Ky. Op. Atty. Gen. 06-ORD-135, 2006 WL 1967994 (Ky.A.G.)

Office of the Attorney General
Commonwealth of Kentucky

06-ORD-135

June 26, 2006

In re: Tom Fitzgerald/Kentucky Transportation Cabinet
Summary: Decision adopting 99-ORD-220 and 05-ORD-179 as to application of KRS 61.878(1)(i) and (j), respectively; the requested application materials are not properly characterized as preliminary drafts, notes, or correspondence with private individuals, nor as preliminary recommendations or memoranda. Accordingly, disclosure of these records is not contingent upon final action being taken by the Cabinet.

Open Records Decision

At issue in this appeal is whether the Kentucky Transportation Cabinet violated the Open Records Act in denying the request of Tom Fitzgerald for a "complete copy of any application filed requesting KYTC approval of a plan for reconfiguration of the intersection and northbound entrance ramp of I-65 at the Outer Loop in Jefferson County," as well as any maps or correspondence "between KYTC Frankfort or Louisville District office and Hagan properties or their agents, and between KYTC and the Federal Highway Administration" concerning this project. Failing to issue a written response within three business days, as the Cabinet did here, is a violation of KRS 61.880(1). In accordance with 99-ORD-220 and its progeny, [FN1] this office concludes that neither the requested application nor the related correspondence are properly characterized as preliminary drafts, notes, or correspondence with private individuals within the meaning of KRS 61.878(1)(i), nor preliminary recommendations or memoranda within the meaning of 61.878(1)(j); disclosure of these records is therefore not contingent upon final action by the agency. Accordingly, the Cabinet must provide Mr. Fitzgerald with copies of any existing records that are responsive to his request, justifying the redaction of any portion with particularity in terms of one or more of the exceptions codified at KRS 61.878(1).

In a letter dated February 27, 2006, J. Todd Shipp, Assistant General Counsel, Office of Legal Services, responded to Mr. Fitzgerald's request of December 6, 2006, advising him that, "at this time, a permit for this project has not been issued." Citing KRS 61.878(1)(i) and (j), Mr. Shipp denied Mr. Fitzgerald's request because "all applications and corresponding documents retain preliminary status and are not subject to public inspection" until such time as the permit has been issued. In a letter received by this office on May 26, 2006, Mr. Fitzgerald, acting in his capacity as Director, initiated this appeal from the Cabinet's denial of his request on behalf of Kentucky Resources Council, Inc.

Relying upon 93-ORD-22, Mr. Fitzgerald rejects the Cabinet's position relative to KRS 61.878(1)(i), arguing that nothing in that provision "authorizes withholding of maps filed with the permit application, nor of official correspondence between the [Cabinet] and the [FHA]." With respect to correspondence between the agency and the permit applicant, "KRS believes that any correspondence that requests information, which notes deficiencies

in the application, or which is of a factual nature," must be disclosed "since it is outside of the ambit of 'correspondence' that the General Assembly sought to shield under KRS 61.878(1)(i)." According to Mr. Fitzgerald:

> ***2** Where a business entity such as Hagan Properties seeks approval to encroach on [a] public right-of-way in order to support a Wal-Mart and other mall stores, the correspondence is not between an agency and a "private individual," nor [is] the correspondence of [a] personal nature such that disclosure would be considered an invasion of privacy. There is no reasonable expectation for an applicant who seeks approval to encroach on a public right-of-way that official correspondence from the agency concerning the sufficiency and status of the application will be exempt from disclosure.

