

## Decision Notice

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**Decision 25/2022: Department of Public Lands and Buildings**

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### **Tudor Farm records**

**Reference no: 20210223**

**Decision date: 26 October 2022**

## Summary

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The Applicant made a request under the Public Access to Information (**PATI**) Act 2010 to the Department of Public Lands and Buildings (**Department**) for various records concerning Tudor Farm. The Department's internal review decision provided the Applicant with some information responsive to the PATI request. The Applicant, however, challenged the reasonableness of the search conducted by the Department.

The Information Commissioner has found that the Department conducted a reasonable search in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations 2014 to locate records relating to the current tenants and tender records. The Information Commissioner has also found that the Department's initial search to locate records related to its decision making process was not reasonable. During this review, the Department conducted additional searches to meet the requirements of section 12(2)(b) and regulation 5. The additional searches resulted in the identification of more records responsive to the PATI request.

The Information Commissioner has upheld the Department's internal review decision, in part, and ordered the Department to issue a new initial decision to the Applicant on two newly identified records.

## Relevant statutory provisions

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Public Access to Information Act 2010: section 12(2)(b) (reasonable search).

Public Access to Information Regulations 2014: regulation 5 (reasonable search).

Appendix 1 provides the text of these statutory provisions and forms part of this Decision.

## Background

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1. The history and background on the importance of Tudor Farm can be found in [Decision 20/2022](#), Department of Public Lands and Buildings.
2. On 27 July 2020, the Applicant made a PATI request to the Department of Public Lands and Buildings (**Department**), asking for records capturing the following information about the "Agricultural Reserve and Open Reserve Space land (10.36 acres) purchased by the Government of Bermuda from A.J. Terceira Settlement Trust" on 12 May 1989, "situated at Tudor Farm, #4 Middle Road, Southampton":

- a. the status of the current occupiers, tenants or lessees as well as the length of lease terms (**item 1**);
  - b. current tenders (accounts of all current tenders for project, all applicants and application information, successful applicants, the criteria of selection in the tendering process) (**item 2**); and
  - c. if no tenders occurred, any policies used by the Department to make a final decision on future lease agreements contemplated by the Department (**item 3**).
- 3. The Department acknowledged the PATI request but did not issue an initial decision within the statutory timeline.
- 4. On 2 November 2020, the Applicant submitted an internal review request to the head of authority. The internal review request referred to PLAN 0404-20 (published on 18 September 2020) for buildings #2 and #4 at Tudor Farm submitted by Overnight Construction Ltd., and referred to information published by the Department of Planning<sup>1</sup>.
- 5. The Department issued an internal review decision on 18 February 2021, as a result of the Information Commissioner's [Decision 01/2021](#), Department of Public Lands and Buildings. The internal review decision provided the Applicant with a meeting note of 2 November 2020 and informed the Applicant of the following:
  - a. For item 1: The occupiers of Tudor Farm at the time of the PATI request were a farmer and the Department of Environmental and Natural Resources (**DENR**). The Department informed the Applicant that there was no lease term attached to the DENR. The Department further provided the Applicant with information on the length of the farmer's lease and a copy of the lease plan.
  - b. For item 2: There were no current tenders at the time of the PATI request and no other tenders were issued in 2020. The Ministry of Public Works (**Ministry**) received a request for a proposal by a construction company to lease and refurbish the residential buildings, provide space for storage of building materials and some shared use with the tenant farmer for a residential conversion. Because the proposal did not impact the arable farm fields occupied by the farmer, the proposal was given consideration. The proposal, however, has since been withdrawn.

The Department further explained that there was no requirement to tender the project, because the proposal was based on arrangement for renovation works to

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<sup>1</sup> Available from the Department of Planning's [Customer Self Service Public Information](#) website.

save deteriorating buildings in return for an interest in the property by a leasing proposal.

The Department informed the Applicant that, as a preliminary to an agreement, the Ministry gave permission to the construction company to submit a planning application in June 2020. The application was later amended to include the restoration of the buildings only. The proposal for an outdoor space to store materials was abandoned.

