

## **Freedom of Information Act 2000 ('FOIA')**

### **Decision notice**

**Date:** 18 February 2013

**Public Authority:** Department for Environment, Food and Rural Affairs (DEFRA)

**Address:** Nobel House  
17 Smith Square  
London  
SW1P 3JR

### **Decision (including any steps ordered)**

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The complainant has requested from DEFRA copies of email traffic concerning the Individual Performance Management system and its implementation between specific dates. The Commissioner's decision is that DEFRA has not provided sufficient reasons for applying the exemption where the cost of compliance exceeds the appropriate limit. The Commissioner has also decided that DEFRA did not provide adequate advice and assistance. However, the Commissioner does not require the public authority to take any steps to ensure compliance with the legislation as the complainant is already in possession of the information he required.

### **Background**

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1. This request was made shortly after the complainant received a disciplinary conviction from DEFRA. The complainant alleges that his complaints about the unfairness of that conviction directly led to his dismissal in December 2009 and that the requested information was deliberately withheld as they would have been of crucial relevance to the employment proceedings.
2. The Commissioner understands that the complainant launched a grievance and a claim for Judicial Review in early 2009 against DEFRA's strategy in designing and implementing Individual Performance Management ('IPM') which was done under the 'Renew Programme'. The

grievance and subsequent appeal were rejected and the claim for Judicial Review failed at the permission stage. A disciplinary hearing then took place in mid 2009 as a result of the complainant using the office email system to draw colleagues' attention to the issue. The disciplinary hearing resulted in a conviction of serious misconduct and the complainant was given a final written warning. He lodged an appeal against the conviction along with complaints to the Solicitors Regulation Authority and the Civil Service Commissioner and an allegation that contempt of court had been committed. The complainant was dismissed by DEFRA in December 2009. Proceedings in the Employment Tribunal followed in May 2010 with a settlement reached in January 2011. In March 2012 the complainant submitted a dossier to the police alleging fraud against certain individuals who had been involved in the issue.

### **Request and response**

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3. On 3 September 2009, the complainant wrote to DEFRA and requested information in the following terms:

"Please provide me with copies of the email traffic concerning the IPM system and its implementation, including the development of the risk assessment considered on 25 February 2008, between 14 January 2008 and 25 February 2008 involving the following officers:

- [19 named individuals]

For the avoidance of doubt this request includes emails between the above people and people not on the list, if relevant to the development and implementation of the IPM System. However the common denominator will always be one of the people on the list.

If you are unwilling or unable, for any reason, to disclose copies of the emails themselves please provide me with details of the substance of the arguments, observations, recommendations and disagreements set out in the email traffic within the time window mentioned.

I base this request in part on the following statements of [named individual], taken from her email to [named individual] dated 27 January 2009, which was forwarded to me by [named individual] on the same day, in the context of my efforts to get hold of the 25 February minutes:

*"The decision to implement the new IPM process was taken by the Executive Management Board (ie: DGs) by correspondence. It was due to be formally discussed at the 18 February 'Renew' meeting which*

*followed DGs (essentially an executive MB-DGs), but had to be deferred due to other items overrunning.*

*[Named individual] in the Renew team then circulated the attached paper for comment by 22<sup>nd</sup> Feb to DGs, copied to the Renew Delivery Board. I have a record of several correspondents agreeing with implementing option 2 and no dissenters (specifically 5 said yes to option 2 – but it may have been more as there is (sic) no reasons to assume I have a full record in the archive emails, particularly as I believe this office was under-staffed at that time)."*

If you cannot retrieve the correspondence from any central archive I suggest you invite all the above officers to check their own archives."