To the extent that any correspondence between the Cabinet and the FHA or the permit applicant contains recommendations or opinions, the Cabinet "is under an obligation to redact such material and to disclose the remainder of the record" per KRS 61.878(4); KRS 61.878(1)(j) is inapposite in Mr. Fitzgerald's view. In conclusion, Mr. Fitzgerald argues that "failure to disclose the records prejudiced the due process rights of local residents, by both denying the opportunity to discover the comment period," and rendering any hearing meaningless since the Cabinet had denied access to the permit application and other records "necessary to allow for informed public participation and precluding independent expert review of the feasibility and safety of encroaching into an Interstate Highway entrance ramp." [FN2]

Upon receiving notification of Mr. Fitzgerald's appeal from this office, Mr. Shipp supplemented his response on behalf of the Cabinet. Directing our attention "first to the exhibit attached to" Mr. Fitzgerald's letter of appeal, Mr. Shipp notes that "the permitting process is a long, arduous procedure to final approval." More specifically, Mr. Shipp argues that step seven (7) references the public hearing, and a "thorough review of the subsequent steps will show that not until step [18] does this process reach final decisions. Any and all steps from the first to the seventeenth are preliminary in nature until the final decision is made one way or another." At this point, the Cabinet and FHA have only given "conceptual approval." According to Mr. Shipp, no "detailed plans, maps or drawings exist. [FN3] The applicant is doing this as this is written." Until "final action and decision is given," the cited exceptions "clearly apply." Attached to Mr. Shipp's response is a copy of "the only document that anyone who responded to the legal notice placed in the [*Courier-Journal*] would have received if requested in response to the Notice." [FN4] In conclusion, Mr. Shipp argues:

> Lastly, 93-ORD-22 is clearly distinguishable from the Appeal herein. In this opinion, the final permit had been issued. Here, the final decision one way or the other has not been made. The opinion cites specifically to OAG 87-58. That opinion authorized nondisclosure of records relating to the evaluation of proposed building sites and the installation of private sewage systems. In that opinion, the decision whether to issue a permit had not yet been made. Thus, no final action had been taken by the public agency. OAG 87-58 held that the documents pertaining to the obtaining of a permit to install a sewage disposal system were "merely preliminary documents which constitute part of the process to obtain a permit at some future time," and could properly be withheld at this time. OAG 87-58, p. 4.
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> ***3** This is exactly the factual scenario herein. The documents are preliminary in nature and are well within the early stages of the possible obtainment of [a] permit at a future date. It may very well be denied. It is too early to tell.

In accordance with 99-ORD-220, and the opinions upon which the Attorney General relied in rendering that decision, this office respectfully disagrees with the Cabinet's position regarding the significance of finality in the relevant analysis.

As a public agency, the Cabinet must adhere to both the procedural and substantive provisions of the Open Re-

cords Act. More specifically, KRS 61.880(1) sets forth the procedural guidelines that a public agency must comply with in responding to requests submitted pursuant to the Act. In relevant part, KRS 61.880(1) provides:

> Each public agency, upon any request for records made under KRS 61.870 to 61.884, shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period of its decision. An agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld. The response shall be issued by the official custodian or under his authority, and it shall constitute final agency action.

In applying this provision, the Attorney General has consistently observed:

> "The value of information is partly a function of time." *Fiduccia v. U. S. Department of Justice*, 185 F.3d 1035, 1041 (9th Cir. 1999). This is a fundamental premise of the Open Records Act, underscored by the three day agency response time codified at KRS 61.880(1). Contrary to [the Records Management Section's] apparent belief, the Act contemplates records production on the third business day after receipt of the request, and not simply notification that the agency will comply. In support, we note that KRS 61.872(5), the only provision in the Act that authorizes postponement of access to public records beyond three business days, expressly states:
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> > If the public record is in active use, in storage or not otherwise available, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records *not to exceed three (3) days from receipt of the application, unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection*.
>
> (Emphasis added). Additionally, we note that in OAG 92-117 this office made abundantly clear that the Act "normally requires the agency to notify the requester and designate an inspection date not to exceed three days from agency receipt of the request." OAG 92-117, p. 3. Only if the parameters of a request are broad, and the records implicated contain a mixture of exempt and nonexempt information, and are difficult to locate and retrieve, will a determination of what is a "reasonable time for inspection turn on the particular facts presented." OAG 92-117, p. 4. In all other instances, "timely access" to public records is defined as "any time less than three days from agency receipt of the request." OAG 82-300, p. 3; see also 93-ORD-134 and authorities cited therein. Pursuant to KRS 61.872(5), "any extension of the three day deadline for disclosure *must be accompanied by a detailed explanation* of the cause for the delay, and a written commitment to release the records on the earliest date certain." 01-ORD-38, p. 5.

