CAJ
Committee on the Administration of Justice
Promoting Justice / Protecting Rights

CAJ's Submission no. S451

Submission to the Department of Culture, Arts and Leisure (DCAL) consultation on the draft proposed PRONI Statutory Rule *The Court Files Privileged Access Rules (Northern Ireland) 2016*

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Introduction

1. The Committee on the Administration of Justice (CAJ) is an independent human rights NGO with cross community membership in Northern Ireland and beyond. It was established in 1981 and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its international human rights obligations.

2. The Department of Culture, Arts and Leisure (DCAL) is the sponsor department for the Public Records Office for Northern Ireland (PRONI). The DCAL Minister is currently the minister responsible for decisions on release of records, this is planned to transfer to the new Department of the Communities later in 2016.

3. A consultation was launched on the 14 January 2016 running until the 22 February 2016, on a draft Statutory Rule on privileged access to information contained in court and inquest files. CAJ welcomes the opportunity to respond to the consultation.

4. **In summary:**

- We understand PRONI holds court and inquest files that date up until at least the 1990s. The draft Statutory Rule made under the Public Records Act 1923 would codify into law a mechanism whereby persons directly injured or bereaved in relation to an incident recorded in a court file held by PRONI, could seek limited access to a copy of the court file on a confidential basis. The court documents and inquest papers which would be regulated by this rule are proceedings which were usually held in open court and may have been reported in the media at the time;

- The Rule would provide a separate mechanism to existing procedures under the Freedom of Information Act (FoI) 2000 (which puts documents into the public domain), and the Data Protection Act 1998 (DPA). Under FoI court records are usually exempt information and not disclosed, but this does not apply to documents defined as 'historic records' namely those over 30 years old. Hence at present court records from on or before 1986 would potentially be available under FoI, subject to any other exemptions applied under that Act. Under s35 of the DPA personal data can be exempt from the non-disclosure provisions where the disclosure is necessary for legal proceedings. We understand the DPA has only been used in a small number of requests;

- Given the limitations the DPA and the FoI Acts as well as their permitted exemptions, some of which are absolute, we do not regard these two routes in themselves as meeting all of the circumstances whereby persons may have an entitlement to public documents in accordance with the ECHR and other international standards;

- CAJ is concerned that the background context to the current consultation are attempts by security bodies and the UK government to obstruct access to public records with the purpose and/or effect of preventing effective investigations into past human rights violations;

- There is an emerging body of international standards in relation to entitlements to access the type of official documents the rule regulates. This includes a high presumption of disclosure of documents that may contain evidence of human rights violations and provisions for review of decisions not to disclose by a competent independent body. There are also emerging entitlements to disclosure for the next of kin, family members and others with a 'public watchdog' function (such as the press and NGOs) to information on legacy investigations that can be derived from Articles 2, 10 and 13 of the European Convention on Human Rights (EHCR);

- In light of this we would urge consideration of the following amendments:

    - ***Rules 3 & 4: Eligible Applicants:*** permits applications from those who were injured, bereaved or seriously adversely affected by a particular incident recorded in a court file, or to a legal or charity representative acting on their behalf. Rule 4 requires a signed confidentiality undertaking;
    - *CAJ proposes the categories of eligible applicants be extended including to permit applications from those exercising a public watchdog function in certain circumstances. Restricting representation to charities may also not capture other organisations undertaking equivalent work;*

    - ***Rule 5: redactions under the Data Protection Act****:* places an obligation for material to be redacted before release to comply with DPA principles.
    - *CAJ would urge further policy elaboration of the likely interpretation of this provision and compliance with the ECHR and broader disclosure duties;*

    - ***Rule 6: duty to consult relevant authorities:*** requires the Minister for PRONI to consult with 'relevant authorities' which for pre-devolution records is likely to be the Northern Ireland Office (NIO). The consultation document sets out this will be at various stages to review the material for ECHR compliance;
    - *There are likely conflicts of interest in this vetting function if a family member is seeking information that evidences official wrongdoing that the relevant authority may be liable for. We also have experience of redactions which have stretched interpretation of the ECHR beyond what is credible. We would urge consideration for such an exercise being conducted independently;*

- **Rule 7 provision of information:** this rule establishes a process for the information to be provided to the applicant. Rule 7(3) contains a discretionary power for the minister to withhold the whole or part of the file or place conditions on its release;
- *CAJ believes this power should be qualified in accordance with the framework provided by the EHCR and other international standards. In addition to specific provisions for disclosure of human rights violations we would urge consideration of a presumption of disclosure unless certain specified conditions are met;*

- ***Rule 8 places conditions on a released court file:*** this provides that files are to be stored confidentially and not copied, put in the public domain without authorisation, or shown to others save that the file may be shared with a solicitor for advice, who may share it with other law officers including the NI Attorney General for the purpose of seeking a fresh inquest.
- *CAJ suggests consideration of provisions to permit qualified disclosure to other domestic and international agencies with a legitimate public interest in access to the material. For example it is not clear if an intervener in the European Court of Human Rights could make use of the material; There are specific provisions in relation to ECHR Article 6 provided for in the rule that could be extended to other rights including Article 13 on an effective remedy.*

- ***Rule 9 application to publish court file:*** This rule would provide for a process for applicants to publish a court file with the Minister for PRONI's permission. The rule requires the minister to allow the use of material in court when the applicants Article 6 rights require so, but otherwise provides for ministerial discretion on publication, following consultation with relevant authorities;
- *CAJ urges that the discretion not to permit publication is further qualified in accordance with the framework provided by the EHCR and other relevant international standards;*

- ***Rule 10 appeals mechanism:*** This rule would provide for a process whereby an applicant could seek a review of a decision to refuse access to a court file. The application must be made within one month of the refusal, and the decision will be retaken by the Minister for PRONI, having consulted the relevant authorities.
- *CAJ urges provision for an appeal on decisions not to release or publish files to a competent independent body;*

- ***Rule 11 recall of files****:* This rule empowers the minister to recall files when they have reasonable cause to believe undertakings and conditions have been breached.

