



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

December 18, 2012 Government Records Council Meeting

Keith A. Werner
Complainant

Complaint No. 2011-151

v.

NJ Civil Service Commission
Custodian of Record

At the December 18, 2012 public meeting, the Government Records Council (“Council”) considered the November 20, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. See Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (April 2010), O’Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. The Complainant’s cause of action was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied access to any records responsive to the Complainant’s April 2, 2011 OPRA request because the Custodian responded to the Complainant’s OPRA request within the statutorily mandated seven (7) business days set forth in N.J.S.A. 47:1A-5.i., requesting an additional seven (7) business days to respond to the OPRA request. Thus, the extended seven (7) business day time frame for the Custodian to respond had not expired at the time the Denial of Access complaint was filed; the instant complaint is materially defective and should therefore be dismissed. See Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007- 226 (April 2009).

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the



Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 18th Day of December, 2012

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: December 20, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
December 18, 2012 Council Meeting**

**Keith A. Werner¹
Complainant**

GRC Complaint No. 2011-151

v.

**New Jersey Civil Service Commission²
Custodian of Records**

Records Relevant to Complaint: Title, position, payroll history, dates of separation and reasons therefor, including incapacitation during performance of duty, and resumes for the following people:

- Salvatore Maniscalco³
- Robert J. Campanelli⁴
- Robert Funderburke
- Robert Fraley⁵
- K. Newsom(e) (male forty (40) to fifty (50) years old)

Request Made: April 2, 2011

Response Made: April 28, 2011

Custodian: Christopher J. Randazzo

GRC Complaint Filed: May 6, 2011⁶

Background

April 2, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

¹ No legal representation listed on record.

² Represented by DAG Pamela N. Ullman, on behalf of the NJ Attorney General.

³ The Complainant requested records for Salvatore Moniscalco. However, the evidence of record indicates that the Custodian identified a State employee named Salvatore Maniscalco.

⁴ The Complainant requested records for Robert J. Campanelli. However, the evidence of record indicates that the Custodian identified a State employee named Robert J. Campanelli.

⁵ The Complainant requested records for R. Fraley. However, the evidence of record indicates that the Custodian identified a State employee named Robert Fraley.

⁶ The GRC received the Denial of Access Complaint on said date. The Complainant signed the Denial of Access Complaint on April 29, 2011.

April 28, 2011

Custodian's response to the OPRA request.⁷ The Custodian responds in writing to the Complainant's OPRA request via letter on the seventh (7th) business day following receipt of such request. The Custodian states that he is currently researching the Complainant's OPRA request to ensure proper disclosure of records pursuant to N.J.S.A. 47:1A-2.2. The Custodian requests a seven (7) business day extension or until May 9, 2011 to fulfill the OPRA request as permitted by N.J.S.A. 47:1A-5.i.

May 6, 2011

Denial of Access Complaint filed with the Government Records Council ("GRC") attaching the Complainant's OPRA request dated April 2, 2011.⁸

The Complainant asserts that he did not receive a response to his OPRA request. The Complainant states that the requested records are subject to disclosure. The Complainant also states that each of the individuals named in the request are state employees. The Complainant further states that the Custodian violated not only OPRA, but also the Complainant's state and federal constitutional rights. *See Press-Enterprise Co. v. Superior Court of California for the County of Riverside* 478 U.S. 1 (1986) and *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555 (1980). Lastly, the Complainant states that the GRC should order the Custodian to provide the requested records free of charge.

The Complainant does not agree to mediate this complaint.

May 12, 2011

Request for the SOI sent to the Custodian.

May 17, 2011

E-mail from Custodian's Counsel to the GRC. Counsel requests a five (5) business day extension to complete the SOI.

May 17, 2011

E-mail from the GRC to Custodian's Counsel. The GRC grants Counsel a five (5) business day extension to complete the SOI. The GRC informs Counsel that the SOI will be due on May 26, 2011.

May 26, 2011

Custodian's SOI with the following attachments:

- Complainant's OPRA request dated April 2, 2011
- Letter from the Custodian to the Complainant dated April 28, 2011
- E-mail from the GRC to the Custodian dated May 11, 2011.

⁷ The Custodian certifies in the Statement of Information ("SOI") that he received the Complainant's OPRA request on April 18, 2011.

⁸ The Complainant did not include a copy of the Custodian's letter dated April 28, 2011.

