

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
LEONARD LEVITT, :
 :
 Petitioner, : Index No.
 :
 -against- :
 :
 NEW YORK CITY POLICE DEPARTMENT, :
 and RAYMOND KELLY, in his official capacity as :
 Commissioner of the New York City Police :
 Department, :
 :
 Respondents. :
 :
 For a Judgment Pursuant to Article 78 :
 of the Civil Practice Law and Rules :
-----X

**MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S
VERIFIED ARTICLE 78 PETITION**

Respectfully submitted,

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Dated: October 18, 2011
New York, N.Y.

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PRELIMINARY STATEMENT

This Article 78 proceeding seeks to vindicate the right of the public to learn basic facts about the work of high-level public officials. The petitioner Leonard Levitt is a journalist who has reported about the New York City Police Department for decades. Following reporting he did about extensive and previously unknown meetings that NYPD Commissioner Raymond Kelly had held at the Harvard Club in New York City, Mr. Levitt sought under the Freedom of Information Law copies of Mr. Kelly's schedule to uncover information about Mr. Kelly's meetings since becoming police commissioner in January 2002. The NYPD denied the request entirely. The New York Civil Liberties Union then filed an appeal on behalf of Mr. Levitt, and the department likewise denied that appeal. In doing so, it asserted that none of Commissioner Kelly's schedule for the last ten years could be disclosed because doing so could endanger the commissioner as well as those with whom he had met.

Commissioner Kelly is the most important appointed government official in New York City government. He commands the largest police department in the country, his accomplishments have been recognized internationally, and the prospect of his running to serve as the next mayor of New York City has been widely discussed. Throughout his tenure as NYPD commissioner, Mr. Kelly likely has met with a wide range of influential people. The public has a substantial interest in knowing the identity of those people and the subject matter of those meetings.

There is no reason for Commissioner Kelly to withhold from public scrutiny his entire schedule of meetings for the last decade. Many high-level government officials, including the

President of the United States make portions of their schedules available to the public. Just last month, New York Governor Andrew Cuomo started posting detailed versions of his daily schedules.

To the extent disclosure of specific meetings would present a legitimate security threat to Commissioner Kelly or those with whom he has met, information about those specific meetings can be withheld under FOIL. The department has no authority, however, to categorically withhold the entire schedule.

The department's actions violate the Freedom of Information Law and the strong policy of open government that underlies the law. Having exhausted his administrative remedies, Levitt now seeks judicial relief to force the NYPD to comply with its legal obligations about this matter of pressing public importance.

FACTS

Raymond Kelly was named commissioner of the New York City Police Department in January 2002 by Michael Bloomberg, who had been elected mayor of New York City in November 2001. Prior to being appointed commissioner in 2002, Mr. Kelly had had an illustrious career in public service, including having served as commissioner of the NYPD from 1992 to 1994. Affidavit of Leonard Levitt ¶¶ 4-5 (Aug. 22, 2011).

For over 20 years, petitioner Leonard Levitt worked at *Newsday*, reporting about the NYPD for much of that time. From 1994 to 2004 he authored a weekly column called "One Police Plaza" that focused on the inner workings of the NYPD. The column was widely read by upper-level members of the department. Levitt Affidavit ¶¶ 3, 6.

After returning to the NYPD in January 2002, Commissioner Kelly was often the target of unflattering commentary by Mr. Levitt in his weekly column. Mr. Kelly became so unhappy about Mr. Levitt's column that in 2003 he traveled to the Long Island offices of *Newsday* in an apparent effort to persuade the paper's editors to remove Mr. Levitt from his position. That effort failed. Levitt Affidavit ¶ 7.

In 2004 Mr. Levitt retired from *Newsday*. At that point, he started an online version of his column, and he continues to publish the column on a weekly basis. The column, which is called "NYPD Confidential," continues to enjoy wide readership within the NYPD. Levitt Affidavit ¶ 8.

In 2008 and 2009 it was widely reported that Mr. Kelly was considering running for mayor of New York City. At that time, term limits would have forced an end to Mr. Bloomberg's tenure in 2009. Levitt Affidavit ¶ 9. However, changes to the City Charter engineered by Mr. Bloomberg and approved by the City Council allowed Mr. Bloomberg to run for a third term, and Mr. Kelly did not run for the position.

