

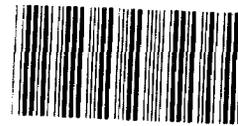
GAO

Briefing Report to the Chairman,
Subcommittee on Government
Information, Justice, and Agriculture,
Committee on Government Operations,
House of Representatives

June 1987

FREEDOM OF
INFORMATION ACT

Fee Waiver Practices at
the FBI



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United States
General Accounting Office
Washington, D.C. 20548

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June 3, 1987

The Honorable Glenn English
Chairman, Subcommittee on Government
Information, Justice, and Agriculture
Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

In June 1986, you asked us to conduct a review of how agencies administer the provision of the Freedom of Information Act (FOIA) pertaining to the waiver of fees charged on information requests. During our review, however, Congress amended the FOIA provision relating to fee waivers with the anticipated result that agencies will revise their fee waiver practices after the April 25, 1987, effective date of the amendment. In subsequent discussions with your office, it was agreed that we would complete our work on fee waiver practices only at the Federal Bureau of Investigation (FBI) under the prior law, leaving open the possibility of examining practices at other agencies after the new FOIA fee waiver amendment has been implemented. The objectives of our work at the FBI were to (1) identify and describe the procedures and standards used in making fee waiver decisions and (2) provide information on how the procedures and standards were applied to specific fee waiver requests. To illustrate the FBI's operations under the prior law, we reviewed fee waiver requests decided by the FBI during the period January 1985 through September 1986.

Under the FOIA, agencies are permitted to charge reasonable fees associated with the search for and duplication of requested documents. The act allows agencies to waive or reduce these fees when they determine that it is in the public interest because furnishing the information can be considered as primarily benefiting the general public, rather than the individual making the request.

We examined all 48 requests for fee waivers that were decided by the FBI's fee waiver committee during the period from January 1985 through September 1986. We found that the FBI used criteria developed as governmentwide guidance by the Department of Justice in evaluating these requests, and that these criteria pertain both to characteristics of the person or organization making the request as well as to

the nature of the requested material. Since the guidance is general, individual discretion and judgment by agency decisionmakers is required in applying the guidelines to specific fee waiver requests. Appendix I describes the FBI's decisionmaking process and its handling of specific cases.

Of the 48 cases we examined, the FBI committee denied a fee waiver in 11. It partially reduced the fee in 31 cases. In the remaining six cases the committee granted full waivers. These actions reduced the \$44,859 in total estimated fees for these applications by \$12,503. Appendix II provides a classification of the fee waiver cases by profession of requester, subject matter, and other characteristics.

In October 1986, the Freedom of Information Reform Act of 1986 was enacted by Congress which, among other things, amended the FOIA fee waiver provision. To assist agencies in implementing the amendment, the Department of Justice issued new FOIA fee waiver policy guidance on April 2, 1987.

As you requested, we did not obtain official agency comments on this briefing report. We did, however, discuss our findings with FBI officials responsible for FOIA activities and they agreed with the facts presented. As arranged with your office, we plan no further distribution of this report until 30 days from the date of this letter unless you publicly announce its contents earlier. At that time, we will send copies to the Attorney General; Director, Federal Bureau of Investigation; Director, Office of Management and Budget; and to others who have an interest in the subject. If you have any questions, please contact Richard Caradine or me on 275-8676.

Sincerely yours,



L. Nye Stevens
Associate Director

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ABBREVIATIONS

DOJ	Department of Justice
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act
OIP	Office of Information and Privacy
OLP	Office of Legal Policy

FREEDOM OF INFORMATION ACT
FEE WAIVER PRACTICES AT
THE FEDERAL BUREAU OF INVESTIGATION

The Freedom of Information Act (FOIA), 5 U.S.C. section 552, provides the basic authority and procedures for the public to obtain documents and records from the executive branch of the federal government. In making documents available to the public, agencies are permitted to charge fees, limited to reasonable charges for search and duplication, to individuals and organizations requesting such information. The FOIA permits agencies to waive or reduce these fees when they determine that it is in the public interest because furnishing the information can be considered as primarily benefiting the general public, rather than the requester. Prepared at the request of the Chairman of the House Government Operations Subcommittee on Government Information, Justice, and Agriculture, this briefing report considers how one agency--the Federal Bureau of Investigation (FBI)--deals with applications for such fee waivers.

