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NO. 52673-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PACIFIC NORTHWEST CHILD CARE ASSOCIATION,

Appellant,

v.

ATTORNEY GENERAL'S OFFICE, a state agency, JAY INSLEE,
Governor of the State of Washington, and STATE OF WASHINGTON
DEPARTMENT OF EARLY LEARNING, a state agency,

Respondents.

STATE OF WASHINGTON
DEPARTMENT OF EARLY LEARNING'S
RESPONDENT'S BRIEF

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I. INTRODUCTION

This case addresses whether the Public Employment Relations Commission (PERC) properly dismissed an unfair labor practice complaint filed by the Pacific Northwest Child Care Association (Association) against the Department of Early Learning (Department) in August 2017. This case was not filed pursuant to the Public Records Act (PRA), nor is it a request for declaratory judgment. Instead, the Association claims that the Department committed interference with Family Child Care Providers' (Providers) collective bargaining rights in violation of RCW 41.56.140. The claims here are based solely on the Department's denial of a public record request received five days prior to the filing of the Association's unfair labor practice complaint.

The Department properly denied the Association's public record request for a list of Providers' personal sensitive information when the Association did not meet the criteria to obtain the information pursuant to the PRA. Although the Association spends considerable time addressing an alleged conflict in the law between the applicable collective bargaining laws and the relevant provisions of the PRA, there is no conflict and this analysis is unwarranted.

Finally, the statutes at issue in this case do not violate public employees' constitutional rights pursuant to the First or Fourteenth Amendments to the United States Constitution. Cases addressing public record exemptions have determined that laws prohibiting the release of public records do not implicate the First Amendment. In addition, it is appropriate and does not violate the Fourteenth Amendment for a public employer to comply with laws that require it to interact with a certified bargaining representative in ways that are different from how it interacts with others. For these reasons, this Court should affirm PERC's decision below.

II. STATEMENT OF THE ISSUES

- 1) Did PERC properly dismiss the Association's Unfair Labor Practice Complaint when the Department denied a public record request made by a member of the public for a list of bargaining unit members' sensitive contact information in compliance with codified provisions of I-1501, specifically RCW 42.56.640, RCW 42.56.645, and RCW 43.17.410?
- 2) Are RCW 42.56.640, RCW 42.56.645, and RCW 43.17.410 constitutional as applied in this case under the First and Fourteenth Amendments to the United States Constitution?

III. COUNTERSTATEMENT OF THE CASE

In 2006, the Washington State Legislature granted Providers the right to collectively bargain with the State. Laws of 2006, ch. 54 § 1

(codified in RCW 41.56.028). Providers include licensed and license-exempt child care providers who care for children in the provider's own residence or in the child's home, and who receive subsidized payments from the State for caring for eligible children. RCW 41.56.030(7); WAC 110-15-0003. Providers do not include child day care centers.

Providers are quasi-public employees, meaning that they are employees of the State solely for the purposes of collective bargaining. RCW 41.56.028(2)(c). Pursuant to statute, the only appropriate bargaining unit for purposes of collective bargaining is "a statewide unit of all family child care providers." RCW 41.56.028(2)(a). Service Employees International Union 925 (SEIU 925) is the certified exclusive bargaining representative for Providers, and the parties have a collective bargaining agreement governing their relationship. Administrative Record (AR) at 111-67.

Washington voters adopted Initiative 1501 (I-1501) in the 2016 general election. Laws of 2017, ch. 4. In a statement of intent, the initiative stated that additional measures should be taken to protect vulnerable individuals and seniors because they often have less ability to protect themselves and can be targeted through information publicly available, including personal information about them or their in-home caregivers. *Id.* § 4. The initiative increased penalties for criminal identity theft and civil consumer fraud targeted at seniors or vulnerable individuals. *Id.* § 2. I-1501 also created an exemption to the PRA such that agencies are not required to disclose personal information of vulnerable individuals and in-home

caregivers, including names, addresses, GPS coordinates, telephone numbers, email addresses, social security numbers, driver's license numbers, or other personally identifying information. *Id.* § 8 (codified as RCW 42.56.640). There are several exemptions to this PRA exemption, including when the request is made by the certified bargaining representative. *Id.* § 11 (codified as RCW 42.56.645). Not only did I-1501 create an exemption to the PRA, it also expressly prohibited the State or any of its agencies from releasing sensitive personal information of in-home caregivers for vulnerable populations, as defined in RCW 42.56.640. *Id.* § 10 (codified as RCW 43.17.410). In-home caregivers for vulnerable populations include the Providers involved in the instant case. RCW 42.56.640(2)(a); RCW 41.56.030(7).