In 2009 Mr. Levitt published a book examining the history of the NYPD over the last several decades. A chapter of that book described Mr. Kelly's most recent tenure as commissioner and earlier parts of the book examined his original time as commissioner. Levitt Affidavit ¶ 10.

In October 2010 Mr. Levitt published a column revealing that since 2002 Commissioner Kelly had regularly met with prominent people for lunch at the Harvard Club in New York City and that a foundation controlled by Mr. Kelly had paid for the cost of those lunches. According

to the column, Mr. Kelly had refused to tell even the foundation the identity of those he had hosted at the Harvard Club. Levitt Affidavit ¶ 11.

Mr. Levitt's disclosures about Mr. Kelly's Harvard Club meals triggered substantial press coverage. In a February 2011 column, Mr. Levitt noted that recent disclosures in the *New York Daily News* revealed that Mr. Kelly has spent more than \$15,000 at the Harvard Club in 2008, "the year he was seriously considering running for mayor." Levitt Affidavit ¶ 12.

ADMINISTRATIVE PROCEEDINGS

On or about February 10, 2011, Mr. Levitt submitted a request, pursuant to the Freedom of Information Law, seeking records of the public schedule of Commissioner Kelly. On May 5, 2011, the NYPD denied Mr. Levitt's request. In a letter from Sergeant James Russo, the department asserted that Mr. Levitt's request was "too broad, and fails to describe an NYPD record in a manner that can lead to its retrieval." Levitt Affidavit ¶¶ 13-14 & Exhibit C.

On June 3, 2011, the New York Civil Liberties Union appealed the NYPD's denial of Mr. Levitt's request. In that appeal the NYCLU argued the original request was sufficiently clear in that it "plainly encompasses a paper or electronic calendar or log of the Commissioner's schedule, records that undoubtedly exist and that could easily be retrieved." In addition, the appeal clarified any ambiguity that might have existed in the original request as follows:

To the extent, however, the Department insists the request was too broad or vague, we are happy to clarify it. In seeking records of the Police Commissioner's schedule since January 2002, Mr. Levitt's request specifically includes a request for any paper or electronic calendars or logs maintained by or for the Commissioner about his daily appointments and activities as Police Commissioner. Production of such records would satisfy the request.

Letter to Jonathan David from Christopher Dunn (June 3, 2011) (attached as Exhibit A to Affirmation of Christopher Dunn (Oct. 17, 2011)).

On June 21, 2011, the NYPD denied Mr. Levitt's request. In doing so, it contended the original request could not be construed to encompass any record that in fact existed. As for the clarification offered in the appeal letter, the NYPD asserted it could withhold entirely any calendars or appointment logs of Commissioner Kelly's on the grounds that disclosure of such records could endanger the safety of the commissioner or of those with whom he had met, could impair ongoing investigations, could involve information that was not final, and could violate the privacy rights of those with whom the commissioner had met. Letter to Christopher Dunn from Jonathan David (June 21, 2011) (attached as Exhibit B to Dunn Affirmation).

Mr. Levitt has a substantial interest in learning the identity of those with whom Mr. Kelly has met and in learning information about the substance of those meetings, and he believes the public has a similar interest. Given his long history of reporting about the NYPD and Mr. Kelly and given the leadership role Mr. Kelly plays in New York City's government and in the national and international law-enforcement community, Mr. Levitt believes it is important for the public to know who Mr. Kelly has met with during his time as commissioner. That there has been widespread public reporting about his possibly running for Mayor of New York City simply adds to the legitimate public interest in Commissioner Kelly's meetings. Levitt Affidavit ¶ 16.

Many high-level government officials, including the President of the United States make portions of their schedules available to the public.¹ Just last month, New York Governor Andrew Cuomo started posting detailed versions of his daily schedules. Dunn Affirmation ¶ 5.

¹See <http://www.whitehouse.gov/schedule/complete>

ARGUMENT

I. THE FREEDOM OF INFORMATION LAW ESTABLISHES A BROAD RIGHT OF PUBLIC ACCESS TO GOVERNMENT RECORDS THAT CAN BE ENFORCED THROUGH ARTICLE 78.

