



Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner
Catherine Tully

REVIEW REPORT 18-07

October 4, 2018

Department of Health and Wellness

Summary: In this modern world of ubiquitous information it can be very challenging for a public body to determine whether or not information it holds can, in combination with other readily available information, be turned from non-identifiable to identifiable. The applicant sought release of a spreadsheet providing information regarding funded salaries for each nursing home and residential care facility in Nova Scotia. The Department aggregated the data, releasing only funded salaries by position types and not by facility. While the original spreadsheet did not contain any names, the Department argued that, in combination with publicly available information, the spreadsheet could potentially disclose individual salary amounts. The Commissioner determines that although wage ranges can be gleaned from the record, the evidence does not support a finding that the salaries set out in the original spreadsheet accurately reflect actual salaries paid. The Commissioner determines that disclosing the original spreadsheet would not result in the unreasonable invasion of a third party's personal privacy but would result in greater transparency regarding the funding decisions of the Department. The Commissioner recommends full disclosure of the original spreadsheet.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [SNS 1993, c 5](#), ss. 3, 20, 45.

Authorities Considered: **British Columbia:** Order [F09-15](#); **Nova Scotia:** Review Report [16-10](#).

Cases Considered: *House (Re)*, [2000 CanLII 20401 \(NS SC\)](#).

Other sources: Canadian Union of Public Employees: 3215 – Centennial Villa: <https://cupe.ca/local/cupe-3215-centennial-villa>; *Concise Oxford English Dictionary*, 12th ed. (New York: Oxford University Press, 2011) “income”; Government of Nova Scotia: Department of Labour and Advanced Education: <https://novascotia.ca/lae/databases/>; Indeed.com: Personal Care Workers in Nova Scotia: <https://ca.indeed.com/Personal-Care-Worker-jobs-in-Nova-Scotia>; Neuvoo.ca: Personal Support Worker salary in Nova Scotia: <https://neuvoo.ca/salary/personal-support-worker/nova-scotia/>; Nova Scotia Government Employees Union: Directory of NSGEU

Locals - Community - Long Term Care: <http://nsgeu.ca/members/directory-of-locals/community/long-term-care/>; Nova Scotia Nurses' Union: Long Term Care Collective Agreements: <http://www.nsnu.ca/en/home/collectiveagreements/longtermcare/default.aspx>; Payscale.com: Nursing Home Administrator Salary: https://www.payscale.com/research/CA/Job=Nursing_Home_Administrator/Salary.

INTRODUCTION:

[1] The applicant sought information relating to the number and type of funded base salaries for each licensed nursing home and residential care facility in Nova Scotia. In response, the Department of Health and Wellness (Department) determined that disclosing the information by facility could potentially disclose personal information of individual employees. As a result, the Department released information aggregated by position type.

ISSUE:

[2] Is the Department required to refuse access to information under s. 20 of the *Freedom of Information and Protection of Privacy Act (FOIPOP)* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?

DISCUSSION:

Background

[3] The applicant sought information showing the number of funded base salaries by licensed nursing home and residential care facility in Nova Scotia for each position title that the Department funds in each of the facilities. The original, unsevered record that the Department produced is a spreadsheet with all of the requested information for each facility. It consists of three columns in relation to each facility: position title (e.g. physiotherapist, dietician), FTE's (# of staff holding the position) and salaries.

[4] However, the Department decided that in order to protect third party personal information, it needed to aggregate the data. As a result, it provided the applicant with a modified report that presents the requested information, not by facility, but by staffing category.

[5] The Department created a report (the modified report) from the original data organized into four broad staffing categories: management, residential care, program support and support services for nursing homes. It created a second, similar spreadsheet for residential care facilities. Individual facilities are not identified, rather, all of the data from all facilities is aggregated and presented based on staffing category rather than by facility.

[6] Within each broad staffing category, the Department listed the positions – a subset of each category, and then listed position types – a further subset. The final column then provided the range of salaries paid to the positions types. So, for example, in the category “support services”, one of the positions identified is “cleaning and maintenance”. The position types within cleaning and maintenance are divided into two groups: (i) general workers - housekeeping/laundry and (ii) worker – tradesman and maintenance. The spreadsheet then provided a list of all of the funded

salary amounts for each of the position types. This provides information about the range of funded salaries by position types but does not provide any information about the funding provided to individual institutions as requested by the applicant.

