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# **FOIA: Making Transparency a Priority**

**Advanced Municipal Elected Officials  
Institute of Government**

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## S.C. Freedom of Information Act

- Codified at Chapter 4 of Title 30 of the Code of Laws of South Carolina 1976
- FOIA governs two functions of government:
  1. The disclosure of public records
  2. Conducting public meeting



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## Purpose of FOIA

S.C. Code §30-4-15: The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

Weidemann v. Town of Hilton Head Island (1998): “The purpose of the FOIA is to protect the public from secret government activity.”

Campbell v. Marion County Hosp. Dist. (2003): “The FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature.”



## Applicability of FOIA

Public body means . . . any public or governmental body or **political subdivision of the State**, including counties, municipalities, townships, school districts, and special purpose districts, or **any organization, corporation, or agency supported in whole or in part by public funds or expending public funds**, including **committees, subcommittees, advisory committees**, and the like of any such body by whatever name known...”

Quality Towing, Inc. v. City of Myrtle Beach (2001): Review committee composed of city employees created by the city manager to evaluate bids by towing companies was an “advisory committee” and thus a “public body.”

DomainsNewMedia.com, LLC v. Hilton Head Island-Bluffton Chamber of Commerce (2018): Chamber of Commerce was not a public body even though it received and expended accommodation tax funds because other statutes provided different accountability measures and public access to how public funds were spent.



## Applicability of FOIA

"Public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body.

Definitely a public record:

- Documents and records in hardcopy and electronic formats
- Emails
- Text messages on phones provided by the public body

More difficult questions:

- Emails from personal email accounts dealing with business of the public body
- Text messages on phones not provided by the public body
- Documents provided to the public body and taken back up



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## Applicability of FOIA

"Meeting" means the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.

Lambries v. Saluda County Council (2014): “Meetings are not limited to instances where action is taken. . . . Deliberative gatherings are included as well, and deliberation in this context connotes not only collective decision-making but also the collective acquisition and exchange of facts in preparation for the final decision.”



## Public Records

S.C. Code §30-4-30(A)(1) “A person has a right to inspect, copy, or receive an electronic transmission of any public record of a public body, except as otherwise provided by Section 30-4-40, or other state and federal laws, in accordance with reasonable rules concerning time and place of access.

- Public bodies must respond to any written request for public records
- Public bodies are almost never required to create a public record or an electronic version of a hardcopy record\*
- Certain records must be made available for inspection during business hours without the need for a written request:
  - Minutes of meetings held during the preceding six months
  - Law enforcement incident reports for the preceding fourteen day period
  - Documents identifying persons detained for the preceding three months
  - Documents produced by a public body or its agent that were distributed to or reviewed by a member of the public body during a public meeting for the preceding six months

\*See, S.C. Code §30-4-55 for exception



# Public Records

## Response Times and Formats

- Public bodies must respond to any written FOIA request
- Initial response must state whether a record exists, and ideally will state whether it will be withheld or redacted under an exemption
  - Respond within 10 business days for records 2 years old or less
  - Respond within 20 business days for records older than 2 years
- After the initial response is made, records must be provided:
  - Within 30 calendar days for records 2 years old or less
  - Within 35 calendar days for records older than 2 years



# Public Records

## Fees

S.C. Code §30-4-30(B): “The public body may establish and collect reasonable fees not to exceed the actual cost of the search, retrieval, and redaction of records.”

- Records must be furnished at the lowest possible cost (hourly salary of lowest-paid employee capable of fulfilling request)
- Fees may not include time to determine if an exemption applies, including legal fees, but may include legal fees necessary to redact records
- Public body may require a deposit of not more than 25% of anticipated costs before copies of documents are made
- Public body must adopt a fee schedule and post it on its website



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# Public Records

## Exemptions in general

S.C. Code §30-4-40: Lists records that a public body may exempt from disclosure

- Most exemptions are not mandatory
- Records that contain both exempt and non-exempt material must be redacted and disclosed
- Many other exemptions are located elsewhere in State and federal law



## Public Records

### Exemptions listed under §30-4-40

- Personal privacy—“information of a personal nature where public disclosure would constitute an unreasonable invasion of personal privacy”  
Burton v. York County Sheriff’s Dept.: Employment records of sheriff’s deputies who had been suspended for misconduct were not exempt  
City of Columbia v. ACLU of South Carolina: Internal investigation reports of law enforcement agencies are not exempt
- Contracts and documents related to contractual negotiations—Exempt until the contract has been entered into or the property had been sold or purchased
- Compensation—disclosure is based on total compensation:  
\$50,000 and up and department heads—the amount of compensation  
Less than \$50,000—generally the salary range in \$4,000 increments