As the New York Court of Appeals recognized long ago, the Freedom of Information Law, codified at sections 84 to 90 of the New York Public Officers Law, embodies the State's strong commitment to open government and public accountability. *See Capital Newspapers Division of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 565, 505 N.Y.S.2d 576, 578 (1986). As the statute's legislative declaration explains, the basis of FOIL is the belief that a "free society is maintained when . . . the public is aware of government actions The people's right to know the process of governmental decision-making and to review documents and statistics leading to determination is basic to our society." N.Y. Pub. Off. Law § 84.

Accordingly, FOIL establishes a broad, robust public right of access to information about the daily functioning of state and local government. *See Capital Newspapers*, 67 N.Y.2d at 566, 505 N.Y.S.2d at 578. FOIL provides that government agencies "shall . . . make available for public inspection and copying all records." N.Y. Pub. Off. Law § 87(2); *Capital Newspapers*, 67 N.Y.2d at 566, 505 N.Y.S.2d at 578. FOIL's policy of free and open disclosure applies to all records except those falling into ten narrow exceptions specified in the statute. *See* N.Y. Pub. Off. Law § 87(2)(a)-(j).

FOIL also establishes an administrative process to ensure the public's right of access is vindicated in a timely manner. Section 89 contains the provisions addressing the procedure for processing FOIL requests. Section 89(3) explains how an agency is to process an initial request.

Section 89(4)(a) provides that any person whose request is denied can appeal that denial to the agency, and section 89(4)(b) provides that any person whose administrative appeal is denied may bring an action under Article 78 to challenge the denial. Section 89(4)(b) specifies in particular that in any such Article 78 proceeding, “the agency involved shall have the burden of proving that such record falls within” the exemptions of section 87 if the agency relies on those exemptions in denying the request. *See* N.Y. Pub. Off. Law §§ 87(3)–(4).²

II. THE NYPD IMPROPERLY DENIED THE PETITIONER’S REQUEST IN ITS ENTIRETY.

The petitioner Leonard Levitt has sought copies of the schedule of NYPD Commissioner Raymond Kelly to uncover information about meetings held by Mr. Kelly since January 2002, a request that almost certainly encompasses thousands of entries over a nearly ten-year period. More than two decades ago, the daily calendar of the Mayor of the City of New York was held to be subject to production under FOIL. *See Kerr v. Koch*, N.Y.L.J. (N.Y. County Sup. Ct., Feb. 1, 1988) (courtesy copy attached as Exhibit D to Dunn Affirmation).

Nonetheless, the NYPD categorically rejected the petitioner’s entire request, invoking three exemptions under the Freedom of Information Law: (1) the life-and-safety exemption of section 87(2)(f) of FOIL; (2) the law-enforcement interference exemption of section 87(2)(e); (3)

² Finally, FOIL authorizes the Committee on Open Government to oversee and issue advisory opinions interpreting FOIL. N.Y. Pub. Off. Law § 89(1)-(2). The central purpose of this government body is to ensure that the state’s commitment to open government is carried out as delineated by the statute. *Id.* Because the Committee is the administrative agency charged with oversight of the Freedom of Information Law, its interpretation of the statute, “if not irrational or unreasonable, should be upheld.” *Howard v. Wyman*, 28 N.Y.2d 434, 438, 322 N.Y.S.2d 683, 685-86 (1971).

the intra-agency materials exemption of section 87(2)(g); and (4) privacy exemptions under sections 87(2)(b) and 89(2) and under section 50 of the Civil Rights Law.

The NYPD's effort to categorically withhold a decade of calendar entries conflicts squarely with extensive case law from the Court of Appeals and elsewhere barring such blanket withholdings. Moreover, with respect to the specific exemptions it invokes, the department does little more than offer conclusory (and incredible) assertions that plainly are insufficient under well-established law. Finally, if some of Commissioner Kelly's calendar entries contain legitimately exempt information, that only allows the NYPD to redact that information, not to withhold all responsive documents entirely.

A. FOIL Does Not Permit Categorical Denials, Imposes a Substantial Burden on Government Agencies Seeking to Invoke Exemptions, and Requires Agencies to Employ Redaction to Protect Exempt Material.