Burden of Proof

[7] Section 45 of *FOIPOP* provides first that where access to information is refused it is the public body that bears the burden of proof. However, s. 45(2) provides that “where the record or part that the applicant is refused access to contains personal information” the burden of proof then shifts to the applicant. This means that where a public body has withheld information under s. 20, the public body bears the burden of proving that the withheld information is personal information within the meaning of *FOIPOP*. Once that is established, the applicant bears the burden of proving that the disclosure of the information would not be an unreasonable invasion of the third party’s personal privacy.

Is the Department required to refuse access to information under s. 20 of *FOIPOP* because disclosure of the information would be an unreasonable invasion of a third party’s personal privacy?

[8] Section 20 is designed to balance the information rights of the applicant against the privacy rights of others. It contemplates that in some cases, third party personal information may be disclosed, even if disclosure may be an invasion of the third party’s personal privacy. What it prohibits is disclosure that would result in an unreasonable invasion of personal privacy.

[9] The original record at issue here is a spreadsheet. The spreadsheet has three columns of information and is organized by facility. So, for each nursing home and residential care facility, the spreadsheet lists: position titles, FTE’s (full time equivalents, i.e. number of staff holding the identified position) and salaries. Although the Department’s (DHW) spreadsheet uses the description “salaries”, the severed version of the same information lists this column as “funded salaries” and includes the following definition:

“Funded salaries”: represents the funding allocated by DHW allocates [sic] to positions. Service providers are not required by DHW to have positions or pay the funded amount for positions except as required by the Homes for Special Care Act or by contract. Funding amounts listed below represent the continuum of funded salaries by category.

[10] In order to determine whether or not a disclosure would result in an unreasonable invasion of personal privacy, public bodies must take a four-step approach to their analysis:¹

1. Is the requested information “personal information” within the meaning of s. 3(1)(i)? If not, that is the end. Otherwise, the public body must go on.
2. Are any of the conditions of s. 20(4) satisfied? If so, that is the end.
3. Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 20(3)?

¹ This is the standard test for applying s. 20 as set out by the Nova Scotia Supreme Court in *House (Re)*, [2000 CanLII 20401 \(NS SC\)](#).

4. In light of any s. 20(3) presumption, and in light of the burden upon the applicant established by s. 45(2), does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?

Step 1: Is the requested information “personal information” within the meaning of s. 3(1)(i)? If not, that is the end. Otherwise, the public body must go on.

[11] *FOIPOP* defines personal information as recorded information about an identifiable individual, including information about the individual’s financial or employment history.² Two issues arise here. First, is the requested information about an *identifiable* individual or individuals? And second, is the salary information in the original spreadsheet information about an identifiable individual? To be clear, the responsive record itself, the original spreadsheet, does not contain any names. The issue is whether or not the position titles combined with the name of the facility in the original spreadsheet could be used in combination with publicly available information to identify an individual.

[12] According to the Department, the requested information does qualify as personal information for the following reasons:

- (i) Base funded salary is usually the only salary that the staff of these private facilities receive.
- (ii) Individual staff names can be ascertained online at the Department’s public directory as well as on the individual websites of facilities.³
- (iii) The facilities vary in size and some may only have one dietitian, for example. Therefore, if the facility names were disclosed along with the funded salary for the position, the identity of the person and his or her income could easily be ascertained.
- (iv) The Department had disclosed to the same applicant in a previous *FOIPOP* request the list of facilities, by name, the position title and the number of FTEs the Department funds. Putting all these lists of information together could reveal employment history and financial information of identifiable individuals who are not employees of the Department.

[13] The applicant argues that the requested information is not personal information for three reasons:

- (i) The requested information is not about a specific person. Rather, the applicant seeks funding, by position, that the Department provides to each nursing home and residential care facility in Nova Scotia.
- (ii) Funded base salaries do not describe an individual’s income or salary since, according to the Department, service providers are not required by the

² Section 3(1)(i)(vii) of *FOIPOP*.

