

GeneWatch UK response to the Northern Ireland Department of Justice Consultation on Proposals for the Retention and Destruction of Fingerprints and DNA in Northern Ireland

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GeneWatch UK is a not-for-profit organisation which aims to ensure that genetics is used in the public interest. GeneWatch began investigating the issues associated with the expansion of the National DNA Database (NDNAD) in 2003 and published the first report about the database for members of the public in January 2005.¹ GeneWatch has previously supplied written and/or oral evidence on the National DNA Database to the Scottish Parliament's Justice 2 Committee in 2006; to the Science and Technology Committee, Constitution Committee, Home Affairs Committee and Joint Committee on Human Rights at Westminster; and to the European Court of Human Rights on behalf of S. and Marper. GeneWatch also provided written and oral evidence to the Bill Committees for the Crime and Security act 2010 and the Protection of Freedoms Bill.

GeneWatch is regularly contacted by members of the public who have records on the DNA database, or whose children do so.

In 2007, GeneWatch published a briefing for Members of the Northern Ireland Assembly and Policing Board about police retention of DNA in Northern Ireland.²

GeneWatch UK has consistently argued that new legislation governing DNA databases could be adopted which significantly improves protection for human rights, is compliant with the European Court of Human Rights' judgment on this issue³, regains much of the loss of public trust in policing, and does not have an adverse impact on crime detection or prevention.

We welcome the objectives of the Northern Ireland Department of Justice in seeking to comply with the judgment of the European Court of Human Rights whilst maintaining the benefits of the use of DNA in criminal investigations. Our comments on the consultation proposals are below.

Background

The Forensic Science Northern Ireland laboratory (FSNI) analyses and stores DNA samples in Northern Ireland on behalf of the Police Service Northern Ireland (PSNI) and manages Northern Ireland's computer database of DNA profiles. It also exports DNA profiles to the National DNA Database (NDNAD) in England.

The National DNA Database (NDNAD) was set up to contain the DNA records of convicted criminals in 1995 by Conservative Home Secretary Michael Howard. Two changes in the law, made by the Blair Government in 2001 and 2003, led to a massive expansion of the database, which now contains the records of approximately 5 million people (8% of the UK population, by far the largest proportion in the world)⁴. These changes in the law (amendments to PACE introduced by the Criminal Justice and Police Act 2001 and the Criminal Justice Act 2003) allowed DNA samples and records to be collected routinely from everyone arrested for any recordable offence, from the age of ten, and retained indefinitely whether or not they were charged or convicted.

The sections of the Criminal Justice and Police Act 2001 which allow the retention of DNA samples and data from persons not prosecuted or acquitted were extended directly to Northern Ireland by that Act.⁵ At the time, the law in England, Wales and Northern Ireland allowed police to collect DNA from any person held at a police station and *charged* with a recordable offence.

The section of the Criminal Justice Act 2003 which allows DNA to be taken on arrest, rather than on charge, was introduced via a late amendment submitted by the UK Home Secretary during the first week of the Iraq war: no Northern Ireland MP from any party voted in favour it.⁶ However, the provisions were later applied to Northern Ireland via the Criminal Justice (Northern Ireland) Order 2004.⁷ The Draft Order was made on 24th March 2004 and approved by both the Commons and the Lords on 3rd April, in a process lasting only ten days.^{8,9} On 28th April 2004, the UK Government responded to criticism from the Northern Ireland Affairs Committee regarding the use of Executive Orders to address policing matters during suspension of the Assembly.¹⁰ Although it rejected the committee's recommendation to correct the legislative process under the Northern Ireland Act 2000 (which had omitted any consultation process), it accepted that there should generally be twelve weeks' consultation on draft Orders before they are laid before Parliament. However, no such consultation took place with regard to the Order regarding the collection of DNA routinely on arrest.

Until October 2005, the FSNI had not completed the quality standards accreditation process required to export DNA profiles to the NDNAD in England, although it had 36,219 individuals' DNA profiles on its own database.¹¹ On 7th September 2005, FSNI began loading the backlog of DNA profiles to the NDNAD, marked with a 'pre-accreditation' flag, and on the 20th October it began exporting post-accreditation DNA profiles.

