

**FURTHER REPORT BY THE BIOMETRICS COMMISSIONER
ON ISSUES RAISED IN HIS 2015 ANNUAL REPORT**

Alastair R MacGregor QC

April 2016

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THE SCOPE OF THIS REPORT

1. In Section 3 of my 2015 Annual Report I dealt in detail with the retention of biometric material by the police on the grounds of national security, with the making of National Security Determinations in relation to such material, and with the operation of the national CT databases. At paragraphs 142-6, 159 and 168 of that Report I made specific reference to problems that had recently come to my attention as regards:
 - i. procedural errors and handling delays in relation to New Material (i.e. material taken on or after 31 October 2013) which had led, or would lead, to the loss of a significant number of biometric records that probably could and should have been retained on the grounds of national security; and
 - ii. the retention of New Material on the CT databases beyond its lawful retention date.

In relation to each of those matters I said that I had been informed that urgent work was being done to resolve those problems and to prevent them recurring in the future. I also observed that I would be keeping that work – and those matters more generally – under close and active review.

2. On 2 March 2016 I was informed by officials that the Home Secretary had requested a report from me on the sufficiency of the remedial, preventative and mitigatory work that was being planned and undertaken by the Metropolitan Police Service in connection with the issues referred to above. I was further informed that that report need not provide a detailed description or analysis of those issues or of that work but should set out my general views as to the sufficiency of the steps that were being taken to address the problems that had arisen.
3. This Report is submitted in response to that request. The terms and abbreviations used in it are as defined in my 2015 Report.
4. At the end of this further Report I address an additional issue that has very recently become apparent in relation to Legacy Material (i.e. material taken before 31 October 2013).

THE INFORMATION RELIED ON

5. All the information upon which I have relied when preparing this Report has been provided to me by representatives of SOFS, JFIT and others within the MPS. They have at my request provided me with various reports and other documents and I have had numerous meetings with them in the course of which I have asked them to explain and expand upon the contents of those documents. Although I believe that from those enquiries I have been able to obtain a reasonably full and reliable picture of the nature, cause and development of each of the problems that have arisen, I have tried not to take up unnecessary time and resources in an attempt to dot and cross every 'i' and 't' of the past. Instead – and as

requested – my principal concern has been to satisfy myself as to the sufficiency of the action that has been taken and is planned to remedy those problems, to minimise the risk of their recurrence, and to mitigate their adverse consequences.

DELAYS AND ERRORS IN THE NSD PROCESS

BACKGROUND

6. Since 31 October 2013 New Material has been taken and processed as follows.¹
- i. Fingerprints and a DNA sample are taken from an individual under relevant statutory powers (e.g. at a port in the context of a ‘Schedule 7 Examination’). The fingerprints are sent to SOFS and the DNA sample is sent to an FSP (or in some cases to SOFS) for profiling. The resulting profile is then sent to SOFS.
 - ii. SOFS enter the fingerprints and the DNA profile on the CT databases. SOFS then conduct PNC and other checks to establish whether that material can be retained indefinitely (e.g. on the grounds that the relevant individual has a criminal conviction) and, if not, the case is referred to JFIT so that JFIT can consider whether or not to apply for an NSD.
 - iii. JFIT enter the case on the NSD IT System and prepare an initial ‘intelligence profile’.
 - iv. JFIT then:
 - may allocate the case to a relevant Counter Terrorism Unit (CTU) for it to supply any additional relevant intelligence information;and (at or around the same time)
 - will provide details of the individual at issue to the Security Service for it to provide its ‘pro-forma summary assessment’ (if any) of that individual.
 - v. JFIT then decide whether or not to apply for an NSD. If so, the application is submitted to the relevant Chief Officer for decision. If not, the case is provisionally marked ‘Stop-NSD’ and remitted to a Superintendent for final approval as such.
 - vi. The Chief Officer approves or refuses the application, alternatively the Superintendent approves or overrules the provisional Stop-NSD decision.

It was originally anticipated that each of those steps would be completed in its entirety before the next was embarked upon and that the end-to-end process would take no more

¹ A slightly different process has been adopted as regards New Material that has been taken in Northern Ireland. No ‘expiry’ problems appear to have arisen in relation to such material.

than 4 months. Given that a high proportion of New Material was likely to be taken in the context of 'Schedule 7 Examinations'² – and given that in the absence of an NSD such material might well fall to be deleted or destroyed after only six months – it was obviously important that there be no significant delay in the completion of any of those steps.

