Order F16-48

INSURANCE CORPORATION OF BRITISH COLUMBIA

Celia Francis
Adjudicator

December 5, 2016

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Summary: An applicant requested access to vendors' submissions in response to ICBC's Request for Expressions of Interest #2011-006 (providing "bio-hazardous vehicle cleaning" services) and any contracts with vendors for providing those services. ICBC decided to disclose BioSolutions Inc.'s Expression of Interest, withholding some information under s. 21(1) (harm to third-party business interests). ICBC also decided to disclose the resulting contract with BioSolutions. BioSolutions objected to the disclosure of both records. The adjudicator found that s. 21(1) does not apply to the information which ICBC decided to disclose and ordered ICBC to disclose it to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 21(1)(a)(ii), 21(1)(b), 21(1)(c)(i), 21(1)(c)(iii).

Authorities Considered: B.C.: Order 03-02, 2003 CanLII 49166 (BC IPC); Order 03-15**,** 2003 CanLII 49185 (BC IPC); Order 01-39, 2001 CanLII 21593 (BC IPC); Order 01-36, 2001 CanLII 21590 (BC IPC); Order F08-03, 2008 CanLII 13321 (BC IPC); Order 03-15, 2003 CanLII 49185 (BC IPC); Order 00-22, 2000 CanLII 14389 (BC IPC); Order F05-05, 2005 CanLII 14303 (BC IPC); Order F13-06, 2013 BCIPC 6 (CanLII); Order F13-07, 2013 BCIPC 8 (CanLII); Order F15-53, 2015 BCIPC 56 (CanLII); Order F16-17, 2016 BCIPC 19 (CanLII); Order 04-06, 2004 CanLII 34260 (BC IPC); Order F14-28, 2014 BCIPC 31 (CanLII); Order 03-33, 2003 CanLII 49210 (BC IPC); Order F13-17, 2013 BCIPC 22 (CanLII); Order F15-44, 2015 BCIPC 47 (CanLII); Order F13-22, 2014 BCIPC No. 4 (CanLII); Order 00-10, 2000 CanLII 11042 (BC IPC); Order F14-04, 2014 BCIPC 31 (CanLII); Order 02-50, 2002 CanLII 42486 (BC IPC).

Cases Considered: *Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 101; *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603; *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3; *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875.

INTRODUCTION

[1] This order concerns an applicant's request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for access to two types of records: vendors' submissions to the Insurance Corporation of British Columbia ("ICBC") in response to its Request for Expressions of Interest #2011-006 (providing "bio-hazardous vehicle cleaning" services); and any contracts with vendors for providing those services. ICBC provided notice of the request under s. 23 of FIPPA to the third-party vendor, BioSolutions Inc. ("BioSolutions").

[2] BioSolutions asked that ICBC withhold all of the responsive records, on the grounds that disclosure would harm its business interests. After considering BioSolutions' comments, ICBC told BioSolutions that it had decided to disclose the records in severed form, withholding some information under s. 21(1) of FIPPA (harm to third-party business interests).

[3] BioSolutions then asked that the Office of the Information and Privacy Commissioner ("OIPC") review ICBC's refusal to apply s. 21(1) to all of the records. Mediation by the OIPC did not resolve BioSolutions' third-party request for review and the matter proceeded to inquiry. The OIPC received submissions from BioSolutions and the original applicant for records.[1] ICBC did not make a submission.

ISSUE

[4] The issue before me is whether ICBC is required by s. 21(1) of FIPPA to deny the applicant access to information. Under s. 57(3)(b) of FIPPA, BioSolutions has the burden of proving that the applicant has no right of access to the records.

[1] The applicant's email address indicates that she represents a competitor of BioSolutions.

DISCUSSION

Preliminary issue

[5] The records in dispute indicate that ICBC intends to withhold some information under s. 22(1) (harm to third-party privacy). However, there is no evidence that ICBC issued a formal decision on s. 22(1) to the applicant and BioSolutions or that the applicant requested a review of any s. 22(1) decision. Section 22(1) was also not listed as an issue in the notice for this inquiry. Moreover, the applicant, who would have the burden of proof in an inquiry involving s. 22(1), has not had an opportunity to make submissions on this exception. I do not therefore consider that s. 22(1) is properly before me in this inquiry and I will not deal with it here. The applicant is of course free to request a review of any s. 22(1) decision later, should she wish to do so, as well as of ICBC's decision to withhold information in BioSolutions' expression of interest ("EOI") under s. 21(1).

