

Board Members, Personally Owned Technology and FOI Law: What Everyone Needs to Know



School Law Seminar
Arkansas School Boards Association
February 9, 2021
(this is a virtual event)



The Freedom of Information Act (FOIA)

FOIA

Freedom of Information Act

Three major sections of FOIA:

- Public Records
- Public Meetings
- Executive Sessions

FOIA

Freedom of Information Act

The main point of Arkansas' FOIA is to ensure that electors are fully advised of the activities and decisions of their officials.

FOIA is popularly referred to as the “Sunshine Law”.



FOIA

Freedom of Information Act

Public Records

FOIA allows the public to inspect and receive copies of public records of governmental agencies unless the law makes an exception for them.

FOIA Freedom of Information Act

“Unless Exempt...All Public Records Shall Be
Open to Inspection and Copying by Any Citizen
During Regular Business Hours”

FOIA

Freedom of Information Act

**Or ... Unless You
Didn't Retain ...**

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Posted September 13, 2013 – 10:44am
Updated September 13, 2013 – 11:31pm
UA Spokesman Accuses Chancellor of Destroying Documents

- You can't produce what you don't have.
- You don't have to create a document to produce.
- Active inbox/information management can be your friend.

FOIA Freedom of Information Act

Once a FOIA Request is Received...

It's Too Late!!!



FOIA Multiple Choice

I've received a new FOIA request.

How long do I have to respond?

- a. 3 days
- b. Now
- c. When I can free up someone to respond
- d. As soon as practicable

FOIA Multiple Choice

I've received a new FOIA request.

How long do I have to respond?

b. Now

FOIA Multiple Choice

The FOIA request I've received is harassing – submitted for an improper purpose. Do I have to respond?

- a. No
- b. Yes
- c. Yes, but only to the extent reasonable

FOIA Multiple Choice

The FOIA request I've received is harassing – submitted for an improper purpose. Do I have to respond?

b. Yes

FOIA Multiple Choice

...Requesters are under no obligation to do or say anything whatever their “associations” might be. The district and its representatives are obliged to comply with the law promptly. By posing irrelevant questions that submitters are under no obligation to answer you effectively delay response and thus defeat the law.

--Max Brantley, *Arkansas Times*

FOIA Multiple Choice

March 14, 2016

XXXXXXX Public Schools,

In accordance with the Freedom of Information Act, I'm requesting the following:

- All communications including but not limited to email, letter, card, fax, etc. from Feb 1, 2016 to current date, from **REQUESTOR 1** to School Board Members at XXX, School Staff and Administration, and Superintendent. I am also requesting all communications from these individuals to **REQUESTOR 1**.
- All communications including but not limited to email, letter, card, fax, etc. from Feb 1, 2016 to current date, from **REQUESTOR 2** to School Board Members at XXX, School Staff and Administration, and Superintendent. I am also requesting all communications from these individuals to **REQUESTOR 2**.
- All communications including but not limited to email, letter, card, fax, etc. from Feb 1, 2016 to current date, from any representative of the **Freedom From Religion Foundation** to School Board Members at BPS, School Staff and Administration, Superintendent and Mr. Marshall Ney. I am also requesting all communications from these individuals to any representative of the **FFRF**.
- All communications including but not limited to email, letter, card, fax, etc. from Feb 1, 2016 to current date, from any representative of the media including but not limited to **Arkansas Times, Arkansas Democrat Gazette, KNWA News, and 40/29 News** to School Board Members, School Staff and Administration, and Superintendent. I am also requesting all communications from these individuals to any representative of the media.
- A copy of all FOIA requests to XXX from February 1, 2016 to current date.

I request all of the above items be emailed to me or made available for me to pick up within the timeframe set forth in accordance with the law.

If you have any questions or need clarity regarding my request, please call me at 479-616-XXXX.

Thank you,
L. K.

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FOIA Multiple Choice

How do I respond to the above request?

- a. Provide everything responsive
- b. Provide nothing because it's a FOI of a FOI
- c. Provide a partial response and ask questions

FOIA Multiple Choice

How do I respond to the above request?