The backdrop to the proposals

5. CAJ is conscious that the context and backdrop to the current subject matter are well documented efforts by the state and security agencies to restrict disclosure of documents required for legacy investigations. We are not aware of any instances whereby past release of public records has put persons' lives in danger, prejudiced the interests of justice or created other similar human rights concerns. We are however aware of instances whereby the release of material from the archives has exposed human rights violations, including instances of collusion by state agencies. In this context we are concerned that the primary motivation by security bodies in limiting disclosure is to cover up state wrongdoing rather than to ensure compliance with positive human rights obligations.

6. In January 2015 CAJ published our 'Apparatus of Impunity' research report in which we detailed limitations on legacy investigations in recent years.[1] In this report we provided details of an incident in 2013 relating to legacy inquest papers which appears to directly relate to the development of the current proposals. This narrative is reproduced in full below:

> **Interventions to prevent access to archives**
> A [...] remarkable intervention was made in the late summer of 2013 when the Secretary of State for Northern Ireland and Chief Constable of the PSNI sought injunctions against NGO Relatives for Justice and KRW Law acting on behalf of a victim's family who had successfully sought the release from the Public Records Office for Northern Ireland (PRONI), under freedom of information, of copies of past inquest papers. The purpose of seeking copies of historic inquest papers, which were of inquests which had been heard in public, was and is usually to gather evidence, including of flaws in the past inquest, in order to petition the Attorney General to exercise the powers to open a fresh inquest.
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> Following requests from the victims' representatives to the PRONI for this material the documents were released by the devolved Northern Ireland Culture Minister (Carál Ní Chuilín MLA). The Culture Minister is responsible for the PRONI and had consulted with both the Secretary of State (Teresa Villiers MP) and devolved Department of Justice before exercising powers to release the documents. This action had followed the PRONI earlier declining to release court and inquest papers to families following representations from the PSNI Historical Enquiries Team. In a remarkable move hours after the Culture Minister had released the papers, the Secretary of State and Chief Constable sought and, after midnight in the absence of the other parties, were granted temporary injunctions against these representatives.[2] The Attorney General for Northern Ireland advised the Court that the Culture Minister was the 'keeper of the records' and had acted within her

[1] The Apparatus of Impunity? – Human rights violations and the Northern Ireland conflict: a narrative of official limitations on post-Agreement investigative mechanisms'. CAJ, January 2015
[2] Release of Troubles' killings documents sparks legal row *BBC News Online*, 12 August 2013.

powers.[3] On 13 September the Secretary of State and PSNI withdrew their legal action and the documents were disclosed.[4] The application was therefore dismissed and full costs were awarded to RFJ and KRW Law.

The legal basis for this remarkable intervention has remained unclear, with reports only containing general references to any potential 'security risks' to personnel. CAJ expressed concern at the time that we did not believe that there was any justifiable reason to withhold such material which could assist families in obtaining a proper investigation into the death of their loved ones, particularly given the assurances that names of individual security force members had been redacted. We also stated that the UK has an obligation to carry out investigations in accordance with Article 2 and not to thwart attempts by families and their representatives who are acting on their own initiative to learn the truth about the deaths of their next of kin.

It is difficult not to conclude that this whole episode was indicative of concern by senior officials that there was access to legacy information that they could not readily veto. Arguably there was perceived to be a 'gap' in the increasingly complicated structure of limitations and 'national security' exemptions to accountability that allow the state to thwart due scrutiny of conflict related deaths in which they may be implicated. In this instance family representatives had been seeking the papers from May 2012, and had faced significant delays. This was just three months after the same representatives had published a damning report into the 1992 sectarian UDA attack on Ormeau Road Bookmakers shop in which 12 people were shot and five, including a child, died.[5] The report cited materials obtained from the Public Records Office, by way of a trial deposition of two individuals convicted of possessing a Browning weapon used in the shooting. This contained a firearms report indicating that the weapon was in good working order, which contradicted the RUC position to the Stevens and Cory inquiries that they had rendered the weapon inoperable before giving it back to an agent within the UDA. The public record thus provided evidence that RUC Special Branch had supplied the weapon then used in the atrocity.[6] CAJ understands that since the legal challenge of 2013 the Department of Culture, Arts and Leisure has subsequently put into place a draft Protocol setting out the process to be adhered to by PRONI and the NIO/DoJ in responding to requests for access to conflict-related inquests and court records. However, the NIO have argued this protocol has not been 'agreed' by them and therefore it does not regard there as being an 'agreed' protocol in place in relation to access such information.[7]

There are also other reasons why the state may wish to tighten its grip over its archives, in that given the passage of time papers are now being released, under standard rules, challenge the official narrative of the conflict.[8] Such documents and

[3] 'A late-night injunction on decades-old murder papers: why are the PSNI and NIO keeping them under wraps?' *The Detail* 11 August 2013.
[4] NI Secretary Theresa Villiers withdraws Troubles documents case *BBC News Online* 13 September 2013.
[5] Sean Graham Bookmakers Atrocity, Relatives for Justice, February 2012.
[6] Summary Briefing for UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Niall Murphy, KRW LAW LLP Belfast, 6 June 2014.
[7] Correspondence to KRW Law, by PRONI 22 August 2014 and NIO 10 September 2014.
[8] Contrast for example the official position on the UDA, which remained a legal organisation until it was ultimately proscribed in 1992. It was long the practice of the UDA to claim murders and other activities under the name of the effectively non-existent 'Ulster Freedom Fighters' (UFF). This position was given official

assessments of them add to the questions as to whether disclosure to inquests and other legacy investigations is being delayed in the context of information within files compromising the official narrative of the conflict.