The Freedom of Information Law provides that "all records" of a public agency are open to public inspection and copying unless otherwise specifically exempted. N.Y. Pub. Off. Law § 87(2). The Court of Appeals has determined that "[t]o ensure maximum access to government documents, the 'exemptions are to be narrowly construed.'" *Gould v. New York City Police Dep't*, 89 N.Y.2d 267, 275, 653 N.Y.S.2d 54, 57 (1996) (citation omitted). Moreover, an agency that seeks to withhold a record has the burden of proving that the requested record falls squarely within an enumerated exemption. *Id.* To do this, the agency must articulate "particularized and specific" facts justifying its belief that the requested records are exempt from disclosure. *Id.* Conclusory averments, without more, are insufficient to meet the agency's burden. *See, e.g., Capital Newspapers Division of the Hearst Corp. v. City of Albany*, 15 N.Y.3d 759, 906

N.Y.S.2d 808 (2010) (reversing Appellate Division and holding that “conclusory affidavit” from agency insufficient to meet burden of invoking exemption); *Washington Post Co. v. New York State Ins. Dep't*, 61 N.Y.2d 557, 567, 475 N.Y.S.2d 263, 267 (1984) (rejecting reliance on “conclusory pleading allegations and affidavits”). And only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld. *See Fink v. Lefkowitz*, 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 471 (1979).

Even if a government agency is able to establish that some material in requested records is exempt, that does not mean the document is entirely exempt from disclosure. FOIL expressly provides that an agency may deny access to records “or portions thereof.” N.Y. Pub. Off. Law § 87(2). As the Third Department has explained, “[N]ot all of a document is necessarily exempt because a portion of it would be.” *Polansky v. Regan*, 81 A.D.2d 102, 104, 440 N.Y.S.2d 356, 358 (3d Dep't 1981) (citation omitted). To the contrary, the Court of Appeals has declared that “blanket exemptions” for particular documents, or types of documents, are “inimical” to FOIL's policy of open governance. *Gould*, 89 N.Y.2d at 275, 653 N.Y.S.2d at 57.

Reflecting this approach, New York courts have a well-established policy of ordering redaction where some, but not all, information in requested records is within a statutory exemption. In particular, ample authority from the Court of Appeals and the First Department favors disclosure of records kept by police departments, even where some information in the records is exempt. *See Gould*, 89 N.Y.2d at 275, 653 N.Y.S.2d at 57 (ordering disclosure of NYPD complaint follow-up reports with opinions and analysis subject to the intra-agency exemption redacted); *Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 159, 688 N.Y.S.2d 472, 477-78 (1999) (explaining that, for officer disciplinary reports, “disclosure for

uses that would not undermine the protective legislative objectives [of the personnel records exemption] could be attained . . . through redaction by the agency having custody of the records”); *New York Civil Liberties Union v. New York City Police Department*, 74 A.D.3d 632, 902 N.Y.S.2d 356 (1st Dept. 2010) (rejecting NYPD effort to withhold shooting reports in their entirety and ordering production subject to appropriate redaction); *Johnson v. New York City Police Dep’t*, 257 A.D.2d 343, 349, 694 N.Y.S.2d 14, 19-20 (1st Dep’t 1999) (holding that disclosure of unredacted complaint follow-up reports could pose a threat witness safety, but rejecting the NYPD’s claim of a blanket exemption and instead ordering disclosure of the records with names and identifying information redacted); *Capital Newspapers Division of Hearst Corp. v. Albany*, 63 A.D.3d 1336, 1339, 881 N.Y.S.2d 214, 217-18 (3rd Dep’t 2009) (finding gun tags exempt personnel records but nevertheless subject to disclosure and stating that redacting officers names would “adequately protect the individual officers”), *aff’d on other grounds*, 15 N.Y.2d 759, 906 N.Y.S.2d 808 (2010).