7. In the event the statutory retention periods applicable to a substantial amount of New Material have expired before the NSD process has been completed in respect of it. In particular:

- i. when I submitted my 2015 Report it appeared that *“by 31 October 2015 handling and other delays had led to a situation in which the statutory retention periods in respect of the biometric records of at least some 450 individuals had expired before NSDs could be or had been made in relation to them”*;

and

- ii. it now appears that by 31 March 2016 the retention periods applicable to the biometric records of around 810 individuals had expired before the NSD process had been completed in respect of them.³

In the great majority of those cases the biometric material in question was taken in the context of a Schedule 7 Examination.

8. Furthermore, although at the date of my 2015 Report it was my understanding that it was possible that NSDs would have been applied for in about 45 of the cases that were at that time thought to have expired by 31 October 2015, it is now my understanding that applications for NSDs would undoubtedly have been made in at least 108 of the cases that had in fact expired by 31 March 2016 and that the actual figure might well have been appreciably larger.⁴

² i.e. examinations pursuant to the powers set out at Schedule 7 of the Terrorism Act 2000 (TACT)

³ In more than 60 other cases the NSD process had not been completed by the dates on which it had been anticipated that the relevant retention periods would or might expire. As regards those cases, however, it has been established that, as a result of intervening convictions or other factors, it remained lawful to retain the material in question.

⁴ JFIT have confirmed that they would have made an application for an NSD in each of the 108 expired cases in respect of which a 'positive' summary assessment had or has been provided by the Security Service. It has, however, by no means been uncommon for JFIT to make an application for an NSD in circumstances where no such assessment has been provided and JFIT have yet to review expired cases of that type.

9. A number of factors have contributed to the expiry problems that have arisen as regards New Material. Put briefly – and taking them broadly in the order of the steps summarised at paragraph 6 above – those factors are as follows.
- A. There have been repeated delays in the transfer of DNA samples and/or profiles to SOFS from the ports where Schedule 7 Examinations have taken place. Whilst there will inevitably be some delay between the taking of a DNA sample and the deriving from it of a DNA profile, the delays in providing samples and/or profiles to SOFS have often been significantly greater than might reasonably have been expected.
- B. There have been substantial delays in the processing of relevant cases by SOFS and in their referral to JFIT. These delays have largely – though not entirely – been a function of difficulties associated with the ‘HAILOH’ IT application used by SOFS. That application was not designed with the requirements of PoFA in mind, has ‘significant limitations’, and has been the subject of a number of piecemeal updates as those limitations have become apparent. In combination with the ‘ports’ delays referred to above, delays while cases have been with SOFS have meant that around 165 of the cases that had expired by 31 March 2016 had already expired by the time they reached JFIT.
- C. A ‘glitch’ associated with updates to the HAILOH application has also led to incorrect expiry dates being notified to JFIT and thus to a situation in which, although cases have not in fact expired by the time they have reached JFIT:
- they have appeared to JFIT to be expired cases; and
 - JFIT have, as a result, concluded that no useful purpose would be served by the carrying out of further work on them.
- Around 110 of the cases that had expired by 31 March 2016 appear to have fallen into this category.
- D. Substantial delays have arisen in connection with the provision of ‘summary assessments’ by the Security Service and, to a lesser extent, the provision of additional intelligence information by CTUs. As regards the Security Service, these delays have arisen despite the fact that considerable efforts have been made to reduce to an absolute minimum the time and resources which that Service is asked to devote to the NSD process.⁵ Some 54 cases have expired while waiting for information from the Security Service and 11 while waiting for information from CTUs.

⁵ The summary assessments which are provided by the Security Service are initially generated by an automated process and are subject to only limited checking before they are passed to JFIT.