A 2006/07 FSNI-PSNI agreement requires the routine export of individuals' DNA profiles from Northern Ireland to the NDNAD¹² It includes provisions for the removal of records from the Northern Ireland database, and destruction of the associated DNA samples, but only on the written direction of the PSNI. It also includes provisions for familial searching of DNA database records (searching for partial matches with the profile of a relative).

The situation on retention of records must now be changed in the light of the judgment of the European Court of Human Rights in the case of *S. and Marper v. the UK* and the recent decision of the Supreme Court, which allows a "reasonable time" for the introduction of national legislation before further cases will become before the courts.

Human rights issues

DNA databases rely on the fact that DNA can be taken from any sample of human tissue left at a crime scene. DNA profiles (a string of numbers based on part of the sequence of the DNA) can be obtained from both crime scene DNA and from individuals' DNA (usually collected at a police station using a mouth swab) and stored on a computer. Speculative searches of the NDNAD are run repeatedly to look for new DNA profile matches. A match between an individual's DNA profile and a crime scene DNA profile indicates a high probability that the individual was at the crime scene.

A DNA *database* is not required to provide evidence of guilt or innocence when there is a known group of suspects for a specific crime: a DNA profile can be taken from each individual and compared directly with a crime scene profile. For the same reason, a database of individual DNA profiles is also unnecessary to exonerate an innocent person. The 'added value' of putting individuals' DNA profiles on a database is only to introduce *new suspects* into an investigation, via unexpected matches between DNA profiles from crime scenes and those from individuals. All such matches risk reversing the presumption of innocence and corroborating evidence must be required to guard against false matches (or false inferences) and prevent miscarriages of justice.

The human rights concerns associated with DNA databases relate to the widening of the group of *individuals* (not crime scene samples) from whom DNA can be taken and then *retained* on the database. This is because:

- DNA can be used as a form of biological tagging to track individuals or their relatives, so the Database could be misused by Governments or anyone who can infiltrate the system (e.g. police tracking protestors, organised criminals tracking a victim on a witness protection scheme, or an abusive father who may wish to track down their child using a sample of their DNA from a toothbrush);
- DNA is not foolproof, so people on the Database can be falsely implicated in a crime;
- Stored DNA samples contain additional private genetic information (e.g. health-related information).

In England and Wales, DNA records are linked to Police National Computer (PNC) records of arrest, which are stored to age 100 and can be used to refuse someone a visa or a job, or lead to them being treated differently by the police, purely on the basis of a record of arrest.

Examples of people affected by the DNA database expansion in England and Wales include: a 12-year old-schoolboy arrested for allegedly stealing a pack of Pokemon cards¹³; a grandmother arrested for failing to return a football kicked into her garden¹⁴; a ten-year-old victim of bullying¹⁵; a 14-year-old girl arrested for allegedly ping-ponging another girl's bra¹⁶; a 13-year-old who hit a police car with a snowball¹⁷; a computer techie wrongly accused of being a terrorist¹⁸; Janet Street-Porter¹⁹; comedian Mark Thomas²⁰; and MPs Greg Hands and Damian Green.

In Northern Ireland, the PSNI were forced to remove the DNA and fingerprints of 11-year-old Derry child Sarah Leigh Millar from their databases in 2006, following protests after she was arrested for allegedly writing graffiti on the city walls. The Children's Commissioner later expressed concerns about the number of children whose DNA records were being held.²¹ In January 2010, 106 persons aged under-18 had their DNA records retained by PSNI (79 were charged or reported, the remaining 27 individuals were released unconditionally). Of these young people, 44 were children aged ten to fifteen (33 were charged or reported, the remaining 11 individuals were released unconditionally).²²

An estimated 986,185 unconvicted persons had records on the NDNAD at 24th April 2009. A small minority of these people will be still under investigation: the remainder will have been found innocent of any crime. GeneWatch is not aware of any published record of the number of innocent people with records on the database due to being

arrested in Northern Ireland: in 2009 PSNI held 103,441 profiles on its DNA database, but were unable to supply information regarding the number of unconvicted persons.²³ During 2008/09, only 283 innocent individuals in total were successful in getting their records deleted from the NDNAD under the 'exceptional cases' procedure²⁴, which requires application to the relevant Chief Constable. The procedure is widely regarded as unfair: success requires considerable persistence and knowledge of the system and is strongly influenced by police area and access to sympathetic media coverage, political support and/or expensive legal advice.