³ The directory referred to is the *Nursing Homes and Residential Care Facilities Directory* available at: <https://novascotia.ca/dhw/ccs/documents/Nursing-Homes-and-Residential-Care-Directories.pdf>. The Department gave one example of a facility website that contained a partial list of staff: <http://grandviewmanor.org/contact-us/>.

Department to have positions or pay the funded amount for the positions except as required by the *Homes for Special Care Act* or by contract.

- (iii) The Department claims that the funded positions are often the only funding that staff in nursing homes receive but the Department does not provide any supporting evidence for this position.

Is the information about an identifiable individual?

[14] To begin, it does not matter, for the purposes of this analysis, that the applicant is not seeking personally identifiable information. What does matter is whether or not the record sought includes information that is personally identifiable.

[15] In this modern world of ubiquitous information it can be very challenging for a public body to determine whether or not information it holds can, in combination with other readily available information, be turned from non-identifiable to identifiable. In this case, the public body is of the view that two publicly available sources of information can be used in combination with the information it has withheld to make identifiable portions of the original record.

[16] The Department says that, in combination with website staff lists, the original list of information requested could be used to identify the actual salaries of identifiable individuals. The Department identified the staff contact list at Grandview Manor as an example. That staff list gives contact information for 15 individuals identified by name and position title. Six individuals have position titles that match with or closely resemble the position titles listed for Grandview Manor in the original spreadsheet produced by the Department. In those six cases, I find that the information on the original withheld document does therefore contain personally identifiable information.

[17] How common is it for nursing homes or residential care facilities to list staff and position titles? A review of website information reveals a marked difference between nursing homes and residential care facilities.

[18] A search of the first 10 nursing homes on the original spreadsheet reveals that 8 of the 10 nursing homes list between 1 and 16 staff by name and position on their public-facing websites.⁴ The vast majority of positions listed are senior management and middle management positions. The 10 websites identified a total of 50 staff by name and position. The original spreadsheet indicates that for those same 10 facilities, a total of 302 positions were funded. A comparison of the position titles listed on the websites reveals that approximately half of the titles do not correlate with positions listed in the original spreadsheet. I estimate roughly 50% of the individuals named on websites can be connected to jobs and salaries listed on the original spreadsheet created by the Department. In other words, approximately 25 or 8% of the 302 positions listed in the original spreadsheet can be connected to an identifiable individual through the facilities' website staff contact lists.

⁴ Annapolis Royal (5), Bay Side (1), Blomidon Court (1), Evergreen (9), Harbour View Haven (16), Hillside Pines (8), Mahone Nursing Home (4), Mountain Lea Lodge (6), Nakile Home for Special Care (0), Heart of the Valley (Northhill) (0).

[19] With respect to residential care facilities, a search of the last 10 facilities listed on the original spreadsheet reveals that only three facilities have websites. Two websites identify owners and/or senior managers on the website. A total of five individuals were identified by name and position on these websites.⁵ None of the positions identified on the websites (owners and founders for the most part) correlate with the original spreadsheet list for residential care facilities. In other words, no individuals were identifiable on the original spreadsheet for the 10 residential care facility websites reviewed.

[20] The Department also identifies its own contact list for nursing homes and residential care facilities as another publicly available source of information that would render the original list identifiable. The Department's contact list identifies one or sometimes two individuals per facility by name and position title. Generally, the contacts listed are administrators, but a number of other contact types are also included such as site managers, executive directors and directors of resident care. A comparison between this list and the responsive record reveals that, "administrator" is a commonly listed position title with just one or less FTE per facility. So, the combination of the Department's publicly available contact list for nursing homes and residential care facilities, and the original spreadsheet, would indeed reveal the funded salaries for identifiable individuals – assuming those listed on the contact list still occupy the identified positions.

[21] The Department argues that a third potential source of identification is based on the fact that many facilities have only one person occupying a position. So, for example, if a facility has one dietitian and the salary for that position is disclosed, the Department states that the identity of the individual "could easily be obtained." The Department does not say how. One could speculate that the applicant could try calling up the facility and asking the name of the dietitian. But if, as noted above, the general practice is to disclose the names of management staff (for nursing homes) and no names except owner's names (for a few residential care facilities), it is unclear that these facilities would freely give up information over the phone that they are not prepared to disclose on their public-facing websites.