- E. In addition to the cases that have actually or apparently expired by the time that SOFS, the Security Service and/or CTUs have completed their work on them, around 160 further cases have expired without being fully assessed by JFIT. Although in many of those cases delays on the part of third parties have made it difficult or impossible for JFIT to complete their assessment work before the relevant expiry dates have been reached, in many others JFIT's failure to do so appears to have been largely attributable to a failure to prioritise their PoFA casework by reference to those dates.
 - F. 13 cases in which JFIT have made applications for NSDs have expired while awaiting a decision by a Chief Officer. As I explained in my 2015 Report⁶, in 3 of those cases what had purported to be timely NSDs had in fact been made by officers of insufficient rank.
 - G. Finally, substantial delays have arisen as regards the review and 'signing-off' by a Superintendent of provisional Stop-NSD decisions. Whilst delays of that sort have much more commonly arisen in relation to Legacy Material, it seems likely that around 300 cases involving time-limited New Material have expired before such sign-off has been obtained.⁷
10. Two more general factors which have contributed to the expiry of cases involving New Material have been resource difficulties and a lack of adequate management information and oversight.
- A. In the context of the NSD process, both SOFS and JFIT have had to operate under significant staffing and other resource pressures and in circumstances where difficult decisions have had to be made as regards the prioritisation of work. Those decisions have had to cater not only for the need to deal with other and more obviously 'operational' matters but also for the extent to which time should be spent on New Material rather than on Legacy Material (particularly before, in October of 2015, the deadline for dealing with Legacy Material was extended by 12 months until 31 October 2016).
 - B. The IT applications and other procedures which were adopted in the context of the NSD process were not such as allowed for the easy and regular generation of detailed management and performance information. In the absence of such information management appears to have been unaware of the scale of the difficulties and delays that were being encountered or of the impact that they were having on the process as a whole. Appropriate Key Performance Indicators were not established and appropriate statistical information was not regularly produced and reviewed.

⁶ (at paras 145-6)

⁷ Concerning though this last point is, it should be noted that each of those 300 cases was subject to investigation and appraisal and that in none of them was a 'positive' summary assessment provided by the Security Service. It is now clear that in none of those 300 cases would the provisional Stop-NSD decision in fact have been overturned. See in this connection paragraph 23 below.

THE DISCOVERY OF THE SCALE OF THE EXPIRY PROBLEMS

11. Although some of those concerned had from time to time become aware of delays affecting aspects of the NSD process and of cases having expired as a result of them – and although active steps had from time to time been taken to minimise those delays – it was only in December of 2015 that the scale and continuing nature of the problems caused by those delays were recognised. They became apparent in the context of the MPS’s attempts to answer my repeated requests for statistical information for the purposes of my 2015 Report and it is only since that time that they have been systematically investigated and addressed.

THE WRONGFUL RETENTION OF BIOMETRIC RECORDS ON THE CT DATABASES

12. It was also only in December of 2015 – and in the context of my repeated requests for that statistical information – that it became apparent that very significant quantities of New Material that should have been deleted from the CT databases had in fact been retained on them. Later investigations have established that this was true of very nearly all of the New Material that had expired by that time without an NSD being made in respect of it.⁸
13. Although a variety of factors appear to have contributed to this wholly unsatisfactory situation, I have found nothing to suggest that it was a function of any deliberate policy or decision to ignore the retention regime that Parliament has established. Even so, however, it seems clear that insufficient priority was given to the need to comply with that regime and to ensure that expired material was quickly deleted. It also seems clear that IT and resource difficulties, a lack of adequate management information and oversight, the absence of any proper system to check the lawfulness of retention and/or to generate appropriate deletions, and a breakdown in communications/understanding between JFIT and SOFS all played important parts in this ‘deletion deficit’.

THE CONSEQUENCES OF THE EXPIRY AND DELETION PROBLEMS

14. The fact that a large amount of New Material has fallen to be deleted before a proper assessment has been made of the extent to which its retention would be desirable on national security grounds is, of course, a matter of real concern. So is the fact that, although biometric material is only taken relatively rarely in the context of Schedule 7 Examinations, the cases which have been subject to the expiry problems referred to above include a high proportion of the cases where that has been done since 31 October 2013. In practical terms, however, the damage done by those expiry problems must largely turn on whether

⁸ It also became apparent – albeit much less worryingly – that because of delays of the type referred to at Paragraph 9G above, a great deal of Legacy Material had been retained which, though it could lawfully be retained, would have been destroyed if the MPS had acted expeditiously and in accordance with what it had intended to be ‘normal practice’. See in this connection Paragraph 140 of my 2015 Report.

the material at issue could, should and would have been retained if the NSD process had operated efficiently.