7. The consultation document makes reference to a new process having been introduced by DCAL in January 2015 in relation to release of such documents.

8. A starting point to look at the present draft Rule is the extent families or other interested parties would be entitled to information under international standards. An outline of this framework is covered in the following section.

Human rights standards and rights to information

9. Legislation and acts of public authorities must be compatible with ECHR rights under the Human Rights Act 1998. ECHR rights themselves are to be interpreted in light of other relevant international standards and their authoritative interpretation by competent treaty bodies.[9]

10. The first question is the extent to which the next of kin or families of victims in general have a right to information from the findings of investigations into the deaths of their loved ones under the procedural limb of Article 2 ECHR (right to life). The European Court of Human Rights has held to this end that there must be a sufficient element of public scrutiny of the investigation or results to secure accountability in practice as well as in theory. It has also held that the next-of-kin should be involved to the extent necessary to safeguard their legitimate interests. In *McKerr v UK* the court held that:

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legitimacy by the proscribing of the UFF but not the UDA until 1992. However, by contrast an official secret 'guide' to loyalist paramilitary groups document recently uncovered in declassified archives by the Pat Finucane Centre describes the UDA as "the largest and best-organised of the loyalist para-military [sic] associations" and the UFF as "an essentially fictitious organisation widely known to be a nom de guerre of the UDA". This document is dated 2 September 1976 and hence demonstrates from at least that time the authorities were clearly aware of the role of the UDA, yet chose to maintain its status as a lawful organisation. Other official documents also contradict the official line of distance from loyalist paramilitarism. One 1973 British Army intelligence document, released under the 30 year rule, entitled "Subversion in the UDR" (available at: http://cain.ulst.ac.uk/publicrecords/1973/subversion_in_the_udr.htm [accessed September 2014.]) sets out the official assessment that a 'significant proportion' of UDR soldiers, providing estimates of 5-15% will also be members of loyalist paramilitary organisations. It also sets out that at the time at least "the biggest single source of weapons (and the only significant source of modern weapons) for Protestant extremist groups has been the UDR." The official picture of the security forces treating loyalists in the same manner as republicans is somewhat challenged at least in the era for which documents have been released by, for example, the release of minutes of an official meeting on 19 December 1974 with representatives of the UVF, UDA and other loyalist paramilitary groups. The de Silva Review into the killing of Pat Finucane stated that MI5 in 1985 assessed that "85% of the UDA's 'intelligence' originated from sources within the security forces. I am satisfied that this proportion would have remained largely unchanged by February 1989, the time of Patrick Finucane's murder" (de Silva Review 2012, paragraph 49.)

[9] *Demir and Baykara v Turkey* §85.

> ...there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. [115]

11. In the same case the Court indicated this threshold had not been met by specifically through the withholding of information in the Stalker reports, stating:

> ...since the reports and their findings were not published, in full or in extract, it cannot be considered that there was any public scrutiny of the investigation. This lack of transparency may be considered as having added to, rather than dispelled, the concerns which existed [141].

12. In a subsequent case in *Anguelova v. Bulgaria* (2004) 38 EHRR 31 the court held, specifically in relation to collusion, that:

> There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Güleç*, cited above, p. 1733, § 82, where the father of the victim was not informed of the decisions not to prosecute; *Oğur*, cited above, § 92, **where the family of the victim had no access to the investigation and court documents**... [140, emphasis added]

13. In another case, *Cobzaru v Romania* App. No. 48254/99 judgment 26 July 2007, the Court held that there was an additional duty to 'unmask' any racist motive. 'Unmasking' indicating such information be made public. The Council of Europe Advisory Committee on the Framework Convention for National Minorities has treated sectarianism in Northern Ireland is a form or subset of racism and hence should be covered by such an Article 2 requirement.

14. The UK has cited both *McKerr v UK* and *Ramsahai v Netherlands* as an authority for stating that the next of kin/families do NOT have a right to information from a police investigation.[10] However, in the latter more recent case the applicants were in fact given access to the full investigative file, and the court's conclusions are limited to indicating that there is no *automatic* entitlement to such information *whilst the investigation is ongoing.* Hence the ruling appears to address questions of timing rather than stating there is no entitlement to files:

[10] NIO submission to Dept Execution of Judgements European Court of Human Rights (in response to CAJ Submission) 30 November 2015.

> The disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects for private individuals or other investigations. It cannot therefore be regarded as an automatic requirement under Article 2 that a deceased's victim's surviving next of kin be granted access to the investigation as it goes along. The requisite access of the public or victim's access may be provided for in other stages of the available procedures [347].

15. In the case of legacy court and inquest files held by PRONI we are by definition referring to past investigations which have been completed. It should be noted that most ECHR rights are qualified in that the state can justify their limitation when meeting strict tests over necessity in a democratic society in pursuit of a number of enumerated legitimate aims. An explicit qualification clause to this end applies to Article 10. Articles 2 and 3 are not explicitly qualified to this end. This is also the case with Article 13 – the right to an effective remedy for breaches of ECHR rights, which explicitly includes violations when those responsible are agents of the state.[11]

16. There is also the question of entitlements to official documents and documents containing personal information of applicants under Article 10 ECHR (freedom of expression. In this regard we note the more recent broader interpretation by Strasbourg of the notion of 'freedom to receive information' and move towards the recognition of rights to access particular information.[12] ECHR jurisprudence had long held the right to receive information essentially prohibits a Government from restricting information that others wish or may be willing to impart to them.[13] In relation to conflict-era court and inquest papers there is the curious situation which has arisen in recent years whereby the branch of the Executive with primacy and competence over delivery has been willing to release such information only for a restriction to be sought by another branch of the Executive.

