

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
Matter of THE LEGAL AID SOCIETY, a nonprofit
corporation,

Petitioner,

For a Judgment under Article 78
of the Civil Practice Law and Rules

**VERIFIED PETITION –
ARTICLE 78 OF THE CPLR**

-against -

Index No. _____-21

NEW YORK CITY DEPARTMENT OF CORRECTION,

Respondent.
-----X

Petitioner THE LEGAL AID SOCIETY, through Robert M. Quackenbush of The Legal Aid Society Prisoners' Rights Project, for its verified petition under Article 78 of the Civil Practice Law and Rules, affirms under penalty of perjury that the following is true and accurate:

PRELIMINARY STATEMENT

1. I am a staff attorney with The Legal Aid Society Prisoners' Rights Project, which has its primary offices in New York County. I make this affirmation on behalf of Petitioner, THE LEGAL AID SOCIETY, in support of its verified petition under Article 78 of the Civil Practice Law and Rules (CPLR §§ 7801 *et seq.*) seeking an order, under the Freedom of Information Law, Public Officers Law §§ 86 *et seq.* ("FOIL"), directing Respondent NEW YORK CITY DEPARTMENT OF CORRECTION ("DOC") to disclose certain records depicting and describing the conditions inside of DOC's Enhanced Supervision Housing ("ESH") during the heat wave the engulfed the New York City metro area from June 28 to June 30, 2021.

2. ESH – an experiment that DOC plans to abandon and eliminate by the end of this year¹ – consists of allegedly non-punitive restrictive housing units that former DOC Commissioner Joseph Ponte praised as the “cornerstone [of DOC’s] agenda of meaningful reform at Rikers.” See Oliver Laughland, *Rikers Island to open new unit for most difficult prisoners*, *The Guardian*, Feb. 24, 2015, available online at goo.gl/8GBPYY (last visited Sept. 13, 2021).

3. In recent years, ESH has become known for its brutal conditions of confinement. As explained by the New York City Board of Correction (“BOC”), which is the municipal agency charged with oversight of DOC, see N.Y. City Charter § 626:

Board staff remain concerned about ESH for the young adult population. For a variety of reasons, including—lockdowns, the lockout schedule, operational issues related to staffing and management, safety concerns, and a general lack of engagement—most young adults are spending nearly all day locked in their cells rather than the minimum 7 hours provided for under the ESH Standards. Most young adults in ESH are restrained to desks when they lock out of their cells, and participation in programming, recreation, and mental health services has been very low, particularly in blended ESH units (units housing adults and young adults). Nearly all young adults in ESH have non-contact visit restrictions imposed for the duration of their time in DOC custody, and very few young adults have progressed to less restrictive housing assignments. Furthermore, the occurrences of slashings and serious acts of violence in units where restraint desks are in use raises serious concerns and warrants further investigation.

See Board of Correction, *An Assessment of Enhanced Supervision Housing for Young Adults*, July 2017, *Executive Summary*, at iii (available online at <https://bit.ly/BOCesh>, last visited Sept. 13, 2021).

¹ See New York City Board of Correction, Notice of Adoption of Rules, June 2021, at 6 (“On March 9, 2021, at a regularly scheduled public meeting, the Board voted to formally propose a new rules package which, among other things, sought to end the use of PSEG and most other forms of restrictive housing (including ESH).”) (footnote and parenthetical omitted), available online at <https://on.nyc.gov/3Dlu94y> (last visited Sept. 13, 2021).

4. In addition to the year-round threats to personal safety experienced by those in these units, *see id.*, ESH has become notorious for the life-threatening conditions inside the facility when the outside temperatures exceed 85 degrees Fahrenheit.

5. In Petitioner's role as class counsel in a 2014 enforcement trial in *Benjamin v. Schiraldi*, No. 75-CV-3073 (LAP) (S.D.N.Y.), a seminal case governing unlawful conditions of confinement in the New York City jails, Petitioner adduced detailed, damning evidence about dangerous conditions on high-heat days inside the Otis Bantum Correctional Center ("OBCC") – an aging, crumbling facility on Rikers Island that lacks air-conditioning and has other physical features that trap heat inside, including thick concrete walls and solid cell doors that eliminate the possibility of ventilation.