15. As is indicated at paragraph 8 above, it now appears that NSDs would undoubtedly have been applied for in at least 108 of the cases that had expired by 31 March 2016 and that the actual figure might well have been appreciably larger. Although it is possible that some of those applications would have been rejected by Chief Officers, it seems more than likely that NSDs would in fact have been made in over a hundred of those cases.
16. Equally, however, when considering the extent to which national security may have been damaged by these expiry problems, it is right to bear in mind:
 - that virtually none of that expired material was in fact deleted from the CT databases before February of 2016;
 - that all of it was being searched against until that date; and
 - that no 'matches' to expired material appear to have been reported at any stage.

It is also right to bear in mind that it is at least possible that 'replacement' biometric material may in due course be obtainable from the individuals concerned.

17. Although on the face of things the wrongful retention of expired New Material on the CT databases cannot have put national security at risk, the MPS's failure to comply with their legal obligations in that regard must also, of course, be a matter of real concern. Even if, moreover, the MPS's failure to ensure the timely deletion of expired material has not been directly prejudicial to national security, any unlawful behaviour on the part of the police must inevitably give rise to a risk that public confidence in them will be undermined.

THE ACTION TAKEN BY THE MPS

18. In December of 2015 – and within a few days of the above expiry and deletion problems becoming apparent – the MPS started to take steps to remedy them, to prevent (or at least to minimise the risk of) their recurrence, and to mitigate their adverse consequences. Much of the discussion at the many meetings which I have had with the MPS since then has been devoted to that remedial, preventative and mitigatory work.

PORT DELAYS

19. Processes have been introduced – and further steps are planned – to minimise delays in the provision of DNA profiles to SOFS in the context of Schedule 7 Examinations. These include arrangements whereby SOFS/JFIT can and do make direct contact with ports in the event that (as continues often to be case) such profiles do not reach SOFS within 21 days of the relevant Examinations. Just as importantly, moreover, even before December of 2015 changes had been made to SOFS's procedures which made it possible for JFIT to start NSD-

related work in the great majority of Schedule 7 cases within a few days of the relevant Examinations and even in circumstances where the relevant profiles had yet to be received by SOFS.⁹

SOFS's IT DIFFICULTIES

20. Steps have also been taken – and further steps are planned – to circumvent, and ultimately to resolve, the difficulties that have arisen in connection with the HAILOH application. These involve in the short term the use of detailed spreadsheets in place of that application and, in the longer term, the development of a permanent solution to the IT problems that have arisen, possibly by way of the incorporation of the relevant HAILOH functions into the NSD IT System that is used by JFIT and by all the other participants in the NSD process other than the Security Service.

DELAYS BY THE SECURITY SERVICE AND CTUs

21. There appear to have been a number of reasons for the Security Service's repeated failures to provide in a timely manner its summary assessments of relevant individuals. Those delays have now been the subject of discussions at a high level and assurances have been given by the Security Service both as regards the making of improvements to the relevant processes and more generally. CTUs have also been reminded of the importance of complying with time limits and refresher training has been arranged.

DELAYS BY CHIEF OFFICERS

22. Action has been taken:
 - to remind Chief Officers of the need to decide applications for NSDs within the appropriate time limits; and
 - to ensure that, at least within the MPS, such applications are properly prioritised for decision by the relevant Chief Officer.

Appropriate advice has also been given to the force which allocated applications for NSDs to officers of insufficient rank.

⁹ Although this is still not open to JFIT in the relatively rare cases where only DNA is taken (i.e. where fingerprints are not also taken from the subject of the Schedule 7 Examination) consideration is being given to ways in which JFIT could also start work at an earlier stage on cases of that type.

STOP NSDs

23. Provisional Stop-NSD decisions are now reviewed by officers of Inspector rank, albeit such officers should refer for decision by a Superintendent any cases about which they have doubts or concerns. This change has already eliminated the backlog of cases where provisional Stop-NSD decisions have been made. In none of the cases involving expired New Material has a provisional Stop-NSD decision been overturned.

