

# JUDGE BAER

# 04 CV 4872

CIVIL COVER SHEET

JS 44C/SDNY  
REV. 1/97  
WEB 12/02

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for use of the Clerk of Court for the purpose of initiating the civil docket sheet.

**PLAINTIFFS**

**DEFENDANTS**

*The Associated Press*

*U.S. Dep't of Defense; Dept of the Air Force*

**ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)**

**ATTORNEYS (IF KNOWN)**

*Lévine Sullivan Koch + Schultz, LLP  
230 Park Ave., Suite 1160, NY NY 212 850-6100*

**CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE)**

*FOIA case seeking  
Access to microfilm copy of military personnel record of Pres. Bush under 5 USC § 552, et. seq.*

Has this or a similar case been previously filed in SDNY at any time? No  Yes?  Judge Previously Assigned

If yes, was this case Vol  Invol.  Dismissed. No  Yes  If yes, give date \_\_\_\_\_ & Case No. \_\_\_\_\_

(PLACE AN [x] IN ONE BOX ONLY)

**NATURE OF SUIT**

**ACTIONS UNDER STATUTES**

CONTRACT		REAL PROPERTY		TORTS		FORFEITURE/PENALTY		BANKRUPTCY		OTHER STATUTES																																																	
<input type="checkbox"/> 110 INSURANCE	<input type="checkbox"/> 120 MARINE	<input type="checkbox"/> 130 MILLER ACT	<input type="checkbox"/> 140 NEGOTIABLE INSTRUMENT	<input type="checkbox"/> 150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT	<input type="checkbox"/> 151 MEDICARE ACT	<input type="checkbox"/> 152 RECOVERY OF DEFAULTED STUDENT LOANS (EXCL VETERANS)	<input type="checkbox"/> 153 RECOVERY OF OVERPAYMENT OF VETERANS BENEFITS	<input type="checkbox"/> 160 STOCKHOLDERS SUITS	<input type="checkbox"/> 190 OTHER CONTRACT	<input type="checkbox"/> 195 CONTRACT PRODUCT LIABILITY	<input type="checkbox"/> 210 LAND CONDEMNATION	<input type="checkbox"/> 220 FORECLOSURE	<input type="checkbox"/> 230 RENT LEASE & EJECTMENT	<input type="checkbox"/> 240 TORTS TO LAND	<input type="checkbox"/> 246 TORT PRODUCT LIABILITY	<input type="checkbox"/> 290 ALL OTHER REAL PROPERTY	<input type="checkbox"/> 310 AIRPLANE	<input type="checkbox"/> 315 AIRPLANE PRODUCT LIABILITY	<input type="checkbox"/> 320 ASSAULT, LIBEL & SLANDER	<input type="checkbox"/> 330 FEDERAL EMPLOYERS' LIABILITY	<input type="checkbox"/> 340 MARINE	<input type="checkbox"/> 345 MARINE PRODUCT LIABILITY	<input type="checkbox"/> 350 MOTOR VEHICLE	<input type="checkbox"/> 355 MOTOR VEHICLE PRODUCT LIABILITY	<input type="checkbox"/> 360 OTHER PERSONAL INJURY	<input type="checkbox"/> 362 PERSONAL INJURY - MED MALPRACTICE	<input type="checkbox"/> 365 PERSONAL INJURY PRODUCT LIABILITY	<input type="checkbox"/> 368 ASBESTOS PERSONAL INJURY PRODUCT LIABILITY	<input type="checkbox"/> 370 OTHER FRAUD	<input type="checkbox"/> 371 TRUTH IN LENDING	<input type="checkbox"/> 380 OTHER PERSONAL PROPERTY DAMAGE	<input type="checkbox"/> 385 PROPERTY DAMAGE PRODUCT LIABILITY	<input type="checkbox"/> 610 AGRICULTURE	<input type="checkbox"/> 620 FOOD & DRUG	<input type="checkbox"/> 625 DRUG RELATED SEIZURE OF PROPERTY	<input type="checkbox"/> 630 LIQUOR LAWS	<input type="checkbox"/> 640 RR & TRUCK	<input type="checkbox"/> 650 AIRLINE REGS	<input type="checkbox"/> 660 OCCUPATIONAL SAFETY/HEALTH	<input type="checkbox"/> 690 OTHER	<input type="checkbox"/> 422 APPEAL 28 USC 158	<input type="checkbox"/> 423 WITHDRAWAL 28 USC 157	<input type="checkbox"/> 400 STATE REAPPORTIONMENT	<input type="checkbox"/> 410 ANTI TRUST	<input type="checkbox"/> 430 BANKS & BANKING	<input type="checkbox"/> 450 COMMERCE/ICC RATES/ETC	<input type="checkbox"/> 460 DEPORTATION	<input type="checkbox"/> 470 RACKETEER INFLUENCED & CORRUPT ORGANIZATION ACT (RICO)	<input type="checkbox"/> 810 SELECTIVE SERVICE	<input type="checkbox"/> 850 SECURITIES/COMMODITIES/EXCHANGE	<input type="checkbox"/> 875 CUSTOMER CHALLENGE 12 USC 3410	<input type="checkbox"/> 891 AGRICULTURE ACTS	<input type="checkbox"/> 892 ECONOMIC STABILIZATION ACT	<input type="checkbox"/> 893 ENVIRONMENTAL MATTERS	<input type="checkbox"/> 894 ENERGY ALLOCATION ACT	<input checked="" type="checkbox"/> 895 FREEDOM OF INFORMATION ACT	<input type="checkbox"/> 900 APPEAL OF FEE DETERMINATION UNDER EQUAL ACCESS TO JUSTICE	<input type="checkbox"/> 950 CONSTITUTIONALITY OF STATE STATUTES	<input type="checkbox"/> 990 OTHER STATUTORY ACTIONS