OBJECTIVES, SCOPE,
AND METHODOLOGY

The Chairman's request of June 3, 1986, asked us to conduct a governmentwide review of FOIA fee waiver practices. During our review, however, the FOIA provision relating to fee waivers was amended by Congress, with the anticipated result that agencies will revise their fee waiver practices after the amendment's April 25, 1987, effective date. As a result, it was agreed with the Chairman's office that we would complete our work on fee waiver practices only at the FBI, leaving open the possibility of examining practices at other agencies when the new FOIA amendment has been implemented.

The objectives of our work were to (1) identify and describe the procedures and standards used by the FBI in making fee waiver decisions and (2) provide information on how the procedures and standards were applied to specific fee waiver requests.

We conducted our work at FBI headquarters in Washington, D.C., from September 1986 to January 1987. Our work included:

- discussions with FBI officials responsible for fee waiver decisions;
- review of the guidelines involved in the fee waiver decision process; and

--review of the records of the 48 FBI fee waiver decisions made from January 1985 through September 1986.

Our analysis was limited to an examination of the documents connected with the 48 fee waiver decisions made by the FBI fee waiver committee in this period.

We determined the procedures and standards used in making fee waiver decisions from (1) review of FBI documents, (2) discussions with FBI officials, and (3) analysis of specific cases. In addition, we discussed the status of cases under appeal with officials of the Department of Justice (DOJ), the appeal authority for FBI FOIA cases.

We conducted our review in accordance with generally accepted government auditing standards.

FBI PROCEDURES FOR MAKING FEE WAIVER DECISIONS

All FOIA requests for files maintained at FBI headquarters are handled by the FBI Freedom of Information/Privacy Act section, which locates the requested file, determines its releasability, and assesses and collects fees. While FBI field offices sometimes handle FOIA requests, they refer all fee waiver requests to FBI headquarters.

The FOIA allows agencies to charge search and duplication fees. The FBI normally does not charge search fees since files are usually located rapidly through its file indexing systems. The FBI's standard duplication fee is 10 cents per page. No fee is assessed unless the documents requested exceed 250 pages or a fee of \$25. When a fee is to be charged, the FBI asks the requester for a written statement of his or her willingness to pay; if the fees are expected to exceed \$300, the FBI requires a 25-percent deposit.

The FBI does not maintain statistics showing the total number of fee waiver requests received. Statistics for fee waiver requests involving fewer than 250 pages are not kept because these requests fall below the threshold for assessing fees and there is no need to make a decision on the merits of the fee waiver request. Statistics for fee waiver requests by individuals asking for their own files, or involving only previously released documents, are also not maintained. As a matter of policy, the FBI generally denies these requests at the initial review level because it has concluded that no public benefit will be derived from the information.

Those fee waiver requests not subject to general denial are referred to a three-member fee waiver committee composed of the senior officials of the FBI Freedom of Information/Privacy Act section. The committee uses guidance developed by the Department of Justice's Office of Legal Policy (OLP) and case law, if applicable. The guidance was issued governmentwide to assist¹ agencies in applying the fee waiver provision consistently. This guidance cites two basic policy objectives embodied in the statutory fee waiver provision: 1) the fostering of disclosure of non-exempt agency records where it will primarily benefit the general public and 2) the preservation of public funds where there will be insufficient public benefit derived from disclosure. The guidance identified five general criteria presented below which should be considered by an agency in determining whether there is sufficient public benefit to warrant a fee waiver. The first two deal with the requester while the remaining three address the material requested. These five criteria include:

- the qualifications, expertise, ability, and intention of the requester to disseminate the information to the public;
- the personal interest of the requester weighed against the expected public benefit from disclosure;
- the genuine public interest in the subject matter of the records for which a fee waiver is sought;
- the value of the records themselves in being informative on the issue found to be of public interest; and
- the already existing availability in the public domain of requested information.

According to FBI fee waiver committee members, after a file has been located, but prior to detailed processing and duplication, an agent reviews the case file and presents a summary to the committee. The committee evaluates the merits of the fee waiver request by applying the five criteria.