4. DEFRA replied on 1 October 2009 stating that it intended to extend the 20 working day deadline in order to consider the balance of the public interest as it was considering applying the exemption for the formulation of government policy at section 35(1)(a). It informed the complainant that it hoped to respond by 15 October 2009.
5. The complainant responded on the same day conveying his view that the requested information does not relate to government policy.
6. DEFRA provided its response to the request on 8 October 2009. It stated that the amount of information requested is very substantial, that several of the officers listed have since left the Department and gathering together the information would involve a significant cost and diversion of resources from the Department's other work likely to exceed the £600 cost limit. It stated that under section 12 of the FOIA it is not obliged to process the request further and would not be doing so.
7. It further stated that in fulfilling its duty to advise and assist requesters under section 16 of the FOIA, it had undertaken a specific search in the email archive held by the Permanent Secretary's office to extract the emails referred to in the fourth paragraph of the request and on which the request for information is based. It enclosed such emails stating that for the avoidance of doubt it does not equate to a search for all of the information requested.
8. The complainant requested an internal review on 9 October 2009. He stated that he had not been given advice and assistance that was focused on the material he was interested in or in terms of narrowing the request so that it could be met. He further stated that there has been no attempt to ascertain what relevant material could be supplied within the fees limit and no indication has been given of the way in which the cost of meeting the request has been arrived at. He stated the following:

"I had no interest whatsoever in the options for competency assessment. My interest in January 2009 was in the choice between options 1 and 2 for implementation of the rating distribution element of the new IPM system, which was supported by the risk assessment produced by [named individual's] team and the minutes of the Renew Executive dated 25 February 2008. The decision arrived at on 25 February flatly contradicted the 14 January decision, but of course I did not know this until 14 August 2009."

9. DEFRA provided its internal review response on 23 October 2009. It stated that the original decision was correct and in any case the information is not held. However, it stated that for completeness it had considered whether the appropriate fees limit would apply and provided reasons as to why it would.

### **Scope of the case**

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10. The complainant originally contacted the Commissioner on 11 November 2009 to complain about the way his request for information had been handled. The original complaint was closed on 1 October 2010 following the complainant's confirmation that he was withdrawing his complaint on the basis of the Commissioner's preliminary assessment that section 12 was applied appropriately and that on the balance of probabilities it was unlikely that the requested information was still held. The complainant then wrote to the Commissioner on 28 February 2012 requesting that the complaint be reconsidered as he had been provided with information on both 18 November 2010, under Employment Tribunal disclosure obligations, and 13 January 2012, under the FOIA, which showed that the officer who provided the internal review response was a party to an email conversation which fell within the scope of the request and therefore DEFRA's response was incorrect at that time. He alleged that DEFRA was clearly hiding behind procedural and technical aspects of the FOIA in order to cover up information it expressly knew existed and could easily be retrieved.
11. The Commissioner has considered whether DEFRA was entitled to rely on section 12 as a basis for refusing to provide the information requested and whether it was in breach of its obligation under section 16 to provide advice and assistance.
12. The Commissioner has not considered whether the information was held at the time of the request. This issue has been overridden by the fact that some information within the scope of the request is now in the possession of the complainant and in the public domain.

13. As the complainant has made it clear that he has now received the information he required, the purpose of this decision is to determine whether the response provided by DEFRA in relation to sections 12 and 16 was correct at the time rather than to consider ordering the disclosure of information.
14. In addition, DEFRA stated in its internal review response that it interpreted the request as a request for information relating to 'the choice between options 1 and 2 for implementation of the rating distribution element of the new IPM system' and because there was no evidence to suggest that there were two separate decisions, the information does not exist. The Commissioner does not agree that this was a complete interpretation of the request. DEFRA's opinion was that because there was no change of decision, the information was not held. However, the original request was wider than a 'change of decision' as it focused on email traffic concerning the IPM system and its implementation, between certain dates and certain officers. Although the complainant's internal review request pointed out that the email correspondence about 'options 1 or 2' for the competency assessment was a 'red herring' and was not what he required, the internal review request should not have been seen as limiting the request to a change in decision as that is more specific than 'the choice between options 1 and 2 for implementation of the rating distribution element of the new IPM system'. Therefore, DEFRA's statement that the information is not held was based on an inaccurate interpretation of the request.
15. For clarity, the Commissioner does not consider whether there had been a change in decision as the complainant alleges (see paragraph 10) as it cannot be categorically established from the documentation provided on this case and, more importantly, it is not the Commissioner's role to adjudicate on that particular issue.

