

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**MICHAEL LESAGE**

Applicant

- and -

**ATTORNEY GENERAL OF ONTARIO**

Respondent

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**FACTUM OF THE RESPONDENT**

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October 5, 2023

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**Applicant**

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## **PART I – OVERVIEW**

1. The applicant is a member of the public and lawyer. He has asked the Superior Court of Justice for court file numbers for every case resolved by jury and by non-jury trial in six Ontario courthouses over a seven-year period.
2. The Office of the Chief Justice of the Superior Court of Justice refused the applicant's request for the information. The applicant now asks this Court to compel the Attorney General to provide him with the information he wants.
3. This Court retains control of the information in the registry, and alone can refuse to release or withhold that information. By bringing this application against the Attorney General, the applicant seeks to obtain indirectly what he cannot obtain directly from the Court. The Attorney General's function is simply to administer the registry on the Court's behalf.
4. The Attorney General makes no submission on the correctness of the Chief Justice's decision to refuse the applicant's request for the information. That decision was the Court's to make alone.
5. This application should be dismissed, with costs to the respondent.

## PART II – FACTS

### A. The Applicant Asked for Bulk Production of Court File Numbers

#### 1) *This Court Refused to Give the Applicant Thousands of File Numbers*

6. The applicant requested production of, *inter alia*, court file numbers for every case resolved by jury trial and by non-jury trial in six Ontario courthouses from 2015 – 2021.<sup>1</sup> The applicant made his request of both the Superior Court of Justice and of the Ministry of the Attorney General (the “MAG”).

7. The Court refused to produce the court file numbers the applicant sought.<sup>2</sup> The Court did approve the release of most of the other records the applicant requested.<sup>3</sup>

8. The applicant wrote to the Chief Justice of the Superior Court of Justice, seeking his intervention and the release of the court file numbers.<sup>4</sup>

9. In a response dated February 15, 2023, the Office of the Chief Justice wrote to the applicant that, “Any release of Court data by the Ministry is subject to the approval of the Court. Your requests have been considered and you have received your response. The Court’s decision will not be reconsidered.”<sup>5</sup>

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<sup>1</sup> Affidavit of Michael Lesage, sworn February 21, 2023, Ex. 1, Applicant’s Record, Tab B1, pp 23 – 24.

<sup>2</sup> *Ibid*, pp 24, 26, 29 – 30.

<sup>3</sup> *Ibid*, pg 28.

<sup>4</sup> *Ibid*, pg 31.

<sup>5</sup> *Ibid*, pg 35.

**2) *The Applicant has Previously Received and Published Court File Numbers***

10. The applicant requested and received information on a previous occasion. The information was provided with a notice that “The data is being provided ‘as is’ for the specified purpose and may not be used for any other purpose without seeking further approval.”<sup>6</sup> Nonetheless, the applicant published the information, including individual court file numbers, on his website in apparent violation of the conditions under which it was shared.<sup>7</sup>

11. While the correspondence between the applicant and the Court concerning his first request for court information is not in evidence, it appears that the Court provided the court file numbers on the understanding that they would not be published. In response to the applicant’s second request, the Court wrote to the applicant that “Only aggregate data is appropriate to provide for statistical research. To the extent that file numbers have been provided on one occasion in the past, it had been our understanding that only the results of the research would be published, not individual case file numbers.”

**B. The Attorney General of Ontario Does Not Control the Information Sought**

12. Contrary to the assertion in the notice of application,<sup>8</sup> the respondent Attorney General of Canada has no responsibility for the administration of the Superior Court of Justice.

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<sup>6</sup> *Ibid*, pp 20 – 21.

<sup>7</sup> *Ibid*, pp 14 – 15.

<sup>8</sup> Notice of Application, Applicant’s Record, para 3, Tab A, pg 9.

**1) *The Role of the Court Services Division***

13. The Court Services Division (“CSD”) of the MAG is responsible for the care and maintenance of court files and documents on behalf of the Court and for assisting the judiciary in relation to public access requests to court information.<sup>9</sup>

14. In carrying out its responsibilities, CSD is guided by the Court Services Division Policy on Access to Court Files, Documents and Exhibits.<sup>10</sup> The Policy provides, in part, that the courts retain control over their own records:

1.2 Judicial direction

Each court has jurisdiction over its own records, and all policies respecting access to court documents, files and exhibits are subject to judicial direction. However, legislation and regulations (including rules of practice), existing jurisprudence, and consultation with the judiciary have led to the result that, except in the specific circumstances outlined in this guide, many documents are publicly accessible. Judicial consent is required to obtain access to court exhibits (see Section “6 Public access to exhibits”).

