

# Decision Notice

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**Decision 099/2016: Mr Gordon Motion and Stirling Council**

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## **Planning information**

Reference No: 201502123  
Decision Date: 4 May 2016



Scottish Information  
Commissioner

## Summary

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On 22 August 2015, Mr Motion asked Stirling Council (the Council) for all communications, advice and other notes regarding the construction of a specific dwelling house and related enforcement notices.

The Council responded under the EIRs and provided Mr Motion with some information, stating that other information was excepted from disclosure as internal communications, personal data or information subject to legal professional privilege.

The Commissioner investigated and found that the Council had incorrectly withheld some of the information in terms of regulation 11(2) of the EIRs (which relates to personal data). She found that the Council was entitled to withhold other information as legally privileged information or personal data.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation – definition of environmental information); 5(1) and (2)(b) (Duty to make environmental information available on request); 10(1), (2), (3) and (5)(d) (Exceptions from duty to make environmental information available); 11(2), (3)(a)(i) and (b) (Personal data)

Data Protection Act 1998 (the DPA) section 1(1) (Basic interpretative provisions – definition of “personal data”); Schedule 1 (The data protection principles – Part I, The principles (the first data protection principle)) and Schedule 2 (Conditions relevant for purposes of the first principle: processing of any personal data) (condition 6)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 22 August 2015, Mr Motion made a request for information to the Council. He asked for all communications (including all letters and e-mails), advice (whether internal or external) and all other notes in any format held by the Council with respect to the construction of a dwelling, or the service of enforcement notices, relating to a specific address. The Council was asked to exclude information available on its planning portal.
2. On 24 September 2015, Mr Motion wrote to the Council, requiring a review on the basis that the Council had failed to respond to his request.
3. The Council notified Mr Motion of the outcome of its review on 8 October 2015. It informed him that as the request was for environmental information, it had been handled under the EIRs. Consequently, it applied the exemption in section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA). The Council explained that some of the information was already available on its website and elsewhere, and provided Mr Motion with links. It referred to information sent to him previously.

4. The Council also informed Mr Motion that it was withholding emails from the enforcement complainant under regulation 11(2) of the EIRs, as the information in these was considered personal data, the disclosure of which would breach the data protection principles.
5. In addition, the Council stated that it was withholding legal advice from both internal and external sources in relation to initiation of enforcement proceedings, under regulations 10(4)(e) (internal communications) and 10(5)(b) (which relates to the course of justice, etc.) as this was likely to be subject to legal professional privilege.
6. On 11 November 2015, Mr Motion wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr Motion stated he was dissatisfied with the outcome of the Council's review because he considered the Council could redact personal data from the withheld information. He also stated that the Council had not justified the use of regulations 10(4)(e) and 10(5)(b) to withhold information.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that Mr Motion made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 26 November 2015, the Council was notified in writing that Mr Motion had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr Motion. The Council provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions, with particular reference to the exceptions applied to the information.
10. The Council responded, confirming that the request fell to be dealt with in terms of the EIRs and applying the exemption in section 39(2) of FOISA.
11. The Council stated that it withdrew its reliance on regulation 10(4)(e) and that it had provided Mr Motion with internal legal advice previously withheld. It maintained that any external legal advice was excepted in terms of regulation 10(5)(b) of the EIRs and that the correspondence withheld under regulation 11(2) could not be redacted to allow disclosure.
12. Following further correspondence with the investigating officer, the Council reconsidered its position regarding some of the correspondence previously withheld under regulation 11(2) of the EIRs. It confirmed it had provided Mr Motion with some of the correspondence with personal data redacted. It maintained that other information, including the data redacted, was excepted from disclosure in terms of regulation 11(2) of the EIRs. In relation to the external legal advice, the Council stated that it now wished to rely upon regulation 10(5)(d) of the EIRs.
13. Mr Motion acknowledged receipt of the information disclosed during the investigation and provided comments as to why he believed the remaining information should be disclosed.

## Commissioner's analysis and findings

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14. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Motion and the Council. She is satisfied that no matter of relevance has been overlooked.

### Application of the EIRs

15. It is clear from the Council's correspondence with both Mr Motion and the Commissioner, and from the information itself, that the information sought by Mr Motion is properly considered to be environmental information, as defined in regulation 2(1) of the EIRs. Mr Motion made no comment on the Council's application of the EIRs in this case and the Commissioner will consider the request in what follows solely in terms of the EIRs.
16. During the investigation, the Council notified the Commissioner that it was withholding information under regulations 10(5)(d) (in substitution for regulation 10(5)(b)) and 11(2) of the EIRs. The Commissioner will first of all consider the application of regulation 10(5)(d).