RESOURCES AND WORKING PRACTICES

24. Although JFIT and SOFS continue to work under significant staffing and other resource pressures – and although difficult decisions still have to be made as regards the prioritisation of work – substantial improvements appear to have been made by way of the recruitment or secondment of additional personnel and by way of changes in relation to supervision, shift patterns, overtime arrangements, prioritisation policies and working practices. Importantly, moreover, senior figures within the MPS are now well aware of the concerns which have arisen in relation to these expiry and deletion problems – and of the risks (including reputational risks) to which they have given rise – and it seems in those circumstances more than likely that NSD work in relation to New (and indeed Legacy) Material will from now on be accorded a significantly higher priority than it was accorded before December of 2015.

MANAGEMENT INFORMATION, OVERSIGHT AND COMMUNICATIONS BETWEEN JFIT AND SOFS

25. In my view much the most important of the remedial actions that have been taken by the MPS since December of 2015 has been the establishment of systems and procedures whereby:
- detailed management and performance information is now produced; and
 - that information is closely monitored and examined, particularly at fortnightly meetings between representatives of JFIT and of SOFS and, where appropriate, at monthly meetings which are attended by more senior figures from the MPS and to which senior representatives of other stakeholders are invited.¹⁰

My Head of Office currently attends each of those fortnightly meetings and I am one of the stakeholders who attends the monthly meetings.

26. Although since December of 2015 cases involving New Material have continued to expire before the NSD process has been completed – and although further such cases will no doubt expire in the future (particularly where, as was described at paragraphs 147 – 148 of my

¹⁰ Regrettably, the Security Service has yet to attend one of these meetings.

2015 Report, material is taken under PACE) – there appear to be reasonable grounds to believe:

- that expiries attributable to avoidable delays within JFIT/SOFS have now been reduced to a minimum;
- that expiries attributable to delays on the part of third parties have been or will be similarly reduced; and
- that cases which are at risk of expiry will be identified and dealt with while there is still time to take appropriate remedial steps.

One such step could be the increased use of applications for ‘emergency’ or ‘holding’ NSDs such as are referred to at paragraphs 150-151 of my 2015 Report.¹¹

DELETIONS

27. In the period since December of 2015 active steps have been taken to delete from the CT databases material which can no longer lawfully be retained thereon and, indeed, to destroy any hard copies of fingerprints that can no longer lawfully be retained in case files. For a variety of reasons this process can take up to 2-hours in any given case and as an interim step such material has been put into a non-searchable format.¹² In respect of the great bulk of the expired material, that interim step was taken during February of 2016 and I understand that the full deletion process was completed during the following month. I have repeatedly emphasised to JFIT and SOFS that, while it is obviously important that unlawfully held material be quickly deleted/destroyed, it is also important that great care be taken to avoid the deletion/destruction of material which can and should lawfully be retained. I have repeatedly been assured that such care has indeed been taken.
28. Management information as regards the deletion/destruction of unlawfully held material is now produced and examined at the meetings referred to at paragraph 25 above. A detailed written ‘Deletions Policy/Procedure’ is also under development.

MITIGATORY WORK

29. Given that, as a result of the problems referred to above, the biometric material of a significant number of individuals has been lost in circumstances where that material could

¹¹ It is possible that within the next few weeks it will become apparent that a small number of additional cases have already expired or will expire before remedial steps can be taken in relation to them. I have been assured that urgent steps are being taken to establish if that is in fact the case and, if so, to ensure that there are no further such expiries.

¹² Unlike the position as regards most biometric records held by the police, deletions from the CT databases cannot, of course, be triggered automatically by the making of entries on the PNC.

and should have been retained on the grounds of national security, it is obviously very important that steps quickly be taken to establish whether – and, if so, how – replacement material should be obtained from those individuals and/or other action should be taken to minimise any risk which they pose to national security. Whilst it will often be for others to make strategic and operational decisions as regards these matters, JFIT have an important role to play in the collection and dissemination of relevant information. Steps have already been taken to obtain that information and progress as regards risk mitigation is and will be the subject of review at the monthly meetings referred to above.

CONCLUSIONS

30. In general terms – and although it has taken much longer to reach this position than I would have wished – I am now broadly satisfied that proper steps have been and are being taken to remedy the expiry and deletion problems that have arisen as regards New Material, to minimise the risk of their recurrence, and to mitigate their adverse consequences. Importantly, I am also satisfied that appropriate procedures are now in place which allow for the timeliness of deletions to be properly monitored and for cases which are at risk of expiry to be identified while there is still time to complete the NSD process in respect of them.
31. I shall continue to keep these matters under close and active review and have little doubt but that my successor as Biometrics Commissioner will do likewise.