Records in dispute

[6] Two records are in issue here:

- BioSolutions' EOI, which it submitted in response to ICBC's Request for Expressions of Interest #2011-006 ("REI"); the EOI includes a covering letter

- the April 1, 2013 Contract for Services ("Contract") between ICBC and BioSolutions for the provision of bio-hazardous vehicle cleaning services

[7] BioSolutions wants ICBC to withhold both records in their entirety. ICBC has decided to disclose most of the EOI, withholding several portions under s. 21(1). ICBC has also decided to disclose the entire Contract. Consequently, the information in dispute is that which ICBC has decided to disclose.[2] I will not consider here whether s. 21(1) also applies to the information that BioSolutions and ICBC agree should be withheld in the EOI.[3]

[2] As noted just above, ICBC intends to apply s. 22(1) to some information in both records, but this exception is not in issue here.

[3] This information includes the following: BioSolutions' proposed pricing for providing its services (*i.e.*, the "cost information" in Appendix B to the EOI); dollar figures in its financial statements; names of its other clients; insurance information; details on the types of services it would provide; and details on the techniques, training, processes, tools, procedures and equipment it would use.

Harm to third-party interests

[8] The relevant parts of s. 21(1) of FIPPA read as follows:

> 21(1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
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> …
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> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
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> (b) that is supplied, implicitly or explicitly, in confidence, and
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> (c) the disclosure of which could reasonably be expected to
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> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
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> …
>
> (iii) result in undue financial loss or gain to any person or organization, …

[9] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.[4] All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld. First, BioSolutions, as the party resisting disclosure, must demonstrate that disclosing the information in issue would reveal commercial, financial, labour relations, scientific or technical information of, or about, a third party. Next, it must demonstrate that the information was supplied, implicitly or explicitly, in confidence. Finally, it must demonstrate that disclosure of the information could reasonably be expected to cause one of the harms set out in s. 21(1)(c). In assessing the parties' arguments on s. 21(1), I have taken this approach, which is set out in previous orders and court decisions.

Is the information "financial or commercial information"?

[10] FIPPA does not define "commercial" or "financial information." However, previous orders have found the following:

- "commercial information" relates to commerce, or the buying, selling, exchange or providing of goods and services; the information does not

[4] See, for example, Order 03-02, 2003 CanLII 49166 (BC IPC), Order 03-15, 2003 CanLII 49185 (BC IPC), and Order 01-39, 2001 CanLII 21593 (BC IPC).

need to be proprietary in nature or have an actual or potential independent market or monetary value.[5]

- hourly rates, global contract amounts, breakdowns of these figures, prices, expenses and other fees payable under contract are both "commercial" and "financial" information of or about third parties.[6]

Analysis and finding

[11] BioSolutions did not expressly address this issue. However, its submission indicates that it considers the information to be its financial and commercial information. The applicant admitted that the records relate to services that BioSolutions provides.

[12] The information in dispute relates to the processes, products and tools BioSolutions uses, the services it provides or would provide under the contract and the unit pricing for providing those services. I am satisfied that it is financial and commercial information of or about BioSolutions, as past orders have interpreted these terms. I therefore find that s. 21(1)(a)(ii) applies to it.

Was the information "supplied in confidence"?

[13] The next step is to determine whether the information in issue was "supplied, implicitly or explicitly, in confidence." The information must be both "supplied" and supplied "in confidence."[7]

[14] "**Supplied" —** B.C. orders have normally found that submissions or proposals made in response to requests for proposal were "supplied" for the purposes of s. 21(1)(b).[8]

[15] B.C. orders have also consistently found that information in an agreement or contract does not normally qualify as "supplied" for the purposes of s. 21(1)(b), because the information is the product of negotiations between the parties. This