The Custodian certifies that personnel records are required to be maintained for sixty (60) years after termination of employment or until the employee reaches age eighty-five (85), whichever is sooner, in accordance with the Records Destruction Schedule established and approved by Records Management Services.⁹

The Custodian certifies that he received the Complainant's OPRA request on April 18, 2011. The Custodian also certifies that he responded to the Complainant's OPRA request on April 28, 2011. The Custodian further certifies that he informed the Complainant that the Custodian was researching the Complainant's request to ensure proper disclosure of records under OPRA and that he requested an extension until May 9, 2011 to respond to the Complainant's request. The Custodian also certifies that the Complainant did not respond to the request for an extension of time. The Custodian further certifies that the Complainant signed the Denial of Access Complaint on April 29, 2011. The Custodian argues that he believes that he did not have to provide records in response to the Complainant's OPRA request until the Complainant consented to the extension of time, but shortly thereafter, the Custodian received the Complainant's Denial of Access Complaint.

The Custodian asserts that the Complainant's Denial of Access Complaint is not ripe for adjudication. The Custodian certifies that within five (5) business days of filing his SOI, he will respond to the Complainant's OPRA request. The Custodian certifies that some of the records requested are not government records pursuant to OPRA. The Custodian also certifies that some of the records requested are not in the Custodian's possession and thus he is unable to produce them. The Custodian further certifies that he plans to disclose records responsive to title, position, dates of separation and reasons therefor pursuant to N.J.S.A. 47:1A-10. The Custodian certifies that a search for records pertaining to K. Newsom(e) resulted in more than one match. The Custodian also certifies that he will ask the Complainant to clarify for which K. Newsom(e) he is seeking records.

The Custodian argues that the remaining records requested are not disclosable under OPRA. The Custodian certifies that regarding payroll history, the Custodian is not clear what information the Complainant seeks. The Custodian argues that OPRA exempts a "payroll record" from confidential status as a personnel record. The Custodian certifies that the Complainant did not request a payroll record, but payroll history.

The Custodian states that the Council defined the term "payroll record" in Verry v. Borough of South Bound Brook (Somerset) GRC Complaint No. 2009-149 (June 2010), as including not only salary history, but also information on items such as clothing allowance, overtime, leaves of absence, commissions, bonuses, number of weeks worked, etc. The Custodian certifies that this information is not maintained by the New Jersey Civil Service Commission ("NJCS") and argues that this request must therefore be denied. The Custodian certifies that payroll records may likely be obtained from the Department of Treasury.

⁹ The Custodian does not certify what search was undertaken to satisfy the Complainant's records request. Keith A. Werner v. New Jersey Civil Service Commission, 2011-151 – Findings and Recommendations of the Executive Director 3

The Custodian argues that the request for records regarding incapacitation for duty must be denied. The Custodian also argues that personnel records of employees are not considered government records unless specifically covered under N.J.S.A. 47:1A-10. The Custodian further argues that incapacitation information is not so covered. The Custodian argues that an employee's right to privacy pursuant to N.J.S.A. 47:1A-1 dictates that such information be withheld by NJCSC and because the record requested is a personnel record not subject to disclosure under N.J.S.A. 47:1A-10.

The Custodian certifies that the NJCSC does not have any records responsive to the request for resumes. The Custodian also certifies that once the Complainant clarifies his request for K. Newsom(e), the Custodian will perform a search to determine if his resume is contained in NJCSC's records and if so, will determine whether it is legally disclosable under OPRA. The Custodian argues that if a record does not exist and is not a government record stored or maintained by the public agency, then it need not be obtained from another agency in order to disclose said record to the requestor. The Custodian certifies that the resumes responsive may be in possession of the agency that employs such person, and therefore the Complainant might request those resumes from the employing agency.

June 2, 2011

Letter from the Custodian to the Complainant. The Custodian states that he was able to identify the following individuals from the Complainant's OPRA request: 1) Salvatore Maniscalco; 2) Robert J. Campanelli; 3) Robert Funderburke; and 4) Robert Fraley. The Custodian also states that a search for K. Newsom(e) has resulted in more than one record match. The Custodian further states that one of the search results for K. Newsom(e) resulted in Kevin Newsom. The Custodian requests the Complainant to verify if these are the state employees whose records the Complainant seeks.

The Custodian states that the Complainant's request must specify an identifiable government record or the request may be denied because it is overly broad or unclear pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). The Custodian also states that he is not required to research files to determine which records are responsive to a broad and unclear OPRA request pursuant to Donato v. Township of Union (Union), GRC Complaint 2005-182 (February 2007). The Custodian further states that in response to the Complainant's request for "payroll history," the NJCSC maintains base salary information, but the base salary does not include stipends, bonuses or overtime. The Custodian states that this information can be found on a payroll record. The Custodian requests that the Complainant respond in writing if the Complainant wants the base salary history of the individuals listed in his OPRA request. The Custodian states that if the Complainant is seeking a payroll record, the Complainant must submit an OPRA request to the Department of Treasury.

