

Public Management Compliance: Access to Information Versus Data Protection

Administration of Justice and its Influence on Law and Public and Private Organizations

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ABSTRACT

This report discusses the conflict between two fundamental rights: the right to privacy and the right to access public information. This theme originated from an ongoing research project that deals with the performance measurement and management of public servers at the Court of Justice of Minas Gerais (TJMG). These employees work in civil departments carrying out procedural activities in the so-called Electronic Judicial Process (PJE). The project led to the development of a management tool that analyzes the performance data available in the productivity reports extracted from the Judiciary Strategic Information System (SIJUD) portal. The methodology used in the project was Design Science Research, which is a prescriptive methodology that ensures rigor and scientific relevance for the developed artifacts. The reflections presented deal with the problem awareness phase, and their arguments were mainly obtained from document analysis. The jurisprudence and doctrine studied favor the applicability of the tool which is shown as a way to collaborate towards the fulfillment of constitutional principles, in addition to following the trends of a more open and participatory government. Considering the benefits generated by the dissemination of public management information, there is the opportunity for the development of technological initiatives by those who are not a direct member of these public institutions, which can generate, as a consequence, contributions to increase the effectiveness of their administration. This is also associated with the implementation and discussion of more modern and innovative practices for the public sector.

Keywords: Electronic Judicial Process, Design Science Research, Power BI, General Data Protection Law, Access to Information Law

Introduction

The notion of democracy has its origins in Ancient Greece, at the time of the emergence of direct democracy, in which the citizen directly participates in the construction of society. The development of the “great modern territorial state” (Bobbio, 1986) made direct democracy impossible, replacing it with a representative one. In order to maintain a government "of the people, by the people, for the people" (Abraham Lincoln), the public character of power needed to be reinvented, and it was necessary that rights which guarantee the participation of the people in government were declared fundamental.

In Article 1 of the Brazilian Constitution of 1988, it is stated that Brazil is constituted as a Democratic State of Law, in which laws are created for the people and by the people, bearing in mind the dignity of the human person (Entenda o que é o Estado Democrático de Direito, 2018). Thus, in order to guarantee the existence of democracy, its characteristic of government of visible power (Bobbio, 1986) must be guaranteed, in which the public is the rule and secrecy the exception. Only then will the people be aware of the government's actions, expanding democratic participation, as shown in the quote from the Republican Catechism of Michele Natale:

“Is there nothing secret about democratic government? All operations of rulers must be known to the Sovereign People, except for some public security measures, which they must know only when the danger ceases.”¹

The Constitution also makes it clear that access to information is a form of participation in public administration, by disciplining, in article #37, the "forms of participation of users in governmental entities", which will be done through "the access of users to administrative records and to information about Government initiatives”.

There are situations in which these rights conflict with the fundamental right to privacy, protected in item X of article #5 of CRFB/88. As the jurisprudence understands that no fundamental right is absolute, proportionality and reasonableness principles must be used to define the prevailing right in the concrete situation.

This report discusses the conflict between two fundamental rights: the right to privacy and the right to access public information. This theme originated from an ongoing research project that deals with the performance measurement and management of public servers at the Court of Justice of Minas Gerais (TJMG). These employees work in civil departments carrying out procedural activities in the so called Electronic Judicial Process (PJE). The project led to the development of a management tool which analyzes the performance data available in the productivity reports extracted from the Judiciary Strategic Information System (SIJUD) portal. The methodology used in the project was Design Science Research, which is a prescriptive methodology that ensures rigor and scientific relevance for the developed artifacts. The reflections presented deal with the problem awareness phase, and their arguments were mainly obtained from document analysis. The jurisprudence and doctrine studied favor the applicability of the tool which is shown as a way to collaborate towards the fulfillment of constitutional principles, in addition to following the trends of a more open and participatory government.

The initial version of the artifact was created in 2020, developed in Excel and presented at a scientific event. During the presentation, the discussions pointed out the possibility of reflection on themes related to the exposure of the public servants' performance information. Concomitantly, the initial artifact had a stage demanding excessive manual work, and the use of new technologies was thought of as a solution.