**a. Provide
everything
responsive**

Controversy = FOIA Requests



FOIA

Principles of Interpretation

- FOIA is construed in favor of openness.
- Exceptions are narrowly construed.

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS
CIVIL DIVISION

WADE CASH

v.

Case No. CV 2014-1084-2

UNIVERSITY OF ARKANSAS

FILED FOR RECORD
2015 MAY -8 PM 1:00
PLAINTIFF
DEFENDANT

JUDGMENT

On the 22nd day of April, 2015, the Court conducted a one-day bench trial in the above-styled case filed by Plaintiff Wade Cash ("Mr. Cash") against the University of Arkansas ("University") under the Arkansas Freedom of Information Act ("FOIA"). Based upon the evidence, including all exhibits and testimony presented at trial on April 22, 2015, the Court hereby FINDS and ADJUDGES, as follows.

A.
FINDINGS OF FACT

Based upon the exhibits, testimony, and evidence presented at trial, the Court makes the following FINDINGS OF FACT:

1. On January 13, 2013, Mr. Cash issued a FOIA request to the University. Mr. Cash requested the following documents:

- 1). All cell phone records and billing for any and all cell phones issued to Brian Haggard from January 1, 2012, to the present. This would include all incoming and outgoing calls and all incoming and outgoing text messages as well as the content of the text messages.
- 2). All cell phone records and all billing for any and all cell phones issued to Leslie Massey from January 1, 2012, to the present. This would include all incoming and outgoing calls and all incoming and outgoing text messages as well as the content of the text messages.
- 3). All incoming and outgoing email correspondence related to the email address of haggard@uark.edu from January 1, 2008 to the present.

2015 17259

4). All incoming and outgoing email correspondence related to the email address of lbarts@uark.edu from January 1, 2008 to the present.

2. Counsel for the University objected to Mr. Cash's FOIA request as invalid because it failed to meet the requirements of Ark. Code Ann. § 25-19-105(a)(2)(C). In response, Mr. Cash declined to modify his request. In a good faith effort to respond to the FOIA request, the University, acting through its counsel, notified Mr. Cash in a letter dated March 1, 2013, that over 2,500 pages of non-exempt public records that were responsive to Mr. Cash's FOIA request were ready for him to pick-up. The University produced all responsive cell phone records, including both text messages and billing records. It also produced several hundred emails from the haggard@uark.edu and lbarts@uark.edu accounts, including all responsive emails that contained the words "Wade" or "Cash" or that concerned Mr. Cash.

3. On July 16, 2013, Mr. Cash's former counsel, acting on behalf of Mr. Cash, modified Mr. Cash's original FOIA request dated January 8, 2013. Instead of emails "related to" the two email accounts, Mr. Cash requested all "incoming and outgoing email from those email addresses for the dates in question."

4. In his Third Amended Complaint, Mr. Cash sued the University solely on its alleged failure to comply with the second (July 16, 2013) FOIA request (the "FOIA Request").

5. At trial, Mr. Cash's counsel acknowledged that the FOIA request would require the production of a voluminous number of records. In addition, based upon the testimony of all three witnesses at trial, the Court finds that the records covered by Mr. Cash's FOIA Request would include records that were personal communications and not "public records" within the meaning of the law, as well as information that is not subject

to release under the statutory list of FOIA exemptions, (including, for example, education records, tax records, and personnel records).

6. The Court found the testimony of Ms. Leslie Massey (“Ms. Massey”), the former Project Manager for the Arkansas Water Resource Center (“AWRC”) at the University, to be credible. Ms. Massey is currently an Instructor in the College of Engineering at the University’s Fayetteville campus and no longer works for the Division of Agriculture in the AWRC.