In January 2021, the leasing arrangement proposal was withdrawn and no longer considered. As of the time of the internal review, the Ministry and Department were progressing an arrangement with the tenants at the time to progress the renovation and conversion works to save the buildings from deterioration under a leasing arrangement.

- c. For item 3: The Department did not provide the Applicant with a copy of a written policy, but explained that the proposal from the construction company was considered because it would have met the zoning requirements set out in Development and Planning Act 1974 (**Development and Planning Act**) and would not disturb the leased arable land areas. The Department also informed the Applicant that the DENR had no objections to the proposal. The Department was also satisfied that the lease arrangement with the construction company would be beneficial to the Government because the company proposed to invest in the buildings in return for a long lease with a rent free period for payback of expenses. The Government would therefore have had the benefit of returning vacant and derelict buildings to residential use, without any expense to the Government.
6. On 23 February 2021, the Applicant made a timely application for an independent review by the Information Commissioner of the Department's internal review decision. The Applicant expressed their dissatisfaction with the internal review decision, which they considered to be incomplete.

## Investigation

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7. The application to the Information Commissioner was accepted as valid. The Information Commissioner confirmed that the Applicant made a valid request for an internal review to a public authority. Additionally, the Information Commissioner confirmed the issues the Applicant wanted her to review.

8. On 8 March 2021, the Information Commissioner's Office (**ICO**) notified the Department of the valid application. The Information Commissioner decided that early resolution under section 46 of the PATI Act was appropriate and the parties' consent was obtained. The early resolution was not successful and ended on 29 April 2021.
9. On 8 September 2021, while this review was ongoing, the Applicant filed a separate PATI request asking for additional records concerning Tudor Farm, including copies of the lease agreements signed between all relevant entities and the Department. In response to the PATI request and the Information Commissioner's [Decision 16/2021](#), Department of Public Lands and Buildings, the Department provided the Applicant with additional records on Tudor Farm.
10. Section 47(4) of the PATI Act requires the Information Commissioner to give the public authority and the applicant a reasonable opportunity to make representations. Both the Department and the Applicant were invited to make submissions on the reasonableness of the Department's search.
11. The ICO received submissions from the Department. The Applicant did not respond to the ICO's invitation to make a submission, but the Information Commissioner takes into consideration the information they provided during this review and related reviews with the Department considered in Decisions [01/2021](#), [16/2021](#) and [20/2022](#).
12. On 27 September 2022, the Department provided the Applicant with a copy of a lease signed between the Government and a farmer tenant dated 1 September 2016. The Department additionally provided the Applicant with the two flow charts for 'Agricultural Lettings' and 'Non-residential Leases' on 11 October 2022<sup>2</sup>.
13. On 28 September 2022, the Department submitted to the ICO a memorandum addressed to the Minister that was dated 25 May 2020 and was identified during this review. The Department further located its Lease Tender Protocol. The Department has not issued an initial decision on these newly identified records.

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<sup>2</sup> These are listed in Section E: Administration (all public access) manuals in the Department's [Information Statement](#), dated 9 January 2022.

## Information Commissioner's analysis and findings

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14. In coming to this Decision, the Information Commissioner considered all the relevant submissions, or parts of submissions, made by the parties. She is satisfied that no matter of relevance has been overlooked.

### *Reasonable search – section 12(2)(b) and regulation 5*

15. Section 12(2)(b) of the PATI Act requires public authorities to make every reasonable effort to respond to PATI requests completely and accurately. Regulation 5 of the PATI Regulations requires the public authority to make reasonable efforts to locate records responsive to the request. A public authority is required to document its efforts if it has been unable to locate the records. Read together, these provisions require public authorities to conduct a reasonable search in response to a PATI request.
16. In determining whether a public authority's search was reasonable, the Information Commissioner takes into account the following<sup>3</sup>:
- [1] the quality of the public authority's analysis of the PATI request;
  - [2] the scope of the search that it decided to make on the basis of that analysis; and
  - [3] the rigour and efficiency with which the search was then conducted.
17. Finally, the public authority bears the burden to establish, on the balance of probabilities, that the search it conducted to locate records responsive to a PATI request was reasonable.