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JUN 22 2004  
U.S. ATTORNEY SDNY

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JUN 22 2004  
U.S.D.C. S.D. N.Y.  
CASHIERS

Check if demanded in complaint:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DO YOU CLAIM THIS CASE IS RELATED TO A CIVIL CASE NOW PENDING IN S.D.N.Y.? IF SO, STATE: \_\_\_\_\_

DEMAND \$ \_\_\_\_\_ OTHER \_\_\_\_\_ JUDGE \_\_\_\_\_ DOCKET NUMBER \_\_\_\_\_

Check YES only if demanded in complaint  
JURY DEMAND:  YES  NO

NOTE: Please submit at the time of filing an explanation of why cases are deemed related.

(PLACE AN X IN ONE BOX ONLY)

ORIGIN

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from (Specify District)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judge Judgment

(PLACE AN X IN ONE BOX ONLY)

BASIS OF JURISDICTION

- 1 U.S. PLAINTIFF
- 2 U.S. DEFENDANT
- 3 FEDERAL QUESTION (U.S. NOT A PARTY)
- 4 DIVERSITY

IF DIVERSITY, INDICATE CITIZENSHIP BELOW. (28 USC 1322, 1441)

CITIZENSHIP OF PRINCIPAL PARTIES (FOR DIVERSITY CASES ONLY)

(Place an [X] in one box for Plaintiff and one box for Defendant)

CITIZEN OF THIS STATE PTF DEF <input type="checkbox"/> [1] <input type="checkbox"/> [1]	CITIZEN OR SUBJECT OF A FOREIGN COUNTRY PTF DEF <input type="checkbox"/> [1] <input type="checkbox"/> [1]	INCORPORATED and PRINCIPAL PLACE OF BUSINESS IN ANOTHER STATE PTF DEF <input type="checkbox"/> [1] <input type="checkbox"/> [1]
CITIZEN OF ANOTHER STATE PTF DEF <input type="checkbox"/> [1] <input type="checkbox"/> [1]	INCORPORATED or PRINCIPAL PLACE OF BUSINESS IN THIS STATE PTF DEF <input checked="" type="checkbox"/> [1] <input type="checkbox"/> [1]	FOREIGN NATION PTF DEF <input type="checkbox"/> [1] <input type="checkbox"/> [1]

