



## Privacy in the Workplace

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### Abstract

*The Privacy Act came into force on 1 July 1993. The first part of this paper surveys areas that raise privacy issues in the workplace. These relate in particular to the collection and use of employee information for selection, evaluation, monitoring, surveillance, and testing purposes. The second part of this paper discusses the nature of the Privacy Act, and its effect on the workplace.*

The coming into force of the Privacy Act on 1 July 1993 affected nearly every area of daily life in New Zealand, none more so than the workplace. The first part of this paper briefly surveys the principal areas that raise privacy issues in the workplace. The second part of this paper discusses the impact of the Privacy Act on the workplace.

At the start, it is important to draw attention to the nature of the concept of privacy, particularly in relation to the workplace. 'Privacy' is not a precise technical legal or philosophical term, nor does it denote a quality that has an absolute value on its own. Rather, it is a compendious expression that is capable of embracing a variety of interests in relation to the individual, and its value usually depends on the context and circumstances in question. Privacy has been described as, "a broad value, representing concerns about autonomy, individuality, personal space, solitude, intimacy, anonymity, and a host of related concerns."<sup>1</sup> In regard to the workplace, these related concerns include the protection of one's reputation and the confidentiality of one's sensitive personal information. In general, workplace privacy interests have been said to arise from the following:

1. Employee's person, property, or private conversations;
2. Employee's private life or beliefs;
3. Use of irrelevant, inaccurate, or incomplete facts to make employment decisions; and
4. Disclosure of employment information to third parties.<sup>2</sup>

It is also important to note at the outset that a focus on privacy in the workplace may somewhat arbitrarily single out only one aspect of what actually may be a multifaceted issue. Privacy issues often raise concerns in relation to other workplace matters, such as worker health and stress, workplace safety, worker dignity, working conditions, and

discrimination. For example, workers in the most heavily monitored industries, such as airline reservations, telemarketing, and wordprocessing, are predominantly women, so that privacy concerns in these areas also raise gender issues.

### Privacy issues in the workplace

The post-war international human rights community has repeatedly affirmed that individuals have an interest in some measure of control over the dissemination and use of information about themselves, and in enjoying freedom from unreasonable intrusion into their personal affairs. The existence of such privacy interests is especially relevant to institutional settings such as the employment context, where the job applicant or employee is in a position of relative weakness in comparison to those who would collect and use personal information. While the individual may in law consent to the intrusion, it is only because the individual is not really in a position to refuse consent.

Thus, the basis for much of the concern about the privacy of employees in the workplace lies in their inherent powerlessness to assert their privacy interests, and in the traditional disinterest and weakness of the law in compensating for this lack of power in the employment relationship. The Australian Law Reform Commission, for example, has commented:

An intrusive interference with the person is not tortious where consent has been obtained. Consent in certain settings, while it might appear to have been voluntary, will very often not be real. The weaker party, whether a shopper, employee, applicant for employment, or institutionalised person, will often not be in a position to deny a request to search property or person. Consent may be an appropriate bar to an action for assault, but it is not

necessarily a bar to the invasion of privacy, especially in relationships of unequal power. When the search is on the investigator's property, such as a search by an employer or institution of a locker or desk drawer, the law is of no assistance to the person whose privacy has been invaded.<sup>3</sup>

Employer interest in employee information began to grow significantly in the early twentieth century, when it was fostered by the 'scientific management' school of thought that sought to maximise the efficiency of the 'human machine'. In 1912, for example, Frederick W Taylor stated that

It becomes the duty of those on the management's side to deliberately study the character, the nature and the performance of each workman with a view to finding out his limitations on the one hand, but even more important, his possibilities for development on the other hand...<sup>4</sup>

The scientific approach to the workplace encouraged employers to become personally interested in the welfare of their workers. The Ford Motor Company was among the first to send inspectors to investigate the personal lives of its workers. The object here was not only to enhance production, but also to undermine the need for unions. The scientific approach continued to grow in influence after the First World War with the rise of the specialist field of industrial psychology, which had its immediate roots in the United States Army's institution of intelligence tests during the war.