17. We also wish to draw attention to the extent to which there are entitlements to information that extend beyond family members to encompass others who play a public watchdog role on matters of public interest such as the press and Non-Governmental Organisations (NGOs). To this end a more recent ECHR case, which has also reiterated the evolving right of access to certain information, has held that NGOs involved in matters of public interest exercise a role as public watchdog in a manner of similar importance to the press and hence are warranted similar entitlements under the ECHR.[14] The definition of NGOs is not restricted to charities.

18. Rights under the ECHR must be interpreted in light of other relevant international standards and their authoritative interpretation by competent bodies.[15]

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[11] ECHR Article 13: *Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*

[12] See Társaság a Szabadságjogokért, paras, 35-39 Application no. 37374/05, April 2009

[13] Leander v. Sweden, 26 March 1987, para 74.

[14] Youth Initiative for Human Rights v. Serbia (application no. 48135/06), June 2013.

[15] *Demir and Baykara v Turkey* paragraph 85.

There are therefore a range of other relevant international instruments relevant to the current policy. The UK is party to the International Covenant on Civil and Political Rights (ICCPR), Article 19 of which provides a similar right to freedom of expression as that in the ECHR. General Comment no. 34 of the UN Human Rights Committee elaborates that the scope of this provision "embraces a right of access to information held by public bodies". It continues that "To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest" and that "States parties should make every effort to ensure easy, prompt, effective and practical access to such information."[16]

19. The European Court of Human Rights has also made reference to the Joint Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression of December 2004. The Court singled out a number of the principles in the Joint Declaration including the following:

> ...The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.
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> The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions.
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> Those requesting information should have the possibility to appeal any refusals to disclose to an independent body with full powers to investigate and resolve such complaints.
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> National authorities should take active steps to address the culture of secrecy that still prevails in many countries within the public sector. This should include provision for sanctions for those who wilfully obstruct access to information. Steps should also be taken to promote broad public awareness of the access to information law.
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> Urgent steps should be taken to review and, as necessary, repeal or amend, legislation restricting access to information to bring it into line with international standards in this area, including as reflected in this Joint Declaration...

[16] CCPR/C/GC/34 of 12 September 2011, paragraphs 18 and 19.

> Certain information may legitimately be secret on grounds of national security or protection of other overriding interests. However, secrecy laws should define national security precisely and indicate clearly the criteria which should be used in determining whether or not information can be declared secret, so as to prevent abuse of the label 'secret' for purposes of preventing disclosure of information which is in the public interest. Secrecy laws should set out clearly which officials are entitled to classify documents as secret and should also set overall limits on the length of time documents may remain secret. Such laws should be subject to public debate."[17]

20. In relation to the latter provision we draw attention to The *Global Principles on National Security and the Right to Information* (the Tshwane Principles), which were launched in June 2013, having been drafted by 22 groups in a process which consulted over 500 experts in over 70 countries and four Special Rapporteurs.[18]

21. The first principle within the Tshwane Principles sets out that those with an obligation to disclose information... must make information available on request, subject only to limited exceptions prescribed by law and necessary to prevent specific, identifiable harm to legitimate Interests..." Principle 4 outlines that the burden of establishing the legitimacy of any restriction should lie with the public authority stating:

> (a) The burden of demonstrating the legitimacy of any restriction rests with the public authority seeking to withhold information.
> (b) The right to information should be interpreted and applied broadly, and any restrictions should be interpreted narrowly.
> (c) In discharging this burden, it is not sufficient for a public authority simply to assert that there is a risk of harm; the authority is under a duty to provide specific, substantive reasons to support its assertions.

22. Principle 10 deals specifically with '*Categories of Information with a High Presumption or Overriding Interest in Favor of Disclosure',* which include information relating to human rights violations. It states that information that may concern human rights violations gross human rights violations, including systemic or widespread violations of the rights to personal liberty and security, should never be withheld in any circumstances. In relation to other human rights violations the Principle sets out that such information should be:

> ....subject to a high presumption of disclosure, and in any event may not be withheld on national security grounds in a manner that would prevent accountability for the violations or deprive a victim of access to an effective remedy.[19]

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[17] Youth Initiative for Human Rights v. Serbia (application no. 48135/06), June 2013, paragraph 14.
[18] Frank LaRue, the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression; Ben Emmerson, the UN Special Rapporteur on Counter-Terrorism and Human Rights; Pansy Tlakula, the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information; Catalina Botero, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, and Dunja Mijatovic, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media (Tshwane Principles, page 5).
[19] Tshwane Principles, Principle 10A(2).

23. Speaking specifically to the type of situation which now prevails in Northern Ireland, in so far as cases relate to the legacy of the past rather than a wholesale change in Executive power, the Principle further provides that:

> When a state is undergoing a process of transitional justice during which the state is especially required to ensure truth, justice, reparation, and guarantees of non-recurrence, there is an overriding public interest in disclosure to society as a whole of information regarding human rights violations committed under the past regime.[20]

24. Principle 10 further elaborates that "*Where the existence of violations is contested or suspected rather than already established, this Principle applies to information that, taken on its own or in conjunction with other information, would shed light on the truth about the alleged violations.*" [21] A note to Principle 10 does provide that the "*The names and other personal data of victims, their relatives and witnesses may be withheld from disclosure to the general public to the extent necessary to prevent further harm to them."*

25. In 2013 the UN Special Rapporteur for Freedom of Expression, in a report to the UN General Assembly stated:

> ...whenever a State imposes restrictions on the exercise of the right to freedom of expression, such restrictions may not put in jeopardy the right itself, much less when the information requested relates to human rights violations. Restrictions must be defined by law that is accessible, concrete, clear and unambiguous, and compatible with the State's international human rights obligations. They must also strictly conform to tests of necessity and proportionality…For a restriction to be necessary, it must be based on one of the grounds for limitations recognized by the International Covenant on Civil and Political Rights and address a pressing public or social need. Any restriction must also be proportionate to the aim invoked and must not be more restrictive than is required for the achievement of the desired purpose or protected right.[22]

26. There has also been a body of emerging international law on the importance of the right to truth specifically in relation to ending impunity. This includes the 2013 UN General Assembly Resolution 68/165 on the Right to Truth and the 2005 Updated Set of principles for the protection and promotion of human rights through action to combat impunity.[23]

[20] Tshwane Principles, Principle 10A(3).
[21] Tshwane Principles, Principle 10A(4).
[22] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. United Nations General Assembly A/68/362 04/09/2013 [12].
[23] (E/CN.4/2005/102/Add.1), 2005.