The Custodian states that access to records responsive to "incapacitation during performance of duty" is denied. The Custodian also states that pursuant to N.J.S.A. 47:1A-10, personnel records of employees are not considered government records except with certain exceptions. The Custodian further states that incapacitation information is not one of these exceptions. The Custodian additionally states that employees' right to

privacy in accordance with N.J.S.A. 47:1A-1 dictates that incapacitation information be withheld by the NJCSC. The Custodian states that it does not have any records responsive for resumes for: 1) Salvatore Maniscalco; 2) Robert J. Funderburke; 3) Robert J. Campanelli; and 4) Robert Fraley. The Custodian also states that once the Complainant provides clarification on the record for K. Newsom(e), the NJCSC will conduct a search to determine if it maintains any resumes responsive. The Custodian further states that the agency that employs these individuals may assist the Complainant to gain access to these records.

September 22, 2011

E-mail from the GRC to the Custodian. The GRC states that upon reviewing the Custodian's SOI, the GRC needs an additional legal certification. The GRC requests that the Custodian certify whether any records responsive were provided to the Complainant. The GRC also requests the Custodian to provide the GRC with any correspondence sent to the Complainant seeking clarification regarding his OPRA request and any of the Complainant's responses to such request for clarification.

September 27, 2011

E-mail from Custodian's Counsel to the GRC. Counsel attaches the requested legal certification. The Custodian certifies that on June 2, 2011 he wrote a letter to the Complainant requesting clarification of the identity of the five (5) individuals listed in the Complainant's OPRA request.¹⁰ The Custodian also certifies that he requested clarification regarding payroll history of the named individuals. The Custodian further certifies that to date, the Complainant has not responded to the Custodian's request for clarification. Lastly, the Custodian certifies that without this clarification, he is unable to supply any records to the Complainant.

Analysis

Whether the Custodian lawfully requested an extension of time to respond to the Complainant's OPRA request?

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian

¹⁰ The Custodian encloses a copy of his letter to the Complainant dated June 2, 2011.

fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request ...* If the government record is in storage or archived, the requestor shall be so advised within seven business days after the custodian receives the request. *The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.*” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.¹¹ Thus, a custodian’s failure to respond in writing to a complainant’s OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The Complainant stated that he submitted his OPRA request on April 2, 2011. However, the Custodian certified that he received said request on April 18, 2011, and responded to the request in writing on April 28, 2011 seeking an extension of time until May 9, 2011. The Complainant filed his Denial of Access Complaint on May 6, 2011, although the Complainant verified the complaint on April 29, 2011, asserting that the Custodian failed to respond to his request.

Thus, the GRC must address whether the Custodian lawfully sought an extension of time to respond to the Complainant’s OPRA request.

OPRA provides that a custodian may request an extension of time to respond to the Complainant’s OPRA request, but that a specific date on which the Custodian will further respond must be provided. N.J.S.A. 47:1A-5.i. OPRA also provides that should the custodian fail to provide a response on that specific date, “access shall be deemed denied.” N.J.S.A. 47:1A-5.i.

In Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011), the complainant filed an OPRA request on November 5, 2009. The custodian responded to the request in writing on the fourth (4th) business day following receipt of such request, requesting an extension of time to respond to the request and providing an anticipated deadline date when the requested records would be made available. The complainant did not agree to the custodian’s request for an extension of time. The Council stated that:

¹¹ It is the GRC’s position that a custodian’s written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency’s official OPRA request form, is a valid response pursuant to OPRA.

“The Council has further described the requirements for a proper request for an extension of time. Specifically, in Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009), the Custodian provided the Complainant with a written response to his OPRA request on the second (2nd) business day following receipt of said request in which the Custodian requested an extension of time to respond to said request and provided the Complainant with an anticipated deadline date upon which the Custodian would respond to the request. The Council held that ‘because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g. [and] N.J.S.A. 47:1A-5.i.’”

In Rivera, the Council noted that the custodian provided the Complainant with a written response to his OPRA requests on the fourth (4th) business day following receipt of said request, seeking a two (2) week extension of time to respond to said request; the Council determined that because the custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date when the requested records would be made available, the custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Starkey, *supra*.

Moreover, in Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010), the Council determined in pertinent part that:

“because the Custodian provided a written response requesting an extension on the sixth (6th) business day following receipt of the Complainant’s OPRA request and providing a date certain, on which to expect production of the records requested, and, notwithstanding the fact that the Complainant did not agree to the extension of time requested by the Custodian, the Custodian’s request for an extension of time [to a specific date] to respond to the Complainant’s OPRA request was made in writing within the statutorily mandated seven (7) business day response time.”

As such, the Council held that the Custodian did not unlawfully deny access to the requested records. *See also* Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (April 2010), O’Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).