## Reasons for decision

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### **Section 12 – Exemption where cost of compliance exceeds appropriate limit**

16. Section 12 of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate cost limit which, in this case, is £600 as laid out in section 3(2) of the fees regulations.
17. Regulation 4(3) of the Fees Regulations states that an authority, when estimating whether complying with a request would exceed the

appropriate limit, can only take into account the costs it reasonably expects to incur in:

- determining whether it holds the information;
  - locating the information, or documents containing it;
  - retrieving the information, or documents containing it; and
  - extracting the information from any documents containing it.
18. As the costs are calculated at £25 per person per hour for all authorities regardless of the actual cost or rate of pay, in this case the limit will be exceeded if the above activities exceed 24 hours.
19. In its internal review response, DEFRA stated that;

“There is an archive for all documents related to the Renew Programme but this does not generally include emails. However, there is no similar archive for emails. The storage of emails relating to the Programme would have been down to the individual recipient.

Although the emails stored in the Permanent Secretary’s Office is not a central or necessarily complete archive we have assumed that it is likely that it would be one of the more comprehensive archival sources available outside those of Renew in terms of your request. We have established the volume of emails held by the Office. The Office received 4,800 emails over this period and sent another 2,500 (received and sent are archived separately). The e-mails are stored in about 12 separate folders which are not jointly searchable. This means that the search would have to be undertaken per folder as opposed to across sub-folders in an inbox. In addition the folders are not organised by subject but by date so they are effectively unstructured.

We have undertaken an exercise to estimate how long such a search would take. We recognise that Outlook’s search and filter facilities could be used to narrow down the search by sender/recipient/and possible subject terms. It might also be the case that if certain email strings were identified it would facilitate or perhaps minimise the extent of the search in other accounts.

On the other hand that search would have to be replicated across some 12 individual folders. Any information in scope would probably be imbedded in the body of likely emails which would then need to be read through and extracted. Even assuming that the total email load could be reduced by half and that it would take one minute to check each email that would total around 60 hours, at a flat rate of £25 per hour that would exceed the appropriate limit of £600. Even a more heroic assumption that the email load could be reduced to a quarter it would still total about 30 hours. For completeness similar searches

would also have to be conducted across the in and sent boxes of around some 10 other members of staff.

Therefore we conclude that the fees limit was appropriately applied."

20. The complainant does not believe that cost is an obstacle to gathering and supplying the requested emails. He suggested to DEFRA that all it needed to do was to contact the individuals who are still in DEFRA and ask them to check their email archives or to check the Permanent Secretary's Office archive as she is likely to have been the focal point of most of the correspondence. He submitted to the Commissioner that even if a trawl of the Permanent Secretary's email account were to leave gaps such gaps could readily have been identified and further narrowly targeted requests could then have been made with a view to filling the gaps.
21. He is of the view that if common sense had been applied the material could have been found and collated very quickly and cheaply. He has stated that although the request involved a lot of different individuals it was the same information that was going to all of them. In relation to the 2 emails that were disclosed after this request, he has stated that they represented two discrete pieces of information that happened to be sent to multiple email addresses and that once they had been discovered in one email address box it would have been apparent from the address list that they had been sent in identical form to multiple other addresses. He has submitted that it would not have been necessary to search all the other email accounts.
22. The complainant has also stated that by using key search words, and knowing the finite list of names of those who had been involved in the Renew email address groups, DEFRA could have found all the relevant emails without exceeding the cost limit but it did not want to "find" the material.
23. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate and what amounts to a reasonable estimate has to be considered on a case by case basis. The Information Tribunal in the case of *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency*<sup>1</sup> said that a reasonable estimate is one that is "...sensible, realistic and supported by cogent evidence".