[22] Finally, the Department states that the applicant has already received a list of facilities by name, with a list of position titles and the number of FTEs. It says that putting all these lists of information together could reveal employment history and financial information of identifiable individuals who are not employees of the Department. It is unclear what the Department means by this argument. The original spreadsheet that was withheld in this case is a list by facility name, position title and FTEs, which is exactly the same list of data elements as the previously released information. Therefore, the previous release would not augment the information contained on the original spreadsheet at issue here.

[23] Alternatively, it might be that the Department is saying it could not aggregate the data in any other way, for example, by facility with the positions combined together in some way, because it believes the applicant could de-aggregate the data using the information he already

⁵ Wolfville Elms (0), Victoria Park Guest House (2), Victoria Manor (0), Townsview Estates (0), Tibbetts Home for Special Care (0), The Willows Special Care Manor (0), White Birches Retirement Residence (0), Sunshine Personal Home Care (3), Southview Guest Home (0), Serenity Lodge (0).

obtained. It is impossible to assess this risk in a vacuum. It would be necessary to view the proposed alternative spreadsheet to assess this risk.

[24] The evidence available establishes that with some effort using public websites, roughly 8% of employees of nursing homes are identifiable in the original list. For residential care facilities, the main risk of identification stems from the Department's directory document which lists administrators and owners of residential care facilities. While the position "owner" is not listed as a funded salary, the position "administrator" is listed for all residential care facilities.

[25] I find that for both nursing homes, and to a lesser extent for residential care facilities, a small portion of staff may be identifiable using a combination of job title contained in the original spreadsheet and publicly available information. The personal information available includes name and job title.

Are the salaries listed about an identifiable individual?

[26] The final question to be evaluated is: does the evidence support the Department's position that the column "salaries" contained in the original spreadsheet accurately reflects the actual salary of identifiable individuals?

[27] The Department's evidence on this point is contradictory. As the applicant points out, in the disclosed spreadsheet the Department provides the following explanation regarding the column entitled "Funded Salaries":

"Funded salaries": represents the funding allocated by DHW allocates [sic] to positions. Service providers are not required by DHW to have positions or pay the funded amount for positions except as required by the Homes for Special Care Act or by contract. Funding amounts listed below represent the continuum of funded salaries by category.⁶

[28] The "funded salaries" column in the disclosed spreadsheet contains the same salary amounts listed in the "salaries" column of the original spreadsheet.

[29] In its submission, the Department takes a different position:

Base funded salary is usually the only salary that the staff of these private facilities receive. While they are publicly funded the information requested does also meet the test of personal information under section 3(1)(vii).⁷ (emphasis in original)

[30] The Department did not explain the differences in the two statements, nor did it provide any evidence as to how frequently the funded salaries are the actual salaries.

[31] Many of the staff in the two types of homes are unionized. So in fact, the salary levels are negotiated in collective agreements. Those agreements are publicly available online in a number of locations including on the Department of Labour and Advanced Education's website,⁸ the

⁶ Note inserted on responsive records sent to the applicant.

⁷ Department of Health and Wellness submission dated August 24, 2018.

⁸ <https://novascotia.ca/lae/databases/>

Nova Scotia Nurses Union website,⁹ the Canadian Union of Public Employees website¹⁰ and the Nova Scotia Government Employees Union website.¹¹

[32] A random search for collective agreements reveals the following:

- There are collective agreements publicly available for both nursing home staff and residential care staff. The Department's online system lists 261 collective agreements in health care related industries.
- The wage rates available from collective agreements indicate that wage depends on hours of experience of the individual and sometimes on education. The agreements also indicate yearly percentage increases.
- A comparison between the salaries listed in the original spreadsheet and the collective agreements reveals that the salaries listed in the original spreadsheet fall within the range of negotiated salary levels. Sometimes they are the maximum possible negotiated salary amount; other times the exact amount does not appear in the negotiated wage rates but is within the range of wage rates published.
- There are generally 15-20 potential precise wages possible for each unionized position.