# Public Records

## Exemptions listed under §30-4-40

- Records subject to attorney-client privilege  
Must be careful to maintain attorney-client privilege for exemption to attach
- Economic development—records related “to efforts or activities of a public body . . . to attract business or industry to invest within South Carolina”  
Documents become subject to disclosure when (1) the offer has been accepted, and (2) the project has been announced.
- New Employment—“materials . . . gathered by a public body during a search to fill an employment position”  
Materials related to the finalists for a position must be disclosed (no fewer than 3, but can be more)



## Public Records

Other exemptions to be aware of:

- S.C. Code §6-1-120: “financial information, or other information indicative of units of goods or services sold, provided by a taxpayer included in a report, tax return, or application required to be filed by the taxpayer”
- S.C. Code §23-1-240: “Data recorded by a body-worn camera is not a public record subject to disclosure under the Freedom of Information Act.”
- S.C. Code §63-19-2030: “law enforcement records and information identifying children pursuant to this chapter are confidential and may not be disclosed directly or indirectly to anyone, other than those entitled under this chapter to receive the information.”
  - A child’s legal counsel is authorized to receive these records
  - A child’s parent is not authorized to receive records



## Public Records

### S.C. Code § 30-2-50: Obtaining Personal Information for Commercial Solicitation

(A) A person or private entity shall not knowingly obtain or use personal information obtained from a state agency, a local government, or other political subdivision of the State for commercial solicitation directed to any person in this State.

(B) Each state agency, local government, and political subdivision of the State shall provide a notice to all requestors of records pursuant to this chapter and to all persons who obtain records pursuant to this chapter that obtaining or using public records for commercial solicitation directed to any person in this State is prohibited.

(C) All state agencies, local governments, and political subdivisions of the State shall take reasonable measures to ensure that no person or private entity obtains or distributes personal information obtained from a public record for commercial solicitation.

(D) A person knowingly violating the provisions of subsection (A) is guilty of a misdemeanor and, upon conviction, must be fined an amount not to exceed five hundred dollars or imprisoned for a term not to exceed one year, or both.



## Public Records

Complying with §30-2-50:

Commercial solicitation means contact by telephone, mail, or electronic mail for the purpose of selling or marketing a consumer product or service.

What requests are covered under this provision?

- Names and addresses of new business license applicants for the past year by a company that sells copiers
- Names and addresses of all water and sewer customers by a company that provides sewer line insurance
- Building permit information, including property owner names and addresses, for residential construction over the past year by a trade publication that compiles residential construction costs



## Best Practices

### *Responding to FOIA Requests*

1. Adopt a comprehensive FOIA Policy.
2. Include a fee schedule and deposit requirements.
3. Assign a specific position the responsibility to coordinate FOIA responses.
4. Ask requestors to use an approved form, but respond to all “written requests.”
5. Adopt all possible exemptions, but keep in mind that typically the decision to apply an exemption is up to the local government.
6. Respond to FOIA requests as quickly and completely as possible.
7. Include a “completion form” with all FOIA responses that includes a commercial solicitation warning.



# Public Meetings

## S.C. Code §30-4-80: Notice of Meetings

- The schedule of regular meetings must be posted at the beginning of each calendar year
- Agendas for regular and special meetings must be posted at least 24 hours prior to the meeting
  - Must be posted at the main office and on your website if you have one
  - Notice must include the agenda, date, time and place of the meeting
- An agenda must also be given to media and any person who requests receipt of notice



# Public Meetings

## Agendas in general

- A public body must create an agenda for all regularly scheduled and special-called meetings
- No items may be added to the agenda within 24 hours of the meeting
- Changes to the agenda within a meeting must be approved by a 2/3 vote of members present
- If the item to be added is a final reading or there will not be an opportunity for public comment, the change must be approved by a 2/3 vote and it must be an “emergency or an exigent circumstance”
- “Exigency” – An urgent need or circumstance



## Executive Sessions

S.C. Code §30-4-60: “Every meeting of all public bodies shall be open to the public unless closed pursuant to Section 30-4-70 of this chapter.”

S.C. Code §30-4-70: Executive sessions may be held for the discussion of any of the following reasons:

- (1) Discussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee, a student, or a person regulated by a public body or the appointment of a person to a public body;
- (2) Discussion of negotiations incident to proposed contractual arrangements and proposed sale or purchase of property, the receipt of legal advice where the legal advice relates to a pending, threatened, or potential claim or other matters covered by the attorney-client privilege, settlement of legal claims, or the position of the public agency in other adversary situations involving the assertion against the agency of a claim;
- (3) Discussion regarding the development of security personnel or devices;
- (4) Investigative proceedings regarding allegations of criminal misconduct; or
- (5) Discussion of matters relating to the proposed location, expansion, or the provision of services encouraging location or expansion of industries or other businesses in the area served by the public body.