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<sup>1</sup> Appeal number EA/2006/0004, 30 October 2007

24. In his guidance on this subject<sup>2</sup>, the Commissioner states that a sensible and realistic estimate is one which is based on the specific circumstances of the case and should not be based on general assumptions, for example, that all records would need to be searched when it is likely that staff in the relevant department would know where the requested information is stored.

25. In the aforementioned guidance on the subject, the Commissioner also states that;

“A public authority is not obliged to search for, or compile some of the requested information before refusing a request that it estimates will exceed the appropriate limit. Instead, it can rely on having cogent arguments and/or evidence in support of the reasonableness of its estimate. It is good practice to give these arguments or evidence to the requestor at the outset to help them understand why the request has been refused. This reasoning is also likely to be required if a complaint is made to the Information Commissioner.

However, it is likely that a public authority will sometimes carry out some initial searches before deciding to claim section 12. This is because it may only become apparent that section 12 is engaged once some work in attempting to comply with the request has been undertaken. ”

26. The Commissioner sought further information from DEFRA, specifically in relation to the searches undertaken, in order to assess whether its estimate was reasonable and based on cogent evidence.

27. DEFRA confirmed that there was no central archive where emails relating to the Renew Programme were stored. There was a folder where all documents relating to the Renew Programme were stored but this was not generally used to store emails.

28. As regards whether DEFRA conducted an “archive search” on the 19 individuals named in the original request for information, it stated that such a search was not possible in respect of all of the named personnel. At the time that DEFRA received the request, a number of the personnel had left the department and their accounts were “decommissioned”. Any emails or other documents held in decommissioned IT accounts are not retrieved

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[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/costs\\_of\\_compliance\\_exceeds\\_appropriate\\_limit.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/costs_of_compliance_exceeds_appropriate_limit.ashx)



after the decommissioning and are not able to be retrieved if 6 weeks or more has lapsed since the decommissioning. Therefore, at the time of the request, there was no information in the IT accounts of staff that had left the department as their accounts no longer existed. As regards the IT accounts of the staff still employed by the department, it was determined that a search of these accounts would exceed the cost limit and so they were not searched, otherwise that would negate the effect of section 12 of the FOIA.

29. DEFRA repeated the explanation it had given to the complainant (contained in paragraph 19) and stated that; 'in view of that explanation in response to your questions, quite clearly, any meaningful search would have exceeded the cost limit and so such searches were not undertaken'.

30. The Commissioner notes that DEFRA has not provided an explanation of why it provided estimations for reducing the total email load by half or to a quarter. The Commissioner is aware that DEFRA's areas of responsibility include the following:

- the natural environment, biodiversity, plants and animals
- sustainable development and the green economy
- food, farming and fisheries
- animal health and welfare
- environmental protection and pollution control
- rural communities and issues

and that the Permanent Secretary is the most senior civil servant in a department, supporting the government minister who heads their department, and acting as the 'accounting officer' for their department, ensuring their department spends the money allocated to them appropriately. Therefore, in the absence of contrary evidence, the Commissioner considers that the Permanent Secretary's Office would have been dealing with far more than the implementation of the IPM system during the time in question. It therefore follows that its estimate that it would have to read half, or a quarter, of the 7300 emails received and sent by the Permanent Secretary's Office in order to identify the requested information was not a realistic estimate based on cogent evidence.

31. The Commissioner also notes that, although a public authority is not obliged to search for information before refusing a request that it estimates will exceed the appropriate limit, it is likely to carry out some initial searches before deciding to claim section 12. In this case DEFRA did not actually conduct any filtered search. It merely established the

volume of emails held by the area it considered would be 'one of the more comprehensive archival sources available outside those of Renew', that being the Permanent Secretary's Office.