A. Representation Petition

On April 27, 2017, the Association filed a change of representation petition with PERC, seeking to replace SEIU 925 as the exclusive bargaining representative of the Providers in the state of Washington. AR at 49. In support of its petition, the Association submitted showing of interest cards from bargaining unit members; however, the Association failed to provide cards signed by at least 30 percent of the bargaining unit members as required by statute and PERC's rules. AR at 53; RCW 41.56.028, .070; WAC 391-25-110(1). Once a petitioner meets the threshold requirement of producing signed cards from 30% of the bargaining unit members, the employer is required to produce a list of known names and addresses of all employees in the bargaining unit to the petitioner. WAC 391-25-130.

Here, PERC issued a deficiency notice finding that the Association had failed to make a sufficient showing of interest to support its petition and providing the Association an opportunity to demonstrate why the matter should go forward despite this failure. AR at 53. In the Association's response to the deficiency notice, the Association asserted the following: (1) the size and scope of a statewide bargaining unit made it prohibitively expensive to obtain the necessary showing of interest cards; (2) PERC possessed the discretion to conduct a representation election with something less than the mandatory 30% showing of interest; (3) changes in the State's public disclosure laws made it impossible for them to obtain a list of eligible family child care providers, thereby making it even harder to meet the 30% showing of interest standard; (4) SEIU 925 no longer enjoyed the support of a majority of employees in the bargaining unit allowing processing under WAC 391-25-090; and (5) SEIU 925 engaged in objectionable conduct that would warrant continued processing of the petition. AR at 52-57. At no time did the Association allege that the Department engaged in blocking conduct preventing the Association from meeting the required showing of interest.

On July 14, 2017, PERC Executive Director Michael Sellars, determined that the Association did not show good cause as to why the matter should go forward, and the representation petition was dismissed. AR at 57. In the Order of Dismissal, the Executive Director stated, "A party asserting that it was prevented from collecting its showing of interest by the actions of other parties must seek redress through an unfair labor practice

proceeding.” AR at 56. The Association did not appeal the dismissal of the petition.

B. Unfair Labor Practice Complaint

On August 9, 2017, after the dismissal of its representation petition, Deborah Thurber submitted a public record request to the Department seeking Providers’ names and contact information. AR at 88-89. She did not identify herself as being affiliated with the Association, but did explain that she was requesting the information to allow her to communicate with her fellow bargaining unit members about representation issues. AR at 88. On August 11, 2017, the Department denied Ms. Thurber’s request, citing specifically to RCW 42.56.640. AR at 91-92. On August 14, 2017, the Association filed a complaint charging unfair labor practices with PERC under WAC Chapter 391-45, naming only the Department as respondent. AR at 169-76. The Association asserted that by refusing to provide Ms. Thurber with a list of the Providers’ sensitive personal information in response to her numerous public record requests, the Department impeded the right of the Providers to select bargaining representatives of their own choosing, thus committing an unfair labor practice (ULP). The Association alleged it submitted public record requests to the Department in July and December 2014, November 2016, January 2017, and on August 9, 2017. *Id.*

The Association’s complaint was reviewed under WAC 391-45-110, and a deficiency notice was issued by PERC on August 25, 2017, determining that it was not possible to conclude that a cause of action existed based on the allegations. AR at 106-10. The Association was given