## Executive Sessions

Before going into executive session . . . the presiding officer shall announce the specific purpose of the executive session. As used in this subsection, "specific purpose" means a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section. However, when the executive session is held pursuant to Sections 30-4-70(a)(1) or 30-4-70(a)(5), the identity of the individual or entity being discussed is not required to be disclosed to satisfy the requirement that the specific purpose of the executive session be stated.

Freedom of Information Act, Section 30-4-70(b)



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## Case Law Re: Executive Sessions

*Quality Towing* (2001)

### Facts:

- Agenda: “Towing—Contractual Recommendation”
- Announcement: “This matter will be discussed in executive session”



### Holding:

- “FOIA is not satisfied merely because citizens have some idea of what a public body might discuss in private. As evidenced by the minutes, the presiding officer did not announce the specific purpose of the executive session.”

*Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862 (2001).



## Case Law Re: Executive Sessions

*Donohue* (2015)

### Facts:

Agenda/Announcement: “Upon the request of the City Administrator and in accordance with Section 30-4-70 (a) (2) . . . City Council unanimously voted to go into executive session for the purpose of discussion of negotiations incident to 1 proposed contract”



### Holding:

- Reiterates the holding from *Quality Towing*
- “The circuit court erred in finding that respondents satisfied the FOIA's specific purpose requirement when they announced the specific purpose of the executive session in these types of general terms.”

*Donohue v. City of North Augusta*, No. 27530, 2015 WL 3757108 (S.C. Jun. 17, 2015).



# Case Law Re: Executive Sessions

*Brock I (2014) and Brock II (2016)*

## A Tale of Three Special-Called Meetings and Three Executive Sessions:

### *November 13*

2014      2016

- Agenda: “Legal and Contractual Matters pertaining to properties near Shem Creek.”
- Announcement: “Staff would like to ask Council to go into executive session to discuss legal and contractual matters pertaining to properties near Shem Creek...”
- Action: Motion to move forward with property negotiations (not noticed on agenda)



### *November 16*

- Agenda: “Legal Advice pertaining to OK Tire property litigation”
- Announcement: “A motion was needed to adjourn into executive session regarding legal advice pertaining to the OK Tire property litigation . . .”
- Action: Motion to reject offer on property (not noticed on agenda)



### *December 5*

- Agenda: “Receive legal advice pertaining to the OK Tire Store Litigation”
- Announcement: “The settlement of legal issues and purchase of property known as the OK Tire Store and other properties” and “legal advice on OK Tire property litigation.”
- Action: Motion to approve settlement agreement (not noticed on agenda)



*Brock v. Town of Mount Pleasant*, 411 S.C 106, 767 S.E.2d 203 (Ct. App. 2014).



## Case Law Re: Executive Sessions

*Brock II* (2016)

### The Supreme Court's Guidance on Action out of Executive Session:

*Although we conclude the Town committed technical violations of FOIA, we are not unsympathetic to the Town's position. We . . . recognize that unforeseen events often occur and Town Council may “not have known what action it would take—to include on an agenda—prior to discussing the relative legal issues and personnel matters during executive session.” Thus, our holding does not require the Town to list with specificity the actions it plans to take following an executive session; it only requires the Town give notice that some action may be taken. This gives Town Council the flexibility to act as may be discovered appropriate during executive sessions while ensuring the public receives notice Town Council may take such action.*



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## Executive Sessions

Suggested announcements of specific purpose:

- Employment matters?
- Contractual negotiations?
- Sale or purchase of property?
- Attorney-client privilege?
- Investigation of criminal misconduct?
- Location of expansion of services?



## Executive Sessions

Suggested announcements of specific purpose:

- Employment matters – reference the department or division the individual is in
- Contractual negotiations – name of party, service being contracted for, or “project name”
- Sale or purchase of property – name of owner or general info such as acreage if secrecy matters
- Attorney-client privilege – adverse party in litigation, general description of the legal issue
- Investigation of criminal misconduct – alleged misconduct
- Location of expansion of services – the service to be expanded or project name if one exists



## Other Public Meeting Issues

S.C. Code §30-4-70(c): No chance meeting, social meeting, or electronic communication may be used in circumvention of the spirit of requirements of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.