6. Although the number of individuals that DOC held in punitive segregation began to drop around 2014, DOC increased its reliance on ESH and moved ESH units into the same precise OBCC units that had been the subject of the *Benjamin* enforcement motion.

7. The 2014 bench trial in *Benjamin* provided Petitioner with crucial evidence about conditions inside OBCC on high-heat days, which Petitioner used to advocate for improved conditions for those confined in ESH.

8. Over the past several years, the BOC has issued scathing reports concerning conditions in OBCC's ESH units on high-heat days, those where the temperatures exceeded 85 degrees Fahrenheit. Those reports described extremely dangerous, life-threatening conditions, including:

- Temperatures reached 91.6 degrees Fahrenheit on July 19, 2019 and 90.5 degrees Fahrenheit on July 20, 2019 inside OBCC ESH units where individuals are locked behind solid-cell doors for at least 17 consecutive hours. *See Board of Correction, New York City Jail Conditions and Operations During Heat Emergency on July 19-21, 2019*, dated July 22, 2021 (available online at <https://on.nyc.gov/2WpiFMX>, last visited Sept. 13, 2021), at 1, 3.

- During the July 2019 heat emergency, individuals subject to 17-hour lock-in in ESH were not permitted access to cool showers, contrary to DOC policy. *Id.* at 3.
- Temperatures reached 97.8 degrees Fahrenheit inside an OBCC ESH unit on July 21, 2019. *See Board of Correction, NYC Jail Conditions and Operations During July 2019 Heat Emergency, Final Report and Recommendations*, dated September 2019 (available online at <https://on.nyc.gov/3zi0WoZ>, last visited Sept. 13, 2021), at 3, 6.
- Temperatures exceeded 90 degrees Fahrenheit inside of an OBCC ESH unit in June 2020. *See Board of Correction, New York City Jail Heat Conditions and Operations, Mid-Summer 2020 Report*, dated Aug. 21, 2020 (available online at <https://on.nyc.gov/2Y0EZ01>, last visited Sept. 13, 2021), at 9.
- In June 2020 in OBCC, BOC tested the temperatures of showers inside certain facilities on high-heat days and found that 25% of the showers had water temperatures exceeding 100 degrees Fahrenheit, with the coolest available shower having water temperatures over 94 degrees Fahrenheit. *Id.* at 19.
- In 2020, DOC sought and obtained 46 so-called security override requests for heat-sensitive individuals in ESH, meaning that instead of being housed in air-conditioning (as is appropriate for persons with heat-sensitivity qualifying medical conditions), these medically vulnerable individuals were confined in OBCC’s ESH units without air-conditioning due to alleged security concerns. *See Board of Correction, Summer 2020 Heat Report*, dated June 28, 2021 (available online at <https://on.nyc.gov/3yh7EKO>, last visited Sept. 13, 2021), at 11.
- In summer 2020, temperatures inside of OBCC’s ESH units reached 98.5 degrees Fahrenheit. *Id.* at 15.

Those reports provided Petitioner with additional insights about the conditions inside OBCC’s ESH units on high-heat days, which proved useful in advocacy.

9. Last year, DOC temporarily shuttered OBCC, but during the pandemic, it converted another facility – the George R. Vierno Center (“GRVC”) on Rikers Island – to house ESH.

10. Because the 2014 *Benjamin* trial did not concern GRVC, as the isolation units were located in OBCC at that time, Petitioner lacks evidence of the precise conditions inside of GRVC’s ESH units on high-heat days, including basic information concerning housing unit temperatures and the availability of cool showers for people in custody.

11. To help close that information gap and improve the precision and effectiveness of Petitioner's advocacy, Petitioner turned to FOIL to seek information about conditions in GRVC ESH units on high-heat days. The heat wave that gripped the New York metro area from June 28-30, 2021 presented an ideal opportunity to evaluate the conditions inside of a GRVC ESH unit on a high-heat day and DOC's response to them.