7. Ms. Massey testified and the Court finds that she has administrative control over her email account. Ms. Massey also testified and the Court finds that Ms. Massey’s email account contained approximately 8,000 email threads of potentially responsive records to the FOIA Request, with each thread containing a conservative estimate two emails for a total of approximately 16,000 emails. Ms. Massey testified and the Court finds that, estimating conservatively, it would take Ms. Massey approximately 33 and one-third days to search for, retrieve, review, and produce the records in response to the FOIA Request. This calculation conservatively assumes that Ms. Massey would need to spend one minute on each of her 16,000 emails to determine whether the email was a private communication or a public record and whether any exemptions applied in whole or part, while working eight hours per day without interruption. Ms. Massey estimated and the Court finds that the value of Ms. Massey’s time required to complete this task, based upon her current salary and fringe benefits, to be in excess of \$10,000. In addition, the Court finds that the College of Engineering would be required to incur the cost of paying a replacement instructor to teach Ms. Massey’s classes and/or to perform her other duties if she spent approximately one month responding to the FOIA Request.

2015 17261

8. The Court found the testimony of Dr. Brian Haggard ("Dr. Haggard"), the Director of the AWRC for the Division of Agriculture and a professor in the Biological and Agricultural Engineering Department of the Fayetteville campus, to be credible.

9. Dr. Haggard testified and the Court finds that Dr. Haggard has administrative control over his email account. Dr. Haggard also testified and the Court finds that Dr. Haggard's email account contains approximately 16,000 email threads that constitute potentially responsive records to the FOIA Request. A conservative estimate of two emails per thread means that there are approximately 32,000 potentially responsive emails within Dr. Haggard's email account. Based upon this amount of email, Dr. Haggard testified and the Court finds that Dr. Haggard would need to spend approximately 60 work days to respond the FOIA Request based upon an estimate of spending one minute on each email and working eight hours per day without interruption to search for, retrieve, review, and copy or produce the responsive records. Dr. Haggard would need to review each email to determine whether it was a private communication or a public record and whether it contained any exempt information. Dr. Haggard testified and the Court finds the value of Dr. Haggard's time, based on his salary and fringe benefits, would be in excess of \$50,000 to respond to the FOIA Request. The Court finds that the AWRC, which Dr. Haggard oversees, administers multiple grants with time-sensitive performance and reporting obligations relating to water quality.

10. Based upon the testimony of Ms. Massey and Dr. Haggard, the Court finds that responding to the FOIA Request would shut down the operations of Dr. Haggard and Ms. Massey for a considerable period of time.

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B.
CONCLUSIONS OF LAW

11. As a matter of law, the Court concludes that the express wording of the FOIA requires that each request meet the following statutory requirements: “The request *shall be sufficiently specific* to enable the custodian to locate *the records* with *reasonable effort*.” Ark. Code Ann. § 25-19-105(a)(2)(C) (emphasis added); *see also* Ark. Code Ann. § 25-19-105(d)(1) (referring to “reasonable” – rather than unbridled – “access to public records”).

12. In applying this legal requirement of FOIA to this case, the Court has relied upon the case law and drawn guidance from opinions of the Arkansas Attorney General. The Court concludes that, in applying the requirements of Ark. Code Ann. § 25-19-105(a)(2)(C), each case must be decided on its own specific facts. In this ruling, the Court is not establishing a bright line rule and believes that each case must be determined on a fact-specific basis.

13. Based upon all of the foregoing FINDINGS OF FACT and the evidence introduced at trial, the Court concludes, as a matter of law, that Mr. Cash’s FOIA Request dated July 16, 2013 was invalid because it failed to meet the statutory requirements contained in Ark. Code Ann. § 25-19-105(a)(2)(C). Based upon the number of potentially responsive emails at issue, the time required to respond, the cost of responding, and most importantly that the operations of the University would be shut down, the Court concludes that the FOIA Request dated July 16, 2013 was not “sufficiently specific to enable the custodian to locate the records with reasonable effort” and thus is invalid as a matter of law for failing to meet all elements of this statutory requirement. Ark. Code Ann. § 25-19-105(a)(2)(C).

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C.
JUDGMENT

Based upon the evidence at trial, the foregoing FINDINGS OF FACT, and the foregoing CONCLUSIONS OF LAW, the COURT hereby grants JUDGMENT in favor of Defendant University of Arkansas and against Plaintiff Wade Cash. This JUDGMENT is final.