¹ As required by the FOIA, DOJ provides guidance to assist agencies in interpreting and implementing the act. DOJ's Office of Legal Policy fulfilled this responsibility and in January 1983 issued governmentwide fee waiver guidelines. This guidance is advisory rather than mandatory. OLP also publishes an annual summary of court rulings on FOIA matters, including fee waivers.

In considering each of the five criteria, the committee uses a checklist which addresses certain broadly described factors. Because these criteria and factors are broadly described and do not provide precise thresholds or detailed guidance as to when a criteria is or is not met, the committee uses its collective judgment in applying the criteria to individual cases.

When the committee decides that the release of a file will yield a public benefit, it must decide whether to waive the fee in whole or reduce it in part, which constitutes a partial fee waiver. In making this decision, the committee considers the extent to which information in the releasable portion of the file is (1) not pertinent to the subject of the request; (2) repetitive of other material in the file; (3) public source material such as news articles; and (4) of limited value because of deletion of much of the data pursuant to FOIA disclosure restrictions.

From January 1985 through September 1986, the FBI fee waiver committee denied 11 of the 48 fee waiver requests, while granting 31 partial waivers and 6 full waivers. These actions reduced the \$44,859 in total estimated fees for these applications by \$12,503. The average fee which was involved in the 48 fee waiver applications was \$935. The average fee reduction (excluding the 11 cases receiving no reduction) was \$338.

The requests covered a wide variety of FBI investigations. The largest group of requesters were media representatives. Of the 20 media requesters, 4 received full waivers, 15 received waivers ranging from 20 to 50 percent and one was required to pay the entire fee. Additional analyses of the fees assessed and waived, topics of files requested, and professions of requesters are contained in appendix II.

FEE WAIVER DENIALS

The FBI denied 11 of the 48 fee waiver requests after applying the five criteria. Our analysis of these cases showed that application of these criteria often involves judgments and interpretations about the public interest value of the requested material or the requester's ability to disseminate the material. The following sections discuss the 11 fee waiver denials by reason for denial.

Limited public interest in subject

DOJ's guidance for assessing the extent of public interest in a subject indicates that the public benefit need not encompass all citizens but must be distinct from benefit to the requester alone. The FBI denied one fee waiver request when, in its

opinion, the public benefit would be limited to the interest of members of a small group rather than the public at large. A discussion of this request follows.

A member of the editorial board of a marxist periodical requested any information dealing with FBI investigations of the publication, for use in its fiftieth anniversary issue. A fee waiver committee member said the committee denied a waiver because it concluded that release of the information would primarily benefit members of a small group rather than the public at large. The FBI fee waiver committee records do not contain information on the size of the group or specifics about the periodical's availability to the general public. The periodical's circulation is 3,500 and it is indexed and abstracted in several reference systems, such as the Social Sciences and Humanities Index.

Insufficient ability or intent to disseminate

Pursuant to the DOJ guidance, the FBI also considers the requester's ability or intent to disseminate the information. The FBI denied one fee waiver request because it found insufficient intent to disseminate the material. It also denied six other fee waiver requests because the requester could not demonstrate the ability to disseminate.

The fee waiver request denied because of insufficient intent to publish involved a newspaper reporter who asked for information on a recently deceased state government official. According to the FBI, this requester had made 94 previous FOIA requests. He frequently asked for documents on recently deceased individuals and always asked for a fee waiver. The FBI denied the fee waiver because the requester's intentions to disseminate the information were uncertain and he did not show the historical or public interest in the subject matter requested. The FBI was unwilling to waive the duplication fees without additional documentation on the purpose of his research, how the information would be disseminated or demonstrable public interest in the subject. The requester appealed this decision and cited one article he had published and one story he expected to appear shortly, both of which were based upon prior FOIA requests. The appeal decision was pending as of March 1987.

The six remaining cases involved FBI denials on the basis of insufficient ability to disseminate the material. In two of these cases, no information was submitted with the fee waiver application to substantiate the ability to disseminate the material. In the four remaining cases, although the requester provided some information to support a claim that the information

would be disseminated, the FBI concluded that the ability to disseminate the information had not been clearly demonstrated. For example, a requester asking for the FBI's files on a defunct newspaper had written a thesis which was published in an undergraduate review and indicated that a graduate university library had requested her to hold a seminar on the subject of her request. She also informed the FBI that she would deposit the requested documents at this library, which contains the archives of the newspaper and thereby make them available to future researchers and students. The FBI did not interpret this as sufficient ability to disseminate to the general public and thus denied the fee waiver. This requester has appealed the FBI decision. The appeal was pending as of March 1987.