12. But in the middle of the summer, when the need for this information is at its zenith, DOC stonewalled the request. It first failed to respond to the FOIL request within the 20-business-day period after acknowledging the request, which constitutes a denial under FOIL and its implementing regulations. This required Petitioner to serve an administrative appeal, which it did on August 11, 2021.

13. Rather than adjudicate the appeal by "explain[ing] in writing to the person requesting the record the reasons for further denial, or provid[ing] access to the record sought," which were DOC's only two options under Public Officers Law § 89(4)(a), DOC invented a third, nonstatutory disposition that finds no home in FOIL: neither grant nor deny the request; state that the agency has requested the records from its various facilities, with no promise of disclosure, imminent or otherwise; and state that Article 78 review of this "determination" is available.

14. Because DOC's response to the appeal is the functional and legal equivalent of not responding at all, Petitioner asks the Court to direct DOC to produce the requested records within 20 business days of the order resolving this summary proceeding.

15. Further, because DOC failed to respond to the administrative appeal in any way that comports with FOIL, thereby forcing Petitioner to bring this action, Petitioner asks that the Court award reasonable attorneys' fees and costs associated with litigating this special proceeding. Pub.

Off. L. § 89(4)(c)(i); *see Legal Aid Soc. v. New York State Dep't of Corr. & Cmty. Supervision*, 105 A.D.3d 1120 (3rd Dep't 2013).

PARTIES

16. Petitioner THE LEGAL AID SOCIETY is a private not-for-profit organization providing free legal services to low-income individuals and families. Founded in 1876, Petitioner is the Nation's oldest and largest legal services organization. Petitioner represents individuals who are the most vulnerable throughout New York City and New York State in more than 300,000 cases and matters annually, including senior citizens, children and adults with disabilities, survivors of domestic violence, immigrants, low-wage workers, persons living with HIV/AIDS, homeless and imminently homeless children and adults, and incarcerated persons. Its Prisoners' Rights Project, established in 1971, protects incarcerated persons' constitutional and statutory rights through litigation and advocacy. It has been and is class counsel in numerous actions against DOC challenging the agency's failure to comply with federal law.

17. Respondent NEW YORK CITY DEPARTMENT OF CORRECTION ("DOC") is the branch of the municipal government of The City of New York responsible for the custody, control, and care of all individuals remanded to DOC custody. *See* N.Y. City Charter § 621. It is an "agency" within the meaning of Public Officers Law § 86(3), and it is subject to FOIL. Its principal office is located in Queens County, and it made its final determination as to this FOIL request in Queens County.

JURISDICTION AND VENUE

18. Under CPLR §§ 7801-06, this Court has jurisdiction to review the actions by bodies that have failed to perform duties required by state law.

19. Under Public Officers Law § 89(4)(b), an Article 78 proceeding is the proper mechanism for seeking judicial review of a state agency's denial of a FOIL request.

20. Petitioner has exhausted DOC's internal appeals process, and this petition has been filed within the four-month limitations period set forth in CPLR § 217(1).

21. Venue is appropriate in Queens County because DOC's headquarter is located there and because it is the county where DOC made the adverse determination at issue. CPLR §§ 7804(a), 506(b).

STANDARD OF REVIEW

22. In an Article 78 proceeding that challenges the denial of a FOIL request, the appropriate standard of review is "whether the denial of the FOIL request was 'affected by an error of law.'" *Matter of Barry v. O'Neill*, 185 A.D.3d 503, 505 (1st Dep't 2020) (quoting CPLR § 7803(3)).

23. FOIL provides that all records kept by a public agency are presumptively open to public inspection and copying unless specifically exempted by statute. Pub. Off. L. § 87(2); *Matter of New York Civ. Liberties Union v. City of Schenectady*, 2 N.Y.3d 657, 661 (2004).

24. These statutory exemptions "are to be narrowly interpreted so that the public is granted maximum access to the records of government." *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 (2007) (citation omitted).

25. The agency resisting disclosure must prove entitlement to one of the exceptions, meaning the agency bears the burden to resist production. *Id.*, 9 N.Y.3d at 463; *Matter of Laureano v. Grimes*, 179 A.D.2d 602, 604 (1st Dep't 1992).