HON. DOUG MARTIN
WASHINGTON COUNTY CIRCUIT JUDGE


Dated: May 8, 2015

APPROVED AS TO CONTENT
AND FORM:


SCOTT VARADY
Counsel for Defendant University of
Arkansas

Dated: May 7, 2015

APPROVED AS TO CONTENT
AND FORM:


RICK WOODS
Counsel for Plaintiff Wade Cash

Dated: May __, 2015

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Under FOIA, What Documents Can Be Released?

“Public Records” – writings, recorded sounds, films, tapes, electronic or computer-based information or data compilations in any medium required by law to be kept or otherwise kept and which constitute a record of the performance or lack of performance of official functions.

“Public Records”

- All records maintained in public offices or by public employees within the scope of their employment are presumed to be public records.
- The presumption can be rebutted if the records do not reflect the performance or lack of performance of official functions.
- Whether a record is a ‘public record’ depends on its content. *Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 371 Ark. 217 (2007)

FOIA True or False?

Text messages on my private iPhone are private.

- a. True
- b. False

FOIA True or False?

Text messages on my private iPhone are private.

b. False

“Public Records”

Scope

- FOIA covers “records” not information
- An agency need not create new records to comply
- If records are part public and part exempt, redact exempt material and provide the rest
- E-mails or letter sent to private email addresses or private residences of public officials are subject to FOIA if they involve the public’s business
- A public entity can be the custodian of public records even if it does not have physical possession of them, as long as it has “administrative control” of the records

Balance Between FOIA and Personnel Privacy Concerns

- Personnel records are generally open, but FOIA has an exemption for personnel records “to the extent disclosure would constitute a clearly unwarranted invasion of privacy”
 - Exemption applies to both current and former employees.
- What is clearly unwarranted?
 - The Arkansas Supreme Court applies a balancing test [*Young v. Rice*, 308 Ark. 593 (1992); *Stilley v. McBride*, 332 Ark. 306 (1998)]

What is Clearly Unwarranted?

Commonly Exempted Items:

- Social Security numbers
- Medical information
- Insurance, pension & benefits information
- Garnishments
- Educational transcripts
- Home phone numbers and addresses
- Dates of birth
- Anything else which would cause a clearly unwarranted invasion of privacy

Common Items Open to Inspection:

- Name
- Salary information
- Contracts
- Employment applications
- Resumes
- Educational background
- Qualifications
- Leave records
- Change of status records

Employee Evaluation or Job Performance Records

- Includes formal evaluations, or any document created by or at the behest of a supervisor to detail job performance
- Are generally CLOSED, unless there has been a:
 - Final administrative resolution of:
 - Any suspension or termination proceeding, where the records form a basis for the decision to suspend or terminate;
 - And there is a compelling public interest in disclosure
- Each employee has a right to see his/her own personnel records despite these exemptions

How Much Information Should You Disclose to the Press About an Incident?

- Only public records under FOIA or student information by consent or an exception to FERPA may be disclosed
- Always respond to both the press and school community with sensitivity and good PR.

FOIA Multiple Choice

What kind of FOIA issue is a text conversation between board members?

- a. Records issue
- b. Open meetings issue
- c. Executive session issue
- d. None of the above
- e. All of the above

FOIA Multiple Choice

What kind of FOIA issue is a text conversation between board members?

a. Records Issue

FOIA Multiple Choice

What kind of FOIA issue is a text conversation between board members?

a. Records Issue

Exchange always subject to a proper document request.

FOIA Multiple Choice

What kind of FOIA issue is a text conversation between board members?

b. Open Meetings Issue

FOIA Multiple Choice

What kind of FOIA issue is a text conversation between board members?

b. Open Meetings Issue

Could be violating the open meetings provision of FOIA.

More on Use of Personal Device

Cell phone use, such as texting, should be avoided during meetings.