***4** 01-ORD-140, pp. 3-4 (emphasis added). In general, a public agency cannot postpone or delay this statutory deadline. "The burden on the agency to respond within three working days is, not infrequently, an onerous one. Nevertheless, the only exceptions to this general rule are found at KRS 61.872(4) and (5)," neither of which the Cabinet invoked. 02-ORD-165, p. 3. Here, the Cabinet did not respond until February 27, 2006, more than two months after Mr. Fitzgerald submitted his request; noticeably absent from the Cabinet's response is a detailed explanation of the cause for delay. In fact, the Cabinet offered no explanation initially or upon receiving the notification of this appeal. To this extent, the Cabinet violated KRS 61.872(5); the Cabinet should be guided in responding to future requests by the fundamental principle that the procedural requirements of the Open Records Act "are not mere formalities, but are an essential part of the prompt and orderly processing of an open records request." 93-ORD-134, p. 9.

In discharging the statutory duties mandated by KRS 61.880(2), the Attorney General is guided by the legislat-

ive statement of policy codified at KRS 61.871, declaring that "free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed," as well as the Kentucky Supreme Court's pronouncement that the Open Records Act "exhibits a general bias favoring disclosure." *Kentucky Board of Examiners of Psychologists v. Courier-Journal and Louisville Times Company*, Ky., 826 S.W.2d 324, 327 (1992). Nevertheless, this office is fully cognizant that:

> Despite its manifest intention to enact a disclosure statute, the General Assembly determined that certain public records should be excluded from disclosure. Among such records are... "Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency;" and "Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended." KRS 61.878(1)[(i)-(j)]. From these exclusions we must conclude that with respect to certain records, the General Assembly has determined that the public's right to know is subservient to... the need for governmental confidentiality.

Beckham v. Board of Education of Jefferson County, Ky., 873 S.W.2d 575, 577-578 (1994); *See also The Courier-Journal and Louisville Times Company v. Jones*, Ky. App., 895 S.W.2d 6, 8 (1995) (recognizing that "the concept of governmental confidentiality has not been totally diluted by the Open Records Act").

As in every case involving statutory interpretation, our duty is to "ascertain and give effect to the intent of the General Assembly," and not "to add or subtract from the legislative enactment or discover meaning not reasonably ascertainable from the language used." *Beckham* at 577, citing *Gateway Construction Co. v. Wallbaum*, Ky., 356 S.W.2d 247 (1962). Our office is at liberty to neither add nor subtract "from the legislative enactment nor discover meaning not reasonably ascertainable from the language used." *Id*. In the absence of a statutory definition, this office "must construe all words and phrases according to the common and approved uses of language" pursuant to KRS 446.080(4). *Claude D. Fannin Wholesale Company v. Thacker*, Ky. App., 661 S.W.2d 477, 480 (1983); See also *Withers v. University of Kentucky*, Ky., 939 S.W.2d 340, 345 (1997).

***5** Guided by the foregoing principles, as well as an evolving body of case law, the Attorney General has long recognized that public records which are preliminary in nature forfeit having exempt status only upon being adopted by the agency as a basis for final action. *City of Louisville v. The Courier-Journal and Louisville Times Company*, Ky. App., 637 S.W.2d 658 (1982); *Kentucky State Bd. of Medical Licensure v. The Courier-Journal and Louisville Times Company*, Ky. App., 663 S.W.2d 953 (1983); *University of Kentucky v. The Courier-Journal and Louisville Times Company*, Ky., 830 S.W.3d 373 (1992). [FN5] 00-ORD-194; 98-ORD-140; 93-ORD-125. Each of the cited decisions is premised upon the following notion:

> Predecisional and investigative documents which are incorporated by the agency into its final action forfeit their preliminary status and are therefore subject to inspection.... Records which are of a purely internal preliminary investigatory nature are exempt.... Records which are preliminary in character but are subsequently adopted by the agency as a basis of its final action become releasable as public records.