### *Public authority's submissions*

18. In its submissions, the Department explained that it understood the PATI request to be asking for information on the Tudor Farm Estate, namely, the status of current occupiers (including lease terms) and tenders, as well as submissions details of the tendering process (including selection criteria).
19. The Department explained that no tender occurred relating to Tudor Farm at the time of the PATI request. The Department also explained that the Government of Bermuda's

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<sup>3</sup> See, for example, [Decision 11/2020, Department of Education](#), para. 14.

Code of Practice for Project Management and Procurement (**Procurement Code of Practice**<sup>4</sup>) does not apply to “contract relating solely to the disposal or acquisition of securities or of an interest in land and property” by virtue of section 3.3 of the Procurement Code of Practice. The Department further explained that no written policy, guidelines or code of practice, or any document similar to the Procurement Code of Practice, existed in relation to contracts on the disposal or acquisition of an interest in land and property. The Department, however, took into consideration the requirements under the Public Lands Act 1984. When necessary, the Department resorts to a tendering process as a property marketing tool to obtain offers or proper proposals for consideration. The Department has the responsibility of managing properties and makes recommendations to the Minister for approval to progress property transactions.

20. The Department explained that Tudor Farm did not have a tender requirement at the time because of the status or nature of the property. It had no available land suitable for cultivation because all available parcels were in use by the existing farmer. The Department explained that, for the same reason, the “Agricultural Lettings” flow chart disclosed during this review as well as the Department’s Lease Tender Protocol were not applicable to Tudor Farm.
21. The Department also provided the Applicant with a flow chart for “Non-residential Leases” during this review. It submitted that, at the relevant time, the flow chart did not apply to the buildings at Tudor Farm because the structures were dilapidated and thus non-rentable.
22. When informed the Applicant was of the view that the PATI request should lead to the identification of a proposal submitted by the Bermuda Agricultural Group (**BAG**), the Department submitted that it never received the proposal. The Department confirmed that it received an email, with attachments<sup>5</sup>, from a member of the BAG entitled ‘Bermuda Agricultural Group Tudor Farm Proposal/Request for Lease’ on 29 June 2020, but maintained that no proposal was attached to the email. Therefore, the Department did not consider the BAG’s request as a formal proposal because the group did not specify its plan concerning Tudor Farm and did not explain how it was going to make progress with no means of funding.
23. The Department also submitted the history of its relationship with the BAG.

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<sup>4</sup> Government of Bermuda, Cabinet Office, Office of Project Management and Procurement, [Code of Practice for Project Management and Procurement](#) (2 July 2018).

<sup>5</sup> Entitled ‘Bermuda Crop Strategy 2016-2021’ and ‘Bermuda Dairy Industry Strategy’ by BAG.

24. The Department further explained that the records relating to Tudor Farms were stored in its Concerto Asset Management System; Tudor Farm working files in the Estates network drive; the Estates historical hard copy files for Tudor Farm which precedes Concerto; the Department's deed vault; and the digital mapping and land survey files held by the Land Survey and Mapping Section. The Department submitted that it searched all of these locations to locate the records responsive to the PATI request. The Department's searches were conducted by one of its Estates Surveyors as well as the Chief Surveyor.
25. The Department explained that, as part of its response to the Applicant's other PATI request of 8 September 2021, it gave the Applicant a consolidated response to several PATI requests and queries related to the use of Tudor Farm. The Department explained that the meeting minutes disclosed answered the Applicant's questions, in part. The Department also pointed out that the Applicant was previously informed that the management of Tudor Farm did not require a tendering process.
26. The Department clarified that it was approached by a construction company to assist with the restoration or renovation of properties within Tudor Farm, under a public-private partnership scheme. The planning application was approved but the company withdrew itself from the arrangement as the investment was no longer attractive to it. The planning consents secured for the building works could still be progressed, however, as the consents were attached to the buildings. The existing farmer and bee keeper operating from the site opted to progress with the building works and use the improvements in support of their farming operations.
27. The Department submitted a memorandum prepared for the relevant Minister to highlight the feasibility and viability of the proposal submitted by the construction company. The Department confirmed that the memorandum was saved in the Estates drive, to eventually be inputted into the property management system, Concerto.