At least one state attorney general has opined that text messages during a board meeting are subject to FOIA:

*Based upon the foregoing, **it is clear in our view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of" and "listen to" the deliberative process.** Further, we believe that every statute, including the Open Meetings Law, must be implemented in a manner that gives effect to its intent. In this instance, the Board must in our view situate itself and conduct its meetings in a manner in which those in attendance can observe and hear the proceedings. This would include refraining from whispering or passing notes between or among members. **With perhaps minor exceptions involving the receipt of personal or emergency communications, this would also include refraining from transmitting and receiving electronic messages and phone calls.** If it were necessary to receive or send an electronic communication during the course of the meeting or to communicate by telephone, and if the communication is related to public business, we would recommend full disclosure to those present at the meeting. Conducting communications regarding public business privately, during a public meeting, in our opinion would be unreasonable and fail to comply with a basic requirement and intent of the Open Meetings Law. -- State of New York, Department of State, Committee on Open Government, FOIL-AO-18052, March 24, 2010.*

More on Use of Personal Device

ARKANSAS LAW

More on Use of Personal Device – Arkansas Law

Fox v. Perroni, 358 Ark. 251, 188 S.W.3d 881 (2004).

- Judge had his clerk use personal funds in procuring evidence for contempt hearing in which he held Perroni in contempt of court. Perroni submitted a FOIA request for documents to Judge Fox who did not include the check in his response claiming it was not within the confines of the FOIA. *Id.*
- The Supreme Court affirmed the ruling of the trial court, holding that (1) The check was a “public record” for purposes of the FOIA and (2) the judge was the custodian responsible for the check and therefore had a duty to produce. *Id.*
- (1) The Arkansas Code includes in the definition of “public records” that “All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.” *Id.* at 257, 188 S.W.3d at 885 (citing Ark. Code. Ann. § 25-19-103(5)(A) (restated at § 25-19-103(7)(A) 2002)).
 - “The definition of ‘public record’ under the FOIA is not dependent upon who keeps the record or where it is kept – just that it either is required to be kept or is otherwise kept.” *Id.* at 257-58, 188 S.W.3d at 886.
 - “Because the check . . . is a writing, otherwise kept, that constitutes the record of the performance of an official function carried out by a public official through his employee [it] is a public record subject to the FOIA. *Id.* at 259, 188 S.W.3d 886-87.

More on Use of Personal Device – Arkansas Law

Pulaski Cty. v. Arkansas Democrat-Gazette, Inc., 371 Ark. 435, 260 S.W.3d 718 (2007).

- Newspaper filed complaint seeking disclosure of all e-mail communications between former county comptroller and employee of county's software contractor stored on county computer after comptroller was arrested for embezzlement. *Id.*
- “Comparing the nature and purpose of a document with an official's or agency's activities to determine whether the required nexus exists necessarily requires a fact-specific inquiry.” *Id.* at 444, 260 S.W.3d at 724.

More on Use of Personal Device – Arkansas Law

Nabholz Const. Corp. v. Contractors for Pub. Prot. Ass'n., 371 Ark. 411, 266 S.W.3d 689 (2007).

- After a Contractors' Association filed FOIA request against private construction company, Supreme Court overruled the lower court's decision that the private construction business was the custodian of public records and therefore susceptible to the FOIA's control. *Id.*
- "We have held that for a record to be subject to the FOIA and available to the public, it must be (1) possessed by an entity covered by the Act, (2) fall within the Act's definition of a public record, and (3) not be exempted by the Act or other statutes." *Id.* at 416, 266 S.W.3d at 692.

More on Use of Personal Device – Arkansas Law

Apprentice Info. Sys., Inc. v. DataScout, LLC, 2018 Ark. 146, 544 S.W.3d 39 (2018).

- Competitor business filed FOIA claim against corporation. Supreme Court overruled lower court's decision, holding that competitor was not the custodian of public records, and therefore not correct party to compel production of public records from under the FOIA. *Id.*
- “Occasionally a private entity or individual may keep a public record for a public official; however, the public official retains the obligation to produce the public record.” *Id.* at __, 544 S.W.3d at 43 (*citing City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990)).

More on Use of Personal Device – Arkansas Law

Bradford v. Dir., Employment Sec. Dep't, 83 Ark. App. 332, 128 S.W.3d 20 (2003).