B. The NYPD’s Blanket Denial of the Petitioner’s Request Is Impermissible.

Notwithstanding this well-established law, the NYPD has denied the petitioner’s request in its entirety. To the extent there is information in the responsive records that in fact is exempt, the NYPD can withhold that information. As noted above, however, it is only permitted to protect that information through redaction; it cannot resort to the blanket withholding it attempts. It’s blanket denial of the Mr. Levitt’s request is therefore impermissible. *See Gould*, 89 N.Y.2d at 275, 653 N.Y.S.2d at 57 (ordering disclosure of NYPD documents with redactions); *New York Civil Liberties Union v. New York City Police Department*, 74 A.D.3d at 632, 902 N.Y.S.2d at

356 (same).

To the extent, however, the NYPD means to suggest -- though it nowhere asserts this -- that the claimed exemptions encompass all of the contents of all responsive documents and therefore that redaction is not an option, such an assertion would be entirely without merit. With respect to the exemptions invoked in the petitioner's request, the NYPD offers little more conclusory statements that plainly are legally insufficient. And even where the department offers some explanation, that explanation does not justify its blanket withholding of Mr. Kelly's calendars going back to 2002.

Privacy Exemption- Starting with the privacy exemptions claimed by the NYPD, the department does nothing more than assert that disclosure of Commissioner Kelly's schedule "would result in economic or personal hardship" to those with whom he met. *See* David Letter at 2 (attached as Exhibit B to Dunn Affirmation). Offered without explanation or support, this plainly is insufficient to meet the agency's burden. *See Capital Newspapers*, 15 N.Y.3d at 759, 906 N.Y.S.2d at 808 (2010) (rejecting exemption claim for lack of specificity); *Washington Post Co.*, 61 N.Y.2d at 567, 475 N.Y.S.2d at 267 (same). Moreover, it is hard to understand how the fact that a person had met with someone of Commissioner Kelly's stature could cause "economic or personal hardship," much less understand how such a result could apply to any substantial number of people who had met with him. Finally, to the extent the NYPD could establish through appropriate proof such hardship for anyone, it is allowed only to redact those calendar entries, not fall back on blanket withholding.

Intra-Agency Exemption- The NYPD also asserts that the calendar entries "are prospective in nature" and therefore can be denied under section 87(2)(g) as "non-final and

subject to change when recorded.” David Letter at 2. Section 87(2)(g) exempts inter-agency or intra-agency materials that do not fall into four separate categories. The department provides no further explanation as to how appointment information qualifies as exempt under this section, and it of course bears this burden. *See, e.g., Gould*, 89 N.Y.2d at 275, 653 N.Y.S.2d at 57. The exemption therefore cannot justify the blanket withholding of a decade’s worth of appointment information.

Law Enforcement Interference Exemption- The NYPD also asserts that, “to the extent the schedule references appointments to ongoing criminal and public safety investigations, the disclosure of the occurrence of which would interfere with the investigations, the records are exempt from disclosure pursuant to Public Officers Law Section 87(2)(e)(i) and (iv).” David Letter at 2 (emphasis added). Beyond the fatal lack of explanation of support on this point, the NYPD does not even claim any responsive records are implicated by this exemption; to the contrary, it says only “to the extent.” This is not an assertion of an exemption.

The NYPD’s appeal denial further claims that the confidential-information exemption of section 87(2)(e)(iii) is similarly applicable because “the schedule references meetings where confidential information was provided relating to criminal investigations.” David Letter at 2. Again, the lack of explanation or detail is fatal (and not surprising given the small likelihood that a calendar entry would disclose confidential information discussed in a meeting). Moreover, if disclosure of some calendar entries would in fact somehow disclose a confidential source or technique, the NYPD can simply redact those entries. It cannot, however, invoke this exemption for a blanket denial.

Personal Safety- The NYPD’s primary claim is that disclosure of the Commissioner’s

Kelly schedule since 2002 “could endanger the life or safety of the Police Commissioner and/or the people with whom he had scheduled appointments.” *See* David Letter at 1 (attached as Exhibit B to Dunn Affirmation). Even assuming that disclosure of some appointment information might pose a threat, this concern cannot justify withholding nearly ten years of appointment information.