¹ Free translation from Portuguese

Case Study

The previously published technical report “Proposal of a Performance Management System for Electronic Judicial Process”, for ENAJUS 2020, sought to focus on presenting a tool created to facilitate the management of civil servants within the secretariats of the courts of justice through the control of productivity. This artifact was built in an Excel spreadsheet, where a public servant in the secretariat was responsible for updating the productivity reports once a month, via the upload of new data. In addition, after the publication of this work, a 2.0 version of the tool was developed, which seeks to further automate the work of data collection and reporting, but now using a Business Intelligence Platform, Power BI.

In the new format, the proposal is to make it easier for the server to download data from the SIJUD portal, and paste them into access inside an Excel spreadsheet. Power BI is connected to the spreadsheet and is instantly updated with the loading of new data. One of the main differentials of its use, however, lies in the easy visualization and sharing of information, considering that through a single link, anyone can access the graphics, and discriminate the servers present in the exposed analyses, since their full names are exposed. This corroborates the questioning about data security and use, involving issues that have become popular nowadays, such as the General Data Protection Law (LGPD) and the Access to Information Law (LAI).



Figure 1. Presentation of the developed BI
Source: Developed by the second author

The figure above is a photo of the panel built, containing the filters used to be applied to the productivity graphs arranged in the space.

- **Data Extraction**

The first step to perform the data extraction is to access the Judiciary Strategic Information System, better known as SIJUD, whose description, according to the TJMG (n.d.) website:

"The Judiciary Strategic Information System (SIJUD) is a computerized solution that centralizes information from the various 1st and 2nd-degree procedural monitoring systems of the TJMG, following the concepts of "data warehouse" (DW).

*The SIJUD aims to enable magistrates, managers, and, in some cases, even external users, access to information on the TJMG's core activity at their workstations, support in the management of the procedural collection of districts/courts; the assistance to the main user sectors in the performance of their administrative functions; meeting the demands for statistical information from the internal and external public; the identification of the average duration of each phase of the process and its biggest obstacles (in order to allow the adoption of more precise and punctual interventions); the investigation, consolidation, monitoring, and reporting in compliance with the CNJ Resolutions; the identification of the biggest litigants and the classes and subjects most debated in the legal proceedings (enabling better management of the collection and the adoption of measures that encourage conciliation or reduce/prevent conflicts); the greatest uniformity in the treatment of information, etc."*²

Within it, a series of reports referring to procedural status changes are made available. The report that makes the accounting of the operations carried out via PJE by the employees of the first instance, serving to feed the views in question, is: "Operation of Servants of the 1st Degree Common Justice in the PJe".

Página Inicial » SIJUD » Operosidade de Servidores da Justiça Comum de 1º Grau no PJe

SIJUD - Sistema de Informações Estratégicas do Judiciário

Link de acesso ao SIJUD.

Operosidade de Servidores da Justiça Comum de 1º Grau no PJe

Período De	<input type="text"/>	<input type="button" value="🗑️"/>
Até	<input type="text"/>	<input type="button" value="🗑️"/>
Comarca	Selecione a Comarca <input type="button" value="▼"/>	
Órgão Julgador	Selecione o Órgão Julgador <input type="button" value="▼"/>	
Servidor	Selecione o Servidor <input type="button" value="🗑️"/> <input type="button" value="🔍"/> <input type="checkbox"/> APENAS Trabalho Solidário Remoto	
Formato	PDF <input type="button" value="▼"/>	
<input checked="" type="button" value="Confirmar"/> <input type="button" value="Limpar"/>		

RS0288

Instruções

Preencha os dados solicitados para a geração do relatório no formulário ao lado.