A FURTHER PROBLEM IN RELATION TO LEGACY MATERIAL

32. Closely associated with the problems which have arisen as regards New Material has been the difficulty of obtaining reliable statistical information about the biometric material on the CT databases that is subject to the requirements of PoFA. It has very recently become apparent that, as a result of that difficulty, a substantial quantity of potentially relevant Legacy Material has until now been overlooked.
33. Put shortly, in early April of 2016:
 - i. it was discovered that, as a result of deficiencies in the HAILOH application, some 1800 cases relating to biometric material which was taken before PoFA came into effect – and which might conceivably fall to be deleted by 31 October 2016 – had yet to be properly assessed by SOFS and, if appropriate, referred to JFIT for consideration in the context of the NSD process; and
 - ii. it was established that in about 700 of those cases the individuals in question have never been convicted of a recordable offence (and thus that their biometric records will probably have to be deleted from the CT databases unless appropriate NSDs are made before the expiry of the ‘transitional’ period).

A number of points should be noted in relation to this remarkable development.

34. It seems that these Legacy cases had been overlooked because of deficiencies in the 'search function' of HAILOH. I understand that those deficiencies are now being addressed and, more importantly, that in any event SOFS are confident that every possibly relevant Legacy case has now been identified. The fact that it has taken so long to produce a definitive list of those cases is, of course, a further – and striking – illustration of the unsuitability of the HAILOH application and of the urgent need for alternative IT arrangements to be made.
35. It is now apparent that by 31 October 2016 it will be necessary to complete the NSD process in respect of about 700 more Legacy cases than were previously thought to be pending. I have specifically asked if in those circumstances JFIT remain confident that that deadline will be met and I have been specifically assured that they do.¹³ I have also been assured that progress in that connection – and relevant management and performance information – will be closely monitored at the fortnightly and monthly meetings referred to at paragraph 25 above.
36. At paragraph 154 of my 2015 Report (and on the basis of figures that had been provided to me by SOFS) I stated that:

“ At the commencement of the ‘biometric’ provisions of PoFA on 31 October 2013 the DNA profiles and/or fingerprints of some 6500 identified individuals were being held by police forces on the national CT databases. The comparable figure as at 31 October 2015 was some 7800. That latter figure encompasses both new additions to the databases since 31 October 2013 and deletions from those databases after that date.

It now appears that those figures were incorrect and that the true figures as at 31 October 2013 and 31 October 2015 were 8300 and 9600 respectively.

37. At paragraph 155 of my 2015 Report (and again on the basis of figures that had been provided to me by SOFS) I stated that, of the individuals whose biometric records were being held on the CT databases as at 31 October 2013:

“some 3800 (i.e. about 60%) had never been convicted of a recordable offence (and, absent appropriate NSDs, their biometric records would therefore have fallen to be destroyed/deleted after the expiry of the ‘transitional’ period). The comparable figure as at 31 October 2015 was some 4350 (i.e. about 55%).”

It now appears that those figures were also incorrect and that the true position was that:

- i. of the individuals whose biometric records were being held on the CT databases as at 31 October 2013, some 4500 (i.e. about 54%) had never been convicted of a recordable offence; and

¹³ None of the 'overlooked' Legacy material will require processing by PSNI.

- ii. that the comparable figure as at 31 October 2015 was some 5050 (i.e. about 53%).¹⁴
38. I shall of course seek specific reassurances as to the reliability of any future statistical information that is provided to me by the MPS about the biometric material on the CT databases that is subject to the requirements of PoFA. Once again I have little doubt but that my successor as Biometrics Commissioner will do likewise.

Alastair R MacGregor QC
Biometrics Commissioner

22 April 2016

¹⁴ Strictly speaking my 2015 Report was also inaccurate insofar as it suggested that, in the absence of an appropriate NSD, the biometric records of an individual without convictions on 31/10/13 or 31/10/15 will inevitably fall to be deleted from the CT databases when the transitional period comes to an end on 31/10/16. This will not in fact be the case if, for example, that individual is convicted of a recordable offence before that last date.

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