



# RIGHT TO KNOW LAW AND GOVERNMENTAL RECORDS

Records



Stephen C. Buckley, Legal Services Counsel  
Natch Greyes, Municipal Services Counsel

June 22, 2021

# Today's Presenters



*Stephen Buckley*  
*Legal Services Counsel*



*Natch Greyes*  
*Municipal Services Counsel*

# How Do I Ask a Question?



To ask a question:

1. Type your question into the Q&A box. Click **Send**.

**Note:** Check **Send Anonymously** if you do not want your name attached to your question in the Q&A.

2. If the host replies via the Q&A, you will see a reply in the Q&A window.

A screenshot of a web-based Q&A interface. The window title is 'Q&A'. It shows a question and an answer. The question is 'What happens when I raise my hand?' asked at 18:03. The answer is 'I can take you off of mute.' by Molly Parker at 18:04. Below the answer is a text input field with the placeholder 'Please input your question'. At the bottom left is a checkbox labeled 'Send Anonymously' which is unchecked. At the bottom right is a blue 'Send' button.

Text	Time
<b>You asked:</b> What happens when I raise my hand?	18:03
<b>Molly Parker answered:</b> I can take you off of mute.	18:04

Please input your question

Send Anonymously Send

The chat function for this workshop has been disabled.

In order to ask a question of our host or a panelist, please refer to graphic.

Once your question has been answered, it will then appear under the *Answered* tab.

# NHMA's Legal Advisory Services



Open 8:30 a.m. - 4:30 p.m.

- Email: [legalinquiries@nhmunicipal.org](mailto:legalinquiries@nhmunicipal.org)
- Phone: 603-224-7447

Provide general legal advice

- Not comprehensive legal review of documents
- Not drafting individualized ordinances or charters
- Not reviewing specific applications before local boards
- Not settle intra-municipal disputes

Goal: Response w/in 48 hours



# Governmental Records & The Right-to-Know Law

# Governmental Records

STEP 1: Is it a  
*Governmental Record?*

STEP 2: Is the record  
exempt from disclosure?

STEP 3: Make available  
non-exempt records.