[5] See Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.
[6] For example, Order 03-15, 2003 CanLII 49185 (BC IPC) at para. 41, Order 00-22, 2000 CanLII 14389 (BC IPC) at p. 4, Order F05-05, 2005 CanLII 14303 (BC IPC) at para. 46, Order F13-06, 2013 BCIPC 6 (CanLII) at para. 16, Order F13-07, 2013 BCIPC 8 (CanLII) at para. 36, Order F15-53, 2015 BCIPC 56 (CanLII), at para. 11, and Order F16-17, 2016 BCIPC 19 (CanLII), at para. 24. In Order 04-06, 2004 CanLII 34260 (BC IPC), at para. 36, former Commissioner Loukidelis found that such information was also "about" the public body.
[7] See Order 01-39, 2001 CanLII 21593 (BC IPC), at para. 26, for example. See also Order F14-28, 2014 BCIPC 31 (CanLII), at paras. 17-18.
[8] See, for example, Order 03-33, 2003 CanLII 49210 (BC IPC), Order F13-17, 2013 BCIPC 22 (CanLII) and Order F15-44, 2015 BCIPC 47 (CanLII).

is so, even where the information was subject to little or no back and forth negotiation. There are two exceptions to this general rule:

- where the information the third party provided was "immutable" – and thus not open or susceptible to negotiation – and was incorporated into the agreement without change, or

- where the information in the agreement could allow someone to draw an "accurate inference" about underlying information of, or about, a third party that had been supplied in confidence but which does not expressly appear in the agreement.[9]

[16] The applicant did not deal with the "supply" issue and BioSolutions also did not expressly address it. However, BioSolutions' submission indicates that it provided the EOI in response to the REI.

Analysis and findings

[17] Besides BioSolutions' submission, evidence in the records themselves assists me in deciding whether the information in dispute was "supplied" for the purposes of s. 21(1)(b).

[18] EOI — The covering letter to BioSolutions' EOI states that BioSolutions prepared the EOI as a "response" to the REI.[10] The EOI's individual elements also address specific requirements of the REI. I also note that ICBC considered the EOI to be responsive to the applicant's access request, which was for submissions that vendors made in response to the REI.

[19] I accept that BioSolutions prepared the covering letter and compiled the information in the EOI in response to the REI. However, the EOI consists of a series of quotes of the requirements of the REI, followed by BioSolutions' proposal as to how it would fulfil each requirement.[11] In addition, Appendices A, C, E, F, G, H and I of the EOI are copies of appendices from the REI, with no

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[9] See, for example, Order 01-39, at para. 45, and Order F13-22, 2014 BCIPC No. 4 (CanLII) at para. 17. Key judicial review decisions have confirmed the reasonableness of this approach. See Order F08-22, 2008 CanLII 70316 at para. 58, referring to *Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 101, *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603 and *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904.

[10] The parties did not provide me with a copy of the REI. However, it is publicly available on BC Bid's website: http://www.bcbid.gov.bc.ca/open.dll/welcome?language=En. On the "Browse Opportunities" page, click on "Browse Using The Advanced Search" function. Then click on the "closed" button and search under "Document Number" for EOI 2011-006.

[11] Throughout the EOI, BioSolutions quotes the requirements of ICBC's REI #2011-006 in bold face type and inserts its responses in regular face type.

changes, except for brief statements by BioSolutions saying it could meet the requirements set out in the appendices.

[20] I am satisfied that, for the purposes of s. 21(1)(b), BioSolutions "supplied" the covering letter, those portions of its EOI that contain its proposals in response to the requirements of the REI and its brief statements saying it could meet the requirements of the appendices. However, BioSolutions did not develop or create the information in its EOI that copies information from the REI (*i.e.*, the requirements in the body of the REI and in Appendices A, C, E, F, G, H and I). Rather, BioSolutions simply quoted ICBC's own information back to it. I do not therefore consider that BioSolutions "supplied" this copied or quoted information for the purposes of s. 21(1)(b).

[21] Contract **—** The Contract language refers to itself as an "agreement." It also states that BioSolutions and ICBC "agree" on the terms of the Contract, that the agreement sets out the "entire agreement of the Parties regarding the subject matter of this Agreement" and that the "agreement" includes the "Contract for Services" itself and all schedules and appendices.[12] These statements alone indicate that the parties agreed on the terms of the Contract, including its attachments, and that the information in dispute was negotiated, not "supplied."

[22] Moreover, Article 1.2 of the REI states that "ICBC anticipates entering into negotiations with the selected respondent(s) for a three year contract, with an estimated commencement date of September 1, 2011." This also supports my conclusion that the Contract was negotiated.

[23] For these reasons, I find that the information in the Contract, including the appendices, was negotiated and not "supplied" information for the purposes of s. 21(1)(b). This means that s. 21(1)(b) does not apply to the Contract.

