2013) and discussion, infra.

Federal practice and State's website indicate that either the Office of the Secretary of the Deputy Secretary for Management ad Resources are the most likely to have created and possess responsive records. That is not a request that you limit your search there if this suggestion seeking to assist State's search is not accurate.

Public Interest in and Relevance of Responsive Records

As State has already addressed to some extent in *e.g.*, daily press briefings and otherwise is aware, the use by senior public officials of non-official email accounts for work-related correspondence is a topic of great public interest. This has been the case since, at minimum, the exposure that former EPA chief Lisa Jackson used an email account in the name of a fictitious EPA employee, Richard Windsor, and this interest has continued through this week's revelation of former Secretary of State Hillary Clinton's use of such an account for work-related correspondence, obviously also in violation of federal law and policy.

We believe no citations to any such coverage is required to establish this point given the high-profile nature of these revelations.

State Must Err on the Side of Disclosure

It is well-settled that Congress, through FOIA, "sought 'to open agency action to the light of public scrutiny.'" *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (*quoting Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the, "'general philosophy of full agency disclosure'" that animates the statute. *Rose*, 425 U.S. at 360 (*quoting* S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). Accordingly, when an agency withholds requested documents, the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v.*

Merrill, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *Consumer Fed'n of America v. Dep't of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996).

These disclosure obligations are to be accorded added weight in light of the recent Presidential directive to executive agencies to comply with FOIA to the fullest extent of the law. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As the President emphasized, "a democracy requires accountability, and accountability requires transparency," and "the Freedom of Information Act… is the most prominent expression of a profound national commitment to ensuring open Government." Accordingly, the President has directed that FOIA "be administered with a clear presumption: In the face of doubt, openness prevails" and that a "presumption of disclosure should be applied to all decisions involving FOIA."

<u>Request for Fee Waiver</u>

This discussion through page 16 is detailed as a result of our recent experience of agencies improperly using denial of fee waivers to impose an economic barrier to access, an improper means of delaying or otherwise denying access to public records, despite our history of regularly

obtaining fee waivers. We are not alone in this experience.[2] It **is only relevant if State considers denying our fee waiver request**.

Disclosure would substantially contribute to the public at large's understanding of governmental operations or activities, on a matter of demonstrable public interest.

CEI's principal request for waiver or reduction of all costs is pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge... if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester").

CEI does not seek these records for a commercial purpose. Requester is organized and recognized by the Internal Revenue Service as 501(c)3 educational organizations. As such, requester also has no commercial interest possible in these records. If no commercial interest exists, an assessment of that non-existent interest is not required in any balancing test with the public's interest.

As a non-commercial requester, CEI is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. Nov. 30, 2010).

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[2] *See* February 21, 2012 letter from public interest or transparency groups to four federal agencies requesting records regarding a newly developed pattern of fee waiver denials and imposition of "exorbitant fees" under FOIA as a barrier to access, available at http://images.politico.com/global/2012/03/acluefffeewvrfoialtr.pdf; *see also National Security Counselors v. CIA* (CV: 12-cv-00284(BAH), filed D.D.C Feb. 22, 2012); *see also* "Groups Protest CIA's Covert Attack on Public Access," OpentheGovernment.org, February 23, 2012, http://www.openthegovernment.org/node/3372.

The public interest fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987). The Requester need not demonstrate that the records would contain any particular evidence, such as of misconduct. Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir 2003).

FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. "The legislative history of the fee waiver provision reveals that it was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,' in particular those from journalists, scholars and nonprofit public interest groups." *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D.Mass. 1984); S. COMM. ON THE JUDICIARY, AMENDING the FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).[3]

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[3] This was grounded in the recognition that the two plaintiffs in that merged appeal were, like Requester, public interest non-profits that "rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." *Better Gov't v. State*. They therefore, like Requester, "routinely make FOIA requests that potentially would not be made absent a fee waiver provision", requiring the court to consider the "Congressional determination that such constraints should not impede the access to information for appellants such as these." *Id*.

"This is in keeping with the statute's purpose, which is 'to remove the roadblocks and technicalities which have been used by… agencies to deny waivers.'" *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th. Cir. 1987) (quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy).

Requester's ability -- as well as many nonprofit organizations, educational institutions and news media that will benefit from disclosure -- to utilize FOIA depends on their ability to obtain fee waivers. For this reason, "Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the 'public benefit' test for FOIA fee waivers. This waiver provision was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,' in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups. Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as '"toll gates" on the public access road to information.'" *Better Gov't Ass'n v. Department of State*.

As the *Better Government* court also recognized, public interest groups employ FOIA for activities "essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions."