Although management theories have come and gone, employers continue to rely on the systematic collection and use of information about employees in the running of their enterprises. The earlier, partly benign motive for collecting employee information, however, appears to have disappeared. As the workforce becomes more mobile and standards of living have improved, there perhaps no longer appears to be a need for employers to evince an interest in their workers' welfare.

While increased government regulation over the years has had a role in increasing the amount of information collected by employers, their collection of information is still largely carried out for enabling better control over their enterprises and the efficient use of resources, both human and non-human.

In the early twentieth century, technology began to be harnessed to aid employers' collection of information. For example, mechanisms were devised that could be connected to manual typewriters in order to count the number of keystrokes or carriage returns. Technological advances since then have greatly enhanced employers' ability to collect and use information. Information today can be collected in more personally intrusive ways than could ever have been imagined, and vast quantities of information can be easily stored and accessed.

In the past two decades in particular, the surveillance, monitoring, and testing of employees has become an increasingly accessible option for most employers. The Office of Technology Assessment in the United States has classified aspects of employee behavior that are subject to such activities into three broad overlapping categories: (1) *employee performance*, which may be monitored in relation to output (keystrokes, items handled), use of resources (computer time, call accounting, searches), and contents of communications (telephone monitoring, accessing electronic mail or other correspondence, listening devices); (2) *employee behavior*, which overlaps with employee performance, and may be monitored in relation to location (cards, beepers, TV cameras), activities (TV cameras), concentration and mental activity (brainwave), and predisposition to error (drug testing); and (3) *personal characteristics*, which overlaps with employee behavior and performance, and which may include monitoring or testing in relation to employee predisposition to health risk (genetic screening, pregnancy testing), and employee truthfulness and overall character (polygraph, brainwave, psychological tests).<sup>5</sup>

The future holds in store yet more sophisticated means of monitoring. One system being developed by the United States military, IDES (Intrusion Detection Expert System), combines artificial intelligence with employee monitoring. Although developed for security purposes, it has obvious uses in the workplace for detecting changing or unusual behaviour. The system matches the user's actual activity with known historical patterns in order to detect anomalies, which would indicate suspicious activity or deteriorating performance. The system is able to alert the supervisor's terminal, or compile a record of instances of such anomalous behavior.

### The Privacy Act 1993

In its application to the workplace, the Privacy Act did not suddenly introduce rules into an area where before there were none. Nevertheless, the Privacy Act has significantly altered or supplemented law in the workplace.

As human rights legislation, the Privacy Act compensates somewhat for the imbalance in power that normally forms a backdrop to the collection by employers and employment agencies of personal information from job applicants and employees. Information privacy principle 1 in s 6 of the Privacy Act only permits the collection of personal information if it is collected for a lawful purpose connected with a function or activity of the agency, and if it is necessary for that purpose.

For example, a job applicant should not be asked to provide personal information that is irrelevant to the position that is to be filled. Principle 1 supplements existing pre-employment anti-discrimination law, now to be found in Part II of the Human Rights Act 1993, which deals with acting on the basis of particular prohibited grounds of discrimination. In particular, s 23 of the Human Rights Act

makes it unlawful "to use or circulate any form of application for employment or to make any inquiry of or about any applicant for employment" that suggests that a decision will be made on the basis of a prohibited ground of discrimination. The Privacy Act thus overlaps with the Human Rights Act to the extent that both are concerned with the appropriateness of the information that goes into a decision whether or not to employ an individual.

The nature of the relationship between the Privacy Act and the Human Rights Act is illuminated by the OECD collection limitation principle (para 7 of the OECD Council Recommendation Concerning Guidelines Governing the Protection of Privacy and Transborder flows of Personal Data). The OECD Expert Group, which drew up the Guidelines, was of the view that there ought to be

limits to the collection of data which, because of the manner in which they are to be processed, their nature, the context in which they are to be used or other circumstances, are regarded as specially sensitive.<sup>6</sup>

Although the Expert Group discussed various 'sensitivity criteria', such as the likelihood of personal information being used in a discriminatory way, it was unable to agree upon those classes of personal information "which are universally regarded as sensitive" (para 51). Accordingly, the OECD Guidelines leave it to individual states to set limits on the indiscriminate collection of personal data, allowing each country to formulate its own limits. Among the suggested types of limits that may be set on the collection of personal data are those that relate to civil rights concerns. The Human Rights Act may therefore be viewed in part as legislation that fulfills one of the aims of the OECD collection limitation principle.