# Is it a Governmental Record? RSA 91-A:1-a

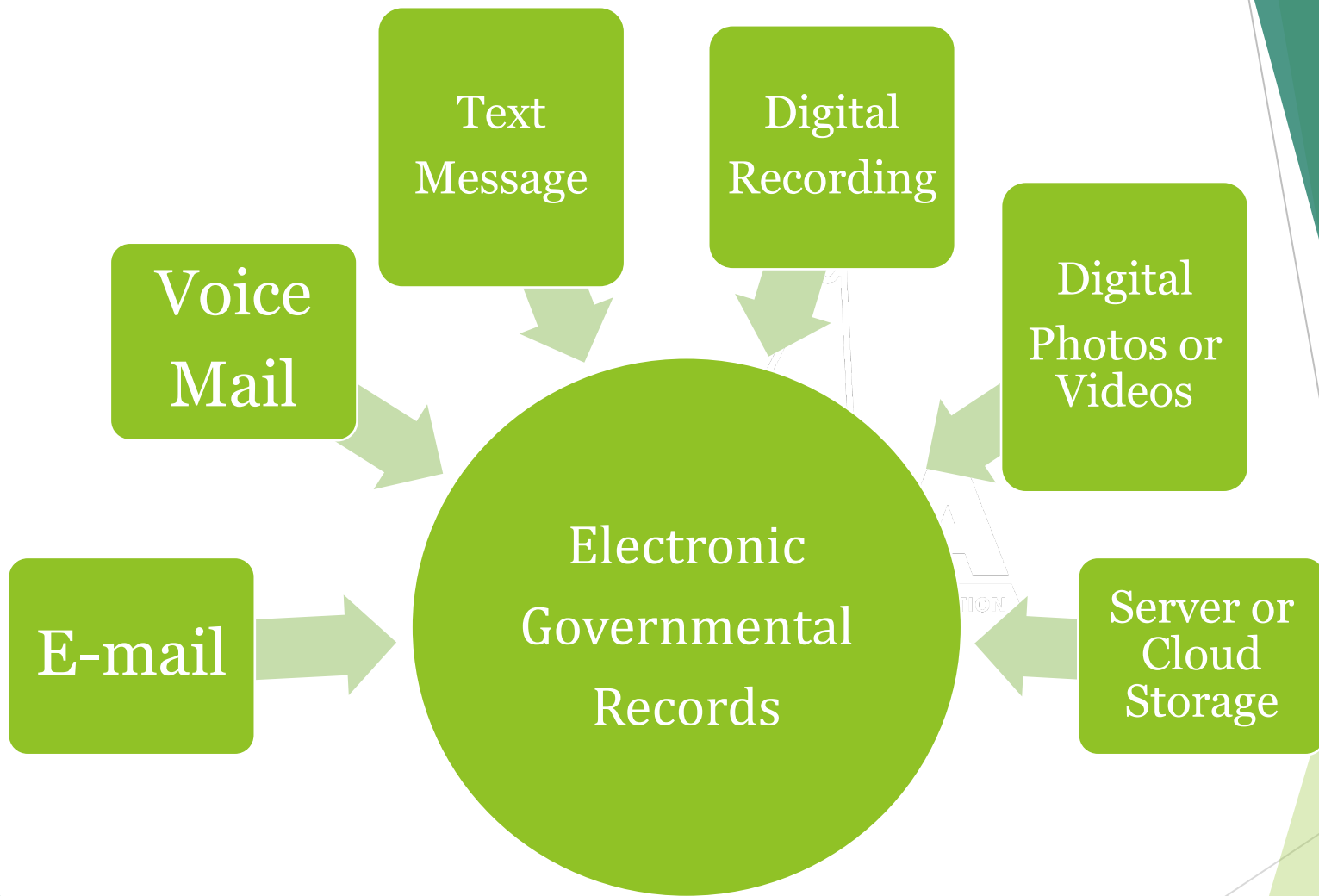
Any information

- created
- accepted, or
- obtained

By, or on behalf of,

- any public body, or a quorum or majority thereof or
- any public agency

in furtherance of its  
official function





# Mandated Access to Certain Records



Employee separation payments if in addition to regular salary, or accrued vacation or sick time - 91-A:4, I-a



Meeting minute raw materials available after completion of public meeting - 91-A:4, II



All lawsuit settlements on file with town clerk and available for public inspection for 10 years - 91-A:4, VI

# Exemptions to Disclosure of Governmental Records

## General Standards Governing Exemptions - RSA 91-A:5



- ▶ RSA 91-A:5 provides a list of records categorically exempt from disclosure; master jury list or teacher certification records.
- ▶ Some statutory exemptions require detailed analysis, such as records whose disclosure would constitute invasion of privacy.
- ▶ The Right-to-Know Law's purpose is to provide the utmost information to the public about what its government is up to. If disclosing the information does not serve this purpose, disclosure may not be required.
- ▶ When a public body or agency seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to avoid nondisclosure.

# “Internal Personnel Practices”

## RSA 91-A:5, IV



- ▶ Applies to governmental records that pertain to rules and practices dealing with employee relations or human resources, including hiring and firing, personnel rules, discipline, compensation and benefits.
- ▶ Recent Reinterpretation of Law by N.H. Supreme Court
- ▶ Formerly: “Internal Personnel Practices” was a fairly broad category separate and apart from any privacy balancing test.
  - ▶ Includes: Evaluation sheets for potential employees and answers; investigation reports of investigators hired by employers to investigate employees.
- ▶ Now: “Internal Personnel Practices” is another privacy balancing test.

# Union Leader v. Salem

If governmental records are properly classified as “internal personnel practices” then whether such records are subject to disclosure depends on evaluating whether that disclosure would constitute an invasion of privacy.

- ▶ *First, evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know Law mandates disclosure.*
- ▶ *Second, assess the public's interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government.*
- ▶ *Finally, balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure.*

# Seacoast Online v. Portsmouth



- ▶ Superior Court decision that denied public access to an arbitration ruling concerning the dismissal of a Portsmouth police office
- ▶ The NH Supreme Court overruled its decision in *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993) to the extent that decision too broadly interpreted the “internal personnel practices” exemption under RSA 91-A:5, IV.
- ▶ Henceforth, the “internal personnel practices” exemption only applies to records pertaining to the internal rules and practices governing an agency’s operations and employee relations, and not information concerning the performance of a particular employee.
- ▶ The internal personal practices exemption in RSA 91-A:5, IV only applies to matters that are inherently minor or trivial, such as rules regarding the use of parking facilities or the regulation of lunch hours.

