

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 4 August 2014

Public Authority: Newbury Town Council
Address: Town Hall
Market Place
Newbury
Berkshire
RG14 5AA

Decision (including any steps ordered)

1. The complainant has requested information relating to subsidence damage to Victoria Park. Newbury Town Council initially applied the exemption for information provided in confidence at section 41 of the FOIA and the exemption for legal professional privilege at section 42 of the FOIA to the requested information.
2. The Commissioner's decision is that the information requested at points 1 – 4 of the request is environmental and therefore should have been dealt with under the EIR. He has also decided that the exception at regulation 12(5)(b) applies to that information.
3. In relation to the information requested at point 5, the Commissioner has decided that Newbury Town Council was not entitled to rely on section 41 as it has not provided sufficient justification for the application of this exemption.
4. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose the information requested at point 5 of the request.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 9 December 2013, the complainant wrote to Newbury Town Council ('the council') via the WhatDoTheyKnow website¹ and requested information in the following terms:

"Please will you let me have the following information relating to the reported subsidence damage to Victoria Park:

 1. The original hydrogeological report.
 2. The follow-up hydrogeological report.
 3. The report you commissioned on the damage and cost of repair.
 4. Any additional report you commissioned into the cause of the reported cracking and subsidence and its associated damage.
 5. Any contract or memorandum that imposes a duty of confidentiality in relation to any of the information in those reports provided by third parties."
7. The council responded on 6 January 2014 and confirmed it held the requested information. It refused to disclose the hydrogeological reports citing the exemption at section 41 and refused to disclose the 'Quantum report' and the 'Expert report' citing the exemption at 42 of the FOIA.
8. The complainant requested an internal review on 15 January 2014. The review request contained 65 numbered points. The main basis for the review request was that the information is environmental, and therefore should have been dealt with under the EIR, and that the council did not disclose the confidentiality agreement or provide a reason for not disclosing it.
9. The council provided an internal review response on 11 February 2014. It responded to each of the 65 points but maintained that the request should be dealt with under the FOIA, stating that as the request was

¹ https://www.whatdotheyknow.com/request/subsidence_damage_in_victoria_pa#incoming-467082

specifically made under the FOIA and there is no health and wellbeing impact, it is correct to progress it under the FOIA rather than the EIR. It maintained that sections 41 and 42 of the FOIA apply. The council also confirmed that the confidentiality requirement is exempt under section 41 of the FOIA.

10. On 14 February, the complainant wrote to the council again asking it to consider another 28 numbered points.
11. The council responded on 3 March 2014 stating that the review is complete and it does not have anything further to add.

Scope of the case

12. The complainant contacted the Commissioner on 21 February 2014 to complain about the way his request for information had been handled.
13. The Commissioner wrote to the council on 7 May 2014 providing his opinion that the information requested is environmental information falling within the scope of the EIR. He requested that the council review the case and consider disclosing the requested information. He informed the council that if it is not prepared to disclose the withheld information it must specify which exceptions of the EIR it is relying on to withhold the information and submit a full rationale as to why the exception applies along with arguments considered in favour of disclosure and in favour of maintaining the relevant exception under the EIR. The Commissioner said that if the council wish to apply the nearest equivalent exceptions to the exemptions it is relying on under the FOIA (i.e. sections 41 and 42) then it should answer detailed questions which he posed in relation to regulations 12(5)(b) and 12(5)(e). He also provided his opinion that it is likely that some of the withheld information constitutes information on emissions and requested that the council provide a rationale for why the information (or parts of it) does or does not relate to information on emissions.
14. The council confirmed that it wished to maintain reliance on sections 41 and 42 of the FOIA as it believed that the requested information was not environmental. However, it also provided arguments in support of the exceptions at regulations 12(5)(b) and 12(5)(e) in the event that the Commissioner finds that the information is environmental.
15. The Commissioner has considered whether the council dealt with the request under the appropriate legislation.
16. Having decided that the request for the reports (points 1 – 4 of the request) should have been dealt with the EIR and the request for the

confidentiality requirement (point 5 of the request) should have been dealt with under the FOIA, he then considered whether the exception at regulation 12(5)(b) and the exemption at section 41 applied in this case.