The Privacy Act also imposes upon employers certain obligations in connection with the provision and collection of references or testimonials. At common law, there is no obligation on an employer or former employer to provide a reference or respond to inquiries about a job applicant: *Gallear v J F Watson & Son Ltd* [1979] IRLR 306. Only recently has a court found that an employer who provides an inaccurate reference can be liable in negligence to the employee about whom it is written: *Spring v Guardian Assurance PLC and Ors* [1994] 3 WLR 354 (UK, HL). Traditionally this area was governed by the tort of defamation (actions in deceit or negligence, however, would still be able to be pursued by the employer who is misled by an inaccurate reference). Since references would be subject to qualified privilege, the protection against liability for defamation can be lost only where malice by the provider of the reference is shown.

Under the Privacy Act, however, a person normally may only supply a reference if there is a reasonable belief that it has been authorised by the individual concerned (principle 11). Moreover, personal information that was obtained for one purpose (for example, the original job application or an in-house performance assessment) should not be able

to be used for another purpose (i.e., providing a job reference) unless it is reasonably believed that this has been authorised by the individual concerned (principle 10). Finally, the supplier of the reference must take reasonable steps to ensure that it is accurate and not misleading (principle 8).<sup>7</sup>

The prospective employer who requests a reference or is collecting personal information from someone other than the job applicant likewise must, in most cases, reasonably believe that the request for the information has been authorised by the individual concerned (principle 2(2)(b)). Where personal information is proposed to be collected from third parties without the knowledge or consent of the individual concerned, that collection must be brought under one of the listed exceptions to principle 2. It is difficult to see how an exception from principle 2 could be made out for corporate 'headhunting', for example, unless the agency reasonably believes that either "the information is publicly available information" (subcl (2)(a)), or else "non-compliance would not prejudice the interests of the individual concerned" (subcl (2)(c)).

Prior to the enactment of the Privacy Act, privacy interests in the workplace could be protected to a limited extent through the personal grievance provisions of the Employment Contracts Act 1991 (and the corresponding provisions of prior industrial legislation). This was because there is a term implied into every contract of employment providing that the relationship between the parties is one of mutual trust, co-operation, and confidence, and as one aspect of this, fair and reasonable behavior is expected of every employer: *Auckland Shop Employees IUW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA); *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378 (CA). One effect of the Privacy Act is that it reinforces, supplements, and aids in defining what constitutes fair and reasonable treatment by an employer, for such treatment would entail substantial compliance with the information privacy principles.

The personal grievance provisions of the Employment Contracts Act may be able to be invoked where there has been an unauthorised disclosure of personal information by the employer. Where the disclosure of the information relates to sexual matters and results in sexual harassment, the use or disclosure of such personal information by a fellow employee, customer, or client may also become the basis of a personal grievance under s 36.

In the recently decided case of *L v M Ltd* (unreported, 14 February 1994, Wellington Employment Tribunal, D E Hurley, WT 29/94), the employee, a homosexual, had been inadvertently 'outed' by his employer. The employer had assured the employee, who was setting up a support group for gay and lesbian staff, that his identity would be kept confidential, but the employee's name appeared in an article in a company magazine compiled by an outside agency. Because of the subsequent harassment suffered by him, the employee was successful in making out a

personal grievance claim for sexual harassment (ss. 27(1)(d), 29, and 36 of the Employment Contracts Act). Moreover, the employee also succeeded in establishing his claim for unjustified dismissal (s. 27(1)(a)) on the basis that he had been constructively dismissed: he had resigned from his employment because of the position of vulnerability in which he had been placed by his employer, and there were "some serious mistakes" in the way the employer dealt with the employee after the publication. In the end, the employee felt he had no option but to resign. The employee also attempted to make out a grievance under s. 27(1)(b) of the Act, that the publication constituted an unjustified act by the employer to the disadvantage of his employment in that the workplace became threatening to him. However, the Tribunal held under its equity and good conscience jurisdiction that it would be unfair to hold the employer responsible for the unintentional publication by a third party, and dismissed this head of the claim. In the end, the employee received compensation of \$32,000, which included \$2,000 for his having to move overseas, and \$25,000 for humiliation and distress.