PLAINTIFF(S) ADDRESS(ES) AND COUNTY(IES) (Calendar Rule 4(A))

50 Rockefeller Plaza  
New York, NY

DEFENDANT(S) ADDRESS(ES) AND COUNTY(IES) (Calendar Rule 4(A))

U.S. Attorney  
Southern District of NY  
Civil Division  
86 Chambers St.  
NY NY 10007

John D. Ashcroft  
Attorney General  
Dep't of Justice  
950 Pennsylvania Ave, NW  
Washington, DC 20530

DEFENDANT(S) ADDRESS UNKNOWN

REPRESENTATION IS HEREBY MADE THAT, AT THIS TIME, I HAVE BEEN UNABLE, WITH REASONABLE DILIGENCE, TO ASCERTAIN THE RESIDENCE ADDRESSES OF THE FOLLOWING DEFENDANTS:

Check one: THIS ACTION SHOULD BE ASSIGNED TO:  WHITE PLAINS  FOLEY SQUARE  
(DO NOT check either box if this a PRISONER PETITION.)

DATE: 4/22/04  
RECEIPT #  
SIGNATURE OF ATTORNEY OF RECORD: *David A. Schulz*

ADMITTED TO PRACTICE IN THIS DISTRICT  
 NO  
 YES (DATE ADMITTED Mo. \_\_\_\_\_ Yr. 79)  
Attorney Bar Code # DS-3180

Magistrate Judge is to be designated by the Clerk of the Court.

Magistrate Judge \_\_\_\_\_ is so Designated.

J. Michael McMahon, Clerk of Court by \_\_\_\_\_ Deputy Clerk, DATED \_\_\_\_\_

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

**JUDGE BAER**

THE ASSOCIATED PRESS,

**04** CV **4872**  
Index No.

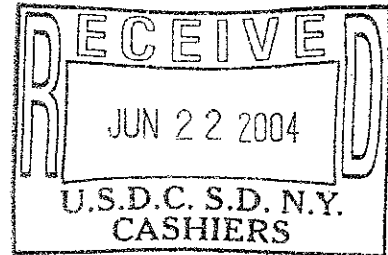
Plaintiff, :

- against - :

DISCLOSURE STATEMENT

UNITED STATES DEPARTMENT :  
OF DEFENSE and its component, :  
DEPARTMENT OF THE AIR FORCE, :

Defendants. :  
X



Plaintiff, The Associated Press ("AP"), pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, states that it has no parents, subsidiaries, or affiliates that have any outstanding securities in the hands of the public, has no publicly held stock, and no publicly held company owns 10% or more of its stock.

Dated: June 22, 2004  
New York, NY

LEVINE SULLIVAN KOCH & SCHULZ LLP

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U.S. ATTORNEY SDNY

*Py*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

**JUDGE BAER**

THE ASSOCIATED PRESS,

**04**<sup>X</sup> **CV** No. **4872**

Plaintiff, :

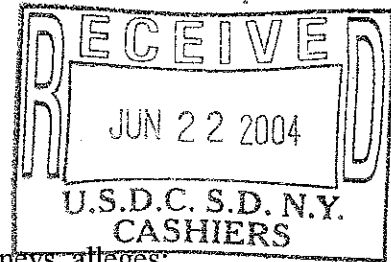
- against - :

COMPLAINT

UNITED STATES DEPARTMENT  
OF DEFENSE and its component,  
DEPARTMENT OF THE AIR FORCE, :

Defendants. :

X



Plaintiff, The Associated Press ("AP"), by its undersigned attorneys, alleges:

**INTRODUCTION**

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, brought by the nation's largest newsgathering organization to compel access to a microfilm copy of the military personnel file of President George W. Bush that is held by the Texas State Library and Archives Commission (the "Texas archives") in Austin, Texas. Obtaining a copy of this microfilm file is a matter of urgent concern to the AP in connection with its reporting on the 2004 presidential election campaign.