21 days to file and serve an amended complaint or face dismissal of the case. AR at 109-10. The Association filed an amended complaint on September 8, 2017. AR at 39-46. In its amended complaint, the Association did not allege that the Department refused to provide it with a list of personal contact information for Providers in response to its July 2014, December 2014, and November 2016 requests. AR at 41, ¶¶ 14-16. To the contrary, the Association admitted that the Department produced the requested list in response to the July 2014 request, and that SEIU 925 attempted to enjoin release of the records the Department intended to disclose in December 2014 and November 2016 by pursuing litigation. *Id.*

The Acting Unfair Labor Practice Manager (ULP Manager) determined that the amended complaint did not describe an employer refusal to bargain or derivative interference in violation of RCW 41.56.140(1) and (4), or any other causes of action that could constitute a ULP under the jurisdiction of PERC. AR at 32-33. The ULP Manager also determined that the Amended Complaint described events that took place outside the six-month statute of limitations period, which began to run on February 14, 2017. AR at 34. The public record events that occurred in July and December 2014, November 2016, and January 2017 were determined to be untimely and dismissed. *Id.* However, the public record request made on August 9, 2017, fell within the six-month statute of limitations period. After consideration of the applicable legal standard under RCW 41.56.140(1) to the August 9, 2017 public record request, the ULP Manager dismissed the Amended Complaint for failure to state a cause

of action for employer interference and PERC upheld that decision. AR at 4, 37. PERC found that no cause of employer interference under RCW 41.56.140(1) existed when the employer complied with the requirements of I-1501 in denying the public record request. AR at 37. Those statutes expressly exempt from public disclosure and prohibit agency disclosure of certain sensitive information, including the names and contact information of Providers. RCW 42.56.640; RCW 43.17.410.

The Association appealed that decision to the Thurston County Superior Court, which affirmed, and this appeal timely followed. CP at 160-66.

IV. STANDARD OF REVIEW

PERC's decisions are subject to judicial review under the Administrative Procedures Act. RCW 34.05.030(5); *Yakima Cty. v. Yakima Cty. Law Enforcement Officers' Guild*, 174 Wn. App. 171, 180, 297 P.3d 745 (2013). Under the Administrative Procedures Act, this Court reviews the findings and conclusions of PERC, as opposed to that of the hearing examiner or the superior court. RCW 34.05.030(5); *Yakima Cty. Law Enforcement Officers' Guild*, 174 Wn. App. at 180. Questions of law are reviewed de novo; however, great weight and substantial deference are given to PERC's interpretation of RCW 41.56 (Public Employees' Collective Bargaining Act or PECBA), and the court may not substitute its judgment for the agency's with respect to witness credibility or weight of

the evidence. *City of Vancouver v. State Public Employment Relations Comm'n*, 180 Wn. App. 333, 347, 325 P.3d 213 (2014).

V. ARGUMENT

A. PERC Correctly Determined That the Department Did Not Commit Employer Interference by Complying with the PRA

RCW 41.56, PECBA, governs the relationship between SEIU 925 and the Department. Pursuant to RCW 41.56.030(4), the parties have an obligation to negotiate in good faith. Under both federal and state law, this duty to bargain includes a duty to provide relevant information needed by the opposite party for the proper performance of its duties in the collective bargaining process. *Nat'l Labor Relations Bd. v. Acme Indus. Co.*, 385 U.S. 432, 87 S. Ct. 565, 17 L. Ed. 2d 495 (1967); *City of Bellevue*, Decision 3085-A (PECB, 1989), *aff'd City of Bellevue v. Int'l Ass'n of Fire Fighters, Local 1604*, 119 Wn.2d 373, 831 P.2d 738 (1992). The Department has a legal obligation to provide information to the certified exclusive bargaining representative of the bargaining unit, in this case SEIU 925. *See City of Yakima*, Decision 10270-A (PECB, 2011).