# Provenza v. Canaan



- ▶ Provenza sought to prevent the public disclosure of an internal investigative report that had exonerated him from a claim of excessive force arising out of a traffic stop.
- ▶ **Superior Court concluded that:**
  - ▶ Information concerning purely private details about a person who happens to work for the government is very different from details concerning the individual's conduct in his capacity as a government employee.
  - ▶ There is a compelling public interest supporting release of the internal investigation - enabling the public to evaluate the integrity of the Canaan Police Department's internal affairs investigation of the incident
    - ▶ Are citizen complaints about police officer conduct taken seriously?
    - ▶ Was the internal investigation process fair the Provenza?
    - ▶ Transparency over police conduct investigations helps ensure public confidence in local police departments

# Confidential, Commercial or Financial Information RSA 91-A:5, IV



- ▶ This determination must be made objectively and should not be based on the subjective expectations of the party generating it.

- ▶ The emphasis placed on the potential harm that will result from disclosure, rather than simply promises of confidentiality, or whether the information has customarily been regarded as confidential.

# Invasion of Privacy

## RSA 91-A:5, IV

Private	Evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know Law mandates disclosure.
Public	Assess the public's interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government.
Balance	Balance the public's interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure.



# Drafts & Notes

## Preliminary Drafts - RSA 91-A:5, IX -

- “[N]ot in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.”

## Personal Notes - RSA 91-A:5, VIII -

- “Any notes or other materials made for personal use that do not have an official purpose are exempt from disclosure.”

# Law Enforcement Records?

## *Use FOIA*



- ▶ Factor A: Interfere with law enforcement proceedings
- ▶ Factor B: Interfere with fair trial
- ▶ Factor C: Invasion of privacy
- ▶ Factor D: Confidential sources
- ▶ Factor E: Disclosing investigative techniques and procedures
- ▶ Factor F: Endangering life or safety