In support of its personal safety claim, the NYPD asserts that Commissioner Kelly and members of his family have been the subject of unspecified “numerous threats.” It then argues that disclosure of the commissioner’s past and future calendar would jeopardize his safety because a person intent on doing harm

would benefit from knowing where the Police Commissioner is scheduled to be at a given time. Also, knowledge of the times and locations of appointments and other activities could be used to assess at which times and places the Police Commissioner might be vulnerable. These safety concerns would apply to both current and past schedules because past schedules could be studied to find patterns of appointments that could be used to predict the Police Commissioner’s future whereabouts.

Id. While the personal safety of the police commissioner is of course a compelling concern, this does not justify a categorical withholding of his entire calendar going back nearly a decade.

First, the NYPD does not suggest -- nor could it -- that all entries in the commissioner’s calendars could allow a person to learn when and where he might be so as to expose him to potential harm. At the very most, this concern would apply to some calendared future meetings or to past meetings that presented a pattern from which future meeting dates, times, and locations could be ascertained. It is only that subset of entries that could even potentially be implicated by the personal-safety concern articulated by the NYPD.

Starting with future appointments, those would constitute only a tiny portion of the

petitioner's request and almost certainly include a mix of publicly announced and private events. To the extent some of those appointments present genuine safety concerns, the NYPD can redact information necessary to obviate those concerns, such as the date, time, or location of the meeting. And if there are some rare circumstances in which the department can establish that very fact of an appointment poses a genuine safety concern, the NYPD can redact that entry entirely.

As for past appointments -- which will constitute nearly all of the responsive records -- the NYPD would have to identify those appointments for which there is some pattern that in fact might reasonably disclose the details of future appointments so as to pose a safety threat. Given that the request seeks records about appointments going back to 2002, it seems evident that this concern cannot apply to the bulk of the petitioner's request.

To the extent, however, that the NYPD can establish that some entries about past appointments do disclose a pattern that in fact might reasonably point to the details of future appointments that in fact would pose a safety threat, the department still could not simply withhold all those entries. Rather, it would first have to use redaction to eliminate the concern. Again, for the entries for which this is a valid concern, redacting the dates or times or in some instances the locations of the appointments would completely eliminate the ability to predict the dates, times, and locations of future meetings.

In sum, the personal-safety exemption may allow the NYPD, with proper support, to redact some information from some responsive entries or, in some very rare instances, withhold an entry entirely. It cannot, however, authorize the department to withhold all the information in the commissioner's entire calendar for the nearly ten years.

III. THE PETITIONER IS ENTITLED TO ATTORNEY'S FEES.

The petitioner also requests attorneys' fees and reasonable litigation costs under FOIL. Section 89(4)(c) grants a court discretion to award reasonable attorneys' fees and other litigation costs when the moving party has substantially prevailed in its Article 78 petition and the agency had no reasonable basis for having withheld the records in dispute.

Section 89(4)(c) was amended in 2006, in part, to remove the previous requirement that "the record involved was, in fact, of clearly significant interest to the general public." *See, e.g. Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 441–42, 808 N.Y.S.2d 568, 571–72 (2005) (rejecting fee claim under former "interest to general public" standard). The legislative history to the 2006 amendment states that "[t]his bill strengthens the enforcement of such a right [citizens' right to access certain government records via FOIL requests] by discouraging agencies from denying public access to records by guaranteeing the award of attorneys' fees when agencies fail to respond in a timely fashion or deny access without any real justification." 2005 Legis. Bill Hist. NY S.B. 7011.

Thus, the only showing that now must be made for an award of attorneys' fees under FOIL is that the petitioner substantially prevailed and that "the agency had no reasonable basis for denying access." N.Y. Pub. Off. Law § 89(4)(c).³ For all the reasons discussed above, it appears at this stage that the NYPD lacks a reasonable basis for denying the NYCLU's FOIL request. The NYCLU recognizes, however, that this matter cannot be definitively resolved until

³Although Section 89(4)(c) alternatively awards attorneys' fees when an agency has not responded to the FOIL request within the statutory timeframe, Petitioner does not invoke this section.

the NYPD files its opposition, at which point the NYCLU will be able to address the fee issue more completely.

CONCLUSION

For all the foregoing reasons, the petitioner Leonard Levitt respectfully requests that the Court grant his petition.

Respectfully submitted,



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Dated: October 18, 2011
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