The Association was not and is not the certified exclusive bargaining representative for Providers, and consequently did not have the authority to make an information request pursuant to RCW 41.56. Additionally, the Association had not met the threshold requirement of producing showing of interest cards from 30% of the bargaining unit members and, therefore, did not have a pending representation petition at the time of its August 9, 2017, request. Had it met this threshold requirement, it would have been entitled

to the information pursuant to WAC 391-25-130. However, as of August 9, 2017, Deborah Thurber was treated like any other ordinary citizen making a public record request under Washington's PRA, when the Department determined that the release of sensitive personal information of Providers was prohibited. The Department's compliance with a public records exemption and an express statutory prohibition of disclosure of sensitive personal information of Providers is not a threat of reprisal or force, or any other employer interference claim. Nor is it reasonable to conclude that such compliance demonstrates favoritism or a preference for SEIU 925.

The Department did not commit an interference ULP by failing to provide a list of sensitive provider contact information to the Association in response to its August 9, 2017, public record request. Rather, the Department properly recognized that the Association is not the exclusive bargaining representative for Providers, and proceeded to comply with the relevant statutes, and in particular with RCW 42.56.640, in denying the request. The Association cites no cases holding that an employer committed a ULP by not providing a list of its employees, much less any case finding a ULP for failure to produce such a list when it is expressly prohibited by law. Because PERC's ruling in this case affirmed well-established law and simply endorsed long-standing definitions of employer interference, this Court should uphold PERC's order dismissing the ULP.

B. There is No Statutory Conflict between the Public Employees' Collective Bargaining Act and the Prohibition of Release of

Sensitive Personal Information under RCW 42.56.640 or RCW 43.17.410

There is no conflict between the PECBA and the relevant statutes codifying I-1501 -- RCW 42.56.640-.645 and RCW 43.17.410. Specifically, RCW 41.56.028(2)(a) states, “[a] statewide unit of all family child care providers is the only unit appropriate for purposes of collective bargaining.” The statute goes on to identify the scope of collective bargaining between Providers and the Governor. RCW 41.56.028(2)(c). RCW 42.56.640 prevents the release of certain public records that could facilitate identity theft and other financial crimes against seniors and vulnerable individuals. It does not bar Providers from organizing.

The language of both RCW 42.56.640 and RCW 43.17.410(1) are clear and unambiguous; there is no need for judicial interpretation. RCW 43.17.410(1) states in part, “neither the *state* nor any of its agencies *shall* release sensitive personal information of vulnerable individuals or sensitive personal information of in-home care givers.” RCW 43.17.410(1) (emphasis added). RCW 42.56.640 defines sensitive personal information as "names, addresses, GPS global positioning system' coordinates, telephone numbers, email addresses, social security numbers, driver's license numbers or other personally identifying information." It also defines

"in-home caregivers" to include family child care providers. RCW 42.56.640(2)(a)(iii).

The words "neither the *state* nor any of its agencies *shall* release" required the Department to withhold the list of contact information of Providers requested on August 9, 2017. The language does not prevent Providers from coming together under a single representative to improve their economic status and working conditions. The statutes do not conflict; therefore, reconciliation is not required.

RCW 42.56.645(1)(d) provides for an exception for release of the sensitive personal information of Providers for specific types of requestors. Sensitive personal information may be released if "the information is being released as part of a judicial or quasi-judicial proceeding and subject to a court's order protecting the confidentiality of the information and allowing it to be used solely in that proceeding." RCW 42.56.645(1)(c). This circumstance did not apply at the time of the Association's request on August 9, 2017. At the time of the Association's request, the representation petition had been dismissed by PERC and no adjudicative hearing existed. Ms. Thurber, on her own, made a simple public records request to the Department. And, no judicial or quasi-judicial proceeding was pending triggering RCW 42.56.645(1)(c). Whether that exception would have allowed the Department to disclose the list of sensitive personal information

is not at issue here and need not be decided by this Court. However, the Department did not have discretion in following the law as set forth in RCW 42.56.640 and RCW 43.17.410, and the Association's August 9, 2017, public record request did not fall within any of the listed exceptions contained in RCW 42.56.645.

The Association argues that the Department's application of RCW 42.56.645(d), the exception authorizing release of the information to the certified bargaining representative results in employer interference. Br. of Appellant at 18. That is not accurate, as discussed further below in the discussion of the constitutional issues raised by the Association. Additionally, the PERC decisions relied upon by the Association for this proposition are not analogous.