2. A significant controversy has arisen in the ongoing campaign over the President's military service during the Vietnam War, and specifically whether he performed his required days of service during a period between May 1972 and May 1973. Allegations have been made that the military personnel file for George W. Bush released to the press earlier this year is not complete. The public has an intense and legitimate interest in knowing

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U.S. ATTORNEY SDNY *RJ*

the validity of these claims, which well may be answered by reviewing the microfilm copy of the personnel file in the Texas archives.

3. On information and belief, the microfilm copy of the personnel file is under the direct control of the Air National Guard of the United States, a unit of the defendants. This file is subject to public disclosure under FOIA, and the President has publicly waived any objection to the release of “everything” in his military personnel file.

4. Nevertheless, for three months defendants have failed to respond to AP’s repeated requests, oral and written, for access to the archived copy of the personnel file pursuant to FOIA. Although the file consists of a small number of clearly-defined and easily identifiable documents, defendants did not expedite their response as requested by AP under 5 U.S.C. § 552(a)(6)(E), they did not produce the file within the time required by law, and they will not now estimate when the file might be produced or even confirm that an effort has been initiated to retrieve a copy from the microfilm at the Texas archives.

5. Given the public’s indisputable right under FOIA to inspect this file, the absence of any privacy objection by the President, the lack of any burden in locating or producing the file, and the obvious importance of its release in advance of the November election, AP seeks declaratory and injunctive relief to compel the release of records that are being unlawfully withheld from the public. AP seeks expeditious treatment of this Complaint pursuant to 28 U.S.C. §1657.

#### **THE PARTIES**

6. Plaintiff is a news cooperative that operates the world’s oldest and largest newswire service, providing content to some 15,000 news outlets. AP is a not-for-

profit membership corporation organized under the laws of the State of New York, with its headquarters located at 50 Rockefeller Plaza, New York, N.Y.

7. Defendant Department of Defense (“DOD”) is a department within the executive branch of the United States government. Defendant Department of the Air Force is a component of DOD and operates the Air National Guard of the United States. Both defendants are agencies of the United States within the meaning of 5 U.S.C. § 552(f)(1).

### **JURISDICTION AND VENUE**

8. This Court has subject matter jurisdiction over this action and personal jurisdiction over the defendants pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(E)(iii). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706.

9. Venue is premised on plaintiff’s place of business and is proper in this district under 5 U.S.C. § 552(a)(4)(B).

### **FACTS**

#### **The election controversy behind AP’s FOIA request**

10. George W. Bush served in the Texas Air National Guard from 1968 to 1973, during the height of the Vietnam War. His military service became a significant issue of public debate earlier this year, after questions were raised about whether he showed up for duty between May 1972 and May 1973. His commanding officer in Texas reported at the time that “Lt. Bush has not been observed at his unit” during this period, but was believed to be “performing equivalent training” in Alabama.

11. When no one seemed able to confirm that Lt. Bush actually appeared for duty in Alabama, Democrats called on the President to release his entire military file to

put the matter to rest. Appearing on NBC's "Meet the Press" on February 8, 2004, the President "absolutely" agreed to open "everything" in his military personnel file, without exception.

12. Subsequently, on or about Feb. 10, 2004 Defense Financing Accounting Service ("D-FAS") in Denver, Colorado released Bush military pay records. On or about February 13, 2004, the White House produced several hundred pages of documents that it understood and intended to be "the entire file." On information and belief, these documents were compiled from records maintained by the Texas Air National Guard at Camp Mabry and from the National Personnel Records Center in St. Louis, Missouri.