Congress enacted FOIA clearly intending that "fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." *Ettlinger v. FBI*, citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at 8. Improper refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Ettlinger v. FBI.*

Therefore, "insofar as… [agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information." *Better Gov't v. State* (internal citations omitted). The courts therefore will not permit such application of FOIA requirements that "'chill' the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage." *Id*. As such, agency implementing regulations may not facially or in practice interpret FOIA's fee waiver provision in a way creating a fee barrier for requester.

Courts have noted FOIA's legislative history to find that a fee waiver request is likely to pass muster "if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286.

This information request meets that description, for reasons both obvious and specified.

1) **The subject matter of the requested records specifically concerns identifiable operations or activities of the government**. Potentially responsive records will inform the

public about this highly newsworthy topic and this unprecedented exclusive use of an email account(s) owned by the Secretary, to the exclusion of the legally required email account.

As noted, the subject of this request has become the subject of substantial media interest, as well as congressional requests for explanation and information.

Records responsive to this request therefore would contribute significantly to public understanding of the operations or activities of the government about which there is no other information in the public domain.

If with no small amount of irony, release of these records also directly relates to high-level promises by the President of the United States and the Attorney General to be "the most transparent administration in history."[4] This transparency promise, in its serial incarnations, demanded and spawned widespread media coverage, and then of the reality of the Administration's transparency efforts, and numerous transparency-oriented groups reporting on this performance, prompting further media and public interest (*see*, *e.g.*, an internet search of "study Obama transparency").

On its face, therefore, information providing further perspective to or shedding light on these matters satisfies FOIA's test.

For the aforementioned reasons, potentially responsive records unquestionably reflect "identifiable operations or activities of the government" with a connection that is direct and clear, not remote.

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[4] Jonathan Easley, *Obama says his is 'most transparent administration' ever*, THE HILL, Feb. 14, 2013, http://thehill.com/blogs/blog-briefing-room/news/283335-obama-this-is-the-most-transparent-administration-in-history.

The Department of Justice Freedom of Information Act Guide expressly concedes that this threshold is easily met. There can be no question that this is such a case.

2) **Requester intends to broadly disseminate responsive information**. As demonstrated herein including in the litany of exemplars of newsworthy FOIA activity requester has generated with public information, and requester has both the intent and the ability to convey any information obtained through this request to the public.

CEI is regularly cited in newspapers and trade and political publications, and the undersigned discusses his CEI-related FOIA work and findings on widely read, viewed and heard electronic media, representing a practice of broadly disseminating public information obtained under FOIA, which practice requester intends to continue in the instant matter. As further established herein, this is an integral part of CEI's mission and operations.

3) **Disclosure is "likely to contribute" to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in relation to the subject matter of the request.** Requester intends to broadly disseminate responsive information. The requested records contain information of significant and increasing public interest. This is not subject to reasonable dispute. Broadly disseminating information of great public interest and informative value requester assures it is "likely to contribute to an understanding of Federal government operations or activities."

However, **the Department of Justice's Freedom of Information Act Guide makes it clear that, in the DoJ's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain**. There is no reasonable claim to deny that, to the extent the requested

information exists, it is likely that the only FOIA-covered party holding it is State. Inherently the correspondence is about State-related work and is subject to FOIA. It is therefore clear that the requested records are "likely to contribute" to an understanding of your agency's decisions because they are not otherwise accessible other than through a FOIA request.

Thus, disclosure and dissemination of this information will facilitate meaningful public participation in the policy debate, therefore fulfilling the requirement that the documents requested be "meaningfully informative" and "likely to contribute" to an understanding of your agency's dealings.

4) **The disclosure will contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons.** Requester has an established practice of utilizing FOIA to educate the public, lawmakers, and news media about the government's operations and, in particular and as illustrated in detail herein, have brought to light important information about policies grounded in energy and environmental policy.

CEI is dedicated to and has a documented record of promoting the public interest, advocating sensible policies to protect human health and the environment, broadly disseminating public information, and routinely receiving fee waivers under FOIA.

With a demonstrated interest and fast-growing reputation for and record in the relevant policy debates and expertise in the subject of energy- and environment-related regulatory policies, and the issue of governmental transparency, CEI unquestionably has the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the "public-at-large."

5) **The disclosure will contribute "significantly" to public understanding of government operations or activities**. *We repeat and incorporate here by reference the arguments above from the discussion of how disclosure is "likely to contribute" to an understanding of specific government operations or activities*.

As previously explained, the public has no source of information on this issue.

Because there is no such information or any such analysis in existence, any increase in public understanding of this issue is a significant contribution to this increasingly important issue as regards the operation and function of government.

Because CEI has no commercial interests of any kind, disclosure can only result in serving the needs of the public interest.

As such, requester has stated "with reasonable specificity that their request pertains to operations of the government," that they intend to broadly disseminate responsive records. "[T]he informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

Finally, we note that State has waived requester CEI's fees for substantial productions arising from requests expressing the same intention, even using the same language as used in the instant request. This is also true of other federal agencies.[5]

For all of these reasons, CEI's fees should be waived in the instant matter.