97-ORD-168, pp. 5-6, citing 93-ORD-103, p. 11; See 04-ORD-162. [FN6]

With respect to the underlying rationale of KRS 61.878(1)(i) and (j), the Attorney General has recognized: " KRS 61.878(1)[(i) and (j)] have been interpreted to authorize the nondisclosure of both interagency and intra-agency drafts and memoranda, and are designed to encourage frank discussion of matters of concern to the public agency or agencies." 93-ORD-125, p. 4. As evidenced by a review of the relevant authorities, this rationale is deemed "equally compelling regardless of whether the communications are within an agency or between agencies." Id. [FN7] However, resolution of the instant appeal turns not on whether the requested application and related correspondence has been adopted as a basis for final action by the Cabinet, but whether the records can properly be characterized as a draft, note, or correspondence with a private individual, or a preliminary recom-

mendation or memorandum in which opinions are expressed. To the extent a preliminary recommendation or opinion is expressed, if at all, the content of any responsive records can properly be withheld; the remainder must be made available to Mr. Fitzgerald. See 05-ORD-144.

In construing KRS 61.878(1)(i), the Attorney General has observed:

> Not every paper in the office a public agency is a public record subject to public inspection. Many papers are simply work papers which are exempted because they are preliminary drafts and notes. Yellow pads can be filled with outlines, notes, drafts and doodlings which are unceremoniously thrown in the wastebasket or which may in certain cases be kept in a desk drawer for future reference. Such preliminary drafts and notes and preliminary memoranda are part of the tools which a public employee or officer uses in hammering out official action within the function of his office.

***6** OAG 78-626, p. 2; 04-ORD-030. A "draft" is defined as "a preliminary version of a plan, document, or picture." *The American Heritage College Dictionary* 495 (4th ed. 2002). [FN8] 97-ORD-183, p. 4. A "note," on the other hand, is defined as a "brief record, esp. one written down to aid the memory." *Id*. at 951; 97-ORD-183, p. 4. In the alternative, a "note" is "created as the basis for a fuller statement, as are, for example, written or shorthand notes taken at a meeting." 97-ORD-183, p. 4 (citations omitted).

As evidenced by the foregoing, no credible argument can be made that the requested application or any related correspondence is a "draft" or "note" according to the "common and approved uses" of those terms. In other words, records of the type at issue do "not represent a tentative version, sketch, or outline of a formal and final written product such as the draft reports [at issue in 94-ORD-38, 93-ORD-67, or OAG 89-34.]" 97-ORD-183, p. 4. Likewise, the permit application is not a note in the relevant sense, nor is the responsive correspondence. "It was not created as an aid to memory or as the basis for a fuller statement," as, for example, are conventional notations taken at a meeting. Id.; 93-ORD-67, p. 9 (KRS 61.878(1)(i) is "intended to protect random notations made by individuals present at a meeting."). Compare 00-ORD-132 (handwritten note concerning a telephone conversation exempt per KRS 61.878(1)(i)); 99-ORD-206 (general counsel's handwritten notes from meetings exempt per KRS 61.878(1)(i)). Given this determination, the question becomes whether the records at issue can properly characterized as "correspondence with private individuals other than correspondence which is intended to give notice of final action of a public agency." [FN9] In short, this characterization is equally inapplicable.

In 00-ORD-168, the Attorney General held that KRS 61.878(1)(i), insofar as it extends protection to "correspondence with private individuals," is "generally reserved for that narrow category of public records that reflects letters exchanged by private citizens and public agencies or officials under conditions in which the candor of the correspondents depends on assurances of confidentiality." Id., p. 2.

Clearly, this exception does not extend to "all writings from individuals to a government agency...." OAG 90-142, p. 6. In OAG 90-7, this office concluded that the Finance and Administration Cabinet had improperly relied upon KRS 61.878(1)(i), then codified as KRS 61.878(1)(g), in denying the public access to correspondence between the Cabinet and a private contractor regarding his contract with the Cabinet. Id., p. 4. Characterizing the document in question as "a letter of a contractor under a public contract involving administration of that contract," this office concluded that "such correspondence may not be properly characterized as 'correspondence with a private individual' within the meaning of KRS 61.878(1)[(i)]." Id. OAG 90-7 has been repeatedly affirmed over time.