27. Given all of the above it can be reasonably determined that next of kin, other family members, the press, NGOs and the public at large should have a level of entitlements, under the right to access information, to the type of court and inquest records covered by the PRONI consultation. Where a right is derived from the ECHR any limitation on that right, such as the proposed statutory rule would impose, must be in conformity with the relevant limitation clause on the respective ECHR right.

28. As alluded to above where entitlements for family members to information from previous investigations can be derived from obligations under the procedural limb of Article 2 ECHR.[24] There is no explicit limitation on the face of the article relating to on grounds such as of 'national security'. There is case law setting out when Strasbourg has not been willing to allow states parties to invoke 'national security' considerations to limit ECHR rights where no such limitation exists.[25]

29. In relation to restrictions to entitlements to information derived from ECHR Article 10(1) the respective limitation clause, Article 10(2) provides that:

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[24] *National security and European case-law* produced by the research division of the European Court of Human Rights in 2013

[25] The absolute nature of Article 3 means there is also no national security exemption, albeit that in assessing the minimum level of severity for an Article 3 violation can be influenced by the circumstances in which it occurs. For example particularly draconian conditions of detention, that may otherwise breach Article 3, may be sought to be justified on the basis that a detainee may otherwise be a threat to 'national security'. By contrast in the case of *Chahal v. the United Kingdom [GC]*, the UK unsuccessfully argued that the risk of ill-treatment if it deported the applicant was overridden when the deportation was necessary for national security reasons. In rendition cases the court also held that, in the context of Articles 3 and 13 that no threat to national security which may be perceived by a state party could justify not conducting an independent and effective examination of any complaint of a risk of treatment contrary to Article 3, within which 'national security' considerations should carry no weight (*El Masri v. "the former Yugoslav Republic of Macedonia" [GC*]). The Court has not been willing to give states leeway when arguing national security considerations in relation to compliance with Article 5 (right to liberty). In *Al-Jedda v. UK* [GC], regarding UK 'preventative detention' of Iraqis in their country with no derogation from Article 5, the Court held that the UK's security considerations were did not justify their violation of Article 5. In Fox, *Campbell and Hartley v UK* also held that the state could not arrest without giving any reasonable grounds even in the context of security considerations -there had to be reasonable suspicion an individual had committed an offence. In the aforementioned *Chahal v. the United Kingdom [GC]* the court did decide that the long period of detention of the applicant, in a 'national security' context, had met the procedural requirements of Article 5, in the particular circumstances of the case. However, it did find that decisions to detain the applicant on grounds which involved national security did not absolve the state of its responsibility for the lawfulness of the detention to be reviewed by a competent court, even if the use of confidential 'national security' information might be unavoidable. The state could not bypass this duty in Article 5 by asserting national security. In *Demir and Others v. Turkey*, regarding lengthy periods detention in police custody in a 'national security' context, the research paper states that "*the Court did not accept that the context of the problem of terrorism in south-eastern Turkey could justify measures derogating from Article 5"*. The case of *A. and Others v. the United Kingdom [GC]* examines whether the system of special advocates was sufficient to meet the grounds of an individual being able to test the validity of their detention, the court found in some circumstances it could, but did not develop a 'national security' exemption to the provisions of the Article. In *Nolan and K. v. Russia*, the Court held that national security could not be used as a ground to justify interference against the applicants Article 9 rights (Freedom of Religion), despite the Russian state asserting, as other states do, that certain religious activities are a threat to national security. The Court therefore did not allow a national security exemption to be written into Article 9. Above information largely derived from: *National security and European case-law* produced by the research division of the European Court of Human Rights in 2013, paragraphs 66, 77, 80, 81-94

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

30. Restrictions under Article 10, as with similar provisions in Articles 8 (right to private and family life) and Article 11 (freedom of association and assembly) must therefore meet the tests of being 'prescribed by law' and 'necessary in a democratic society' in pursuit of one of a number of enumerated 'legitimate aims'. Prescribed by law requires legal certainty over interference in such ECHR rights; necessary in a democratic society requires that the restriction is proportionate to a pressing social need. The following examines some of the case law on related matters.

31. The UK seriously sought to argue relatively recently in Strasbourg that keeping lesbian, gay and bisexual persons out of the armed forces, met the above tests as being a proportionate restriction on 'national security' grounds. In *Smith and Grady v. United Kingdom* (1999) the court disagreed and found breaches of the Article 8 and 13 ECHR rights of the applicants in relation to being for discharged from the military on grounds of their sexual orientation. The Court accepted the UK's assertion that 'national security' included *ensuring the operational effectiveness of the armed forces*, and hence accepted that such a concept is part of national security, including matters effecting the morale of service personnel impacting on effectiveness. However, the Court held that such an assertion of a risk to operational effectiveness must be substantiated. Whilst the UK relied on a Ministry of Defence and British Army report to substantiate its views, the Court was unimpressed by this given both questions of independence and methodology. The ruling stated "*Accordingly, the Court must consider whether, taking account of the margin of appreciation open to the State in matters of national security,* ***particularly convincing and weighty reasons exist*** *by way of justification for the interferences with the applicants' right to respect for their private lives*".[26] The Court concluded no such reasons were provided, in a test which relates to the 'necessary in a democratic society' provision of the limitation clause. A number of principles can be derived from this. This includes that states will have to provide convincing evidence to justify such restrictions, rather than simply playing a 'national security' card or similarly referencing another exemption.