32. The Commissioner considers that if DEFRA had conducted a search, possibly using the sender, recipient and likely subject terms as it had confirmed was possible, it could have then provided a more accurate estimate of the number of emails it would need to examine rather than simply halving, or reducing to a quarter, the total number of emails sent. The Commissioner notes that the 7300 emails were housed in 12 separate folders but does not consider that this would significantly increase the time taken to conduct a filtered search. It has also been noted that DEFRA did not carry out any sampling exercise.
33. DEFRA stated that, for completeness, similar searches to that described for the Permanent Secretary's Office emails would have to be conducted in respect of some 10 other members of staff. However, as the complainant, in his internal review request, stated that the Permanent Secretary is likely to have been the focal point of the correspondence, the Commissioner does not consider that any time taken to conduct other searches could be included in a reasonable costs estimate.
34. The Commissioner considers that DEFRA did not provide an adequate explanation for him to conclude that the estimate of 60 or 30 hours was reasonable and therefore has no choice but to conclude that the exemption at section 12(1) of FOIA is not engaged.

### **Section 16 – Duty to provide advice and assistance**

35. Section 16 of the FOIA states that it shall be the duty of a public authority to provide advice and assistance to requesters, so far as is reasonable, and where a public authority conforms with the code of practice under section 45 in relation to the provision of advice and assistance, it will be taken to comply with the duty imposed.
36. Where a public authority cites section 12, paragraph 14 of the section 45 code of practice indicates that the authority should consider providing an indication of what, if any, information could be provided within the costs limit. This allows the applicant to choose how to refine the request to successfully obtain a more limited piece or section of the requested information.
37. As stated in paragraph 7, in its initial response, DEFRA stated that in fulfilling its duty to advise and assist requesters under section 16 of the FOIA, it had undertaken a specific search in the email archive held by the Permanent Secretary's office to extract the emails that '[named individual] referred to in her email to [named individual] and on which

the request for information is based'. It disclosed those emails to the complainant.

38. The Commissioner understands that the emails disclosed related to the options for the competency assessment rather than the options for the implementation of the IPM system. In his internal review request, the complainant made it clear that the information disclosed was not the information he was interested in and that the reference in the request to the email of 27 January 2009 was referred to as evidence of the way the Renew Executive apparently made decisions, i.e. by email correspondence.
39. The complainant stated that he was not given advice and assistance that was actually focused on the material he was interested in or in terms of narrowing the request so it could be met or attempting to ascertain what relevant material could be supplied within the fees limit. He suggested that the individuals named in the request that were still working for DEFRA could be contacted and asked to check their email archives and/or paper records. He also pinpointed an individual, the Permanent Secretary, who was likely to have been the focal point of the correspondence.
40. The complainant has also submitted that as the person who conducted the internal review was a party to emails falling within the scope of the request, and so had personal knowledge of the requested information, that reviewer could have easily helped to narrow the searches which would have been necessary to locate the information. Alternatively, should that still have involved DEFRA exceeding the appropriate limit to respond to the request he suggests that DEFRA could have contacted him with an alternative approach to resolve his request. He believes that the reviewer could have pinpointed at least some of the emails which fell within the scope of his request, and could have suggested disclosing these to him as a means of narrowing his request.
41. DEFRA explained to the Commissioner that it was not sure that the reviewer held any emails in her IT account, that she did not have any active role in the renew programme and so she would not have needed to have kept them as part of the corporate record, and that emails were copied to her for information as a member of the Senior Civil Service. DEFRA also stated the reviewer would not have been permitted to save any of these emails in 'Renew' folders and, as they were sent to her for information only, it is likely that she deleted them after reading them. It did not accept the assertion that it seems reasonable to conclude that at least some of the information could have been identified fairly easily by locating the reviewer's emails within the archives.