- This case deals with a claim for unemployment by a former state executive CIO, however within this claim the former employee alleges that he was asked to break FOIA regulations by communicating with the governor via his private email and the court offers meaningful insight to the facts at hand in discussing this claim.
- “The creation of a record of communications about the public's business is no less subject to the public's access because it was transmitted over a private communications medium than it is when generated as a result of having been transmitted over a publicly controlled medium. Emails transmitted between Bradford and the governor that involved the public's business are subject to public access under the Freedom of Information Act, whether transmitted to private email addresses through private internet providers or whether sent to official government email addresses over means under the control of the State's Division of Information Services.”
Id at 345, 128 S.W.3d at 28.

More on Use of Personal Device

ARKANSAS ATTORNEY GENERAL OPINIONS

More on Use of Personal Device – Arkansas AG

Ark. Op. Att'y Gen. No. 91-374 (Nov. 27, 1991).

- In response to a request for an opinion concerning records that are maintained by the Public Employee Claims Division (“PECD”) of the Arkansas Insurance Department.
- “It has been suggested that the term “performance” “may invite a narrower interpretation of ‘public records,’ ” as compared to other states’ FOI statutes that seem to include every record held by an agency regardless of its origin or content. Of particular significance for purposes of your second question is the fact that, as pointed out by Professor Watkins, personal notes made by public officials have been held to fall outside state FOI statutes that contain a limitation similar to the “performance” language under § 25-19-103.” *Id.*

More on Use of Personal Device

ANALOGOUS CASE LAW FROM OTHER STATES

More on Use of Personal Device – Analogous Case Law

Highland Min. Co. v. W. Virginia Univ. Sch. of Med., 235 W. Va. 370, 774 S.E.2d 36 (2015).

- Records requestor brought action against public university school of medicine under Freedom of Information Act (FOIA), seeking disclosure of documents related to several articles co-authored by university professor.
- Although the Court held that the records were exempted under an “internal memoranda” exception, it clarified that the West Virginia Code “does not exempt from disclosure written communications between a public body and private persons or entities where such communications do not consist of advice, opinions or recommendations to the public body from outside consultants or experts obtained during the public body's deliberative, decision-making process.” *Id* at 382, 774 S.E.2d at 48.

More on Use of Personal Device – Analogous Case Law

Howell Ed. Ass'n, MEA/NEA v. Howell Bd. of Ed., 287 Mich. App. 228, 789 N.W.2d 495 (2010).

- Teachers' union brought action against public school and board of education, seeking declaratory judgment that certain e-mails on public school e-mail system were not subject to disclosure under Freedom of Information Act (FOIA). The Court of Appeals overruled the opinion of the lower court holding that certain emails were not public records subject to the FOIA. *Id.*
- “A “public record” is “a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created.” *Id.* at 235, 789 N.W.2d at 499 (*citing* MCL 15.232(e)).
- “For the e-mails at issue to be public records, they must have been stored or retained by defendants in the performance of an official function.” *Id.* at 236 789 N.W.2d at 500.
- “The employee's home address and telephone number are examples of private information contained within a public record. In contrast, an e-mail sent by a teacher to a family member or friend that involves an entirely private matter such as carpooling, childcare, lunch or dinner plans, or other personal matters, is wholly unrelated to the public body's official function. Such e-mails simply are not public records.” *Id.* at 240, 789 N.W.2d at 502 (explaining the difference between private information within public documents that is excepted from the FOIA and must be redacted and records that are wholly private)

More on Use of Personal Device – Analogous Case Law

Griffis v. Pinal Cty., 215 Ariz. 1, 156 P.3d 418 (2007).

- Former county manager who was being investigated for alleged misuse of public funds filed action against county seeking to block release to public of personal e-mail messages he had sent or received during specified period he had served as county manager. Supreme Court held that e-mails generated or maintained on a government-owned computer system are not automatically public records. *Id.*
- “The broad definition of public records, however, is not unlimited. The public records law requires all public officials to make and maintain records reasonably necessary to provide knowledge of all activities they undertake in the furtherance of their duties. That definition does not encompass documents of a purely private or personal nature. Instead, only those documents having a “substantial nexus” with a government agency’s activities qualify as public records.” *Id.* at 4, 156 P.3d at 421.
- “Although the public records law creates a strong presumption in favor of disclosure, that presumption applies only when a document first qualifies as a public record.” *Id.* at 5, 156 P.3d at 422.

QUESTIONS?

THANK YOU!!

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