#### *Applicant's submissions*

28. Although the Applicant does not need to explain or justify why they made their PATI request, the Applicant shared that the objective of obtaining access to requested records was to show the inconsistencies and unfairness applied in the leasing of public land at Tudor Farm.
29. The Applicant expressed concern with PLAN 0404-20 and advocated for Tudor Farm to be kept as agricultural reserve and open reserve space, as it was originally intended.



30. The Applicant is challenging the reasonableness of the Department's search because of the Department's incomplete response at the internal review stage. Specifically, the Department's response did not acknowledge the longstanding 'gentleman's agreement' that BAG has had with the Ministry. The Applicant explained that BAG has operated out of, and at the time of the PATI request, resided at Tudor Farm, occupying a classroom and barn that holds BAG's furniture, supplies and equipment. The BAG also operated a Community Garden for area schools and residents.
31. The Applicant was also dissatisfied with the Department's response at the internal review stage partly because it did not include certain records, including BAG's proposal of 29 June 2020, as records responsive to this PATI request.
32. Finally, the Applicant also asked the Information Commissioner to address why the Department did not consider BAG's proposal to be a 'worthy' request to lease. The Applicant proposed that the scope of the PATI request be expanded to include:
  - a. the lease for all former tenants;
  - b. all historical plans, proposals and projects, lengths of lease terms for Tudor Farm that had been submitted, including the Ministry and Department's meeting notes capturing its decisions; and
  - c. copies of policies used to make a final decision on lease agreements demonstrating how it may have changed over the years.

#### *Discussion*

33. The Information Commissioner considers the reasonableness of the Department's search to locate records responsive to the PATI request.

[1] The quality of the public authority's analysis of the PATI request

34. The parties agree on the portion of Tudor Farm that is relevant to the PATI request. They also agree on the relevant time period, which is on or around 27 July 2020 when the Applicant made this PATI request.
35. Although the Applicant asked the Information Commissioner to expand the scope of the PATI request, she has not done so. Once the Department has issued its internal review decision and is before the Information Commissioner, it is only required to respond to the PATI request as it was originally made.

### Item 1

36. Based on the Department's submission and the content of its internal review decision, the Information Commissioner is satisfied that the Department's analysis of part of the PATI request seeking records on the status and lease length of the then occupiers of Tudor Farm was adequate.

### Item 2

37. The PATI request stated that it sought Tudor Farm's current tender records. On the one hand, the Applicant did not explain their understanding of 'tender', but submitted that the BAG's proposal made to the Government via its 29 June 2020 email to the Department should have fallen within the scope of the request. Specifically, the Applicant viewed the email as responsive to that part of the PATI request asking for an "account of all applicants and application information". By the language 'current tender', the Applicant appears to refer to the process of consideration of all proposed projects or applications relating to the use of Tudor Farm during the relevant time period.
38. The Department, on the other hand, appears to understand 'tender' as a specific procurement process during which the public or specific potential bidders are invited to submit "a formal offer to supply or purchase goods or materials or provide services at a stated price"<sup>6</sup>. Based on this understanding of 'tender', the Department informed the Applicant that no tender took place, i.e., the Department did not issue an invitation for the public or specific candidates to submit a formal offer for lease of, or any projects at, Tudor Farm during the relevant period. The Department also did not consider the BAG's proposal to be a 'proper proposal' that falls within the scope of the request because the BAG did not specify its plan for Tudor Farm or how it was going to make any progress without any means of funding.
39. Despite the apparent differences in their understanding of 'tender', the Information Commissioner is satisfied that the Department's understanding of item 2 of the PATI request was adequate. 'Tender' has a specific meaning within the public sector and this is made clear in publications, such as the Procurement Code of Practice and even within the decision making documents listed in the Department's Information Statement.
40. Nothing in the Department's previous correspondence with the Applicant could have led it to believe that the Applicant had a different and broader understanding of a 'tender'.