How does this provision impact:

- Social media?
- Email?
- Text messages?
- The annual Christmas party



## Consequences of FOIA Violations

S.C. Code §30-4-100: allows any citizen to seek injunctive relief and attorneys fees for violations, makes FOIA useful to collaterally attack projects

- “A violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists”
- Any citizen of the State may bring an action in circuit court alleging a violation of FOIA
- Initial hearing must be held within 10 days, but the court will likely not hold a final hearing for up to six months
- The court may order any equitable relief that it considers appropriate, including the invalidation of the underlying action
- The court may grant a prevailing challenger attorneys fees and costs for any litigation



## Public Meeting Best Practices

Provide notice of executive sessions and include the statement of purpose where possible, however, a public body may enter into executive session to discuss an issue regardless of whether it is noticed on the agenda

Notice a general executive session on every agenda, regardless of whether you need one

Notice “action out of executive session” on every agenda, regardless of whether an executive session is planned

The presiding officer should state the purpose in executive session even where it is included on the agenda

# Project “Game Changer”

## FOIA QUIZ



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## Project “Game Changer”

The City of Sparkleberry has been working for years with a private developer on a “game changing” project that will result in \$250 million in public and private investment. The Project has a major opponent in retiree Ned Nimby. Yesterday, he filed a lawsuit against the City challenging the validity of ordinances that are essential to the success of the Project. This morning, he delivered a hand-written letter to your office that, in addition to being a screed against the Project, included the following:

“I order you to give me searchable electronic copies of all emails between all city staff and elected officials that have anything to do with Project Game Changer for use in the lawsuit I filed yesterday. Since these emails are all discoverable, you have to give them to me for free.”



## Project “Game Changer”

- Is this a FOIA request? Does it matter that you’re involved in active litigation?
- Assuming you have to give him something, your search of the City’s email system reveals thousands of emails, including the ones below.
  - An email from the Administrator to the Chairman where the Chairman calls Ned an SOB.
  - An email from the Administrator to her husband saying she would be home late because she is “working late again on this damn project.”
  - An email from the City Attorney discussing how the City would respond to litigation if sued.
  - An email string from the Administrator to the City Attorney and the executive director of the Chamber of Commerce where they discuss the merits of “slowplaying” the litigation.



## Project “Game Changer”

- Is this a FOIA request? Does it matter that you’re involved in active litigation?
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  - An email from the Administrator to her husband saying she would be home late because she is “working late again on this damn project.”
  - An email from the City Attorney discussing how the City would respond to litigation if sued?
  - An email string from the Administrator to the City Attorney and the executive director of the Chamber of Commerce where they discuss the merits of “slowplaying” the litigation.

### **§ 30-4-40. Matters exempt from disclosure.**

(a) A public body may but is not required to exempt from disclosure the following information:

(7) **Correspondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships.**



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## Project “Game Changer”

- What form would you provide any emails in?
- The City’s FOIA policy authorizes charging for FOIA responses. May you charge him in this case?



## Project “Game Changer”

- What form would you provide any emails in?
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### **§ 30-4-30. Right to Inspect or copy public records; fees; notification as to public availability presumption upon failure to give notice; records to be available when requestor appears in person.**

(b) The public body may establish and collect fees not to exceed the actual cost of searching for or making copies of records. Fees charged by a public body must be uniform for copies of the same record or document. . . . The records must be furnished at the lowest possible cost to the person requesting the records. **Records must be provided in a form that is both convenient and practical for use by the person requesting copies of the records concerned, if it is equally convenient for the public body to provide the records in this form. Documents may be furnished when appropriate without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public. Fees may not be charged for examination and review to determine if the documents are subject to disclosure.** Nothing in this chapter prevents the custodian of the public records from charging a reasonable hourly rate for making records available to the public nor requiring a reasonable deposit of these costs before searching for or making copies of the records.



## Project “Game Changer”

During a Sparkleberry City Council meeting, in the “Administrator’s Update” agenda item, the Administrator provides Council with an update on Project Game Changer, including the sale of City-owned land to the Developer. Councilman Warren Clueless insists knowing what the City’s absolute bottom line is on the price of the land. The Administrator suggests that might best be discussed in an executive session, however, there is no executive session listed on the agenda.

- May the Council still meet in executive session to discuss this matter?
- If so, how should the purpose of the executive session be worded?
- May Council take action after the executive session on the price of the land?



## Project “Game Changer”

- May the Council still meet in executive session to discuss this matter?
- If so, how should the purpose of the executive session be worded?
- May Council take action after the executive session on the price of the land?