32. In relation to the requirements of legal certainly over restrictions the court has held that the in accordance with the law or prescribed by law test will only be met when three conditions are satisfied: 1) the impugned measure must have some basis in domestic law and, with regard to the quality of the law at issue, 2) it must be

[26] *Smith and Grady v. United Kingdom,* paragraphs 89 and 94, emphasis added.

accessible to the person concerned and 3) have foreseeable consequences.[27] To the extent family reports are required under Article 10 there should therefore be a degree of legal certainty as to the grounds for redactions.[28]

33. In cases where 'national security' has been invoked as a grounds for limiting ECHR rights where it is a permitted ground, whilst the court tends to defer to national authorities it does insist on a competent independent review body to ascertain whether the official claim is reasonable. In such cases official commentary states:

> ...any measure affecting human rights must be subject to a form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where the authorities interpret national security erroneously.[29]

34. There is some indication that the nature of such official material already having been: to an extent already known in the public domain; or involving unlawful conduct by the state may have a bearing in questions of whether interference were necessary in a democratic society, as may the age of the material. Such matters are therefore factors favouring disclosure. See for example:

> *Observer and Guardian v the UK* regarded the publication of extracts from the 'Spycatcher' book, where a former MI5 agent alleged illegal activities by the agency. The Court held that matters including the public interest in awareness of illegal acts coupled with a context that the allegations were already published elsewhere, and hence confidentially had lapsed, rendered a sanction disproportionate. What is notable here is that in one period of time (1986-87) the Court concurred with the UK state that the interference, in the form of injunctions preventing publication, was justified. After this period, when Spycatcher had been published in the USA, the Court held however that the interference was no longer justified as "the purpose of the injunctions had thus become confined to the promotion of the efficiency and reputation of the Security Service…" [69].

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[27] *National security and European case-law* produced by the research division of the European Court of Human Rights in 2013, Paragraph 18, citing Kennedy v. the United Kingdom, op. cit., § 151; Rotaru v. Romania, op. cit., §52; Amann v. Switzerland, op. cit., § 50; Iordachi and Others v. Moldova, op. cit.; Kruslin v. France, § 27; Huvig v. France, § 26;

[28] For example in *Malone v. the UK (1984)* the somewhat vague administrative arrangements for telephone tapping were held incompatible with the legal certainty provision of Article 8. The court accepted the "requirement of foreseability could not mean that an individual should be enabled to foresee if and when the authorities were likely to intercept his communications so that he could adapt his conduct accordingly"…but that the discretion to the Executive should not be an unfettered power and "Consequently, the law should **indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity**, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference". See *National security and European case-law* produced by the research division of the European Court of Human Rights in 2013, paragraph 19.

[29] *National security and European case-law* produced by the research division of the European Court of Human Rights in 201, paragraph 42.

In *Vereniging Weekblad Bluf! v. the Netherlands* the Court similarly found confidentially had lapsed when a security service report had already been disseminated by a magazine before it was withdrawn from publication. Essentially given the information was already out there any perceived risk to national security could no longer be relied upon, it had to be real. The age of the report – although it was only six years old – was also cited as a factor, along with the generality of the information within it.

35. In *Surek v Turkey (no 2)* (1999) the state argued national security grounds over the applicants conviction for reporting accusations of violence against two senior security force members. The state argued that the report had endangered the lives of the officials as it had identified them. The Court considered in light of the gravity of the allegations it was legitimate and in the public interest for the public to know both identities and conduct of the officials even in the context of a live armed conflict. It was also the case that the allegations, and identities, were already otherwise in the public domain. The Court stated:

> Since the applicant was convicted of disclosing the identity of certain public officials through the medium of the review of which he was the owner, the impugned interference must also be seen in the context of the essential role of the press in ensuring the proper functioning of a political democracy… While the press must not overstep the bounds set, inter alia, for the protection of vital interests of the State such as national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them…[35]
>
> The applicant's conviction and sentence related, in the first place, to the fact that his publication had reported the Governor of Şırnak to have affirmed that the Şırnak Chief of Police had given order to open fire against the people. Secondly, it had quoted Leyla Zana, a former parliamentarian, as having stated that a named Gendarme Commander had told Orhan Doğan, also a former parliamentarian, that "[y]our death would give us pleasure. Your blood would not quench my thirst" (see paragraph 10 above). Thus, the wording of the statements clearly implied serious misconduct on the part of the police and gendarme officers in question. Although the statements were not presented in a manner which could be regarded as incitement to violence against the officers concerned or the authorities, they were capable of exposing the officers to strong public contempt. Moreover, the news report was published in the context of the security situation in south-east Turkey, where since approximately 1985 serious disturbances have raged between the security forces and the members of the PKK involving a very heavy loss of life and the imposition of emergency rule in much of the region…[37]
>
> … The impugned news report simply reiterated what a police officer and a gendarme officer were said to have ordered or affirmed on specific occasions. Assuming that the assertions were true, the Court considers that, in view of the seriousness of the misconduct in question, the public had a legitimate interest in knowing not only the nature of the conduct but also the identity of the officers.

> However, the defences of truth (see the Castells v. Spain judgment of 23 April 1992, Series A no. 236, p. 24, §§ 47-48) and public interest could not have been pleaded under the relevant Turkish law. [39]

36. Given all of the above there are requirements for legal certainty and necessity in a democratic society in relation to materials there is a right to have, as well as provisions for a mechanism to allow a competent independent body to review a decision, there is a strong onus to disclose legacy information which contains evidence of potential human rights violations or other wrongdoing. The following section provides some further analysis of the draft Statutory Rule in this context.