Personal interest of requester

The FBI will deny a fee waiver when an individual, or his representative, is requesting his own file. The FBI believes that such "first party" requests are made for the private benefit of the requester, not for the benefit of a broader public. One of the fee waivers decided by the committee was denied on this basis. A lawyer, acting on behalf of two clients, asked for the FBI's files on their deceased son. He requested a fee waiver because of the public interest in the son's death. He cited extensive press coverage and issues implicating the use of deadly force by police as evidence of public interest in the subject. The FBI denied the fee waiver request on the basis of insufficient public benefit since the parents would primarily benefit from the information in the file and no information was provided by the requester about his ability or intent to disseminate it.

File irrelevant to subject

The FBI denied a fee waiver because the information in the file was not relevant to the subject the requester intended to write about. This requester, a freelance writer, requested FBI files on a kidnapping for research on a book on organized crime. The FBI denied the fee waiver request, claiming that the files contained no information that organized crime was responsible for the kidnapping and only a small portion of the file contained information on organized crime implication or involvement. The FBI offered to provide the relevant small portion free of charge since it anticipated that the number of pages were below the threshold for duplication fees. The FBI reasoned that the remaining information in the file was of little relevance to the requester's stated interest in the file--the history of organized crime.

File previously released

The DOJ guidelines state that in evaluating fee waiver requests, agencies should consider the existing availability in the public domain of the requested information. In this regard, the FBI has a general policy to deny fee waivers for information that has been previously released under a prior FOIA request. The FBI offers to provide the previously released file at 10 cents per page or to make the information available at its public reading room in Washington, D.C. Under this policy, the FBI reasons that the information is already in the public domain and therefore the additional release would not add to the public understanding of the subject. In one instance, a writer asked for information about President Reagan. The FBI claimed that all of the documents relevant to the request had been released to others and were therefore already in the public domain. When informed of the decision, the requester reduced the scope of the request. Documents in response to this more limited scope consisted of fewer than the 250-page threshold and were provided without charge.

The FBI does not maintain statistics on the number of fee waiver requests for previously released information which are denied. Although this one request was presented to the committee, the FBI told us that fee waiver requests involving previously released information are normally denied by processing clerks who obtain informal approval from a fee waiver committee member for such decisions.

PARTIAL AND FULL FEE WAIVERS

The majority of fee waiver requests, 37 of the 48, received partial or full fee waivers. Pursuant to the FOIA fee waiver provision, the FBI waived the entire fee in 6 cases and reduced the fee in 31 others. The reductions ranged from 20 to 80 percent. Decisions on the extent of fee waivers are made when the FBI is satisfied that the requester has the ability and intent to disseminate the information and that at least some of the information will contribute to the public benefit. Appendix II contains additional analysis of the fees waived.

FBI officials told us that the amount of the fee reduction granted depends on the extent the releasable portion of the file contains repetitive material, newspaper clippings or other public source documents, and information which is not pertinent to the request or which has been substantially deleted because it is exempt from disclosure. This information does not, according to the FBI's policy, warrant consideration for a fee waiver because its release does not provide any additional public benefit.

Each case file contains a record of the extent of the partial fee waiver. According to the officials, the degree to which partial waivers are granted is based on broad estimates of the file contents. The committee does not examine every page to determine the extent of the waiver because the files are often voluminous. Rather, the committee uses the agent's file summary, discussion with the reviewing agent, and committee members' knowledge of this or similar investigations. This information is used to estimate the percent of the fee that should be waived. Requesters are told that the extent of the partial fee waiver decision will be reconsidered when records are processed and the FBI has a more precise page count of the documents.