17. Having found that the exception at regulation 12(5)(b) applies to the reports, it has not been necessary to consider the exception at regulation 12(5)(e).

Reasons for decision

The appropriate legislation – FOIA or EIR?

18. The first matter for the Commissioner to decide is whether the requested information is covered by the FOIA or the EIR. Section 39 of the FOIA states that information is exempt information if the public authority holding it is obliged, by regulations under section 74 of the FOIA, to make the information available to the public in accordance with those regulations or would be so obliged but for any exemption under those regulations. The regulations under section 74 of the FOIA are the EIR. Information falls to be considered under the EIR if that information is environmental information.

19. Regulation 2(1) of the EIR defines 'environmental information' as having the same meaning as in Article 2(1) of Council Directive 2003/4/EC:

'namely any information in written, visual, aural, electronic or any other material form on –

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)'.

20. In the Commissioner's view, the use of the word 'on' indicates a wide application and will extend to any information about, concerning, or relating to the various definitions of environmental information.
21. The council said that it does not believe that any of the requested information falls within the definition of environmental information. In order to support that belief, it provided the Commissioner with an explanation of the reasoning behind the provision of each of the reports.
22. Having seen the above reports and considered the council's submission, the Commissioner's view is that they clearly constitute environmental information within the meaning of the EIR. The Liability reports are hydrogeological assessments. The Commissioner notes that hydrogeology is the study of water both on and beneath the earth's surface and considers that such hydrogeological assessments, which include for example, geological data, information on groundwater levels, river flows, rainfall and ground disturbance, firmly fall within the definition of environmental information at regulation 2(1)(a). The Quantum Report assesses the damage caused to Victoria Park and includes information on the nature of the damage, whether the damage is repairable and the costs of such repairs. The Commissioner considers that such information is clearly environmental falling within the definition of environmental information at regulations 2(1)(a) and 2(1)(c), as repairing the damage constitutes a measure likely to affect the land and landscape. The Causation Report considers ground disturbance in Victoria Park and the likely future effects of past dewatering and includes information on various geological factors. The Commissioner considers that such information firmly falls within the definition of environmental information at regulations 2(1)(a) and 2(1)(b).
24. The Commissioner has also seen the Confidentiality Agreement and agrees with the council that this does not constitute environmental information and therefore should be considered under the FOIA.

Regulation 12(5)(b)

25. Regulation 12(5)(b) applies to information where disclosure would have an adverse effect on the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
26. The council said that all of the reports were commissioned in support of its claim for damages against the proposed defendant and are subject to legal professional privilege. In particular, litigation privilege.
27. Legal professional privilege protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal, in the case of *Bellamy v the Information Commissioner and the DTI*² as;

"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation." (paragraph 9)
28. There is no specific exception within the EIR referring to information which is subject to legal professional privilege, however both the Commissioner and the Tribunal have previously decided that regulation 12(5)(b) encompasses such information.
29. In the case of *Kirkaldie v ICO & Thanet District Council*³ the Tribunal stated that;

"The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation". (paragraph 21)

² Appeal no. EA/2005/0023

³ Appeal no. EA/2006/0001

30. Therefore the Commissioner considers that legal professional privilege is a key element in the administration of justice and a key part of the activities that will be encompassed by the phrase 'course of justice'.
31. In order to reach a view as to whether the exception is engaged the Commissioner must firstly consider whether the information is subject to legal professional privilege and then decide whether a disclosure of that information would have an adverse effect on the course of justice.
32. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
33. The council said that the information requested at points 1 to 4 of the request consists of reports prepared by third parties for the sole purpose of bringing a claim and as the basis of the councils claim. They are the council's evidence in relation to the three key areas of its claim; liability, loss and causation.
34. Having viewed the reports, the Commissioner is satisfied that they constitute communications to the council's legal team made for the dominant purpose of preparing a case for litigation and are therefore subject to legal professional privilege.
35. Information will only be privileged so long as it is held confidentially. The council has confirmed that none of the reports have been placed into the public domain or disclosed without restrictions being placed on their future use so it has not waived privilege and said it has no intention of doing so.
36. The Commissioner has therefore gone on to consider whether the disclosure of the withheld information would have an adverse effect on the course of justice.
37. In *Archer v ICO & Salisbury District Council*⁴ the Tribunal highlighted the requirement needed for the exception to be engaged. It explained that it