In *Teamsters Local 117*, Decision 11223 (PECB, 2011), PERC addressed alleged interference during the pendency of a representation petition. Significantly, that case specifically noted, "If an employer expresses or indicates a preference between competing organizations **while a representation petition is pending**, it commits an unfair labor practice." *Id.* at 8 (emphasis added). The instant case is not analogous because the Association never met the threshold requirement to produce showing of interest cards from 30% of the members, meaning that it was unable to petition to represent the employees. Because of this, Ms. Thurber's request

for the list of names constituted a public record request made by the public, and was not a request based on a recognized relationship between the requestor and the Providers. There are no PERC cases requiring the employer to provide assistance to the public in obtaining access to employees for purposes of collective bargaining. Here, the Association and the Department did not have a relationship based in collective bargaining, and that is the only type of relationship that PECBA governs.

C. Constitutional Arguments

The constitutional issues raised by the Association in this matter are similar to the issues raised by the same parties in federal court in *Boardman v. Inslee*, 354 F. Supp.3d. 1232 (2019). In that case, Ms. Thurber, the Freedom Foundation, and others asserted that I-1501 violated both equal protection and their rights to freedom of speech and association. *Id.* at 1239. In that case, the United States District Court for the Western District of Washington dismissed the Freedom Foundation's claims on a motion for summary judgment and upheld the constitutionality of I-1501. *Id.* at 1252. The case has been appealed to the Ninth Circuit, which has not yet issued a ruling. The court recognized that treating a person who wants to assume the role of a certified bargaining representative differently than the incumbent union does not violate equal protection. *Id.* at 1249-50. The court also

recognized that “laws restricting public access to records do not implicate the First Amendment at all.” *Id.* at 1242.

1. RCW 42.56.640 and RCW 43.17.410 do not regulate speech

Underlying the Association’s constitutional claims is its incorrect assertion that the statutes prohibiting the release of the information it seeks regulate speech. However, these statutes do not regulate speech. Rather, the statutes create a public record exemption and a statutory prohibition against disclosure for certain sensitive personal information.

Just as with other exemptions contained in the PRA, the statutes at issue in this case do not regulate the Association’s speech in any way. While the Association may not be able to target its speech as efficiently as it would like without access to certain government information, access to government information in order to facilitate one’s speech has never been held to be a First Amendment right. *Houchins v. KQED, Inc.*, 438 U.S. 1, 9, 98 S. Ct. 2588, 57 L. Ed. 2d (1978); *Boardman*, 354 F. Supp. 3d at 1242.

In *Houchins*, the Court distinguished between the media’s right to gather and communicate information with their alleged right to access government information, stating that “[t]his Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control[,] *id.* at 9, and [t]here is no discernable basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information.” *Id.* at 14. The Court thus rejected the First Amendment claim without engaging in any traditional First Amendment

analysis about time, place, and manner or least restrictive methods. *Id.* *Houchins* controls the outcome here; there is no First Amendment right to access information held by the government.

Further, in *Los Angeles Police Dep't v United Reporting Publ'g Corp.*, 528 U.S. 40, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999), the Supreme Court held that a restriction on access to government records for commercial speech was not subject to facial challenge based on the First Amendment because, “[t]his is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses.” Just like the other exemptions in the PRA, the public records act exemption and the statutory prohibition preventing the Department from releasing the information do not regulate the Association’s or its members’ speech in any way. The Association and its members are free to communicate using a myriad of avenues, including media advertising campaigns, social media, working with parent-provider groups, attending professional development and other required trainings, and actively participating with other providers in the State’s Early Achiever’s Program.

As the *Boardman* case correctly held, the First Amendment is not implicated by the provisions of I-1501. *Boardman*, 354 F. Supp. 3d at 1252. Based on the same rationale, this Court should find no violation of the First Amendment in the instant case.

2. RCW 42.56.640 and RCW 43.17.410 do not violate equal protection

The Association asserts that the relevant statutes passed by the voters in I-1501 violate equal protection because they affect the Association's "fundamental rights of free speech and association for political purposes." Br. of Appellant at 43. Distinguishing between elected representatives of a bargaining unit and others with respect to communication with represented employees does not violate equal protection.