13. The file released by the White House contained no documentation from Alabama and provided no direct evidence that Lt. Bush had served in Alabama.

14. Allegations have been leveled concerning the completeness of the military records produced by the White House. On or about February 12, 2004, former Lt. Col. Bill Burkett of the Texas Air National Guard told AP of his personal knowledge that in 1997 potentially embarrassing items were removed from the physical file of Bush's military service at Camp Mabry, as he geared up for re-election as Governor of Texas.

#### **The existence of a second copy of the military file**

15. Pursuant to Texas state law and document retention regulations, a copy of the individual military personnel files of all individuals serving in the Texas Air National Guard must permanently be retained on microfilm at the Texas archives, located at the Texas Records Center, 4400 Shoal Creek Boulevard, Austin, Texas. On information and belief, a copy of the individual military personnel file for President Bush, together with active duty

reports, attendance records and related material bearing on his military service, exists on microfilm residing at this location.

16. On information and belief, no one has looked at any of the records of the Texas Air National Guard maintained at the Texas archives since 1996.

**AP's multiple efforts to obtain a copy of the archive file**

17. Pursuant to Texas Government Code § 441.193(g), requests for public access to documents held in the Texas archives must be authorized by the agency having "legal custody" of the records.

18. AP submitted a request under the Texas Public Information Act to the Texas Air National Guard on March 11, 2004, seeking, *inter alia*, "all documents retained on microfilm that comprise the individual military personnel records for George W. Bush (discharged)...."

19. In the March 11 request to the Texas Air National Guard, AP stressed that the archive file was sought for news reporting on a matter of great public interest, and requested expedited treatment of its application under the Texas Public Information Act.

20. The very next day, by letter dated March 12, 2004, the Texas Air National Guard advised AP that individual military personnel files were considered "federal" files, and AP's request had been forwarded to the National Guard Bureau in Arlington, Virginia for a response.

21. AP promptly protested the transfer of its request for documents created by the Texas Air National Guard and maintained in the Texas archives. By letter dated March 19, 2004, AP also requested certain additional files from the microfilm at the Texas



archives, including active duty reports, attendance records and any orders relating to the squadron in which the President had served that were issued during the time of his service.

22. By letter dated March 30, 2004, the Texas Air National Guard repeated its position that the personnel file was under the "direct control" of the United States Air National Guard and subject to disclosure only pursuant to FOIA. It further advised AP that its request had now been transferred once more, this time from the National Guard Bureau in Virginia to the Directorate for Freedom of Information & Security Review at the Department of Defense in Washington, D.C.

23. Without accepting as accurate the characterization of the military personnel file in the Texas archive as a federal file, and in a continuing effort to accelerate the release of the records, on or about April 7, 2004 AP submitted directly to DOD the same requests it had previously submitted to the Texas Air National Guard, and asked for release of the documents under FOIA.

24. In its FOIA request to DOD, AP once again stressed that it was seeking the documents in connection with its news reporting on a matter of great public interest. AP requested expedited treatment of its request, as authorized by FOIA, 5 U.S.C. § 552(a)(6)(E)(i), and DOD regulations, 32 C.F.R. § 286.4(d)(3).

25. DOD did not respond to AP's request in writing. In a subsequent telephone conversation, a DOD FOI officer, Jim Hogan, confirmed to counsel for AP that DOD did indeed consider the request for the individual personnel file of a member of the Texas Air National Guard to be a request for federal documents subject to disclosure only pursuant to the provisions of FOIA. However, Mr. Hogan stated that the other microfilm

files requested by AP (attendance records, active duty reports, etc.) were considered by DOD to be state records.

26. Having received no written response and no access to the archive copy of the personnel file, on April 23, 2004 AP submitted a further letter, jointly urging both DOD and the Texas Air National Guard to expedite the processing of the release of the archived personnel file. AP stressed that it had been seeking the personnel file for nearly six weeks, pursuant to both state and federal law, and that they were needed in connection with an on-going news story of great public interest.