⁴ Appeal no. EA/2006/0037

is not enough that disclosure would simply affect the course of justice, the effect must be "adverse" and refusal to disclose is only permitted to the extent of that adverse effect. It stated that it was also necessary to show that disclosure "would" have an adverse effect and that any statement that it could or might have such an effect was insufficient.

38. In reaching a decision on whether disclosure would have an adverse effect it is also necessary to consider the interpretation of the word "would". It is the Commissioner's view that the Tribunal's comments in the case of *Hogan v ICO & Oxford City Council*⁵ in relation to the wording of "would prejudice" are transferable to the interpretation of the word "would" when considering whether disclosure would have an adverse effect. The Tribunal stated that when considering the term "would prejudice" that it may not be possible to prove that prejudice would occur beyond any doubt whatsoever. However, it confirmed that the prejudice must at least be more probable than not.
39. The Commissioner notes that legal professional privilege is an established principle which allows parties to take advice, discuss legal interpretation or discuss matters of litigation freely and frankly in the knowledge that such information will be retained in confidence.
40. The Commissioner accepts that a disclosure of information which is subject to legal professional privilege will have an adverse effect on the course of justice simply through a weakening of the doctrine if information subject to privilege is disclosed on a regular basis under the FOIA or the EIR. Clients and their advisers' confidence that their discussions will remain private will become weaker and their discussions may therefore become inhibited.
41. The Commissioner has therefore borne in mind the fact that ordering a disclosure of this information is likely to have an indirect adverse effect upon the course of justice purely because it is information covered by legal professional privilege. However the Commissioner must also consider the specific information caught by the request when making his decision in this case.
42. The council said that it is currently involved in a large claim and a major part of its success is based on the weight of its expert evidence. The evidence is what the claim is based on and must remain confidential until the point at which it decides to rely on it in court or to waive privilege. The council said that as court proceedings have not yet been

⁵ Appeal no's. EA/2005/0026 & EA/2005/0030

issued, it is not bound by the reports and may lawfully choose at a later date not to rely on them and to obtain additional expert evidence. It said that if it is forced to waive privilege in relation to the reports that would put it in a weakened position within the litigation by forcing its hand at an early stage, forcing it to 'place its cards on the table' prior to being in a position to do so. It said that this could only have the effect of jeopardising its current claim causing significant loss and expense. It also said that this would put it at a disadvantage as against the proposed defendant and any other party who has not yet been forced to rely on its expert evidence and could use such premature disclosure to its advantage. The council also said that releasing the expert evidence into the public domain will have the effect of stirring up public interest in the minutiae of the claim and would have an adverse effect on its ability to conduct its claim and ensure that justice is done.

44. The Commissioner has seen the withheld information and considered the council's argument and is satisfied that disclosure would more likely than not adversely affect the course of justice. This is because it would involve public access to privileged information and would provide an indication of the arguments, strengths or weaknesses which the council might have had, unbalancing the level playing field under which adversarial proceedings are meant to be carried out. The Commissioner has therefore concluded that regulation 12(5)(b) is engaged.
45. Regulation 12(1)(b) requires that where the exception in regulation 12(5)(b) is engaged then a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner notes that regulation 12(2) states that in dealing with a request for environmental information a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the requested information

46. The council said that there has been a great deal of public interest in its claim against the proposed defendant and in relation to the repair works to Victoria Park, which is a public park. It said that it understands and appreciates that transparency and openness are important for public authorities and ensures that it is meeting its obligations to the public. It explained that it has frequently provided press releases and answered questions at public meetings. It also said that it has considered whether releasing its expert reports would alleviate some of the concerns which have been raised by members of the public in relation to the length of time that the claim has taken and the costs incurred but it considers that releasing the requested information will do nothing to dispel these concerns. It said it has updated the public in terms of legal costs and

disbursements on a regular basis and has released all the information that it is able to and continues to provide regular updates and press releases on the progress of the claim. It said that the expert reports, whilst a large and important part of its evidence, will not fully explain to the public the litigation process or demonstrate the complexities and timeline involved in pursuing such a claim.