### Regulation 10(5)(d) of the EIRs – confidentiality provided for by law

17. Regulation 10(1) of the EIRs provides that a public authority may refuse to make environmental information available if one or more of the exceptions in regulations 10(4) and (5) applies to that information and, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception or exceptions. It should be noted that, under regulation 10(2), authorities are required to interpret the exceptions in a restrictive way and to apply a presumption in favour of disclosure.
18. The exception in regulation 10(5)(d) provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law. The Council submitted that information relating to external legal advice was covered by this exception.
19. In its publication, *The Aarhus Convention: an implementation guide*<sup>1</sup>, the Economic Commission for Europe (the United Nations agency responsible for the Convention the EIRs are designed to implement) notes, at page 86, that the Convention does not comprehensively define "proceedings of public authorities". It suggests that one interpretation is that these may be proceedings concerning the internal operations of a public authority rather than substantive proceedings conducted by the public authority in its area of competence. The confidentiality under this exception must be provided for under national law.
20. The Council submitted that the withheld information related to it carrying out its functions under Part VI of the Town and Country Planning (Scotland) Act 1997<sup>2</sup>, specifically that it related to the process of obtaining legal advice in connection with the exercise of those functions. The Council submitted that this process should be accepted as relevant "proceedings" for the purpose of regulation 10(5)(d).
21. The Commissioner is satisfied that obtaining legal advice in connection with the exercise of the statutory functions described by the Council can be accepted as falling within the

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<sup>1</sup> [http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf)

<sup>2</sup> <http://www.legislation.gov.uk/ukpga/1997/8/contents>

definition of "proceedings" for the purposes of regulation 10(5)(d). For the exception in regulation 10(5)(d) to apply, the Commissioner must go on to consider whether disclosure of the information would, or would be likely to, prejudice substantially the confidentiality of these proceedings. Firstly, she must be satisfied that the proceedings are confidential, such confidentiality being provided for by law.

22. There may be a specific statutory provision relating to the confidentiality. There will also be cases where the common law of confidence protects the confidentiality of the proceedings. For information to be confidential under the common law, two main requirements must be met. These are:
  - (i) the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already; and
  - (ii) the information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties.
23. The Council submitted that these "proceedings" were confidential. The documents contained legal advice passing between a solicitor and its client (the Council) in respect of which there was a common law claim to confidentiality of communications. The Council submitted that it considered the common law of confidence applied: the information had the necessary quality of confidence and was not already in the public domain. Having considered the withheld information and the context in which it was created, the Commissioner accepts that it had the necessary quality of confidence.
24. The Council also submitted that the information was communicated in circumstances importing an obligation of confidentiality. It considered this to be implicit in the relationship between the parties (solicitor and client). Again, the Commissioner accepts this. The communications in question meet all of the requirements for legal advice privilege, an aspect of the common law of confidence. They are communications in the course of which legal advice is sought and given, by professional legal advisers acting in that capacity and in the context of a professional relationship with their client (i.e. the Council).
25. The Commissioner must also consider whether the confidentiality identified above would have been, or would have been likely to have been, prejudiced substantially by making the withheld information available. The Council submitted that the Council and its officers must be entitled to seek legal advice as and when required, to ensure that it is acting *intra vires* (that is, within its powers).
26. Making the information available, it argued, would substantially inhibit officers from seeking and giving legal advice, with the consequent adverse impact on the Council's decision making abilities.
27. The Commissioner is clear that the test of substantial prejudice is a high one, requiring a real risk of actual, significant harm. That said, given the content of the information and its inherently confidential nature, and having taken full account of the Council's arguments, the Commissioner accepts that making this information available would have caused, or would have been likely to cause, substantial prejudice to the confidentiality of the Council's proceedings. Therefore, the exception in regulation 10(5)(d) applied. She must now consider whether the public interest in making the information available was outweighed by the public interest in maintaining that exception.

## *The public interest*

### Submissions by Mr Motion

28. Mr Motion provided background information on the planning consent and subsequent enforcements notices relating to the property in question. He commented that the Council had two previous enforcement notices quashed and he had believed a third enforcement notice would be unlikely to succeed. The Council, however, continued to issue a third enforcement notice.
29. Mr Motion believed it was in the wider public interest to know if the Council's advice (whether legal or otherwise) advised against continuation of proceedings and, if so, why the Council continued to act against advice and spend tax-payers money doing so.
30. Mr Motion provided these submissions in relation to the application of regulation 10(5)(b) of the EIRs, but (in the circumstances) the Commissioner considers them to be of equal relevance to the application of regulation 10(5)(d).