27. By letter dated April 30, 2004 the Texas Air National Guard responded to AP that DOD was handling the request for the personnel file, and Texas Air National Guard considered the "case closed."

28. DOD did not respond to AP's April 23 request in writing. When called by AP counsel on or about April 30, Mr. Hogan indicated that the personnel file requested by AP had been collected, processed and reviewed for redactions, and estimated that it would be produced within a week.

29. When no documents were forthcoming, AP counsel again spoke with Mr. Hogan on or about May 10, 2004. At that time Mr. Hogan indicated the documents were being reviewed by counsel, and he could not estimate when they would be produced.

30. The documents were still not forthcoming. In a further telephone conversation two weeks later, on or about May 25, 2004, Mr. Hogan repeated that the lawyers were reviewing the documents. When questioned by AP counsel, however, Mr. Hogan could not confirm whether the documents collected in response to AP's request were from the

microfilm maintained at the Texas archives, or were simply copies of the same material previously collected and released by the White House in February.

31. Upon hearing this, AP that same day promptly filed with both DOD and the National Guard Bureau an administrative appeal from the effective denial of its FOIA request.

32. In its May 25 administrative appeal, AP underscored that it was seeking a copy of the microfilm file. AP objected that, by law, the file should have been produced within twenty days of the request (all apart from the disregarded request to expedite), yet no documents had been produced and no request for additional time had been made.

33. In its administrative appeal, AP underscored the time-sensitive nature of its request, and requested expedited consideration of the appeal.

34. By letter dated May 28, 2004, DOD acknowledged receipt of the administrative appeal, but said it could not respond within the statutory period for determining appeals. It denied AP's request to expedite the appeal, saying all requests are treated equally on a first in first out basis, notwithstanding the agency's obligation under FOIA, 5 U.S.C. § 552(a)(6)(E), to provide a process for expediting both requests and appeals where a "compelling need" exists for a prompt disclosure of documents.

35. More than twenty days have passed since AP submitted its administrative appeal to DOD and the National Guard Bureau. AP has received no further response to its appeal.

36. AP has exhausted its administrative remedies.

**FIRST CAUSE OF ACTION**

(Violation of FOIA for failing to expedite AP's request)

37. AP repeats, realleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

38. Defendants' failure to expedite the processing of AP's request violates FOIA, 5 U.S.C. § 552(a)(6)(E), and defendants' own regulations promulgated thereunder.

**SECOND CAUSE OF ACTION**

(Violation of FOIA for failure to timely respond to AP's request)

39. AP repeats, realleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

40. Defendants' failure to respond timely to plaintiffs' request violates FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and defendants' own regulations promulgated thereunder.

**THIRD CAUSE OF ACTION**

(Violation of FOIA for failure to make records promptly available)

41. AP repeats, realleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

42. Defendants' failure to make promptly available and to release the documents reasonably described by AP violates FOIA, 5 U.S.C. § 552(a)(3)(A).

**RELIEF REQUESTED**

**WHEREFORE**, AP respectfully prays that this Court:

- a. Expedite consideration of this Complaint pursuant to 28 U.S.C. §1657;
- b. Declare that the microfilm copy of the military personnel file of President George W. Bush maintained at the Texas archives is subject

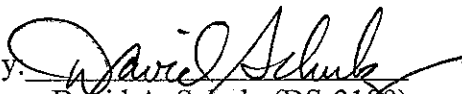
to FOIA and must be disclosed by defendants in the manner proscribed by FOIA;

- c. Order defendants immediately and expeditiously in advance of the November election to provide to AP either (i) a copy of the requested personnel file from the Texas archive or (ii) a written authorization for release of the file directly to AP by the Texas State Library and Archives Commission;
- d. Award AP the costs of this proceeding, including reasonable attorneys' fees; and
- e. Grant such other and further relief as the Court deems just and proper.

Dated: June 22, 2004  
New York, NY

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ LLP

By:   
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