42. DEFRA stated that its usual practice when applying the cost limit is to provide advice and assistance by inviting requesters to narrow down their requests so that they fall within the cost limit and, if possible, it would suggest ways in which that could be achieved. If the nature of the request is such that it cannot be narrowed down, then it would usually still invite the requester to consider narrowing down the request so that it falls within the cost limit, but we would not be able to suggest ways in which that could be done. It stated that by supplying the complainant with a copy of emails and documents that it believed contained at least some of the information that he was seeking it was attempting to ascertain what material could be supplied within the fees limit. It proposed that the alternative would have been to describe the emails and documents that it had located and ask the complainant if he would like them sent to him. It stated that this would have also meant a delay in the complainant receiving the information so it was more expedient to simply send the information and for the complainant to let us know if he needed anything further. DEFRA further stated that if this invitation were not given in this case, it could only assume that it was decided at the time that there was no meaningful way in which the request could be narrowed down and so there was no point in inviting the complainant to consider that. It stated that given the nature of the request (i.e. a specific list of people and the wide ranging scope of the request), it is reasonable to conclude that that is what occurred in this case, since to narrow down the request would involve a small list of people and not such a wide scope, both of which would likely exclude the information that the complainant was seeking.
43. As an example, DEFRA stated that if a requester were to ask for figures for a particular activity for each of the last five years and we were to determine that complying with such a request would exceed the cost limit, to fulfil its duty of providing advice and assistance, it would suggest the number of years for which it could supply the information within the cost limit. It submitted that with this request, it was not possible to suggest ways in which the request could be narrowed down so that it fell within the cost limit as a suggestion that the complainant reduces the names of the officers that he had listed could omit key personnel and deny him receiving the information. It asserted that it was not possible to suggest a smaller timeframe for the same reason.
44. The Commissioner accepts that the reviewer may not have necessarily retained personal knowledge of the emails in questions, given that she was not directly involved in the issue and the time that had elapsed between the emails in question and the date of the review. He does not consider that there is enough evidence to determine that this particular aspect of the request constitutes a breach of DEFRA's duty to provide advice and assistance.

45. However, the Commissioner does not agree that DEFRA fulfilled its duty to provide advice and assistance by disclosing the emails it providing in its initial response. DEFRA had, in effect, removed the choice from the complainant as to what information was of most interest to him and the Commissioner considers that the choice of where to direct limited resources should always be made by the requester. The complainant made it clear in his review request that the emails provided by DEFRA were not what he was requesting. DEFRA did not then attempt to provide more accurate advice and assistance. It stated to the Commissioner that it can only assume that it was decided at the time that there was no meaningful way in which the request could be narrowed down and so there was no point in inviting the complainant to consider that but it did not indicate to the complainant that it was not able to provide any information at all within the appropriate limit. The Commissioner considers this to be a breach of section 16 as DEFRA failed to indicate that it was unable to provide any information within the appropriate limit. This is based on the interpretation of the phrase in paragraph 14 of the section 45 Code of Practice '...should consider providing an indication or what, **if any**, information could be provided within the cost ceiling'.
46. In addition to not pro-actively providing an indication of how the request could be narrowed down, DEFRA did not respond to the complainant's suggestion that the search could be narrowed by focussing on the Permanent Secretary's emails. It did ascertain that the Permanent Secretary's Office email archive would be the most appropriate archive source for the search but the Permanent Secretary's Office email archive is likely to be a lot larger than an individual's email archive. It stated to the Commissioner that it could not suggest ways in which the request could be narrowed down so that it fell within the cost limit as a suggestion that the complainant reduces the names of the officers that he had listed could omit key personnel and deny him receiving the information. However, it did not act on the suggestion made by the complainant that one individual would be the focal point of the information. By not using this suggestion to provide the complainant with an indication of what information could be provided within the costs limit, by, for example, conducting a filtered search of that one individual's emails, the Commissioner considers that DEFRA was in breach of section 16.

## Right of appeal

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47. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

48. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Andrew White**  
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