***7** In 99-ORD-220, for instance, the Attorney General held that the Kentucky Racing Commission had improperly relied upon KRS 61.878(1)(i) in denying a request for copies of applications for "'2000 racing licenses and

2000 racing dates for all Kentucky racetracks... includ[ing] all financial filings that the commission requires accompany these requests[,]"' modifying OAG 90-142 to the extent it held that disclosure is mandatory upon request *only* after final governmental action. Id., p. 1. [FN10] Although tendered by private entities or individuals, the Attorney General determined that said applications could not be considered "correspondence with private individuals" within the meaning of KRS 61.878(1)(i), because the applications "are submitted with the expectation that the Racing Commission will rely upon them to take some action, either approval or denial of a license." Id., p. 4. [FN11]

Of particular relevance, this office engaged in the following analysis:

> If [ ] a disputed record cannot be characterized as correspondence with a private individual, *the question of whether final action has been taken by the agency becomes irrelevant*.... Simpl[y] stated, *we do not reach the second part of the KRS 61.878(1)(i) analysis, requiring final action of a public agency, if the first part of the analysis, requiring that the disputed record consist of correspondence, is not met.* Such [a record] becomes an open record upon submission, and all or any portion of the [record] can properly be withheld only upon a showing by the agency that it qualifies for exclusion under one or more of the other exceptions to public inspection.

Id., p. 5 (emphasis added). Here, as in 99-ORD-220, the record(s) in dispute cannot properly be characterized as correspondence with a private individual, a preliminary draft, or a note; KRS 61.878(1)(j) is similarly inapplicable on the facts presented. [FN12] Contrary to Mr. Shipp's assertion, the final action inquiry is thus moot rather than controlling. [FN13] 04-ORD-125, pp. 9-10. See 05-ORD-210. As in the cited line of decisions, this office finds that the application materials "were open records upon submission." 02-ORD-86, p. 8. To hold otherwise would defy both logic and precedent. [FN14]

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[FN1]. For example, see 00-ORD-98; 02-ORD-86; 05-ORD-221.

[FN2]. To clarify, the Attorney General is not empowered to "resolve non-open records related issues in an appeal initiated under KRS 61.880(1)." 99-ORD-121, p. 12. In analyzing his limited role when adjudicating disputes concerning access to public records, the Attorney General observed:

> This office has a precise and narrow function in connection with the interpretation and application of the Open Records Act. KRS 61.880(2)(a) requires that when a matter has been properly presented to the Attorney General for review, this office shall review the request and the denial and issue a written decision stating whether the agency violated the provisions of the Open Records Act. The Attorney General's responsibility and obligation, normally, is to determine whether a public agency has properly withheld public records from public inspection and whether a request to inspect public records was properly denied under the terms and provisions of KRS 61.870 to KRS 61.884.

96-ORD-120, p. 3. Constitutional issues fall outside the narrow scope of our review in this context; further consideration of due process is therefore unwarranted.

[FN3]. Because a public agency cannot produce for inspection or copying records that do not exist, this office has consistently recognized that a public agency complies with the Act by affirmatively indicating as much in a

written response, and providing a credible explanation for the lack of records as the Cabinet did here, albeit belatedly. See 05-ORD-241.

[FN4]. In addressing Mr. Fitzgerald's argument relative to due process, Mr. Shipp contends the Cabinet "fully complied with all legal requirements for public notice"; the Cabinet "cannot help the fact that Mr. Fitzgerald was dilatory in locating the newspaper notice." Further, the Attorney General "has no legal authority or capacity to 'order' a new Notice." While Mr. Shipp is correct in this assertion, further consideration of this issue is unwarranted as previously noted.

[FN5]. See 04-ORD-187, pp. 21-23, for a detailed discussion of the cited cases which is equally instructive here. "In the intervening years," this principle was the common thread among the decisions by the Attorney General addressing this issue in various contexts. See OAG 89-69; 88-25; OAG 84-98; OAG 83-405. Id., p. 22.