[33] This review of published collective agreements reveals that the Department's first statement regarding the actual wage paid is the more accurate statement. That is, the data on the original spreadsheet represents the funded salaries – the amount paid by the Department to the facilities, but not necessarily the amount paid by the facilities to individuals. Further, based on the wage rates set out in publicly available collective agreements where the funded position is unionized, there is no basis to conclude that the funded amount is the paid amount. It is the collective agreement that governs the actual wage paid.

[34] As noted above, the Department bears the burden of establishing that the withheld information is personal information. It offered no evidence to support its second assertion that “funded salary is the only salary that staff receive.” The available evidence does not support this assertion. The salaries listed may, by happenstance, be the actual wage for some of the thousands of employees of the more than 200 facilities described on the spreadsheets, but there is no evidence to find that this is a consistent or frequent result.

[35] I find that the salaries listed on the withheld original spreadsheet do not exactly correlate with the actual wage paid to any particular identifiable individual.

⁹ <http://www.nsnu.ca/en/home/collectiveagreements/longtermcare/default.aspx>

¹⁰ You must enter a local number to access the collective agreement – for example: <https://cupe.ca/local/cupe-3215-centennial-villa>.

¹¹ <http://nsgeu.ca/members/directory-of-locals/community/long-term-care/>

[36] I conclude then, that the withheld original spreadsheet does contain information that can be made personally identifiable. For a limited number of staff, in combination with publicly available information, it would be possible to identify the name, title and wage range (but not actual salaries) for some employees of some of the nursing homes and residential care facilities listed.

[37] For this reason, I will go on to the next step in the s. 20 review.

Step 2: Are any of the conditions of s. 20(4) satisfied? Is so, that is the end.

[38] I agree with the submissions of both parties that s. 20(4) does not apply in this case.

Step 3: Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 20(3)?

[39] The Department is of the view that the presumption in s. 20(3)(f) applies. That provision states that it is a presumed unreasonable invasion of a third party's personal privacy to disclose personal information that describes the third party's finances, income or financial history among other things.

[40] As noted above, while the evidence does not support finding that the salaries listed by position on the original spreadsheet equate to the salary actually paid to any identifiable individual, the evidence does support that the salaries listed are in the range of salaries actually paid. So, for example, where the original spreadsheet lists a position and salary as say, \$50,000, a review of the collective agreement wage range for that position confirms that the salary range is generally around \$50,000. Usually, the negotiated amounts cover a \$10,000 spread calculated based on factors such as education and years of experience. So, if the Department were to disclose the original spreadsheet, it would be disclosing wage range information but not exact income information.

[41] Does information about a wage range qualify as "income" within the meaning of s. 20(3)(f)? Income is not defined in *FOIPOP*. The Concise Oxford English Dictionary defines "income" as money received, especially on a regular basis, for work or through investments. Other types of information subject to the presumption in s. 20(3)(f) are bank balances and net worth – precise numbers specific to an individual. Other types of information subject to the s. 20(3) presumption include information relating to medical conditions, religious beliefs, sexual orientation and personal recommendations. I conclude that the intention of s. 20(3) is to protect only the most sensitive of personal information specific to identifiable individuals. Wage range does not fit within that category of information.

[42] In fact, wage ranges by occupation are readily available from a variety of sources. Individuals trying to decide what occupation they might train for often want to know what their potential income might be. So, if you want to be a personal care worker in Nova Scotia, what might your expected income be? According to the website Indeed,¹² personal care workers earn

¹² <https://ca.indeed.com/Personal-Care-Worker-jobs-in-Nova-Scotia>

in the \$30,000 range in Nova Scotia. According to Neuvoo,¹³ the wage is closer to \$29,000. The Government of Canada provides wage information and lists the wage range for a nursing home administrator as between \$49,000 to \$110,000 with the median being \$86,000.¹⁴ All of these salaries are within the wage ranges provided by the Department. I conclude that wage range is not of a sufficiently personal nature to attract the protection of the presumption set out in s. 20(3)(f).

[43] I find that wage range does not qualify as “income” for the purposes of s. 20(3)(f) of *FOIPOP*. I conclude that no presumption applies to the withheld information.

Step 4: In light of any s. 20(3) presumption, and in light of the burden upon the applicant established by s. 45(2), does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?