15. The Policy does not address requests for aggregate, bulk or statistical data.

16. The Analytics and Evidence Branch (“AEB”) of the Corporate Service Management Division, within the MAG, assists the judiciary with requests for aggregate, bulk or statistical court data.<sup>11</sup>

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<sup>9</sup> Affidavit of Sandra Di Ciano, affirmed June 12, 2023, Respondent’s Record, Tab 1.

<sup>10</sup> *Ibid*, para 4, Ex. A, Respondent’s Record, Tabs 1, 1A.

<sup>11</sup> *Ibid*, para 3.

17. CSD posts many court file numbers on the daily court list website; the information displayed on the website belongs to the Court.<sup>12</sup> That website<sup>13</sup> includes a statement of the terms and conditions upon which the information is provided, and to which users must agree before gaining access to the court lists. Those terms and conditions include the following: “The information contained in the daily court lists may not be collected, copied or distributed in any fashion, including for resale or other commercial use.”

### **C. This Court Controls the Information Sought**

18. CSD and AEB hold court records and data; however, those records and data remain within the Court’s custody and control at all times.<sup>14</sup> That arrangement is reflected in a Memorandum of Understanding between the Chief Justice of the Superior Court of Justice of Ontario and the Attorney General of Ontario (the “MOU”),<sup>15</sup> which provides, *inter alia*, that:

- the Chief Justice and the Attorney General “are committed to the importance of the principle of judicial independence and to supporting the core functions of the judiciary associated with adjudication, including judicial dispute-resolution, and assignment and scheduling”;<sup>16</sup>
- they entered into the MOU to promote clarity, consistency, and accountability in the administration of the courts and in the respective roles and responsibilities of the Attorney General and the Chief Justice;<sup>17</sup>

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<sup>12</sup> Transcript of the cross-examination of Sandra Di Ciano, August 3, 2023, Q. 158, pg 39, ln 25 – pg 40, ln 4; Q. 223, pg 51, ln 23 – pg 52, ln 5.

<sup>13</sup> <https://www.ontariocourtdates.ca/>.

<sup>14</sup> *Ibid*, para 4.

<sup>15</sup> *Ibid*, para 4; [Memorandum of Understanding | Superior Court of Justice \(ontariocourts.ca\)](https://www.ontariocourts.ca/mou).

<sup>16</sup> *Ibid*, Preamble.

<sup>17</sup> *Ibid*.



- the Chief Justice’s roles and responsibilities include, “subject to the principle of judicial independence, to manage the matters of administration of the Superior Court of Justice of Ontario relating to the Court’s core functions”.<sup>18</sup>

### PART III – ISSUES AND THE LAW

19. There are two issues on this application:
- i. Does the applicant have a common law right to receive the records from the respondent Attorney General?
  - ii. Is *mandamus* available in these proceedings?
20. The respondent submits that, for the reasons set out below, both questions must be answered in the negative and this application be dismissed with costs.
21. The respondent makes no submissions on the correctness of the Court’s decision to refuse the applicant’s request for the information.
- A. The Applicant Has No Right to Get the Information from the Attorney General**
22. Both the constitutional principle of judicial independence and the common law give guardianship over court records that are directly and immediately connected to the adjudicative function of the courts to the judiciary.
23. As such, it is the judiciary who determine policies on public access to court records.

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<sup>18</sup> *Ibid*, 3.b. Office of the Chief Justice.

### ***1) The Role of the Attorney General***

24. The Attorney General is the chief law officer of the Crown. His duties include advising the government on matters of law and legislation, and the conduct and regulation of all litigation for and against the Crown.<sup>19</sup> MAG lawyers are directly involved in legislative drafting and advising on legislation which is often the subject of litigation before the courts. MAG lawyers also appear on behalf of the Crown before the courts, including this Court, on a wide range of issues.

25. Pursuant to the *Ministry of the Attorney General Act*,<sup>20</sup> the Attorney General also has the duty to "superintend all matters connected with the administration of justice in Ontario".

The *Courts of Justice Act*<sup>21</sup> similarly provides that the Attorney General "shall superintend all matters connected with the administration of the courts", other than, *inter alia*, "matters that are assigned by law to the judiciary". As set out above, that work includes operating the registry and holding court records for the Court.