The PRONI proposals and the domestic legislative framework

37. It is welcome that the consultation document sets out the full text of the draft statutory rule which assists us in assessing the full impact of its provisions. The Rule would be made under powers conferred by section 9(1) of the Public Records (Northern Ireland) Act 1923. This legislation itself is very dated and belongs to the era of the Special Powers Acts. Section 9(1) refers to rule-making powers over the management of the public records office, with section 9(2) referring to the admission of persons to use 'Northern Ireland records'. The proposed rule appears to regard the release of records as part of the management of the public records office.

38. The consultation document make references to other entitlements under other statutes to receive the type of court records and inquest papers that the rule covers, namely the Freedom of Information Act 2000 and the Data Protection Act 1998. The consultation document sets out that the rule would establish a separate additional procedure under the auspices of the 1923 Act.

39. The Freedom of Information Act 2000 (FoI), due to an exemption under s32, does not usually afford access to Court Records. However by virtue of Part IV of the FoI Act this exemption is removed in the case of 'historic records' defined as records that are over 30 years old.[30] In the present year therefore this could mean an entitlement to Court and Inquest records held by PRONI created before 1986, subject to the broader exemptions under this Act.

40. The consultation document also sets out that a system to access court records under the Data Protection Act 1998 (DPA) also operates in tandem. We understand there have only been a small number of DPA applications to PRONI for court and inquest papers, and there no requirement for an undertaking to be signed. S35(2) DPA exempts personal data from its non-disclosure provisions when the disclosure is necessary for the purpose of legal proceedings, prospective legal proceedings, legal

[30] S62 and s63(1).

advice or legal rights.[31] This means that a data subject could not prevent the release of a file under certain non-disclosure provisions under the DPA when the purposes in s35(2) applied. Whole files could be released but disclosure of the information could be withheld in all or in part on other grounds. This includes a 'national security' exemption under s28 of the DPA, exercisable through the issuing of a certificate by the Secretary of State.

41. CAJ's suggestions on the individual rules are listed in the summary at the beginning of this submission, and further elaborated on below.

Eligible applicants (rules 3 and 4)

42. Proposed Rule 3 permits applications to persons who were injured or bereaved by a particular incident recorded in a court file, or were otherwise seriously adversely affected by it. It also permits a solicitor or the employee of a charity acting on their behalf to make the application. This does not extend to an NGO or other group that is not a charity. Many campaigning groups (including CAJ) will not be charities. CAJ proposes the categories of eligible applicants be extended including to permit application from those exercising a public watchdog function. Restricting representation to charities may also not capture other organisations undertaking equivalent work.

43. Under rule 4 a signed application must be made including a signed confidentiality undertaking. Rule 9 later covers a process to apply to make the information public.

Redactions under DPA (rule 5)

44. Proposed Rule 5 itself states that no information can be released from PRONI-held Court Files except insofar as it complies with the DPA Data Protection Principles. This means that if court files are released they must be redacted in accordance with the DPA principles. CAJ would seek further information and consideration of the scope and likely interpretation of this provision and compliance with the ECHR and broader disclosure duties;

Duties to consult (rule 6)

45. Proposed rule 6 requires the Minister to *consult* with Relevant Authorities before taking a decision to release (or publish etc) a court file.

[31] s35 Data Protection Act 1998 "Disclosures required by law or made in connection with legal proceedings etc.
(1)Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court.
(2)Personal data are exempt from the non-disclosure provisions where the disclosure is necessary—
(a)for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or
(b)for the purpose of obtaining legal advice,
or is otherwise necessary for the purposes of establishing, exercising or defending legal rights."

The consultation document sets out that the Relevant Authorities will be – depending on who supplied the record to PRONI:

- The Northern Ireland Office (Secretary of State)
- The Department of Justice (NI Justice Minister)
- Or the head of another department / public authority;

46. It is likely, and could be clarified, that the Relevant Authority in relation to the pre-devolution period (which in the case of justice was 2010) will therefore be the NIO. The consultation document sets out that this will enable the NIO/ other Relevant Authority to vet the content of the files for compliance with the ECHR.

47. Unfortunately CAJ also has experience of 'relevant authorities' stretching the interpretation of Article 2 beyond credible interpretation in relation to seeking redactions to material. In one case we were involved in the state even sought to redact out the words 'RUC Special Branch' from a document on Article 2 grounds, despite the existence of such a unit not being a secret.

48. It would appear that insofar as this provision may be interpreted as Relevant Authorities making recommendations as to a family member, or public, entitlement to information under the ECHR, there are likely to be conflicts of interest. If, for example, the Relevant Authority considering whether the family has an entitlement to information which contains evidence of official wrongdoing is also the public authority who would be liable for the public wrongdoing, there is a conflict of interest. In general we would urge consideration of a mechanism whereby exercises to ascertain ECHR compliance are conducted independently from such authorities.

Powers to redact the Information (rule 7)

49. The consultation document sets out a policy intention to make available the majority of information to eligible applicants, but that some information will be withheld such as names or other information which would identify jurors, witnesses etc. However the draft Rule 7(3) does not expressly place this on the face of the legislation but rather empowers the Minister to withhold the whole or a part of the court file on any grounds or place conditions on their release.

50. CAJ believes this power should be qualified in accordance with the framework provided by the EHCR and other international standards. In addition to specific provisions for disclosure of human rights violations we would urge consideration of a presumption of disclosure unless certain specified conditions are met. A test could for example provide for the withholding of information in particular to the extent it may endanger lives or reveal operational methodologies of the security forces which were lawful and still used, or in the interests of justice etc.