[44] The Department determined that none of the factors in s. 20(2) applied. It states that no activity of the Government of Nova Scotia is at issue and that disclosure of the information will not promote public health and safety. It concludes then, that the presumption was not rebutted and no exemptions mitigated the unreasonable invasion of the privacy of a third party.

[45] The applicant contends that the funding of long-term care facilities is of vital importance to Nova Scotians. As such, the disclosure of the information requested is in keeping with the central principles of the *Act* that the Department, as a public body, be fully accountable.

[46] In my view, two factors are relevant to the balancing required: nature of the information and public scrutiny.

[47] The personal information at issue here is that a small portion of the original spreadsheet could be personally identifiable in combination with available public documents. For those individuals, the withheld information (facility name, job title) would allow an assiduous researcher to identify the name, position title and then associate that information with wage range if the original spreadsheet was disclosed. As noted above, all three pieces of information are already publicly available using a combination of public websites.

[48] I have previously examined the nature of business contact information including name and title.¹⁵ I have determined, consistent with decisions across Canada and the Supreme Court of Canada, that business contact information lacks a distinctly personal dimension. While job title under Nova Scotia’s *FOIPOP* still qualifies as personal information, it is not sensitive, and is in fact frequently disclosed as a matter of course on business websites. That is exactly what has happened here. The names of individuals can only be associated with information on the original spreadsheet because the facilities in question have published the business contact information of senior staff. This factor weighs in favour of disclosure in this case.

¹³ <https://neuvoo.ca/salary/personal-support-worker/nova-scotia/>

¹⁴ https://www.payscale.com/research/CA/Job=Nursing_Home_Administrator/Salary

¹⁵ See for example NS Review Report 16-10 at paras 96-101.

[49] With respect to wage ranges disclosed by the funded salaries, again, this information lacks a distinctly personal dimension. It tells a reader something about the range of the potential salary an individual might receive based on his or her occupation, but that information is generally available online in any event. If I know what an individual's occupation is, I can easily determine generally, within about \$10,000, what his or her salary is likely to be. The applicant would not need the information in the original spreadsheet to conduct this research. The combination of the public websites and publicly available salary information would accomplish this outcome. Put another way, the withheld information does not provide any additional information about those individuals who might be personally identifiable because salary information is so easily accessed. This factor is neutral in the balancing of interests.

[50] What is distinctly more important about the salary information is what it tells us about funding decisions made by the Department of Health and Wellness. By the Department's own admission, the salaries listed represent the funding allocated by the Department to the positions. The original spreadsheet thus discloses funding decisions made by the Department in relation to each individual facility. In my view, this type of financial information is the type of information that is intended to be covered by the *Act* in order to ensure that public bodies are fully accountable to the public. The money spent, after all, is money paid for through taxpayer dollars. A similar approach was taken by the Office of the Information and Privacy Commissioner for British Columbia where an applicant sought severance information about an employee of a publicly funded transportation authority. In determining that the information should be released, the adjudicator states, "the release of the requested information would be desirable for the purposes of subjecting TransLink to public scrutiny and is a circumstance, in this case, significantly favouring disclosure of the requested records."¹⁶ This factor weighs heavily in favour of disclosure of the salary information by facility name and position.

[51] On balance, there are no factors weighing against disclosure and a significant factor favours disclosure of the original spreadsheet information. On that basis, I find that the disclosure of the original spreadsheet would not result in the unreasonable invasion of a third party's personal privacy.

FINDINGS & RECOMMENDATIONS:

[52] I find that:

1. For both nursing homes and to a lesser extent for residential care facilities, a small portion of staff may be identifiable using a combination of job title contained in the original spreadsheet and publicly available information. The personal information available includes name and job title.
2. The salaries listed on the withheld original spreadsheet do not exactly correlate with the actual wage paid to any particular identifiable individual.
3. The disclosure of the original spreadsheet would not result in the unreasonable invasion of a third party's personal privacy.

¹⁶ Order F09-15 at paras 28-29.

[53] I recommend that the Department disclose the original spreadsheet in full.

October 4, 2018

Catherine Tully
Information and Privacy Commissioner for Nova Scotia

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