47. The complainant acknowledged that the public interest in maintaining legal professional privilege carries significant weight but said that there is a public interest consideration in disclosing these reports. He said that there is a serious concern that the council wants to hide the extent of the damage and likely cost of repair from public scrutiny as the implication is that the damage is not serious enough to justify the significant risk of legal costs. He said that;

“In a situation where a public authority has lost perspective and is willing to risk more than is reasonable in legal costs, finding itself in a hole and choosing to dig itself out, then in those exceptional circumstances it would be in the public interest to disclose the reports on the damage and cost of repair so that the local authority could again find perspective through transparency and openness.”

48. The Commissioner consider that disclosing the information would promote accountability and transparency and allow the public to better understand the basis of the council’s decision and its legal justification for a particular course of action.

Public interest arguments in favour of maintaining the exemption

49. The council said that the outcome of its claim is for it to obtain a settlement sum for damages which will reimburse the cost of the repair work to the park and that it can only be in the public interest for it to be successful in its claim and recoup the repair costs and put the park back into a standard it was in prior to the damage. It said that the only outcome there can possibly be of disclosing legally privileged documents is to jeopardise its claim. It also said that whilst it is understandable that the public are not privy to all the information in relation to the ensuing litigation and are perhaps becoming impatient with the outcome of negotiations, it cannot be in the public’s interest to jeopardise such a claim in order that they have access to expert evidence which has limited use outside of the litigation process.
50. The Commissioner and the Tribunal have expressed in a number of previous decisions that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the Bellamy case, the Tribunal described legal professional

privilege as, "a fundamental condition on which the administration of justice as a whole rests".

51. It is very important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice.
52. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing fundamental principle of English law. The Tribunal recognised this in the Bellamy case when it stated that:

"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."
53. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

Balance of the public interest arguments

54. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible and that those involved in dealings with the public authorities may feel they have better understood the process if they know how the public authority reached its decisions and its legal justification for a course of action. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the council's right to ensure its claim is not jeopardised.
55. The Commissioner notes that the public interest in maintaining this exemption is a particularly strong one and to equal or outweigh that inherently strong public interest usually involves factors such as circumstances where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information, the Commissioner could see no sign of unlawful activity, evidence that the council had misrepresented any legal advice it had received or evidence

of a significant lack of transparency where it would have been appropriate.

56. The Commissioner is satisfied that in this case the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He has therefore concluded that the public interest in maintaining the exception at regulation 12(5)(b) outweighs the public interest in disclosure of the information.

Section 41 – Information provided in confidence

57. The council applied section 41 to the 'confidentiality agreement'.
58. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and the disclosure would constitute an actionable breach of confidence.

Was the information obtained from another person?

59. The first step is for the Commissioner to consider whether the information was obtained by the council from any other person in order to satisfy the requirement of section 41(1)(a).
60. The Commissioner notes that the 'confidentiality agreement' consists of an email from the proposed defendant to the council. He therefore considers that the requirement for the information to be obtained from another person is met in this case and has gone on to consider whether disclosure would constitute an actionable breach of confidence.

Actionable claim for breach of confidence

61. Whilst it is not the only test for establishing confidence, the Commissioner finds that the appropriate test for this case is that which is set out in the case of *Coco v Clark* [1969] RPC 41. According to the decision in this case a claim for breach of confidence can be established where:

"... three elements are normally required if ... a case of breach of confidence is to succeed. First, the information itself ... must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it..."

62. All three elements must be present for a claim to be made and, for that claim to be 'actionable' within the meaning of section 41(1)(b) of the FOIA, a public authority must establish that an action for breach of

confidence would, on the balance of probabilities, succeed. This requires consideration of whether or not there would be a public interest defence to such a claim.