STATEMENT OF FACTS

26. On July 1, 2021, Petitioner served a FOIL request upon DOC seeking the following records related to ESH conditions during the June 28-30, 2021 heat wave:

- 1) all photographs and video of ESH 1 and ESH 2 taken at any point from June 28-30, 2021;
- 2) facsimile cover pages, emails, and other cover pages for all temperature readings taken in housing units used for ESH 1 and ESH 2 on from June 28-30, 2021, and all other records showing the temperatures inside of ESH 1 and ESH 2 from June 28-30, 2021;
- 3) logbook entries documenting the provision of ice to persons confined in ESH 1 and ESH 2 from June 28-30, 2021;
- 4) all notifications made via the Central Operations Desk or by any other means, from June 28-30, 2021, concerning temperatures exceeding 80 degrees anywhere in ESH 1 and ESH 2;
- 5) records reflecting the operability of, and water temperature from, every shower used by individuals in ESH 1 and ESH 2 from June 28-30, 2021; and
- 6) all completed Heat-Sensitive Override Request forms for persons confined in ESH 1 and ESH 2 from June 28-30, 2021.

Petitioner's July 1, 2021 FOIL request is attached as Exhibit 1.

27. In addition to the above requests, which relate only to ESH conditions, Petitioner also requested:

- 7) all notices, announcements, and other records sent to Department employees and/or employees' unions concerning the heat wave from June 28-30, 2021; and
- 8) records reflecting the current location of air-conditioned housing units in all Department facilities and those units' current capacity for housing people in custody.

See id.

28. On July 6, 2021, DOC timely acknowledged the request, assigned it DOC FOIL # 2022FR0001, and estimated that it would make a determination within 20 business days. A copy of DOC's July 6, 2021 acknowledgment is attached as Exhibit 2.

29. When more than 20 business days elapsed without a response, on August 11, 2021, Petitioner served an administrative appeal. In relevant part, it read:

On July 6, 2021, the Department timely acknowledged the request and estimated a determination would be made within 20 business days. But more than 20 business days have passed without a determination. Such delay constitutes a denial. *See Pub. Off.*

L., § 89(4)(a) (“Failure by an agency to conform to the provisions of subdivision three of this section shall constitute a denial.”); 21 NYCRR 1401.5(e)(4) (“A failure to comply with the time limitations described herein shall constitute a denial of a request that may be appealed. Such failure shall include situations in which an agency fails to respond to a request . . . within twenty business days after the date of its acknowledgment of the receipt of a request); *Matter of Molloy v. New York City Police Dept.*, 50 A.D.3d 98, 99-100 (1st Dep’t 2008).

For these reasons, I respectfully appeal the denial of the FOIL request and ask that this appeal be determined within the ten-day period set forth in Public Officers Law § 89(4)(a). Unless I receive a timely, substantive response from the Department, we may proceed with legal action under Article 78 to enforce our rights under FOIL and seek attorneys’ fees and costs from the Department under Public Officers Law § 89(4)(c).

Petitioner’s August 11, 2021 appeal is attached as Exhibit 3.

30. On August 17, 2021, DOC served a letter that purported to adjudicate Petitioner’s appeal.

In relevant part, DOC’s letter read:

The Department has requested item numbers 1 through 8. The requests are currently pending, and we will notify you as we receive documents or responses from the facilities.

In response to request number 8, please find records reflecting the current location of air-conditioned housing units in all department facilities and those units’ current capacities for housing people in custody[.]

This letter constitutes the final determination of the Department with respect to the requested records. You may seek judicial review of this determination pursuant to Article 78 of the New York Civil Practice Law and Rules within four months of the determination.

DOC did not provide access to any of the requested items numbered one through seven. DOC’s

August 17, 2021 letter is attached as Exhibit 4.