[FN6]. In 01-ORD-83, the Attorney General observed that the terms "incorporate" and "adopt" are not "synonymous or interchangeable" in rejecting the agency's position that an internal affairs investigative report must only be disclosed if it is "incorporated by reference" into the final action of the ultimate decision maker, modifying prior decisions to the extent necessary to be consistent with this view. Id., pp. 13-14; 04-ORD-187; 04-ORD-162.

[FN7]. In 93-ORD-125, the Attorney General summarized the decisions to this effect, affirming a denial by the Transit Authority of River City of a request for a report prepared by Coopers & Lybrand evaluating the performance of Yellow Enterprise under its agreement with TARC, as a preliminary record upon which the TARC had not taken final action. Since this office issued 93-ORD-125, the Attorney General has applied this reasoning in various contexts. See 96-ORD-38; 96-ORD-121; 96-ORD-122; 98-ORD-70; 00-ORD-46; 00-ORD-139. In 00-ORD-195, the Attorney General quotes the analysis of 93-ORD-125, as adopted in 00-ORD-139, at length. Although the reports in the aforementioned decisions were final as to the private consultant, the record on appeal in each case, with the exception of 00-ORD-46 (report destroyed prior to the commencement of the appeal), was devoid of evidence that the reports had been adopted as a basis for final action taken by the agency. Such is the case here. However, the relevant inquiry on the facts presented is whether the record is a draft, note, or correspondence with a private individual, or a preliminary recommendation or memorandum in which opinions are expressed; if not, the record does not qualify for protection regardless of whether final action has been taken.

> Barring an amendment to KRS 61.878(1)(j), or a published opinion by either the Court of Appeals or the Supreme Court, the Attorney General found no reason to depart from the view that KRS 61.878(1)(j) authorizes nondisclosure of preliminary recommendations or preliminary memoranda in which opinions are expressed or policies are formulated or recommended until those reports are adopted as a basis for final action, notwithstanding the fact that the records are prepared for the agency by outside agencies or private consultants. 00-ORD-139, p. 9; OAG 90-97. In short, this line of decisions is a logical extension of those holding that internal records i*n which opinions are expressed or policies formulated or recommended* qualify for exemption until those records are adopted as a basis for final action.

[FN8]. Absent a statutory definition, a dictionary may be consulted to ascertain the "common and approved" meaning of a term. See *Young v. Commonwealth*, Ky., 968 S.W.2d 670, 672 (1998).

[FN9]. "Correspondence" is defined as "Communication by the exchange of letters." *The American Heritage College Dictionary* 321 (4th ed. 2002).

[FN10]. To the extent prior decisions of this office "dealing with applications for licenses to do business in the

Commonwealth are inconsistent with this position," those decisions were also modified by 99-ORD-220. Id., p. 4.

[FN11]. See 99-ORD-220 (pp. 4-5), a copy of which is attached hereto and incorporated by reference, for elaboration as to this principle, which had previously found support in at least three other decisions, OAG 80-144, OAG 81-51, and 99-ORD-207. As the Attorney General observed in 00-ORD-98, "disclosure is not contingent upon the occurrence of final agency action." Id., p. 5.

[FN12]. In relying upon KRS 61.878(1)(j), the Cabinet merely cites the language of the exception and asserts that no final action has been taken yet. In our view, 05-ORD-179 (pp. 9-11), a copy of which is attached hereto and incorporated by reference, is controlling on this issue.

[FN13]. To the extent 93-ORD-22 or OAG 87-58 are inconsistent with the position, both are hereby modified. Subsequent decisions interpreting KRS 61.878(1)(i) compel a different outcome.

[FN14]. Although the holding in 99-ORD-220 was expressly limited to applications for licenses to do business in the Commonwealth "in view of the unforeseeable consequences which might flow from [a broader] holding," this office left the door open for a case-by-case analysis of whether correspondence that is submitted by private individuals or entities to a public agency with the expectation that the agency will take action can properly be withheld pursuant to KRS 61.878(1)(i). Given the relatively sensitive nature of the records at issue in the aforementioned decisions, the requested records are necessarily encompassed in the category of records that cannot be withheld on this basis.

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