Obligation of confidence

63. An obligation of confidence may be expressed explicitly or implicitly. The council has not specified how an obligation of confidence exists in relation to the 'confidentiality agreement' as its arguments regarding confidentiality focus on the reports themselves not the email referred to as the 'confidentiality agreement'. It is not evident to the Commissioner how the information in the email has been imparted in circumstances importing an obligation of confidence.

Necessary quality of confidence

64. For information to have the necessary quality of confidence it must be more than trivial and not otherwise accessible.
65. The Commissioner is satisfied that the information in this case, that being correspondence relating to the damage to Victoria Park, is not trivial.
66. However, as stated above, this alone is not sufficient to indicate that the information has the necessary 'quality of confidence'. Therefore the Commissioner has considered whether the information is otherwise accessible.
67. The council has not specifically confirmed that the information is not otherwise accessible. The complainant has said that the agreement itself cannot have been provided in confidence when the council has already disclosed what it purports to be the contents of the agreement in its initial response to the request:

"The Hydrogeological reports contain data that was supplied by a third party, on condition that the overall report was not released to any other third party except for legal purposes. i.e. there is a confidentiality agreement between Newbury Town Council and the supplier of the data."

Given that the council has described the 'confidentiality agreement' in its response on the WhatDoTheyKnow website, the Commissioner does not consider that the substance of the information is not accessible elsewhere, despite the fact that the actual email itself has not been disclosed.

Detriment to confider

68. Having considered whether the information in this case was imparted in circumstances giving rise to a duty of confidentiality and had the necessary quality of confidence, the Commissioner has also considered whether unauthorised disclosure would cause detriment to the confider.
69. The council did not provide any details of what the detriment to the confider would be or how the detriment would be experienced if the confidence was breached. As stated above, the council's arguments regarding confidentiality focus on the reports themselves not the email referred to as the 'confidentiality agreement'.
70. It is not for the Commissioner to speculate as to what the detriment would be. The council was informed by the Commissioner that it must justify its position and was provided with the Commissioner's guidance on how he deals with complaints⁶ which clearly states that it is the responsibility of the public authority to satisfy the Commissioner that information should not be disclosed and that it has complied with the law.
71. The Commissioner considers that the council has been provided with sufficient opportunity to provide its rationale for withholding the 'confidentiality agreement'. The rationale should have been in place since the request was refused and therefore opportunities for providing this existed at the original refusal, at the internal review and when requested by the Commissioner.
72. He has therefore concluded that the council has not sufficiently demonstrated that there would be detriment to the confider.

Conclusion on Section 41

73. The Commissioner does not consider that the council has sufficiently demonstrated that there was an obligation of confidence, that the information has the necessary quality of confidence, or that unauthorised disclosure would cause detriment to the confider, He therefore considers that it has not been shown that there would be an

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http://www.ico.org.uk/for_organisations/freedom_of_information/guide.aspx

actionable breach of confidence and the exemption at section 41 does not apply to the 'confidentiality agreement' in this case.

Other matters

74. The council said that it is mindful of the public interest in this claim and wishes to ensure that there is a degree of visibility and therefore would be prepared to agree to release the reports in relation to quantum and causation once the litigation claim has been concluded and once litigation privilege is no longer a concern. It said that this would then ensure that the public is in receipt of the reports and that its claim is not jeopardised. It also said that it is prepared to seek agreement from the proposed defendant as to the release of the Liability Reports and in the event that it is not forthcoming then it will consider releasing these in redacted form. It said that this should then negate the need to release the confidentiality agreement but will not cause any adverse effects to the ongoing litigation.
75. The council also said that in the meantime it is prepared to release photographs of the park showing the damage together with site inspection reports which set out details of the cracks and damage to the park.
76. In the interests of transparency, the Commissioner welcomes the council's suggestions for disclosure of information that is the subject of this decision notice at a later date, as well as the disclosure of further information that is not within the scope of the request in the case, and encourages the council to take the actions described in the two preceding paragraphs. However, it should be noted that any further action that the council may choose to take does not counter the step outlined in this decision notice without the full consent of the requestor.

Right of appeal

77. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

78. 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.
79. 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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