Children have been particularly affected by the expansion of the DNA database, following a significant increase in the numbers of young persons arrested following minor crimes or false accusations (such as pulling each others' hair or damaging trees or fences), due to the system of police arrest targets put in place as the database expanded.^{25,26,27} In addition, there has been a disproportionate effect on black and ethnic minority communities, with negative impacts on trust in policing in these communities: estimates suggest that 37% of black men²⁸ and 77% of young black men, aged between 15 and 34, may have records on the National DNA Database.²⁹

Role in solving crimes and lack of benefit in database expansion

Home Office figures highlight that the significant expansion in the size of the National DNA Database has not helped to solve more crimes. Collecting DNA is often very useful during a criminal investigation, but storing DNA profiles from hundreds of thousands of innocent people has made a minimal contribution to solved crimes (especially to serious crimes). This is probably because most of these people are extremely unlikely to go on to commit the type of crimes for which DNA evidence might be relevant. A detailed analysis of the available crime detection statistics and cases is available in GeneWatch UK's January 2010 submission to the Home Affairs Committee.³⁰ Some of this data is reproduced in Table 1 below. More facts and figures are on the GeneWatch website.³¹

The value of *entering* increasing numbers of DNA profiles from *individuals* on a DNA database (unrelated to the reason for arrest) is that it may allow investigation of a *past* crime to be re-opened, by unexpectedly identifying a new suspect through a match with a stored crime scene DNA profile. The purpose of *retaining* an individual's DNA profile on a database is to treat them as a suspect for any *future* crime, when they might be identified through a match between a new crime scene DNA profile and their stored record. This is likely to be of most benefit when an individual has a criminal record and is considered likely to re-offend. Provided crime scene DNA samples are analysed promptly, retention of an individual's DNA profile and fingerprints is only useful if they commit a future crime in which DNA evidence has been obtained from the crime scene: such cases are overwhelmingly dominated by volume crimes committed by repeat offenders.

Retention of individuals' DNA records plays no role in exonerating innocent people: only the crime scene DNA needs to be retained for this purpose as an accused or wrongly convicted person carries their DNA with them at all times. Similarly, known suspects (first identified through other means) do not need a record on the DNA database in order to have their DNA sample taken and their profile compared with any crime scene evidence. This is often the situation for murders and rapes, because most murderers and rapists are known to their victims (i.e. a DNA database is unnecessary, although DNA evidence may be very important in the case that is brought to court).

The number of DNA *matches* between crime scenes and individuals on the National DNA Database can sound impressive. However, these figures include many matches with victims and innocent passers-by. Only some matches (called DNA detections) involve sufficient evidence to charge someone for a crime, and not all DNA detections lead to prosecutions or convictions. The number of DNA detections made each year using the NDNAD has fallen since its peak in 2002/03, despite the DNA database more than doubling in size, and the proportion of DNA detections per recorded crime has remained roughly constant at 0.37% (see Table 1, below). Most of these detections involve matches between known suspects and crime scenes, or matches between a newly arrested individual and a crime scene DNA profile (i.e. they are matches which do not require the retention of individuals' records on a database). From available Home Office figures, it is possible to estimate that only about 0.03% of solved crimes involve matches between a crime scene DNA profile and an individual's stored DNA database record as the first link to the suspect. The vast majority of these offences are volume crimes, such as burglaries and thefts. In 2008/09, less than 1% of DNA detections were for rape, and only 0.4% were for homicide (murder plus manslaughter). Most of these matches will be with records from persons with past convictions (especially those with multiple convictions, who commit a high proportion of recorded crime).

According to the NDNAD 2007-09 annual report, 40,687 matches were made between crime scene DNA profiles and individuals' DNA profiles on the NDNAD in 2008/09: only 110 involved crime scene profiles from Northern Ireland and 131 involved DNA profiles from individuals arrested in Northern Ireland. No data on DNA detections for Northern Ireland is available, but on average about 1 in 4 matches lead to a conviction. The vast majority of these cases will be volume crimes and involve repeat offenders.