26. The Legislature's authority over the administration of justice in Ontario, and the Attorney General's statutory duties regarding the administration of justice, must be exercised consistently with the principles of judicial administrative independence.<sup>22</sup>

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<sup>19</sup> [Ministry of the Attorney General Act](#), RSO 1990, c M.17, s 5(e) – (h).

<sup>20</sup> *Ibid*, s 5(c).

<sup>21</sup> [Courts of Justice Act](#), RSO 1990, c C.43, [s 72](#)

<sup>22</sup> [Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.](#), [1997] 3 S.C.R. 3, at para. 108. [*Provincial Judges Reference*]

27. As a result of this constitutional and legislative framework, and the respective roles and responsibilities of the judiciary and the Attorney General, "the heads of the judiciary have to work closely with representatives of the Executive" in matters of court administration.<sup>23</sup>

Nonetheless, given the Attorney General's other roles, maintaining a clear distinction between the Court and the executive is essential to preserving the Court's independence.

## **2) *The Principles of Judicial Independence***

28. Judicial independence is an unwritten constitutional principle, which is reflected in the Preamble and ss. 96 – 100 of the *Constitution Act, 1867* and ss. 7 and 11(d) of the *Charter*.<sup>24</sup> The principle of judicial independence has been recognised as a necessary prerequisite for judicial impartiality.<sup>25</sup>

29. The term "judicial independence" refers to the nature of the relationship between a court and others, particularly the executive branch of government.<sup>26</sup> The relationship must be characterized by sufficient intellectual and institutional separation that allows judges to render decisions based solely on the requirements of the law and justice, free from the pressure or influence of any other entity.<sup>27</sup>

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<sup>23</sup> *Valente v. The Queen*, [1985] 2 SCR 673 at para. 47. [*Valente*]

<sup>24</sup> *Provincial Judges Reference*, *supra*, at para 83.

<sup>25</sup> *Lauzon v. Ontario (Justices of the Peace Review Council)*, 2023 ONCA 425 at para 30.

<sup>26</sup> *Provincial Judges Reference*, *supra*, at para 111; *Mackin v New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405 at para 37; *Valente*, *supra* at paras 15, 18.

<sup>27</sup> *Ontario (Ministry of the Attorney General) v Ontario (Information and Privacy Commissioner)*, 2011 ONSC 172 at para 26 (Div Ct). [*IPC*]

30. In *R v Valente*,<sup>28</sup> the Supreme Court set out three essential conditions of judicial independence: security of tenure, financial security, and administrative independence. Only the third condition is at issue in these proceedings.

31. The essence of administrative independence is that courts must retain control over the administrative functions that bear directly on the judicial function, including the assignment of judges, the sittings of the court, court lists, the allocation of court rooms, and the direction of the administrative staff engaged in carrying out those functions.<sup>29</sup> It is well established that the courts have a supervisory and protecting power over their own records.<sup>30</sup>

32. The Divisional Court held in *Ontario (Ministry of the Attorney General) v Ontario (Information and Privacy Commissioner)*, in the context of a freedom of information request for reports compiled by CSD at the Chief Justice's request, that:

Where the Chief Justice or a judge of a court is exercising responsibilities relating to administrative matters that bear directly on the exercise of the judicial function, the principle of judicial independence requires judicial control. Similarly, **any information or documentation created by and for the judiciary to carry out these judicial administrative functions is also constitutionally protected**. In order to ensure judicial independence, the judiciary, by necessity, must have supervisory control over access to and disclosure of this information.<sup>31</sup>

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<sup>28</sup> *Valente, supra* at paras 27, 40, 47.

<sup>29</sup> *Ibid*, at para 49; *Provincial Judges Reference, supra* at para. 251; *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 40.

<sup>30</sup> *A.G. (Nova Scotia) v MacIntyre*, [1982] 1 SCR 175 at 189; *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3 at para 12.

<sup>31</sup> *IPC, supra* at para 31. [emphasis added]

### 3) *Court File Numbers are Key to this Court's Judicial Function*

33. Court file numbers, which are used to organize the information filed before the Court, are essential to the Court's exercise of its judicial function.