Conditions on a released court file (rule 8)

51. Rule 8 would provide that files are to be stored confidentially and not copied, put in the public domain without authorisation, or shown to others save that the file may be shared with a solicitor for advice, who may share it with other law officers including the NI Attorney General for the purpose of seeking a fresh inquest.

52. CAJ suggests consideration of provisions to permit qualified disclosure to other domestic and international agencies with a legitimate public interest in access to the material. For example it is not clear if an intervener in the European Court of Human Rights could make use of the material. There are specific provisions in relation to ECHR Article 6 provided for in the rule that could be extended to other rights including Article 13 on an effective remedy.

Application to publish court file (rule 9):

53. This rule would provide for a process for applicants to publish a court file with the Minister for PRONI's permission. The rule requires the minister to allow the use of material in court when the applicants Article 6 rights require so, but otherwise provides for ministerial discretion on publication, following consultation with relevant authorities.

54. CAJ urges that the discretion not to permit publication is further qualified in accordance with the framework provided by the EHCR and other relevant international standards.

55. In particular we draw attention to domestic case law on the 'Neither Confirm or Deny' (NCND) doctrine. The courts have indicated in such proceedings that such a doctrine of non-disclosure should not be invoked to "conceal an improper and unlawful motive for an Executive act" or to deny whether an "illegitimate or arguably illegitimate operational method has been used as a tactic in the past". The former related to a circumstance whereby the UK Government sought to invoke NCND to avoid confirming that an official document was an official document. The document had been leaked, widely publicised in the press and exposed official deceit and wrongdoing.[32] The court held:

[32] R (*Bancoult) v Secretary of State for the Foreign and Commonwealth Affairs [2013] EWHC 1502 (admin).* This relates to the Chagos islanders who were forcibly removed by the British authorities from their lands which the UK had colonised. This was undertaken in the late 1960s and early 1970s in order for a US military base to be sited on the main island of Diego Garcia. (The 'deportation or forcible transfer of population' is so serious that it is regarded as a crime against humanity under the Article 7 of the Rome Statute of the International Criminal Court (UN Doc. A/CONF.183/9)). In 2000 a successful challenge in the courts exposed the unlawfulness of their expulsion. However, since then the UK has continued to prevent the return of the Chagosians through a variety of actions (see Piliger, John 'Paradise Cleansed: our deportation of the people of Diego Garcia is a crime which cannot stand' *The Guardian* 2 October 2004). This included the designation of waters around the island as a 'Marine Protection Area' thus preventing fishing. Regardless of the official line, *Bancoult* argued that the motive for the designation was to make the islanders return impossible given their reliance on fishing. To prove this a Wikileaked cable was submitted which showed that a Foreign and Commonwealth Office (FCO) official asserted precisely that "establishing a marine park would, in effect, put paid to resettlement claims of the archipelago's former residents…" (David Hart QC, 'The Chagossian Wikileaks cable judgment, fishing rights

> In the circumstances with which we have to deal, the interests of justice would override the [NCND] policy: the document has been in the public domain for many months, even if it got there as a result of an unlawful act. If it were necessary for us to take it into account evidentially ... we would not regard the NCND policy as a sufficient reason for refusing to do so. To refuse to do so could, in principle, permit Her Majesty's Government to conceal an improper and unlawful motive for an executive act...[33]

56. In *Dill and others* five women, largely activists on environmental or social justice issues, were victim to undercover police officers from the now disbanded Metropolitan Police 'Special Demonstrations Squad' (SDS) who had infiltrated environmental campaign groups and had formed intimate yet deceptive relationships with the claimants. Despite this clearly being in the public domain (including through some of the officers apologising on national television) being the subject of official reports and the Home Secretary announcing a public inquiry, the Metropolitan Police nevertheless sought to apply 'NCND' to the undercover officers in question and even initially sought to have the whole civil claim struck out on the grounds that NCND prevented them from mounting a defence.[34] The Court, having detailed the case law on when it was permissible to use NCND in civil and criminal cases, did not accept that in 2014 there was "any legitimate public interest the entitling the [Metropolitan Police] Commissioner to maintain the stance of NCND in respect of this general allegation."[35] The judgment held that whilst one of the justifications for NCND is to keep covert operational methods secret, this was intended to apply to legitimate operational methods which continued to be used. Mr Justice Bean ruled the Metropolitan Police could not rely on NCND to avoid answering the allegations and in a ruling with significant implications for Northern Ireland stated:

> There can be no public policy reason to permit the police neither to confirm nor deny whether an illegitimate or arguably illegitimate operational method has been used as a tactic in the past.[36]

57. Principles can be derived from these cases that past methodologies of the security forces should be disclosed if they were unlawful or otherwise illegitimate, and that non-disclosure should not be used to conceal improper or unlawful motives for actions of government.

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and a dose of EU law' UK Human Rights Blog 11 June 2013). The FCO invoked NCND relating to the authenticity of the document and hence submitted that the document was inadmissible.

[33] R (*Bancoult) v Secretary of State for the Foreign and Commonwealth Affairs [2013] EWHC 1502 (admin).* paragraph 28.

[34] Dil & Ors v Commissioner of Police of the Metropolis [2014] EWHC 2184 (QB) (02 July 2014), paragraph 3.

[35] Paragraph 41.

[36] Paragraphs 42 and 43.

Provision for Appeals and Recall (rules 10 and 11)

58. Draft Rule 10 provides for an appeal mechanism. This rule would provide for a process whereby an applicant could seek a review of a decision to refuse access to a court file. The application must be made within one month of the refusal, and the decision will be retaken by the Minister for PRONI, having consulted the relevant authorities. In relation to this CAJ urges provision for an appeal on decisions not to release or publish files to a competent independent body.

59. Rule 11 empowers the minister to recall files when they have reasonable cause to believe undertakings and conditions have been breached.

Committee on the Administration of Justice
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