As far as GeneWatch is aware, after ten years' retention of innocent people's DNA records in England and Wales, no murder cases have been identified that would not have been solved had such records been deleted from the database. Provided DNA evidence from crime scenes is analysed promptly, the handful of relevant rape cases that have been identified in England and Wales would be captured by the temporary retention of records from persons arrested and/or charged with qualifying offences as proposed in both this consultation and the Protection of Freedoms Bill.

Further support for restricting the size of the database is provided by the evidence which shows that the number of crimes detected using DNA is driven by the number of crime scene DNA profiles loaded to the database, not by the number of individuals' DNA profiles retained. This has been confirmed by more recent research by the RAND Corporation in the USA, which states:³² *"In assessing how DNA analysis is used to aid investigations in the U.S. system, we found that database matches are more strongly related to the number of crime-scene samples than to the number of offender profiles in the database. This suggests that "widening the net," which research indicates has only a minimal deterrent effect, might be less cost-effective than allocating more effort to samples from crime scenes. Indeed, the UK Home Office reached this same conclusion in an analysis of its National DNA Database (NDNAD) performance"*.

The statistical probability of a false match between two complete DNA profiles is very low, but the likelihood of false matches increases if the crime scene DNA is degraded or mixed, if the suspect is related to the perpetrator, or if only a very small sample is available. For example, the Low Copy Number (LCN) technique, used for very small

samples of DNA, reportedly identified a 14-year old English schoolboy as a suspect for having planted the Omagh bomb.³³

Comments on consultation proposals

Destruction of DNA samples

GeneWatch strongly welcomes the provision to destroy all DNA samples once the computerised DNA profiles (a string of numbers based on parts of the DNA) have been obtained from them. The storage of large numbers of DNA samples raises significant privacy concerns because they contain unlimited genetic information (including private health-related information) and storage creates unnecessary costs. Only the DNA profiles – not the samples - are needed for identification purposes. This proposal is consistent with past recommendations by the Human Genetics Commission and a similar safeguard has already been implemented by a number of other countries (e.g. Germany, Belgium, Switzerland). Destruction of samples is included in the Protection of Freedoms Bill at Westminster and is not opposed by any party or by the police.

Deletion of innocent people's DNA and fingerprint records

GeneWatch UK welcomes these provisions which introduce an approach similar to Scottish legislation for the automatic deletion of DNA profiles and fingerprints from persons who are not convicted of any offence. As outlined above, the proposals in the consultation would allow the benefits of the use of DNA and fingerprints in solving crimes to be retained whilst significantly increasing the protection of the rights of innocent people.

Retention of DNA and fingerprint records from convicted persons

GeneWatch UK welcomes the inclusion of provisions to set time limits on the retention of DNA database and fingerprint records from children convicted of a single minor offence. However, this provision should be extended to adults convicted of a minor offence but with a ten year rather than 5 year retention time.

When the National DNA Database was first set up, DNA database records were supposed to be deleted at the same time as records on the Police National Computer³⁴: innocent people's police records used to be removed after 42 days: those with cautions after 5 years; and those with single convictions for minor offences were due for removal after ten.³⁵ However, the law was changed before any removals were actually implemented (some PNC records, but not NDNAD records, were removed for people with cautions). Home Office data suggests that the likelihood of re-offending falls rapidly with time and is less than the male peak offending rate five years after an offence.³⁶ There is therefore no justification for retaining data from persons convicted of a single minor offence for longer than ten years.

The Equalities and Human Rights Commission has expressed the view that the indefinite retention of all convicted persons' records is incompatible with the European Convention on Human Rights³⁷, and has obtained a legal opinion to this effect³⁸. The Opinion relies on the wording of The Committee of Ministers' Recommendation R92(1)³⁹, which was referred to in the Marper judgment.

Warnings, reprimands and cautions

In the Protection of Freedoms Bill, warnings, reprimands and cautions are treated as equivalent to convictions and all data is retained indefinitely. The current consultation is silent on the definition of convictions. In GeneWatch's view, data from persons given cautions, reprimands or warnings (i.e. not convicted by a court) should not be retained indefinitely. We have suggested a two year retention period for reprimands and warnings and five years for cautions in the context of the Protection of Freedoms Bill.