# Body Worn Cameras (BWCs)

RSA 105-D

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graph TD; A[RSA 105-D] --> B[RSA 91-A:5: Recordings exempt from disclosure, unless  
Restraint/use of force | Discharge of firearm | Felony-level arrest]; B --> C[... unless it constitutes an invasion of privacy or is otherwise exempt from disclosure];
```

RSA 91-A:5: Recordings exempt from disclosure, unless

Restraint/use of force

Discharge of firearm

Felony-level arrest

... unless it constitutes an invasion of privacy or is otherwise exempt from disclosure

# IT Security

As of Aug. 4, 2020, RSA 91-A:5 was amended by adding a new paragraph XI, providing that records pertain to information technology systems are exempt from disclosure under the Right-to-Know Law if release of those records would disclose security details that would aid an attempted security breach or circumvention of law.

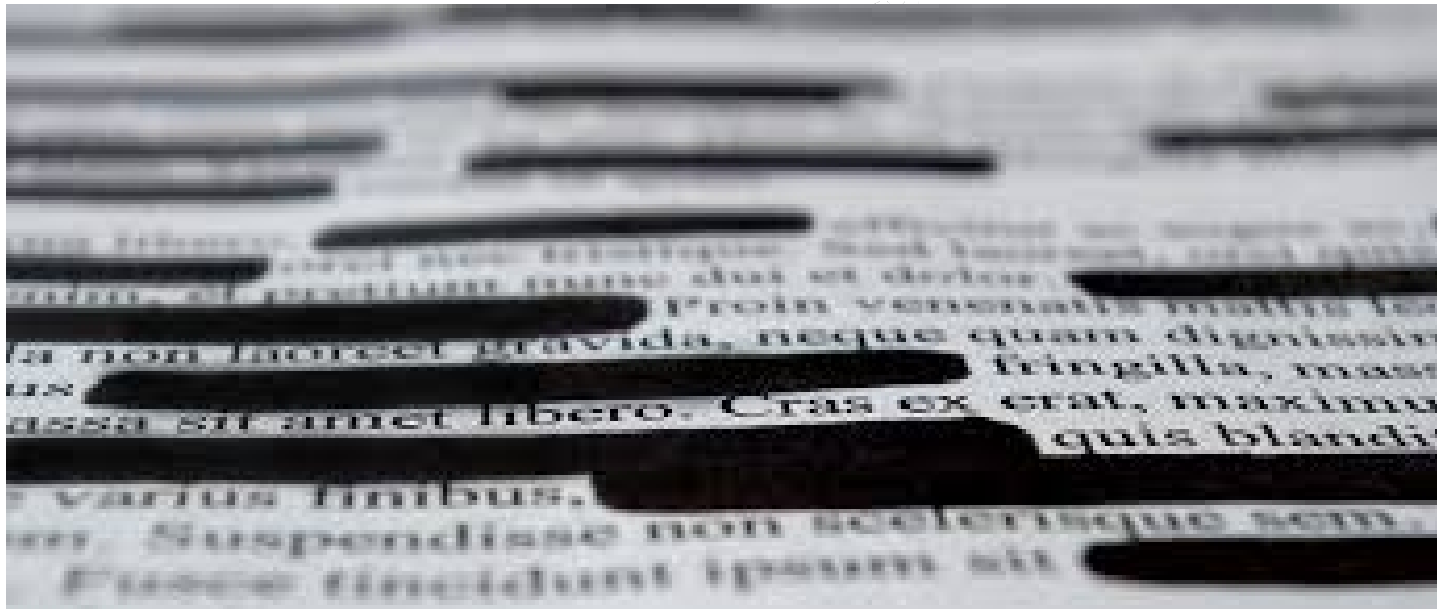


Very limited exemption. Applies, essentially, to the security protocols and measures installed on municipally owned systems.



Attempt to limit hackability of municipal systems.

# Redact Exempt Information



# Basics of Record Production



Records must be provided immediately *only* when they are immediately available for release.



RTK *does not* give citizens the right to review records in any quantity and wherever kept immediately upon demand.

NEW HAMPSHIRE MUNICIPAL ASSOCIATION



Requiring appointment to review records is permitted.



RTK does not require document “compilation.”

# Beginning the Process



Request must “reasonably describe” the record that is to be produced.

May require the municipality to clarify intent. *See Salcetti v. City of Keene*, No. 2019-0217 (N.H. June 3, 2020).



Search must be reasonably calculated to uncover relevant records.



Don't have to compile, cross reference, or assemble records, i.e. don't have to create records that don't exist.

# We have 5 days...



*...right?*



# No flat fees!



- ▶ **ONLY REASONABLE FEES ARE ALLOWED!**
- ▶ **RSA 91-A:4, IV**
- ▶ **New Case!**
  - *Paul Martin v. Rochester* - Court rules that the city's public records copying fee of fifty cents per page for the first ten pages and then ten cents per page did reflect the "actual cost."



# “Something” w/in 5 Days



- ▶ As of Jan. 1, 2020, municipalities must:
  - ▶ Provide a written statement of time necessary to determine whether request granted or denied; AND
  - ▶ *Provide a reason for the delay!*
  - ▶ Amendment to RSA 91-A:4, IV - HB 396 - 2019 NH Laws Chapter 107
- ▶ NHMA Suggestion for Reason for Delay -
  - ▶ Need time to determine whether or not record exists;
  - ▶ Need time to determine whether it is disclosable;
  - ▶ If disclosable, need time to determine how much time it will take to make the requested records ready for review or copying.

# Production of Electronic Records

- ▶ Green v. SAU #55: Electronic Records Produced Electronically.
- ▶ 91-A:4, IV: . . . . No fee shall be charged for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of governmental records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.
- ▶ Taylor v. SAU #55: School Administrative Unit's policy requiring use of a thumb drive to produce electronic records was valid under The Right-to-Know Law.



# Records Retention



*RSA 33-A:3-a* contains 156 categories of records to be retained.



Records retained for the prescribed period.



Once the retention period has expired records may be discarded, but if still available must be produced.

# Recordings of Meetings

Not required



Use and discard



Disclose if they exist

# Archive Paper Records in PDF/A?

*Any* municipal records in paper form listed in RSA 33-A:3-a may be transferred to electronic form (PDF/A Format ONLY), and the original paper records may be disposed of as the municipality chooses.



# Deletion of Electronic Governmental Records



A governmental record in electronic form is no longer required to be disclosed once it has been “initially and legally deleted.” RSA 91-A:4, III-b.

A record can be “legally deleted” if it is not subject to a retention period, or if the required retention period for that record has expired.

# How are Violations of RSA Chapter 91-A Enforced?



No enforcement agency (currently)



“Aggrieved person”



Lawsuit



RSA 91-A:7, :8



# Remedies for Violations



- ▶ Attorney's fees and/or costs to petitioner
- ▶ Invalidation of an action
- ▶ Civil penalty against an individual officer, employee, or other official for bad faith violations
- ▶ Injunction
- ▶ Remedial training
- ▶ Knowing destruction: misdemeanor
- ▶ Attorney's fees and costs may also be awarded to a public body, agency, employee, or official when the lawsuit was brought in bad faith, or was frivolous, unjust, vexatious, wanton, or oppressive