31. This Article 78 proceeding follows.

ARGUMENT

32. “FOIL implements the legislative declaration that government is the public’s business, and imposes a broad standard of open disclosure upon agencies of the government. The statute proceeds under the premise that the public is vested with an inherent right to know and that

official secrecy is anathematic to our form of government.” *Matter of Farbman & Sons v. New York City Health and Hosps. Corp.*, 62 N.Y.2d 75, 79 (1984).

33. As the Court of Appeals has “repeatedly noted, FOIL’s declared purpose of ensuring open government requires giving its disclosure provisions an expansive interpretation.” *Newsday Inc. v. Empire State Development Corporation*, 98 N.Y.2d 359, 361-362 (2002) (citation omitted).

34. For those reasons, government records are presumptively available under FOIL unless the agency shows that they fall under one of the enumerated exemptions. Pub. Off. L. § 87(2); *Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 274-275 (1996); *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979).

35. FOIL’s “[e]xemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access.” *Id. See Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109 (1992) (explaining that the exemptions “are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption.”). Conclusory assertions, unsupported by facts, will not suffice. *Church of Scientology of N.Y. v. State of New York*, 46 N.Y.2d 906 (1979).

POINT I:

Petitioner has exhausted its administrative remedies, and the Court should direct DOC to produce the requested records.

36. Under Public Officers Law § 89(4)(a), an agency must do one of two things when it receives a timely FOIL appeal: “fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought.”

37. FOIL dictates that the agency “shall” take one of those actions “within ten business days of the receipt of such appeal.” Pub. Off. L. § 89(4)(a).

38. Under Public Officers Law § 89(4)(b), “a person denied access to a record in an appeal determination under [Public Officers Law § 89(4)(a)] may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules.” *See also* 21 NYCRR 1401.7(f) (“A failure to determine an appeal within ten business days of its receipt **by granting access to the records sought or fully explaining the reasons for further denial in writing** shall constitute a denial of the appeal.”) (emphasis added).

39. DOC’s appeal response – failing to deny or grant the appeal, but simply stating that it was searching for records – is highly anomalous. “Indeed, the FOIL statute does not appear to contemplate such a scenario, since it requires the appeals officer to either (1) explain in writing the reasons for the denial of access to the requested records, or (2) provide access to the record sought.” *Benedict v. Albany Cty.*, 22 Misc. 3d 597, 601-602 (Albany Cty. Sup. Ct. 2008) (citing Pub. Off. L. § 89(4)(a)).

40. But no matter how anomalous DOC’s response, as a matter of straightforward statutory construction, the result is clear: “Having requested records pursuant to FOIL and been denied access to those records, the literal language of the FOIL statute gives petitioner the right to initiate a CPLR article 78 proceeding to obtain judicial review.” *Id.* at 602.

41. DOC did not grant access to the records sought. It merely stated that the “requests are currently pending” and that DOC would “notify” Petitioner as DOC received “documents or responses from the facilities.” This purported disposition appears to be the FOIL Appeals Officer’s parlance for “remanding” the matter to records access officer.

42. But as the New York State Committee on Open Government has conclusively opined:

[T]here is nothing in the FOIL that authorizes a FOIL appeal officer to “remand” a FOIL request back to the records access officer for further review. The FOIL states that the appeal officer is obligated to either fully explain in writing the reasons for further denial ‘or provide access to the record sought.’ In our view, the appeal determination ‘remanding’ [a] request to the FOIL officer for processing is not sufficient to comply with law.

N.Y.S. Committee on Open Gov’t FOIL-AO-19780, dated Sept. 21, 2020, available online at

<https://bit.ly/COOGremand> (last visited Sept. 13, 2021).

43. Here, Petitioner exhausted its administrative remedies when DOC “constructively denied its timely appeal by failing to respond within the statutorily mandated 10-day period.” *Matter of Jewish Press, Inc. v. N.Y.C. Dept. of Hous. Preserv. & Dev.*, 193 A.D.3d 483 (1st Dep’t 2021) (citing Pub. Off. L. § 89(4)(a), (b)). See *Van Steenburg v. Thomas*, 242 A.D.2d 802, 803 (3rd Dep’t 1997) (“[U]pon respondents’ failure to address the administrative appeal within 10 days, petitioner was deemed to have exhausted his administrative remedies, thereby enabling him to seek judicial review of the denial thereof.”) (citations omitted).