[24] **"In confidence" —** Information must meet both parts of the s. 21(1)(b) test. Thus, I need only consider whether the information that I found was "supplied" in the EOI (*i.e.*, BioSolutions' covering letter, those portions of its EOI that contain its proposals in response to the REI and its brief statements saying it could meet the requirements of the appendices) was supplied, implicitly or explicitly, "in confidence." Ultimately, I do not need to consider if the information was supplied implicitly in confidence, as I find below that it was supplied explicitly in confidence.

[25] A number of orders have discussed examples of how to determine if third-party information was supplied, explicitly, "in confidence" under s. 21(1)(b), for example, Order 01-36:[13]

[12] See pp. 2 and 35 of the Contract.
[13] Order 01-36, 2001 CanLII 21590 (BC IPC).

> [24] An easy example of a confidential supply of information is where a business supplies sensitive confidential financial data to a public body on the public body's express agreement or promise that the information is received in confidence and will be kept confidential. A contrasting example is where a public body tells a business that information supplied to the public body will not be received or treated as confidential. The business cannot supply the information and later claim that it was supplied in confidence within the meaning of s. 21(1)(b). The supplier cannot purport to override the public body's express rejection of confidentiality.

Analysis and finding

[26] The applicant did not address this issue. BioSolutions' submission indicates that it considers the information in dispute to be its confidential proprietary information. In addition, the EOI expressly states that it contains confidential information intended only for ICBC's review and that it is not to be distributed without BioSolutions' consent. Article 3.2 of the REI states that ICBC will hold in confidence all information received, subject to FIPPA's disclosure provisions and other disclosure obligations. I am therefore satisfied that the information in issue was supplied explicitly "in confidence."

Conclusion on s. 21(1)(b)

[27] For the reasons explained above, I find that

- the information in the Contract was not "supplied" but negotiated and s. 21(1)(b) does not apply to it
- the information in the EOI, including Appendices A, C, E, F, G, H and I, which quotes or copies the REI was not "supplied" and s. 21(1)(b) does not apply to it
- BioSolutions' covering letter, those portions of its EOI that contain its proposals in response to the REI's requirements and its brief statements saying it could meet the requirements of the appendices were explicitly "supplied in confidence" and s. 21(1)(b) applies to them

Reasonable expectation of harm under s. 21(1)(c)

[28] Information must meet all three parts of the s. 21(1) test to be withheld. Because I found above that some of the information was not "supplied" under s. 21(1)(b), this means that s. 21(1) does not apply to it and I do not need to consider whether s. 21(1)(c) applies to it. I do, however, need to consider

whether s. 21(1)(c) applies to the information in the EOI which I found was "supplied" under s. 21(1)(b), which I will do next.

Standard of proof for s. 21(1)(c)

[29] The Supreme Court of Canada set out the applicable standard of proof for harms-based exceptions:

> [54] This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."[14]

[30] Previous orders have said that the ordinary meaning of "undue" financial loss or gain under s. 21(1)(c)(iii) includes excessive, disproportionate, unwarranted, inappropriate, unfair or improper, having regard for the circumstances of each case. For example, if disclosure would give a competitor an advantage – usually by acquiring competitively valuable information – effectively for nothing, the gain to a competitor will be "undue."[15]

[31] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,[16] Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm and that the burden rests with the party resisting disclosure (in that case, a public body) to establish that the disclosure of the information in question could reasonably be expected to result in the identified harm.

[32] I have taken these approaches in considering the arguments on harm under s. 21(1)(c).

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[14] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, citing *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, at para. 94. See also Order F13-22, 2014 BCIPC 31 (CanLII), at para. 13, and Order F14-58, 2014 BCIPC 62 (CanLII), at para. 40, on this point.

[15] See, for example, Order 00-10, 2000 CanLII 11042 (BC IPC) at pp. 17-19. See also Order F14-04, 2014 BCIPC 31 (CanLII) at paras. 60-63, for a discussion of undue financial loss or gain in the context of a request for a bid proposal.

[16] 2012 BCSC 875, at para. 43.

Parties' submissions

[33] The applicant argued briefly that disclosure of the information in dispute would serve the best interests of ICBC and "all parties involved." I summarize below BioSolutions' submissions on its concerns:

- information on the processes BioSolutions uses, the products, tools and services it offers its clients and the order in which it performs certain services is proprietary or sensitive, or both, and must not be released.