The correspondence used by the FBI to notify the requester of the partial fee waiver does not always clearly explain the basis for granting a partial rather than full waiver. We reviewed each of the 28 available letters notifying requesters who were granted a partial fee waiver. In six cases, we believe the FBI correspondence clearly explained that a partial rather than full waiver was granted because some portion of the requested material was based on public source or duplicative material. In 21 cases, the FBI letter did not clearly describe the basis for the partial waiver. In the remaining case a partial waiver was decided, but subsequently the requester reduced the scope of his request below the fee threshold. The following excerpts from correspondence illustrate these differences.

Example 1

"We have determined that an 80 percent reduction in duplication fees is appropriate in this instance. This decision is based on the amount of useful and substantive information contained in the releasable portions of the records and the extent to which this information will meaningfully contribute to the public's understanding of the RFK assassination. We have estimated that approximately 20 percent of the releasable records will contain information that is repetitive, already available in the public domain (i.e. newspaper articles and court records) or is otherwise administrative and non-substantive in nature." (underscoring added)

Example 2

"We have determined that a 30 percent reduction in duplication fees is appropriate in this instance in view of the limited amount of useful and substantive information contained in the releasable portions of the records and the extent to which this information will meaningfully

contribute to the public's understanding of the subject matter. Other factors considered included the public interest in the subject matter of the records requested; whether any of the information in our files is already in the public domain; your qualifications, ability and intentions to disseminate the information to the general public; and whether the material is personal in nature or serves only your private interests."

The first letter specifically informs the requester that 20 percent of the requested documents will not be provided free of charge because they are already in the public domain, repetitive or otherwise administrative in nature. The second letter, however, is less clear. It informs the requester that some of the information is of limited use and substance, but does not explain the rationale for this judgment. It also implies that the proportion of the fee waived was in part related to the intention or ability of the requester to disseminate the information. As discussed earlier, the amount of fee reduction is to be based on the extent the material will provide a public benefit. As the following summaries of two appeals of partial waiver cases suggest, the requesters may not understand the FBI's basis for the less than full fee waiver or consider the decision arbitrary or unjustified.

- A scholar contended that his 50 percent fee waiver was inaccurate. The requester also believed that the FBI failed to substantiate that the file requested had only a "limited amount of useful and substantive information."
- The managing editor of a newspaper contended the 20 percent reduction given a reporter was insufficient, arbitrary, and improper and that it was inaccurate to contend that the file was of limited public benefit.

The FBI fee waiver committee members told us that letters to requesters explaining the basis for the partial reductions are prepared by clerks based on a standard fixed text. They recognized that some of the letters could have been clearer and said they would monitor preparation of the letters more closely in the future.

BACKLOG OF FEE

WAIVER ADMINISTRATIVE APPEALS

DOJ's regulations provide that the requester may appeal to the Attorney General fee waiver decisions made by DOJ components. Five of the 48 fee waiver decisions included in our review were appealed. As table I.1 shows, 4 of the 5 fee waiver requests that were appealed had been pending for 5 to 25 months as of

March 1987. The closed appeal was in process for approximately 10 months.

Table I.1:
Status of Fee Waiver Appeals

<u>Case number</u>	<u>Date appealed</u>	<u>Status March 1987</u>	<u>Number of months pending</u>
1	February 1985	Pending	25
2	September 1985	Pending	18
3	June 1986	Pending	9
4	November 1985	Closed	10
5	October 1986	Pending	5

All FOIA appeals, including fee waiver appeals, are handled by the Department of Justice Office of Information and Privacy (OIP). OIP has designated one staff attorney to handle all fee waiver appeals as well as a portion of the other FOIA appeals workload. According to this attorney, as of February 13, 1987, she was carrying a workload from the FBI and other Justice components of 16 fee waiver appeals, 13 general FOIA appeals, and 6 FOIA cases in litigation. This attorney is working part time and said she has also been assisting in drafting new Justice fee waiver guidelines. In total the 10 OIP staff attorneys are responsible for approximately 700 pending FOIA appeals with about 50 cases in litigation. The OIP estimates that on average, approximately 25 percent of the staff attorneys' time is devoted to litigating FOIA cases.

AMENDMENT OF THE FOIA
FEE WAIVER PROVISION

The fee waiver practices and standards previously discussed represent the FBI's application of the prior law and Justice guidance. Recent amendments to the FOIA and new policy guidance developed by OLP may change these standards and practices. The FOIA fee waiver amendment was effective April 25, 1987.