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<sup>6</sup> [Code of Practice for Project Management and Procurement](#), at para. 2.1

41. Further, although its internal review decision informed the Applicant that no tender occurred during the relevant time period, the Department still provided additional information to the Applicant about the arrangement it had with the construction company.

### Item 3

42. As part of the request for current tender records, the Applicant asked for the criteria of selection in the tendering process. If no tenders took place, the Applicant specifically sought policies “used to make a final decision on the future lease agreements” contemplated by the Department as part of the Ministry.
43. In its internal review decision, the Department indicated its broad reading of item 3 as including records labelled as a ‘policy’, along with more general records showing the Department’s decision making process for the use of Tudor Farms. The Department’s broad reading of the PATI request was appropriate, and consistent with the purposes in section 2 of the PATI Act to give the public access to public information to the greatest extent possible. To further this purpose, public authorities should avoid engaging in a narrow technical reading of a PATI request by laypersons to avoid public disclosures.
44. Specifically, the Department’s internal review decision did not focus on whether ‘policies’ for decision making on lease agreements existed. Instead, it provided the Applicant with a general explanation of the factors that were taken into account when the Department decided to enter into an arrangement with the construction company. Those factors included: compliance with the zoning requirements of the Development and Planning Act; the impact of the proposed activity on the leased arable land areas; absence of objections from the DENR; and whether the arrangement would benefit the Government.
45. At the time of its internal review decision, however, the Department overlooked the part of item 3 that seeks records related to policies or factors used to make a final decision “on the future lease agreements”. The Department’s focus was on the leases or proposed leases at the time of the PATI request. With respect to records related to its future decision making, the analysis of the PATI request in the internal review decision was inadequate.
46. During this review, this was brought to the Department’s attention and it revised its understanding of item 3 to include its policies and decision making process for future leases. The Information Commissioner is satisfied that the Department’s revised analysis of the item 3 is adequate.

[2] The scope of the search that it decided to make on the basis of that analysis

Items 1 and 3

47. The Department's search of the network drive and Concerto resulted in the identification of a lease agreement which the Government signed with a farmer dated 1 September 2016, described above in paragraph 5.a.
48. Based on its revised analysis of item 3 during this review, the Department also conducted a new search of these locations to identify any records related to its decision making policies or factors for future leases of Tudor Farms. As a result, the Department located its flow charts for 'Agricultural Lettings' and 'Non-residential Leases' and provided them to the Applicant during its review. It also identified its Lease Tender Protocol.
49. During this review, the Department also confirmed the existence of a 25 May 2020 memorandum related to its arrangement with the construction company that was submitted to the Minister. The memorandum sheds some light on the factors that the Department might take into account for future lease agreements. For this reason, the 25 May 2020 memorandum is also responsive to item 3.

Item 2

50. In addition to searching the drive and Concerto, the Department searched its historical hard copy files for Tudor Farm, which preceded Concerto; the deed vault; as well as digital mapping and land survey files held by the Land Survey and Mapping Section. These locations are where the Department ordinarily stores records related to Tudor Farm. The scope of the Department's search to locate records responsive to the current tender records was adequate.

[3] The rigour and efficiency with which the search was then conducted

51. The Department conducted its search for records responsive to items 1 and 2 with adequate rigour and efficiency. Although the Department's search for records responsive to item 3 was not adequate for its internal review decision, the Department revised its analysis of item 3 during this review and then conducted additional searches with adequate rigour and efficiency.
52. The Chief Surveyor and an Estate Surveyor conducted searches, and both are highly familiar with the Department's filing system, Estates' records and Tudor Farm records. They also had access to all relevant locations. Further, the Department conducted searches for a related PATI request, as noted in paragraph 9, above. During all of these searches, the Department sought to identify records related to the use of Tudor Farms.