In regard to the unsuccessful grievance alleged under s. 27(1)(b) of the Employment Contracts Act, it is interesting to compare the approach of the Employment Tribunal with that set out under subs 85(4) of the Privacy Act. In proceedings undertaken before the Complaints Review Tribunal pursuant to the Privacy Act, it is not a defence that an interference with the privacy of an individual "was unintentional or without negligence on the part of the defendant". The Complaints Review Tribunal, however, must "take the conduct of the defendant into account in deciding what, if any remedy, to grant".

The personal grievance provisions of the Employment Contracts Act are also of use in a privacy context where there has been an unfair use of personal information. While there are no cases dealing directly with complaints about unfair surveillance of workers, the use to which information gained through surveillance activities is put has been examined in personal grievance settings. In *B W Bellis Ltd v Canterbury Hotel, etc, Employees' IUW* [1985] ACJ956 (CA), a night cleaner whose work had deteriorated was surreptitiously observed by her employer while she performed her duties one night. The next morning the employer asked her to complete a schedule of work she had done the previous night. It was only after she had completed this schedule that the employer informed the woman that he had observed her, and that the schedule was inaccurate. The Court of Appeal held that the resulting dismissal was unjustified. It was procedurally unfair because the employee had been trapped into giving inaccurate written answers to the employer's inquiry. The proper approach would have been for the employer to confront the worker from the outset with the fact that he had kept her under surveillance.

In *Northern Industrial District, etc, Storepersons', etc IUOW v Nathan Distribution Centre Ltd* (1987) 1 NZELC 95,478, an employee had been implicated in company

thefts by an undercover agent, but the dismissal interview was mishandled in that none of the detailed evidence of the undercover agent had been put to the employee for specific comment. This led to a finding by the Labour Court that the dismissal was unjustified.<sup>8</sup>

In the recent case of *Graham v Christchurch Polytechnic* (unreported, 14 September 1993, Christchurch Employment Court, Palmer J, CEC 48/93), the employer dismissed a tutor for allegedly harassing a female fellow staff member. In doing so, the employer relied in part upon the employee's E-mail correspondence with the woman concerned. The dismissed employee contended that this was improper and contravened the Privacy Act. Palmer J held that there was "an arguable case for procedural unfairness in this particular context" (p 25). The Privacy Act has thus added further scope to ways in which an employer may be found to have acted in a procedurally unfair manner.

In regard to surveillance and monitoring activities, employment law has always had the potential to set limits on employers' surveillance practices to the extent that they are conducted in a manner that is not destructive of the relationship of trust and confidence that is supposed to exist between the parties, and that the results of the surveillance are used fairly. For example, in *Pillay v Rentokil Ltd* [1992] 1 ERNZ 337, an employee's resignation was held to amount to a constructive dismissal. The reason for the Tribunal's finding was the employer's failure to explain why the employee was being investigated following its botched attempts at surveillance (which included a high speed car chase!). The Employment Tribunal held that although the employer was entitled to carry out a surveillance of the employee, once the surveillance was detected by the employee, the employee

... was entitled to know the depth of the respondent's suspicions and distrust so that he could see whether there was some reassurance he could give to clear up any simple misunderstanding, or whether a more deep seated reason lay behind the distrust. An explanation, if given, may have gone some way to repairing the loss of confidence and trust caused to Mr Pillay by the respondent's actions. Mr Pillay was also entitled to a proper opportunity to explain why the respondent's apparent distrust of him was unfounded.<sup>9</sup>

The Privacy Act further requires that surveillance or monitoring be necessary for a lawful purpose connected with the agency's function or activity (principle 1), and that the means, in the circumstances, are lawful, fair, and do not intrude unreasonably upon the personal affairs of the individual concerned (principle 4). Although principle 3 requires that the employer take such steps (if any) as are, in the circumstances, reasonable to ensure that the individual concerned is aware, inter alia, of the fact that information is being collected, and the purpose for its collection, one exception is where the agency believes, on reasonable grounds, that "compliance would prejudice the purposes of the collection" (subcl 3(4)(d)).