In the matter now before the Council, the evidence of record is clear that the Custodian responded in writing to the Complainant’s OPRA request on the seventh (7th) business day from receipt of such request seeking a seven (7) business day extension to respond to the Complainant’s OPRA request.

Therefore, because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. See Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (April 2010), O’Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).

Whether the Complainant’s Denial of Access Complaint is ripe for adjudication?

OPRA provides that “[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may... in lieu of filing an action in Superior Court, file a complaint with the Government Records Council.” N.J.S.A. 47:1A-6.

In the instant complaint, the Custodian properly requested an extension of time until May 9, 2011 to respond to the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. However, the Complainant filed a Denial of Access Complaint with the GRC on May 6, 2011, prior to the May 9, 2011 extended deadline.

As one means of challenging denials of access to a government record, OPRA provides for the filing of a complaint with the GRC. N.J.S.A. 47:1A-6. In order for such a complaint to be ripe, a complainant must have been denied access to a government record. In the instant matter, however, the Complainant filed a complaint with the GRC prior to being denied access to any records responsive to his request and before the statutorily mandated seven (7) business day time frame for the Custodian to respond expired.

In Sallie v. NJ Department of Banking and Insurance, GRC Complaint No. 2007-226 (April 2009), the complainant forwarded a complaint to the GRC asserting that he had not received a response from the custodian and seven (7) business days would have passed by the time the GRC received the Denial of Access Complaint. The custodian argued in the SOI that the complainant filed the complaint prior to the expiration of the statutorily mandated seven (7) business day time frame set forth in N.J.S.A. 47:1A-5.i. The Council held that:

“...because the Complainant’s cause of action was not ripe at the time he verified his Denial of Access Complaint; to wit, the Custodian had not at that time denied the Complainant access to a government record, the complaint is materially defective and therefore should be dismissed.”

In the matter currently before the Council, the Complainant acted in the same manner as the complainant in Sallie, *supra*, by filing a Denial of Access Complaint with the GRC prior to a denial of access to the requested records by the Custodian. The

Custodian herein responded to the Complainant's OPRA request in writing within the statutorily mandated seven (7) business days, requesting an additional seven (7) business days to respond to the Complainant's OPRA request. N.J.S.A. 47:1A-5.i. states that a custodian's response is due seven (7) business days after *receipt* of an OPRA request. In the instant complaint, the Complainant filed a Denial of Access Complaint prior to the Custodian's expiration of the additional seven (7) business days to respond to the OPRA request.

Therefore, the Complainant's cause of action was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied access to any records responsive to the Complainant's April 2, 2011 OPRA request because the Custodian responded to the Complainant's OPRA request within the statutorily mandated seven (7) business days set forth in N.J.S.A. 47:1A-5.i. requesting an additional seven (7) business days to respond to the OPRA request. Thus, the extended seven (7) business day time frame for the Custodian to respond had not expired at the time the Denial of Access Complaint was filed; the instant complaint is materially defective and should therefore be dismissed. *See Sallie, supra*

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian requested an extension of time in writing within the statutorily mandated seven (7) business days and provided an anticipated deadline date of when the requested records would be made available, the Custodian properly requested said extension pursuant to N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i. *See Rivera v. City of Plainfield Police Department (Union)*, GRC Complaint No. 2009-317 (May 2011); Criscione v. Town of Guttenberg (Hudson), GRC Complaint No. 2010-68 (November 2010); Rivera v. Union City Board of Education (Hudson), GRC Complaint No. 2008-112 (April 2010), O'Shea v. Borough of Hopatcong (Sussex), GRC Complaint No. 2009-223 (December 2010); Starkey v. NJ Department of Transportation, GRC Complaint Nos. 2007-315, 2007-316 and 2007-317 (February 2009).
2. The Complainant's cause of action was not ripe at the time of the filing of this Denial of Access Complaint; to wit, the Custodian had not denied access to any records responsive to the Complainant's April 2, 2011 OPRA request because the Custodian responded to the Complainant's OPRA request within the statutorily mandated seven (7) business days set forth in N.J.S.A. 47:1A-5.i. requesting an additional seven (7) business days to respond to the OPRA request. Thus, the extended seven (7) business day time frame for the Custodian to respond had not expired at the time the Denial of Access complaint was filed; the instant complaint is materially defective and should therefore be dismissed. *See Sallie v. NJ Department of Banking and Insurance*, GRC Complaint No. 2007- 226 (April 2009).

Prepared By: Harlynn A. Lack, Esq.
Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

November 20, 2012¹²

¹² This complaint was prepared and scheduled for adjudication at the Council's November 27, 2012 meeting; however, said meeting was cancelled due to a lack of a quorum.
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