### **§ 30-4-70. Meetings which may be closed; procedure; circumvention of chapter; disruption of meeting; executive sessions of General Assembly.**

(a) A public body may hold a meeting closed to the public for one or more of the following reasons:

(2) Discussion **of negotiations incident to proposed contractual arrangements and proposed sale or purchase of property**, the receipt of legal advice where the legal advice relates to a pending, threatened, or potential claim or other matters covered by the attorney-client privilege, settlement of legal claims, or the position of the public agency in other adversary situations involving the assertion against the agency of a claim.

#### ***Brock v. Town of Mount Pleasant, 415 S.C. 625 (2016)***

Although we conclude the Town committed technical violations of FOIA, we are not unsympathetic to the Town's position. We, like the trial court and court of appeals, recognize that unforeseen events often occur and Town Council may “not have known what action it would take—to include on an agenda—prior to discussing the relative legal issues and personnel matters during executive session.” **Thus, our holding does not require the Town to list with specificity the actions it plans to take following an executive session; it only requires the Town give notice that some action may be taken.** This gives Town Council the flexibility to act as may be discovered appropriate during executive sessions while ensuring the public receives notice Town Council may take such action.



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## Project “Game Changer”

In order to support the Project, Sparkleberry has been involved in a two-year project to expand its wastewater plant, replace sewer lines, and other smaller work to bring its aging wastewater system in the area of the Project up to par. The City has procured the services of various contractors for different components. Despite the fact that the City has adopted a policy requiring the use of a “FOIA Request Form,” you receive the following email one morning from community activist, “government watchdog,” and good buddy of Ned Nimby, Nancy Niedermeyer:

“Pursuant to the FOIA Act, I hereby request a list, sortable in Excel form, of all contractors who have visited the City Manager within the past 12 months along with the date of their visit and whether that contractor was selected after that visit.”



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## Project “Game Changer”

- Do you have to respond even though she didn’t use your awesome form?
- If you discover you have no documents responsive to her request, do you have to respond at all?
- Assuming you have to respond, what form should your response take?



## Project “Game Changer”

- Do you have to respond even though she didn’t use your awesome form?
- If you discover you have no documents responsive to her request, do you have to respond at all?

**§ 30-4-30. Right to Inspect or copy public records; fees; notification as to public availability presumption upon failure to give notice; records to be available when requestor appears in person.**

(c) Each public body, upon written request for records made under this chapter, shall within ten days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of any such request notify the person making such request of its determination and the reasons for it . . . . Such a determination shall constitute the final opinion of the public body as to the public availability of the requested public record and, if the request is granted, the record must be furnished or made available for inspection or copying. If written notification of the determination of the public body as to the availability of the requested public record is neither mailed nor personally delivered to the person requesting the document within the fifteen days allowed herein, the request must be considered approved.

- Assuming you have to respond, what form should your response take?



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## Project “Game Changer”

The Project is on the brink of either success or failure. The finer points of the deal between the City and the Developer have been fully negotiated and the documents have been signed. In order to gain public support for the Project, the Chairman held a major media event where he and the Developer gave remarks and showed renderings of the Project. Everything hinges on the success of the litigation with Ned Nimby. Nimby submits yet another hand-written request (refusing to be ground under the boot of City fascists by using their FOIA form). Nimby requests “a fiscal analysis of the incentives offered to the Developer.” The City has never had a formal analysis prepared, although the anticipated benefits to the City have been discussed in open sessions of meetings of the Council.

- Does the City have to respond? What would the response look like?



## Project “Game Changer”

- Does the City have to respond? What would the response look like?

§ 30-4-55. Disclosure of fiscal impact on public bodies offering economic incentives to business; cost-benefit analysis required.

A public body as defined by Section 30-4-20(a), or a person or entity employed by or authorized to act for or on behalf of a public body, that undertakes to attract business or industry to invest or locate in South Carolina by offering incentives that require the expenditure of public funds or the transfer of anything of value or that reduce the rate or alter the method of taxation of the business or industry or that otherwise impact the offeror fiscally, **must disclose, upon request, the fiscal impact of the offer on the public body and a governmental entity affected by the offer after:**

**(a) the offered incentive or expenditure is accepted, and**

**(b) the project has been publicly announced or any incentive agreement has been finalized, whichever occurs later.**

The fiscal impact disclosure **must include a cost-benefit analysis that compares the anticipated public cost of the commitments with the anticipated public benefits.** Notwithstanding the requirements of this section, information that is otherwise exempt from disclosure under Section 30-4-40(a)(1), (a)(5)(c), and (a)(9) remains exempt from disclosure.



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