### Submissions by the Council

31. The Council acknowledged that there might be a public interest in disclosing legal advice, as this would contribute to openness and transparency in local government.
32. The Council went on to argue that it was in the public interest for the Council to be able to seek and obtain legal advice without making it publicly available, as disclosure could prejudice the Council's position. It further commented that there is a strong constitutional importance placed on legal professional privilege and the protection of free and frank communications between lawyers and clients.
33. On balance, the Council concluded that the public interest in maintaining the exception outweighed the public interest in making the information available.

### The Commissioner's view

34. The Commissioner has considered the representations made by both Mr Motion and the Council carefully. She acknowledges that there is a public interest in the transparency and accountability expected of all authorities, and that making the information available would go some way to promoting such transparency and accountability in this case.
35. On the other hand, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB). Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of regulation 10(5)(d) of the EIRs (and section 36(1) of FOISA).
36. Consequently, while she will consider each case individually, she is likely to order the disclosure of privileged communications (and confidential communications generally) in highly compelling cases only.
37. The Commissioner acknowledges that there may be occasions on which the significant public interest in withholding legally privileged communications will be outweighed by a compelling public interest in making the information available. In this particular case, she

acknowledges the views of Mr Motion regarding the Council embarking on a further enforcement notice.

38. Having considered the public interest arguments advanced on both sides, the Commissioner is not satisfied that the public interest in making this particular information available outweighs the public interest in maintaining the confidentiality of communications between legal adviser and client. It is in the public interest that reasonable expectations of confidentiality be maintained, and in particular that (where necessary) an authority can communicate with its legal advisers freely and frankly in confidence, with a view to performing its statutory functions effectively.
39. In all the circumstances, therefore, the Commissioner concludes that the strong public interest in maintaining the exception outweighs such public interest as exists in making the information available. She is, therefore, satisfied that the Council was entitled to withhold the external legal advice under regulation 10(5)(d) of the EIRs.

### **Regulation 11(2) of the EIRs - personal data of another person**

40. The Council submitted that the information withheld, classed as 'Emails from enforcement complainant' comprised personal data, which were excepted in terms of regulation 11(2) of the EIRs.
41. Regulation 10(3) of the EIRs provides that a Scottish public authority can only make personal data in environmental information available in accordance with regulation 11. Regulation 11(2) excepts personal data where the applicant is not the data subject and other specified conditions apply. These include where disclosure would contravene any of the data protection principles in Schedule 1 to the DPA. The Council argued that disclosure of certain information would breach the first data protection principle.

*Is the information under consideration personal data?*

42. In his application to the Commissioner, Mr Motion submitted that the correspondence being withheld by the Council under regulation 11(2) of the EIRs, could be provided with any personal information redacted.
43. During the investigation, the Council's attention was drawn to page 23 of the Commissioner's guidance<sup>3</sup> on the application of section 38(1)(b) of FOISA (which also relates to regulation 11 of the EIRs), where it is advised that:

*It is important to remember that only the personal data within a document may be exempted by section 38. If the authority does not seek to apply an exemption to the "non-personal" information within the document, then the document should normally be released with personal data "blacked-out" (redacted), ensuring that all non-exempt information can be released.*

44. Following this, the Council provided Mr Motion with some of the correspondence, with personal data redacted. In effect, the Council provided Mr Motion with what it considered to be non-exempt (or non-excepted) information.
45. In this regard, the Commissioner finds that the information provided to Mr Motion during the investigation was not excepted from disclosure and by failing to provide this at the time it dealt with Mr Motion's request, the Council failed to comply with regulation 5(1) of the EIRs.

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<sup>3</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section38/Section38.aspx>



46. The Commissioner will now consider the information that the Council continues to withhold in terms of regulation 11(2).
47. The definition of “personal data” is contained in section 1(1) of the DPA and is set out below in Appendix 1. Having considered the information withheld under this exception and the submissions received from the Council on this point, the Commissioner accepts that the information meets the requirements set out in the definition. It is information which relates to individuals other than Mr Motion which, taken in conjunction with other information accessible to Mr Motion and others, could be attributed to (and thus could identify) those individuals. Given the nature of the information, the Commissioner accepts that it relates to those individual and is, as such, their personal data.

*The first data protection principle*

48. The first data protection principle states that personal data shall be processed fairly and lawfully. The processing in this case would be making the information available in the public domain, in response to Mr Motion’s request. The first principle also states that personal data shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met (the full text of the principle is set out in Appendix 1). A condition in Schedule 3 to the DPA will also require to be met if the data are sensitive personal data, as defined in section 2 of the DPA: the Commissioner is satisfied that this is not the case here.
49. There are three separate aspects to the first data protection principle: (i) fairness, (ii) lawfulness and (iii) the conditions in the schedules. These three aspects are interlinked. For example, if there is a specific condition in Schedule 2 which permits the personal data to be disclosed, it is likely that the disclosure will also be fair and lawful.
50. The Commissioner will now consider whether there are any conditions in Schedule 2 to the DPA which would permit the withheld personal data to be made available. If any of these conditions can be met, she must then consider whether making the information available would be fair and lawful.