44. Because DOC’s denial of Petitioner’s FOIL request was an error of law, the Court should grant the Petition and direct DOC to produce responsive records within 20 business days of the order resolving this petition.

POINT II:

An assessment of attorney’s fees and costs is warranted because DOC had no reasonable basis for denying the request or ignoring the appeal.

45. Under FOIL, trial courts “may assess” attorneys’ fees and costs to a petitioner when it has “substantially prevailed”² and “when the agency failed to respond to a[n] . . . appeal within the

² A petitioner has “substantially prevailed” within the meaning of FOIL when the commencement of an Article 78 proceeding ultimately succeeds in obtaining the records

statutory time.” Pub. Off. L. § 89(c)(i); *see LTTR Home Care, LLC v. City of Mount Vernon*, 179 A.D.3d 798, 800 (2nd Dep’t 2020) (affirming award of attorneys’ fees where the agency failed to respond to an administrative appeal within the statutory deadline).

46. “The award of attorney’s fees is intended to ‘create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL.’” *S. Shore Press, Inc. v. Havemeyer*, 136 A.D.3d 929, 931 (2nd Dep’t 2016) (quoting *Matter of New York Civ. Liberties Union v. City of Saratoga Springs*, 87 A.D.3d 336, 338 (3rd Dep’t 2011)). *See Legal Aid Soc. v. New York State Dep’t of Corr. & Cmty. Supervision*, 105 A.D.3d 1120, 1122 (3rd Dep’t 2013).

47. Here, Petitioner served a timely appeal, which DOC failed to adjudicate as required by Public Officers Law § 89(4)(a).

48. By failing to adjudicate the appeal, DOC evinced the same “sue us” attitude that the Legislature sought to deter by adding the attorneys’ fees provision to the law. *N.Y.S. Defs. Ass’n v. N.Y.S. Police*, 87 A.D.3d 193, 195 n.2 (3rd Dep’t 2011) (citing Assembly Mem. in Support, at 1, Bill Jacket, L. 1982, ch. 73).

49. Because DOC has subjected Petitioner “to the very kinds of ‘unreasonable delays and denials of access’ which the counsel fee provision seeks to deter,” *Legal Aid Soc.*, 105 A.D.3d at 1122 (quoting *New York Civil Liberties Union*, 87 A.D.3d at 339-40), the Court should award an assessment of attorneys’ fees and costs against DOC.

DEMAND FOR RELIEF

WHEREFORE, Petitioner respectfully requests this Court enter an order: (1) directing Respondent DOC to disclose to Petitioner all records requested in the July 1, 2021 FOIL request responsive to the FOIL request, whether by court order or by post-filing voluntary disclosure. *Madeiros v. N.Y.C. Educ. Dep’t*, 30 N.Y.3d 67, 79 (2017).

within 20 business days of the entry of the order resolving this petition; (2) awarding Petitioner's undersigned counsel the legal fees and expenses incurred in making the instant petition for relief and in any subsequent proceedings; and (3) awarding such other and further relief as the Court may deem just and proper.

Dated: New York, New York
September 14, 2021

JUSTINE LUONGO
Attorney for the Petitioner
The Legal Aid Society, Criminal Defense Practice



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VERIFICATION

I, Robert M. Quackenbush, an attorney duly admitted to practice before the Courts of the State of New York and associated with Petitioner THE LEGAL AID SOCIETY, affirm under the penalties of perjury that the following statements are true, except for those made upon information and belief, which I believe to be true: I have reviewed the Petition and swear it is true, upon information and belief, the source of which is my personal knowledge, my personal involvement and participation in the events described in the Petition, and the documents appended to the Petition.

Dated: New York, New York
 September 14, 2021



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WORD COUNT CERTIFICATION

According to the word count provided by Microsoft Office Word, the foregoing affirmation contains 4,054 words and complies with Rule 202.8(b) of the Uniform Civil Rules for the Supreme Court and the County Court.

Dated: New York, New York
September 14, 2021



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