As discussed above, certified unions have a need and a right, long recognized and supported by the State, to be able to contact those they represent in order to fulfill their duties to those individuals. Certified unions are presumptively entitled to access the contact information of public employees they represent in order to fulfill their statutory duties—including the duties of fair representation and collective bargaining. *Nat'l Labor Relations Bd.*, 385 U.S. 432, 87 S. Ct. 565, 17 L. Ed. 2d. 495 (1967).

The United States Supreme Court has concluded that giving preferential access to an incumbent union was not a preference based on viewpoint, even though a rival union alleged that restricting access would distinguish between the incumbent and rival unions' viewpoints on labor relations.¹ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37,

¹ Unlike the present case, the *Perry Education* decision primarily involved an analysis as to what extent a public school's mailbox system was a public forum. *Perry*

49, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983). Instead, the distinction was based on the status of the respective unions – one having been elected as the collective bargaining representative and the other not. *Id.* at 44, 49. The Court specifically stated, “We observe that providing exclusive access to recognized bargaining representatives is a permissible labor practice in the public sector.” *Id.* at 51. That is exactly the situation at issue in the instant case.

RCW 42.56.640 and RCW 43.17.410 deny access to personal information of Providers with few exceptions, which are set forth in RCW 42.56.645. One exception allows for an exclusive bargaining representative certified under RCW 41.56.080 to have access to sensitive contact information of Providers, if confidentiality is maintained. RCW 42.56.645(1)(d). This does not evidence animus by which a classification of persons is rendered unequal without proper legislative end. *See, e.g. Romer v. Evans*, 517 U.S. 620, 635, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). Washington voters expressed their belief that it is important to keep information related to vulnerable populations, including Providers, private and confidential to avoid victimization.

Allowing a representative of a collective bargaining unit access to

Educ. Ass’n, 460 US at 45. Nevertheless, the Court’s rationale with respect to whether favoring an incumbent union showed viewpoint discrimination remains apt here.

contact information for their members, while denying access to the general public, easily satisfies the rational basis test. First, it allows the certified bargaining representative to fulfill its duties to its members. More broadly, however, the statute serves a legitimate purpose because by protecting the confidentiality of in-home caregivers' identifying information, it protects against identity theft and the invasion of privacy for the caregivers, as well as the vulnerable populations for whom they provide care. *See Wash. Pub. Emp. Ass'n v. Wash. State Ctr. For Childhood Deafness & Hearing Loss*, 1 Wn. App. 2d 225, 234, 404 P.3d 111 (2017), *review granted*, 190 Wn.2d 1002, 413 P.3d 15 (2018).²

The voters' findings supporting I-1501 include that vulnerable individuals often have "less ability to protect themselves and such individuals can be targeted using information available through public sources, including publicly available information that identified individuals or their in-home caregivers." RCW 9.35.001(2). Protecting against identify theft is a legitimate governmental purpose; thus, the statutes are constitutional.

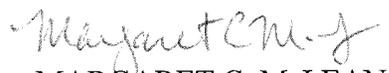
² This case addressed whether public employees have a privacy interest in the release of their names in combination with their dates of birth and concluded that there is such a constitutional right. Regardless of whether the Washington State Supreme Court ultimately affirms or reverses the Court of Appeals opinion, the fact that a Washington court recognized that the state constitution requires that such information remain confidential is a powerful statement that protection of such information serves a legitimate governmental purpose.

VI. CONCLUSION

The Association's arguments would result in any member of the public being able to obtain the personal sensitive information of Providers in contravention of the voters' intent in I-1501 by merely claiming that they are seeking to organize. That is neither required by the constitution, nor permitted by PECBA or the PRA. This Court should uphold PERC's order dismissing the unfair labor practice complaint at issue in this matter and hold that I-1501 is constitutional.

RESPECTFULLY SUBMITTED this 5th day of June, 2019.

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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 5 day of June 2019, at Olympia, WA.



JAMIE MERLY

WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL

June 05, 2019 - 3:56 PM

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