*Can any of the conditions in Schedule 2 be met?*

51. In the circumstances, it appears to the Commissioner that condition 6 in Schedule 2 is the only one which might permit making the information available to Mr Motion. Condition 6 allows personal data to be processed if the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject (the individual(s) to whom the data relate).
52. There are, therefore, a number of different tests which must be satisfied before condition 6 can be met. These are:
  - a. Is Mr Motion pursuing a legitimate interest or interests?
  - b. If yes, is the processing involved necessary for the purposes of those interests? In other words, is the processing proportionate as a means and fairly balanced as to ends, or could these interests be achieved by means which interfere less with the privacy of the data subject?
  - c. Even if the processing is necessary for Mr Motion’s legitimate interests, is that processing nevertheless unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?



53. There is no presumption in favour of making personal data available under the general obligation laid down by regulation 5(1) of the EIRs. Accordingly, the legitimate interests of Mr Motion must outweigh the rights and freedoms or legitimate interests of the data subject before condition 6 will permit making the personal data available. If the two are evenly balanced, the Commissioner must find that the Council was correct to refuse to make the personal data available to Mr Motion.

*Is Mr Motion pursuing a legitimate interest or interests?*

54. The Council submitted that Mr Motion might be pursuing a legitimate interest, while disputing that disclosure would be fair or lawful (or that condition 6 applied).

55. Mr Motion provided his personal reasons for wishing the information in question. Having considered the information, and all of the submissions, the Commissioner accepts that disclosure might satisfy Mr Motion's personal curiosity. She is not satisfied, however, that he has provided anything of substance which could be considered to amount to a legitimate interest in obtaining these personal data. Indeed, his desire for this information is underpinned by a belief that it can be disclosed subject to redaction which would remove any personal data. Having considered the information withheld under regulation 11(2), the Commissioner does not consider this possible. The document, read as a whole, comprises the personal data of the individual(s) concerned.

56. Given this conclusion, the Commissioner finds that there is no condition in Schedule 2 which would permit the personal data to be made available. In the absence of such a condition, it would be unlawful to make the personal data available. Consequently, the Commissioner finds that the Council would have breached the first data protection principle in making the data available, and so was entitled to withhold the data under regulation 11(2) of the EIRs.

## Decision

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The Commissioner finds that Stirling Council partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr Motion.

The Commissioner finds that by withholding some of the information requested under regulation 11(2) of the EIRs, the Council failed to comply with the EIRs, in particular regulation 5(1).

The Commissioner also finds that the Council complied with the EIRs on the basis that it is entitled to withhold the remaining information in terms of regulations 10(5)(d) and 11(2) of the EIRs.

## **Appeal**

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Should either Mr Motion or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

**Margaret Keyse**  
**Head of Enforcement**

**4 May 2016**

### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

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- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in paragraph (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) costs benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in paragraph (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c);

...

#### 5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

...

- (b) is subject to regulations 6 to 12.

...

## **10 Exceptions from duty to make environmental information available–**

- (1) A Scottish public authority may refuse a request to make environmental information available if-
  - (a) there is an exception to disclosure under paragraphs (4) or (5); and
  - (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
  - (a) interpret those paragraphs in a restrictive way; and
  - (b) apply a presumption in favour of disclosure.
- (3) Where the environmental information requested includes personal data, the authority shall not make those personal data available otherwise than in accordance with regulation 11.  
...
- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-  
...
  - (d) the confidentiality of the proceedings of any public authority where such confidentiality is provided for by law;  
...

## **11 Personal data**

- ...
- (2) To the extent that environmental information requested includes personal data of which the applicant is not the data subject and in relation to which either the first or second condition set out in paragraphs (3) and (4) is satisfied, a Scottish public authority shall not make the personal data available.
- (3) The first condition is-
  - (a) in a case where the information falls within paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998<sup>[6]</sup> that making the information available otherwise than under these Regulations would contravene-
    - (i) any of the data protection principles; or  
...
  - (b) in any other case, that making the information available otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

# Data Protection Act 1998

## 1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

## Schedule 1 – The data protection principles

### Part I – The principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

...

## Schedule 2 – Conditions relevant for purposes of the first principle: processing of any personal data

...

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

...

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