- BioSolutions' competitors may not currently offer, or have thought of offering, some of the services, products or tools that BioSolutions offers or the marketing materials and approaches BioSolutions uses; disclosure of the EOI would thus give the competitors a "competitive edge" over BioSolutions.

- BioSolutions has spent 18 years in researching, pioneering and developing its services, through trial and error; disclosure of its EOI would give its competitors an unfair advantage in creating their own proposals, without the "painstaking effort" of developing the proposals themselves.

Analysis and finding

[34] BioSolutions said that disclosure of certain headings in the EOI would reveal that BioSolutions performs specific services and it is thus "sensitive" or "proprietary." The headings are, however, copied directly from the requirements of the REI and thus information I found was not "supplied." It was in any case a requirement of the REI that all proponents, not just BioSolutions, demonstrate that they could perform these services. I do not, therefore, consider that disclosure of these headings would provide its competitors with an advantage.

[35] BioSolutions also expressed concern over the disclosure of certain paragraphs or phrases, saying that disclosure of this information would, for example, reveal that it performs certain services in a certain way. The information to which BioSolutions referred consists of general statements, often of a promotional character, and it does not appear to disclose BioSolutions' proprietary information. BioSolutions did not explain how it does. Moreover, BioSolutions did not explain how this information is "sensitive", how it gives BioSolutions a "unique advantage" or how a competitor could use this information to its advantage.

[36] In some cases, BioSolutions expressed concern over the disclosure of information which ICBC has decided to withhold almost entirely.[17] It also expressed concern over the disclosure of Appendix E of its EOI, saying it would reveal "proprietary services" BioSolutions would perform. Appendix E is, however, a copy of an appendix from the REI listing the services any proponent would have to perform. BioSolutions also objected to the disclosure of Appendix U of the EOI, saying it contains proprietary information on its health and safety plan. However, this appendix does not contain such a plan but simply refers the reader to another document.[18]

Conclusion on s. 21(1)(c)

[37] The information that ICBC decided to disclose in the EOI consists of high-level statements and observations aimed at promoting the quality of BioSolutions' services and their value to ICBC, and how these services have improved over the life of the company. ICBC also decided to disclose BioSolutions' general statements about past cases it has dealt with and how it would meet ICBC's vehicle cleaning requirements. The information in dispute contains no details of proprietary tools, techniques or processes that BioSolutions would use to provide its services.

[38] BioSolutions did not support its arguments on harm by explaining how its competitors could use the information in dispute to harm its competitive position, "significantly" or otherwise. BioSolutions also did not explain how disclosure of the information in dispute could result in financial loss to it, still less how any such loss would be "undue." In this vein, I note that, while BioSolutions said that ICBC disclosed its "proprietary document" to a competitor in 2001 without its consent,[19] BioSolutions did not attempt to explain what, if any, harm to its business interests under s. 21(1)(c) had resulted.

[39] A party resisting disclosure must provide "cogent, case specific evidence of harm" and "detailed and convincing evidence."[20] BioSolutions has provided no such evidence to support its submissions and I find that its submissions regarding harm are little more than assertions. In short, it has not persuaded me that disclosure of the information in dispute could reasonably be expected to cause it harm under s. 21(1)(c).

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[17] For example, the fifth paragraph of item 7.12 and the "cost information" in Appendix B.

[18] BioSolutions also objected to the disclosure of some of appendices to the Contract. I found above that s. 21(1)(b) does not apply to this information.

[19] BioSolutions' initial submission, page 2, para. 3.

[20] See Order 02-50, 2002 CanLII 42486 (BC IPC), at paras. 124-137, which discussed the standard of proof in this type of case and summarized leading decisions on the reasonable expectation of harm.

[40] Therefore, I find that BioSolutions has not met its burden of proof and s. 21(1)(c) does not apply to the information that ICBC has decided to disclose in the EOI. ICBC is thus not authorized to refuse the applicant access to this information under s. 21(1).

CONCLUSION

[41] For reasons given above, under s. 58(2)(a) of FIPPA, I require ICBC to give the applicant access to the information in dispute by Wednesday, January 18, 2017. ICBC must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records. For clarity, this order applies to all of the information in the Contract and the EOI which ICBC has decided to disclose, but not to the information in the EOI that ICBC has decided to withhold under s. 21(1).

December 5, 2016

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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