Photographs and other police computer records

GeneWatch UK has argued that the deletion of photographs and Police National Computer (PNC) records should be included in the Protection of Freedoms Bill in England and Wales, so that all records and photographs are deleted at the same time. The Supreme Court's judgment in the case *R (on the application of GC and C) v The Commissioner of Police of the Metropolis* resulted in a declaration that the current Association of Chief Police Officer (ACPO) guidelines for the retention of DNA, fingerprint and PNC data are unlawful.⁴⁰ The court made no determination on the issue of retention of photographs, on the grounds that this issue was raised late in the process, however it noted that it is common ground that retention of PNC record information raises no separate issues from those raised by the retention of DNA and fingerprints (para 51). UK ministers are currently considering the implications of the judgment for the provisions in the Protection of Freedoms Bill.

It is GeneWatch's understanding that, in Northern Ireland, only selected conviction information is entered into the PNC, and the Criminal Record Viewer system provides records of convictions rather than arrests.⁴¹ If our understanding is correct, our concerns about the use of PNC records of arrest to refuse visas and jobs, and the stigma that sometimes arises due to police access to these records on the beat, do not apply in Northern Ireland. However, photographs also contain personal information and it is hard to see on what grounds their retention can be justified when other personal information is required to be deleted.

Currently, people who make a successful application under the 'exceptional cases' procedure have all their data deleted, including their photographs (provided they request this). Thus, failure to delete photographs would leave some people worse off than under the old discredited system of removals.

In GeneWatch's view, destruction of photographs at the same time as other data is an important aspect of restoring public trust.

Uses of retained material

The listed uses of retained material includes "*for purposes related to the identification of a deceased person or of the person to whom the material relates*".

Use of retained DNA profiles and fingerprints for identification of a living person outside the context of criminal or terrorist investigations has been an allowed use under PACE only since the Counter Terrorism Act 2008 (Clause 14 (5)). Use of the DNA and fingerprint databases for identification purposes was first proposed by the previous UK government when it sought (unsuccessfully) to expand the routine collection of biometrics to all persons arrested for non-recordable offences, such as dropping litter and parking fines, and to allow individuals to be held for four hours in Short Term

Holding Facilities (STHF) in shopping centres whilst their identity was verified using their DNA and fingerprints.⁴²

In its evidence to the European Court the Home Office stated (correctly, at the time, excepting inadvertent disclosures) that an individual's identity would only be revealed if there was match between a crime scene DNA profile and an individuals' DNA profile. The extension of uses to identification of a person is a significant change of use in this respect. It allows the use of DNA to track any individual with a record on the database (for example, by examining DNA left on a beer glass or coffee cup) in any circumstance (for example, allowing the police or secret services to identify whether or not someone has attended a political meeting, rather than a crime scene). Such uses would raise significant human rights concerns in any authoritarian state, due to the potential for tracking dissidents or political opponents (and potentially also relatives, using familial searches of the DNA database).

GeneWatch UK therefore recommends that the use of the DNA database and fingerprint database for "*identification ... of the person to whom the material relates*" should be restricted to identification of specific persons on UK police or Interpol wanted lists. Persons who are not suspected of having committed crimes should not be able to be routinely identified by means of their biometric information.

Commissioner for the Retention and Use of Biometric Material

GeneWatch UK welcomes the inclusion of the oversight powers to be exercised by the proposed UK Commissioner for the Retention and Use of Biometric Material. However, we have supported calls made by a number of other organisations to streamline the system, clarify responsibilities, improve communications and cut costs by creating a single Privacy Commissioner to fulfil the assorted roles and responsibilities proposed or already undertaken by the Biometrics Commissioner, the Surveillance Camera Commissioner, the Interception of Communications Commissioner, the Office of Surveillance Commissioners and the data protection aspects of the Information Commissioner's Office. In our view, it is a matter for Northern Ireland whether it wishes to establish its own Biometrics Commissioner. This might improve accountability and transparency for people living in Northern Ireland; on the other hand it might over-complicate the system if national security determinations are in any case required to be made in London.