# Main Takeaways



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Every citizen can request records. \*

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The record request must be “reasonably described.” RSA 91-A:4, IV.

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Any search for records must be reasonably calculated to uncover relevant documents.

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There is no obligation to compile, cross reference or assemble records.

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Requiring a citizen make an appointment to review records is permitted.

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When denying access provide written reasons.

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Redact exempt information

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Reasonable fees allowed

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Is it really deleted? RSA 91-A:4, III-b

# Join Us for Weekly Membership Call



## WEEKLY MEMBERSHIP CALL

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*Please Join Us!*



## FRIDAYS AT 1:00 PM IN MAY AND JUNE!

NHMA's legal services and government affairs attorneys host a weekly call for municipal officials and employees on municipal issues and concerns. All member officials from member municipalities are encouraged to participate. The purpose of the call is to learn about continuing and new issues municipalities are facing, as well as to try to answer your questions.



[Get TEAMS Invite Here!](#)

# UPCOMING VIRTUAL WORKSHOP

The advertisement graphic is set against a background of a 3D illustration of two figures in business suits pulling a large, dark grey rectangular block up a set of green steps. On the left side of the graphic, the Drummond Woodsum logo is displayed in red and grey, with "ATTORNEYS AT LAW" written below it. Below the logo is a green circular icon containing three stylized human figures, with the text "Collective Bargaining" written in white on a green rectangular background below the icon.

**DrummondWoodsum**  
ATTORNEYS AT LAW

## Collective Bargaining Virtual Workshop

9:00 am - 12:00 pm, Tuesday, June 29, 2021. Join Drummond Woodsum attorneys in this half-day workshop to assist town, city and county negotiators in preparing for the challenges of collective bargaining. Costs \$55.00

**REGISTER TODAY!**

**REGISTRATION OPEN**

# COMPLIMENTARY WEBINARS



**GET REAL! Learn More About Race, Equity and Leadership!**

In partnership with NLC's Race, Equity and Leadership (REAL), join us for 2 webinars in June and town hall meeting in July to learn more about normalizing, organizing, and operationalizing racial equity within your city or town.

[Register for REAL 100 \(June 21\) Webinar Now!](#)

The banner features a background image of four diverse professionals in an office setting. A dark grey text box is overlaid on the right side of the image, containing the main title, a descriptive paragraph, and a call-to-action button with a white background and green text.

REGISTRATION OPEN FOR JUNE 28 WEBINAR

# COMPLIMENTARY WEBINAR



## Right-to-Know Law and Public Meetings Webinar

12:00 noon - 1:00 pm, Tuesday, July 20, 2021. Join NHMA's Stephen Buckley and Natch Greyes who will discuss the requirements for holding a proper public meeting, as well the exceptions to the meeting requirement (the so-called "non-meeting").

**REGISTRATION OPEN!**

MEETING  
IN  
PROGRESS

**REGISTRATION OPEN**

# COMPLIMENTARY WEBINAR



## Staying Out of the Headlines: Cybersecurity Must-Haves So Your City or Town Is Protected and Out of the News Webinar

12:00 noon - 1:00 pm, Tuesday, July 27, 2021. Joe Howland, Chief Information Security Officer at VC3, will talk about evolving threats, discuss a framework for covering all aspects of your cybersecurity, and provide you an actionable checklist!

**REGISTRATION OPEN!**

**REGISTRATION OPEN**



# SAVE THE DATE

**TUESDAY, SEPTEMBER 14**

## **2021 Budget & Finance Virtual Workshop**



NHMA is holding its annual Budget & Finance Workshop on the fundamentals of the municipal budget process from *9:00 am – 4:30 pm on Tuesday, September 14, 2021*, as a virtual workshop in Whova.

*Thank you to our sponsor:*



Attendees receive 2021 supplement to *The Basic Law of Budgeting* publication. Additional materials such as the Power-Point presentation and handouts will be distributed electronically.

Please visit [www.nhmunicipal.org](http://www.nhmunicipal.org) for the latest event information and registration details.



# REGISTRATION TO OPEN JULY 24





for joining  
us today!



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Through the collective power of cities and towns, NHMA promotes effective municipal government by providing education, training, advocacy and legal services.



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