2) **Alternately, CEI qualifies as a media organization for purposes of fee waiver**

The provisions for determining whether a requesting party is a representative of the news media, and the "significant public interest" provision, are not mutually exclusive. Again, as CEI is a non-commercial requester, it is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*. Alternately and only in the event State refuses to waive our fees under the "significant public interest" test, which we will then appeal while requesting State proceed with processing on the grounds that we are a media organization, we request a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by.... a representative of the news media…").

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[5] *See, e.g.*, no fees required by other agencies for processing often substantial numbers of records on the same or nearly the same but less robust waiver-request language include: **DoI** OS-2012-00113, OS-2012-00124, OS-2012-00172, FWS-2012-00380, BLM-2014-00004, BLM-2012-016, BLM: EFTS 2012-00264, CASO 2012-00278, NVSO 2012-00277; **NOAA** 2013-001089, 2013-000297, 2013-000298, 2010-0199, and "Peterson-Stocker letter" FOIA (August 6, 2012 request, no tracking number assigned, records produced); **DoL** (689053, 689056, 691856 (all from 2012)); **FERC** 14-10; **DoE** HQ-2010-01442-F, 2010-00825-F, HQ-2011-01846, HQ-2012-00351-F, HQ-2014-00161-F, HQ-2010-0096-F, GO-09-060, GO-12-185, HQ-2012-00707-F; **NSF** (10-141); **OSTP** 12-21, 12-43, 12-45, 14-02.

However, we note that as the documents requested are most certainly available electronically in their original format, and regardless can easily be moved to a disc or flash drive, or simply emailed, there are no copying costs.

Requester's publishing practices are and intentions to broadly disseminate are well-documented and in fulfillment of CEI's mission, set forth *supra*.

Also, the federal government has already acknowledged that CEI qualifies as a media organization under FOIA.[6]

The key to "media" fee waiver is whether a group publishes, as CEI most surely does. *See supra*. In *National Security Archive v. Department of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), the D.C. Circuit wrote:

> The relevant legislative history is simple to state: because one of the purposes of FIRA is to encourage the dissemination of information in Government files, as Senator Leahy (a sponsor) said: "It is critical that the phrase `representative of the news media' be broadly interpreted if the act is to work as expected.... If fact, *any person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a `representative of the news media.'"*

Id. at 1385-86 (emphasis in original).

As the court in *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) noted, this test is met not only by outlets in the business of publishing such as newspapers; instead, citing to the *National Security Archives* court, it noted one key fact is determinative, the "*plan to act, in essence, as a publisher*, both in print and other media." *EPIC v. DOD,* 241 F.Supp.2d at 10 (*emphases* added). "In short, the court of appeals in National Security Archive held that '[a] representative of the news media is, in essence, a person or entity

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[6] *See e.g.*, Treasury FOIA Nos. 2012-08-053, 2012-08-054.

that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.'" *Id*. at 11. *See also, Media Access Project v. FCC*, 883 F.2d 1063, 1065 (D.C. Cir. 1989).

For these reasons, CEI plainly qualifies as a "representative of the news media" under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the pubic.

The information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with State activities in this controversial area, or as the Supreme Court once noted, what their government is up to. The requested information is of great importance to this emerging issue of senior officials using non-official emails accounts, including for sensitive correspondence.

For these reasons, requester qualifies as a "representative[] of the news media" under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the pubic. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA, including after the 2007 amendments to FOIA. *See ACLU of Washington v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women's Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Accordingly, any fees charged must be limited to duplication costs. The records requested are available electronically and are requested in electronic format, so there should be no costs.

Conclusion

We expect State to release within the statutory period of time all segregable portions of responsive records containing properly exempt information, and to provide information that may be withheld under FOIA's discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) ("The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears).

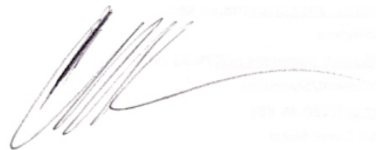
We request State provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). State must at least inform us of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions; FOIA specifically requires State to immediately notify CEI with a particularized and substantive determination, and of its determination and its reasoning, as well as CEI's right to appeal; further, FOIA's unusual circumstances safety valve to extend time to make a

determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013). *See also*, *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at *14 (D.D.C. Sept. 28, 2011)(addressing "the statutory requirement that [agencies] provide estimated dates of completion").

We request a rolling production of records, such that the agency furnishes records to my attention as soon as they are identified, preferably electronically, but as needed then to my attention, at the address below. We inform State of our intention to protect our appellate rights on this matter at the earliest date should State not comply with FOIA per, *e.g.*, *CREW v. FEC*.

If you have any questions please do not hesitate to contact me. We look forward to your timely response.

Sincerely,



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