Accordingly, surveillance or monitoring without an individual's knowledge appears to be permissible if it is necessary for a lawful purpose connected with the agency's function or activity (Principle 1), and if the means, in the circumstances of the case, are not unfair or intrude to an unreasonable extent upon the personal affairs of the individual concerned (Principle 4). If the collection or use of personal information is made in breach of these or other information privacy principles, and the information is relied upon for a decision to dismiss or discipline an employee, this in itself may constitute procedural unfairness, as suggested by Palmer J in the *Christchurch Polytechnic* case.

The upshot of such cases as those cited above involving the unfair use of personal information is that there is little incentive for employers to use such information if in the end the Employment Tribunal or Employment Court will not uphold the action taken in reliance on it. In particular, employment law has long frowned upon the use of information that is adverse to an employee before affording the individual concerned an opportunity to comment on it. Thus, the employee's interest in access to and correction of personal information, now provided for under principles 6 and 7 of the Privacy Act, can be viewed as having been indirectly promoted by employment law's concern with natural justice.

In addition to being a human rights-type statute, the Privacy Act is also a freedom of information statute. Its effect in the employment arena is to extend to workers in the private sector the same rights in relation to personal information that have been enjoyed by public sector workers under the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987.

The Privacy Act enables employees to be proactive in regard to their personal information. Employees normally discover prejudicial information about themselves only after adverse action has already been taken. Principles 6 and 7, however, enable employees to have access to and correct or annotate information about themselves held by their employer. Moreover, these rights of access and correction apply not only to personal information held by an employer, but also to information held by other entities, such as employment agencies, trade unions, professional and trade associations, and agencies in a client or contractor relationship with the employer.

The right of access to personal information is subject to a number of 'good reasons' for refusing disclosure set out in ss 27, 28 and 29 of Part IV of the Act. However, only a few of these 'good reasons' are likely to arise in the ordinary employment context. Chief among these is s 29(1)(b), which provides that:

- (1) An agency may refuse to disclose any information requested pursuant to principle 6 if -
- ... (b) The disclosure of the information or of information identifying the person who supplied it, being

evaluative material, would breach an express or implied promise -

- (i) Which was made to the person who supplied the information; and
- (ii) Which was to the effect that the information or the identity of the person who supplied it or both would be held in confidence...

On its face, this provision might be thought to protect material such as performance appraisals, references, and interview notes from disclosure to the individuals to whom they relate.

However, s 29 (1) is framed as making provision for a series of permissive reasons for refusing disclosure. In the context of applying such a provision to public sector agencies, the Ombudsman has long held that this discretion should be exercised in a fair and reasonable way.<sup>10</sup> Moreover, in accordance with the definition of 'evaluative material' in s 29(1)(3), the information must have been 'compiled solely' for purposes relating to "determining the suitability, eligibility, or qualifications" of a person for employment, promotion or dismissal. Thus, for example, unsolicited complaints about an employee by a disgruntled client cannot be withheld under this provision; there must be "a common purpose in the supply and receipt of the information".<sup>11</sup> Such a common purpose, however, could be found where an employer requested a letter of reference from a referee nominated by a job applicant.

Furthermore, if the supplier of the evaluative material is another employee or a contractor engaged by the employer, it is unlikely that there would be an implied promise of confidentiality. For a promise of confidentiality to apply, the information must be supplied 'in reliance on' the promise. If the information is merely being supplied in the performance of the informant's duties, this is not sufficient. The Ombudsman has stated that 'the promise must be operative in inducing the supply of information.'<sup>12</sup> That is, where evaluative material has been provided pursuant to a contractual duty, it is difficult to say that an implied promise of confidentiality is operative in motivating the provision of the information. Such would clearly be the case, however, where the supply of a job reference is gratuitous, since the promise of confidentiality can easily be implied, and without such an understanding, the supply of such information would be prejudiced, making reliance on s 29(1)(b) in this instance reasonable.

The Privacy Act confers upon individuals a right of access to personal information about themselves regardless of whether that information was obtained before or after 1 July 1993 (s 8(2)). Thus, employees now have access to material which may well be embarrassing for the employer to disclose. Accordingly, a number of employers appear to be in the process of auditing their personnel records to ensure that the information contained in them is accurate, up to date, relevant, and not misleading (Principle 8), and that it is not kept for longer than necessary (Principle 9).