Collection of DNA and fingerprints routinely on arrest for any recordable offence

As outlined above, the decision to collect DNA and fingerprints routinely on arrest for any recordable offence was introduced in Northern Ireland by Order, without any consultation with the Assembly or the public, or any support from any Northern Ireland MP from any party. Previously DNA was collected only on charge not on arrest. No increase in the number of DNA detections has been observed since collection on arrest began to be implemented in England and Wales and Northern Ireland in April 2004 (see Table 1). Continuing to sample everyone arrested for a recordable offence, at a cost of an estimated £30-£40 per person, is therefore likely to be a waste of public money. This is particularly the case for children, whose DNA profile is extremely unlikely to throw up an unexpected match with a string of past serious offences.

Children's organisations have raised particular concerns about the impacts on vulnerable children.^{43,44} For example, the Standing Committee on Youth Justice recommends that DNA samples should not be taken from children unless this is required for the purposes of investigating the offence for which the child was arrested and DNA profiles should be retained for no longer than is required for the purposes of investigating the offence. Many people who are suffering from mental illness get arrested for public order offences because they are behaving strangely in a public place. Some vulnerable individuals may suffer serious impacts on their mental health as a result of having their DNA taken by the police (there is one reported case of suicide in England⁴⁵).

In Scotland, DNA is collected on arrest but for a narrower range of offences (imprisonable offences) than in England, Wales and Northern Ireland (where recordable offences include a long list of very minor offences). In many countries, DNA can only be collected in connection with serious offences and/or when the DNA is clearly relevant to the investigation of the offence for which the individual has been arrested (sometimes this must be determined by a court). Since DNA is collected from crime scenes for less than 1% of recordable offences, routine collection on arrest means that the DNA that is collected is rarely relevant to the offence under investigation. Particular concerns about human rights arise in the context of protest-related offences in view of the potential for DNA profiles to be used to track individuals and their relatives (via partial matching of DNA profiles using a familial search).

In GeneWatch's view, Northern Ireland should conduct its own review of DNA collection, including whether this should take place on arrest or charge, and/or for a narrower range of offences or in more closely proscribed circumstances, and whether there should be special provisions for children and persons suffering from mental illness.

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Table 1: National DNA Database DNA detections 1998-99 to 2008-09

	1998-99	1999-00	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
Number of DNA profiles stored from individuals*	517,000	737,000	1,186,000	1,695,000	2,099,964	2,527,728	3,085,766	3,785,571	4,428,376	5,056,740	5,607,614
Direct DNA detections	6,151	8,612	14,785	15,894	21,098	20,489	19,873	20,349	19,949	17,614	17,463
Recorded crimes % of recorded crimes detected involving a DNA match (direct DNA detections)	5,109,089	5,301,187	5,170,843	5,525,024	5,974,960	6,013,579	5,637,511	5,555,174	5,427,559	4,950,671	4,703,800
Indirect detections† % of recorded crimes with direct or indirect detection	0.12	0.16	0.29	0.29	0.35	0.34	0.35	0.37	0.37	0.36	0.37
Crime scene DNA profiles added per year	N/A	N/A	N/A	6,509	12,717	15,899	15,732	19,960	21,199	15,420	14,452
Individuals' DNA profiles loaded per year	N/A	N/A	N/A	0.41	0.57	0.61	0.63	0.73	0.76	0.67	0.68
Direct detections per crime scene DNA sample loaded	11,951	16,844	27,104	40,296	61,431	60,226	59,247	68,774	55,217	50,579	49,572
	243,199	213,075	389,951	501,212	488,519	475,297	521,118	715,145	722,476	591,028	580,174
	0.51	0.51	0.55	0.39	0.34	0.34	0.34	0.30	0.36	0.35	0.35

*Note that the number of individuals with records on the DNA Database is lower than this, since 10% to 13.7% of the records are replicates (this percentage varies in different years).

† Indirect detections occur if e.g. the suspect confesses to additional crimes.

N/A = Not available

Note: A very small number of additional DNA detections may not be included in the figures: these are detections involving a match with a volunteer's DNA profile in circumstances where the volunteer has given consent for their sample to be used in a specific investigation only and refused permission for it to be loaded to the database. Everyone who is arrested for a recordable offence in England, Wales and Northern Ireland now has their DNA profile added to the Database as a matter of routine.

SOURCES: National DNA Database Annual reports since 2002/03. Earlier detections from Hansard 10 Sep 2008 : Column 1866W.⁴⁶ Recorded crimes from Home Office reports.

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