34. In *Ontario (Ministry of the Attorney General) v Ontario (Information and Privacy Commissioner)*, the Divisional Court concluded that MAG had possession of the reports at issue because its support staff had compiled them at the Chief Justice's direction, and that such "bare possession" did not amount to "custody" for the purposes of the *Freedom of Information and Protection of Privacy Act*.<sup>32</sup> Accordingly, the Court held that:

The Ministry's duty with respect to the administration of justice and courts administration must be exercised within the context of the constitutionally mandated requirement to preserve the independence of the judiciary, including its administrative independence. As already discussed, this need extends beyond exercising judicial supervision over court records and documents to protecting the judiciary's right to supervise the use of Reports such as the ones at issue. Thus, to the extent that the Ministry has a right to possess the Reports because it compiled them at the request of the judiciary, we agree with the reasoning of Adjudicator Cropley in Order P-994, *supra*, at p. 7, namely, that "its limited ability to use, maintain, care for, dispose of and disseminate them does not amount to 'custody' for the purposes of the Act".<sup>33</sup>

35. The same logic applies to court file numbers. MAG only has access to those numbers because it administers the registry for the Court. It does not control the release of the information, which remains under the Court's supervision.

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<sup>32</sup> *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31

<sup>33</sup> *IPC*, *supra* at para 43. The Divisional Court ultimately concluded that the reports were in the MAG's custody because the Office of the Chief Justice subsequently agreed to the reports being made available to senior Ministry staff for planning and decision-making purposes: para 44.

## **B. This Court Cannot Grant *Mandamus***

### ***1) Mandamus is Only Available on an Application for Judicial Review***

36. This Court does not have the jurisdiction to grant *mandamus*.

37. Section 7 of the *Judicial Review Procedure Act*<sup>34</sup> (“*JRPA*”) provides that an application for an order in the nature of *mandamus* shall be deemed to be an application for judicial review and shall be made, treated and disposed of as if it were an application for judicial review.

38. Section 6(1) of the *JRPA* provides that applications for judicial review *shall* be made to the Divisional Court, subject to s. 6(2) of the *JRPA* which provides that such application may be made to this Court with leave where the case is urgent. Given the mandatory language in s. 6(1), unless an application for judicial review is urgent, it must be heard by the Divisional Court.<sup>35</sup>

39. The applicant has not sought leave to seek judicial review in this Court. Nor is this case urgent.

40. This Court has recently rejected applications for *mandamus* on the basis of incorrect forum. In *Sanscon Construction Ltd v City of Toronto*,<sup>36</sup> Justice Vella dismissed an application seeking, *inter alia*, an order for *mandamus* relating to the applicant corporation’s failure to obtain a construction contract. After reviewing ss. 6 and 7 of the *JRPA*, compliance with which she held

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<sup>34</sup> *Judicial Review Procedure Act*, RSO 1990, c J.1.

<sup>35</sup> *Shaulov v Law Society of Ontario*, 2022 ONSC 2732 at para 121.

<sup>36</sup> *Sanscon Construction Ltd v City of Toronto*, 2021 ONSC 6409.

“is not a matter of mere formality”, Justice Vella concluded that the proceeding should have been started as an application for judicial review in the Divisional Court.<sup>37</sup>

41. Similarly, in *1917916 Ontario Ltd v Tarion Warranty Corporation*,<sup>38</sup> this Court dismissed a motion to amend a statement of claim to include a plea for a mandatory order against a regulatory authority. The defendant regulator objected on the basis that the requested relief was akin to a *mandamus* order, which can only be brought in the Divisional Court by way of application for judicial review.<sup>39</sup> Relying on *Sanscon*, the Court held that the plea for a mandatory order was untenable because it was brought in the wrong forum.<sup>40</sup>

## ***2) The Attorney General has no Duty to Release the Information***

42. Even if *mandamus* is available in this Court, the applicant cannot meet the test for such an order in this case.<sup>41</sup> Specifically, the applicant’s case must fail because the Attorney General owes no duty to provide the applicant with the information he seeks.

43. First, as set out in detail above, this Court has custody and control of the case file numbers sought and has the exclusive power to permit its release. The Attorney General may not release the Court’s information without its consent.

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<sup>37</sup> *Ibid*, at paras 13 – 19.

<sup>38</sup> *1917916 Ontario Ltd v Tarion Warranty Corporation*, 2022 ONSC 5034 (Assoc. J.)

<sup>39</sup> *Ibid*, at para 88.

<sup>40</sup> *Ibid*, at para 92.