As a corollary to the right of access under Principle 6, individuals also have the right to seek correction of their personal information (Principle 7). This right is connected with the duty of agencies to ensure that personal information is accurate (Principle 8). Misleading or inaccurate information may be relied upon, for example, where an employer is requested to act as a referee; where an employee is seeking a loan; or in connection with superannuation or health insurance. The right to seek correction of personal information may therefore prevent adverse decisions being made about the individual concerned. Moreover, an employee's personnel records may include a supervisor's comments in relation to competency or conduct, on which matters an employee ought to have an opportunity to comment before the information is acted upon. This would be consistent with the requirements of natural justice.

## Conclusion

The Privacy Act has ushered in a new period when employers will have to become more sensitive to privacy issues affecting the workplace. To that extent, at least, the Privacy Act serves an important consciousness-raising function. A threshold question to be faced by employers under the privacy regime will be recognising whether or not an actual or potential privacy issue arises in the first place.

It is submitted that the requirements of the Act are consistent not only with sensible information practices, but with good industrial practice as well. Many of the concerns with which the Privacy Act deals may also be addressed by pre-existing employment or human rights law. Accordingly, the Privacy Act may be viewed as reinforcing and supplementing existing employment law and practices, particularly those which rely upon concepts of natural justice and fairness for their basis.

## Future research

Overall, there is a need in New Zealand for empirical research into all aspects of privacy-related issues. Most of the information we have relates to the position overseas, particularly the United States. While there is a continuing need to monitor overseas developments, there may well be significant differences in attitudes, requirements, and practices between New Zealand and other developed countries, despite New Zealand's membership in the 'Global Village'.

In particular, there is a need for greater empirical research into current information handling and privacy practices and policies in the workplace, with a view to arriving at a set of model guidelines. In addition, it would be interesting to determine whether or not the enactment of the Privacy Act has made any significant practical difference in the workplace. Other projects could usefully survey New Zealand attitudes towards privacy in the workplace, ten-

sions between privacy and Equal Employment Opportunities monitoring, workplace gender issues relating to privacy, and workplace health issues relating to privacy.

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## Notes

- <sup>1</sup> United States Office of Technology Assessment, *The Electronic Supervisor: New Technology, New Tensions* (Washington D.C., United States Government Printing Office, 1987) p 107.
- <sup>2</sup> K H Decker, *The Individual Employment Rights Primer* (Amityville, New York, 1991).
- <sup>3</sup> *Privacy* (1983, Report No 22) vol 1, para 719
- <sup>4</sup> Testimony before the Special House Committee to Investigate the Taylor and Other Systems of Shop Management, cited in Frederick W Taylor, *Scientific Management* (New York, 1947) p 42.
- <sup>5</sup> *Supra*, note 1, p 13.
- <sup>6</sup> *Appendix to the OECD Guidelines: Explanatory Memorandum* (Paris, 1980) para 50.
- <sup>7</sup> An issue that is to be determined in the near future by the Employment Court is whether an employer's withdrawal or correction of a reference that has already been given to

others could support a claim of unjustifiable disadvantage by the employee concerned: *Hodges v Pollock*, Employment Tribunal, 28 October 1994, CT 180/94 (D S Miller).

<sup>8</sup> See also the Australian Federal Court case of *Byrne v Australian Airlines Ltd* [1994] 120 ALR 273. That case dealt with procedural unfairness arising from the employer's use of the results of video surveillance for dismissal purposes.

<sup>9</sup> At p 346.

<sup>10</sup> See *Case No 129* (1985) 6 CCNO 98, at 100 (G R Laking); (1993) 10(2) CCNO 110.

<sup>11</sup> See *Case No 1141* (1989) 9 CCNO 201, at 202 (N Tollemache).

<sup>12</sup> See *Case No 157* (1986) 7 CCNO 141, at 146 (L J Castle); *Case No 468* (1986) 7 CCNO 209, at 213 (L J Castle); cf *Re Low and Department of Defence* (1983-84) 6 ALD 280; (1984) 2 AAR 142 (Cth AAt); *Smith Kline & French Laboratories (Aust) Ltd v Department of Community Services and Health* (1991) 28 FCR 291, at 302-3.

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