On October 27, 1986, the Freedom of Information Reform Act of 1986, Public Law 99-570 was enacted. Among other things, the law amended the fee waiver provision to provide that documents are to be furnished without charge or at a reduced charge if the disclosure is in the public interest because it is likely to contribute significantly to public understanding of the

operations or activities of the Government and is not primarily in the commercial interest of the requester. According to a sponsor of the amendment who commented in the Congressional Record,

The requirement that the disclosure is "likely to contribute significantly to public understanding of the operations or activities of the Government" is to be liberally construed in favor of waivers for noncommercial requesters.

On April 2, 1987, OLP issued new governmentwide policy guidance for fee waiver determinations made under the statute's new fee waiver standard. According to OLP, agencies should use this policy guidance in developing agency regulations setting forth procedures and guidelines for determining when such fees should be waived or reduced.

SELECTED ANALYSES OF
FBI FEE WAIVER DECISIONS MADE DURING THE PERIOD
JANUARY 1985 THROUGH SEPTEMBER 1986

Table II.1:
 FBI Fee Waiver Committee Activity
 January 1985 Through September 1986

Fee waivers granted in full		6
Fee waivers granted partially		31
Fee waivers denied in full		
Interested group of limited size	1	
File irrelevant to topic	1	
File previously released ^a	1	
Limited ability or intent to disseminate		
Students	3	
Others	4	
Personal interest of requester ^a	<u>1</u>	<u>11</u>
Total cases reviewed		<u>48</u>

^a Normally FBI clerks routinely deny fee waiver requests for files previously released or for individuals seeking their own files, without formal consideration by the fee waiver committee. This application, however, was considered and denied by the committee as an exception to the general rule.

Table II.2:
 FBI FOIA Fee Waivers
 By Profession of Requester and
 Percent of Fee Waived

Percent of Fee waived	<u>Media</u>	<u>Student</u>	<u>Scholar</u>	<u>Writer</u>	<u>Attorney</u>	<u>Librarian</u>	<u>Total</u>
100	4		1	1			6
80					1		1
75				1			1
60				1			1
50	5		6	2			13
40	1		2				3
30	5						5
25						1	1
20	4		1	1			6
0	<u>1</u>	<u>3</u>	<u>2</u>	<u>3</u>	<u>1</u>	<u>1</u>	<u>11</u>
TOTALS	<u>20</u>	<u>3</u>	<u>12</u>	<u>9</u>	<u>2</u>	<u>2</u>	<u>48</u>

Table II.3:
Fees Assessed and Waived
By Profession of Requester

<u>Profession</u>	<u>Number of requesters</u>	<u>Total</u>		<u>Average</u>	
		<u>Fees</u>	<u>Waiver</u>	<u>Fee</u>	<u>Waiver</u>
Media	20	\$ 8,254	\$ 2,721	\$ 413	\$ 136
Student	3	2,210	-	737	-
Scholar	12	10,317	5,334	860	444
Writer	9	10,836	2,168	1,204	241
Attorney	2	2,862	2,260	1,431	1,130
Librarian	<u>2</u>	<u>10,380</u>	<u>20</u>	5,190	10
Totals	<u>48</u>	<u>\$44,859</u>	<u>\$12,503</u>		

Table II.4:
Topics Involved In Fee
Waiver Requests

<u>Topic</u>	<u>Number of cases</u>
Affiliation ^a	17
Civil Rights	8
Espionage	2
Organized Crime	6
Public official/events	13
Other ^b	<u>2</u>
Total	<u>48</u>

^a Represents affiliation of groups or individuals with communist and similar organizations.

^b These involved a World War I draft evader and an investigation of a bomb explosive cache.

Table II.5:
Average Of Fees Assessed
And Waived By Percentage
Of Waiver Granted

<u>Percentage of Fees Waived</u>	<u>Number of Cases</u>	<u>Average</u>	
		<u>Fee</u>	<u>Fee waived</u>
0	11	\$1,838	-
20	6	428	\$86
25	1	80	20
30	5	495	149
40	3	813	325
50	13	815	408
60	1	201	121
75	1	179	134
80	1	2,825	2,260
100	6	546	546
Average of 48 requested waivers		\$935	\$260
Average of 37 approved waivers		666	338

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