<sup>41</sup> *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 FC 742 (FCA)

44. Second, the open court principle does not extend so far as to impose a duty on the Attorney General to compile court file numbers into a new document for the applicant's personal use. To the extent that the applicant is entitled to view court file numbers in the lobby of a courthouse or posted on the daily court lists, that does not entitle him to receive hundreds or thousands of those file numbers compiled from a database. The law distinguishes between access to individual records or evidence which may be obtained through physical attendance at a courthouse and records captured for remote use. For instance, while in most cases anyone is free to attend a court proceeding and listen to the witness' *viva voce* evidence, that evidence may not be broadcast.<sup>42</sup>

45. Similarly, in *Alberta v Krushell*,<sup>43</sup> the Alberta Court of King's Bench held, in granting judicial review of a decision taken under that province's freedom of information legislation,<sup>44</sup> that:

While there is currently limited public access to this information via the physical daily posting of the criminal dockets on site, that does not justify posting world-wide for all time to all of those with access to the internet. **Currently privacy is protected by the practical obscurity created by the physical inconvenience of attending at each courthouse to examine the criminal dockets by others than those who have personal involvement in the matters then before the courts:** *United States Department of Justice et al v. Reporters Committee for Freedom of the Press et al*, 489 U.S. 749, 109 S.Ct. 1468 (1989) (U.S.S.C.). Similarly, the transitory purpose of these documents described by the Privacy Commissioner in his reasons, in that they are created and used only for one day in each courthouse, does not translate into the permanent record that would be created by providing them to Krushell for posting on the world-wide web.

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<sup>42</sup> *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2

<sup>43</sup> *Alberta (Attorney General of) v. Krushell*, 2003 ABQB 252 at para 50 [emphasis added].

<sup>44</sup> *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25.



46. Justice Stevens of the United States Supreme Court made the same distinction in *United States Department of Justice et al v. Reporters Committee for Freedom of the Press et al*,<sup>45</sup> cited in *Krushell*, when he held that:

... the issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.

47. The fact that the applicant in this case may be able to obtain court file numbers by attending a courthouse or by printing the daily court lists every morning does not impose a duty on the Attorney General to compile and produce that information to him.

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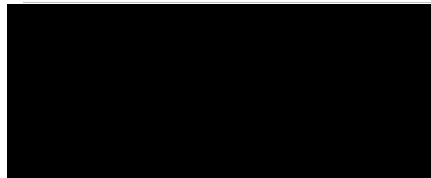
<sup>45</sup> *United States Department of Justice et al v. Reporters Committee for Freedom of the Press et al*, 489 U.S. 749, 109 S.Ct. 1468 (1989) (USSC).

**PART IV – ORDER SOUGHT**

48. For the reasons set out herein, this application should be dismissed with costs.

**All of which is respectfully submitted.**

Dated at Toronto this fifth day of October, 2023.



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## SCHEDULE “A” – LIST OF AUTHORITIES

1. *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3
2. *Valente v. The Queen*, [1985] 2 SCR 673 at para. 47. [*Valente*]
3. *Lauzon v. Ontario (Justices of the Peace Review Council)*, 2023 ONCA 425 at para 30.
4. *Mackin v New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405
5. *Ontario (Ministry of the Attorney General) v Ontario (Information and Privacy Commissioner)*, 2011 ONSC 172 (Div Ct)
6. *Ontario v Criminal Lawyers’ Association of Ontario*, 2013 SCC 43 at para 40.
7. *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 SCR 175
8. *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3
9. *Shaulov v Law Society of Ontario*, 2022 ONSC 2732
10. *Sanscon Construction Ltd v City of Toronto*, 2021 ONSC 6409
11. *1917916 Ontario Ltd v Tarion Warranty Corporation*, 2022 ONSC 5034 (Assoc. J.)
12. *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 FC 742 (FCA)
13. *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2
14. *Alberta (Attorney General of) v. Krushell*, 2003 ABQB 252
15. *United States Department of Justice et al v. Reporters Committee for Freedom of the Press et al*, 489 U.S. 749, 109 S.Ct. 1468 (1989) (USSC).

## **SCHEDULE “B” – LIST OF LEGISLATIVE PROVISIONS**

1. *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31

**LESAGE**

Applicant

-and -

**HIS MAJESTY THE KING IN RIGHT OF ONTARIO**

Respondent

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**(Proceeding commenced at Milton)**

**FACTUM OF THE RESPONDENT**

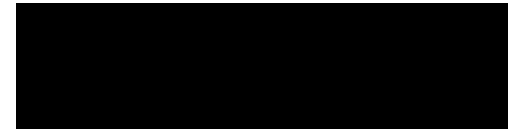
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