53. The Department searched all relevant locations and senior officers with knowledge of the files and records conducted the searches. While some efficiencies could have been achieved by an adequate analysis of item 3 at the internal review stage, once the revised analysis was brought to the Department's attention during this review, it located the responsive records without delay.

### ***Conclusion***

54. The Department's initial search to locate records responsive to item 3 of the PATI request did not meet the reasonableness requirement under section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations. In light of the additional search conducted during this review, the Information Commissioner is satisfied that the Department has now met these requirements for item 3.
55. The Information Commissioner is also satisfied that the Department conducted a reasonable search to locate records responsive to items 1 and 2 of the PATI request, in accordance with section 12(2)(b) of the PATI Act and regulation 5 of the PATI Regulations.
56. The Information Commissioner notes the Applicant's request that this review address the question of why the Department did not consider BAG's proposal for the use of Tudor Farm to be a worthy one. While the Information Commissioner understands that this is a matter of importance to the Applicant, it is not one which falls within the remit of the Information Commission when conducting a review under the PATI Act<sup>7</sup>. The records disclosed and information shared as a result of this PATI request and Information Commissioner's review, however, may assist in facilitating future engagements between the Applicant and the Department on the use and protection of Tudor Farm.

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<sup>7</sup> [Peter Furbert v the Department of Human Resources and the Information Commissioner \[2019\] SC \(Bda\) 19 Civ \(15 March 2019\)](#), para. 17 ("First, the jurisdiction of the IC under the PATI Act is to review the decision made by the head of a public authority and if appropriate to order the production of documents which come within the scope of the PATI Act. It is a limited jurisdiction")

## Decision

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The Information Commissioner finds that the Department of Public Lands and Buildings (**Department**) conducted a reasonable search for records responsive to items 1 and 2, in accordance with section 12(2)(b) of the Public Access to Information (**PATI**) Act 2010 and regulation 5 of the PATI Regulations 2014. The Information Commissioner also finds that the Department did not conduct a reasonable search for records responsive to item 3, but has now met this requirement and identified additional records that are responsive to item 3, some of which the Department has disclosed to the Applicant.

In accordance with section 48 of the PATI Act, the Information Commissioner:

- affirms the Department's internal review decision on items 1 and 2 of the PATI request;
- varies the Department's internal review decision for item 3 of the PATI request to grant access to responsive records disclosed by the Department; and
- orders the Department to issue a new initial decision on the memorandum dated 25 May 2020 and the Lease Tender Protocol that are responsive to item 3, i.e., decide to withhold or disclose them.

The Information Commissioner requires the Department to issue a new initial decision on the two records, as directed by this Decision and the accompanying Order, on or before **Wednesday, 7 December 2022**.

## **Judicial Review**

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The Applicant, the Department of Public Lands and Buildings, or any person aggrieved by this Decision has the right to seek and apply for judicial review to the Supreme Court in accordance with section 49 of the PATI Act. Any such application must be made within six months of this Decision.

## **Enforcement**

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This Decision has been filed with the Supreme Court, in accordance with section 48(3) of the PATI Act. If the Department fails to comply with this Decision, the Information Commissioner has the authority to pursue enforcement in the same manner as an Order of the Supreme Court.



Gitanjali S. Gutierrez  
Information Commissioner  
26 October 2022

## Appendix 1: Relevant statutory provisions

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### Public Access to Information Act 2010

#### Access to records

12 (1) ...

(2) Public authorities shall make every reasonable effort to—

(a) ...

(b) respond to requests completely, accurately and in a timely manner.

...

### Public Access to Information Regulations 2014

#### Reasonable search

5 (1) An information officer shall make reasonable efforts to locate a record that is the subject of an application for access.

(2) Where an information officer has been unable to locate the record referred to in paragraph (1), he shall make a record of the efforts he made.



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