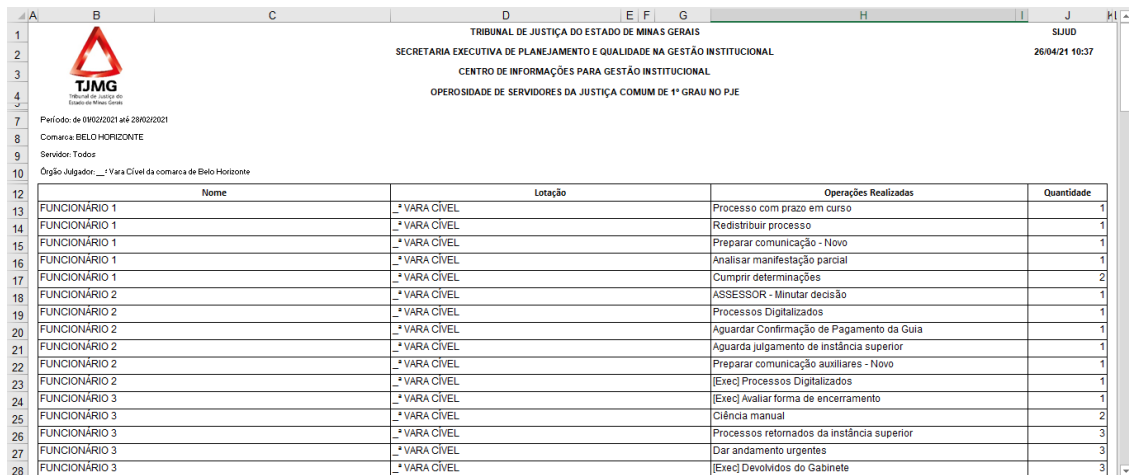
Pode-se gerar o relatório em formato PDF, apropriado para leitura ou impressão, ou Planilha. Escolha o formato que melhor lhe convir.

Finalmente clique em "Confirmar" e o relatório será gerado. Caso queira refazer a consulta, pode-se, clicando em "Limpar", apagar todos os valores já informados nos campos.

Figure 2. Public access to the server's reports
Source: TJMG website access available to the public

Through the web access above, the server downloads the Excel spreadsheet that contains the information extraction. The fields are filled in according to the secretariat in question, and the "Excel" format is selected. No selection is made in the Server field. By clicking "Confirm", the report is downloaded.

² Free translation from Portuguese



Nome	Lotação	Operações Realizadas	Quantidade
FUNCIONARIO 1	* VARA CÍVEL	Processo com prazo em curso	1
FUNCIONARIO 1	* VARA CÍVEL	Redistribuir processo	1
FUNCIONARIO 1	* VARA CÍVEL	Preparar comunicação - Novo	1
FUNCIONARIO 1	* VARA CÍVEL	Analisar manifestação parcial	1
FUNCIONARIO 1	* VARA CÍVEL	Cumprir determinações	2
FUNCIONARIO 2	* VARA CÍVEL	ASSESSOR - Minutar decisão	1
FUNCIONARIO 2	* VARA CÍVEL	Processos Digitalizados	1
FUNCIONARIO 2	* VARA CÍVEL	Aguardar Confirmação de Pagamento da Guia	1
FUNCIONARIO 2	* VARA CÍVEL	Aguarda julgamento de instância superior	1
FUNCIONARIO 2	* VARA CÍVEL	Preparar comunicação auxiliares - Novo	1
FUNCIONARIO 2	* VARA CÍVEL	[Exec] Processos Digitalizados	1
FUNCIONARIO 3	* VARA CÍVEL	[Exec] Avaliar forma de encerramento	1
FUNCIONARIO 3	* VARA CÍVEL	Ciência manual	2
FUNCIONARIO 3	* VARA CÍVEL	Processos retornados da instância superior	3
FUNCIONARIO 3	* VARA CÍVEL	Dar andamento urgentes	3
FUNCIONARIO 3	* VARA CÍVEL	[Exec] Devolvidos do Gabinete	3

Figure 3. Servant's PJE transactions report downloaded

Source: TJMG public access

The report table exemplified in the image above is copied and pasted into an Excel spreadsheet, where, through buttons configured with macros, the extraction, formatting, and processing of the data is carried out. After that, it is launched to a second tab, which serves as a database for the system.

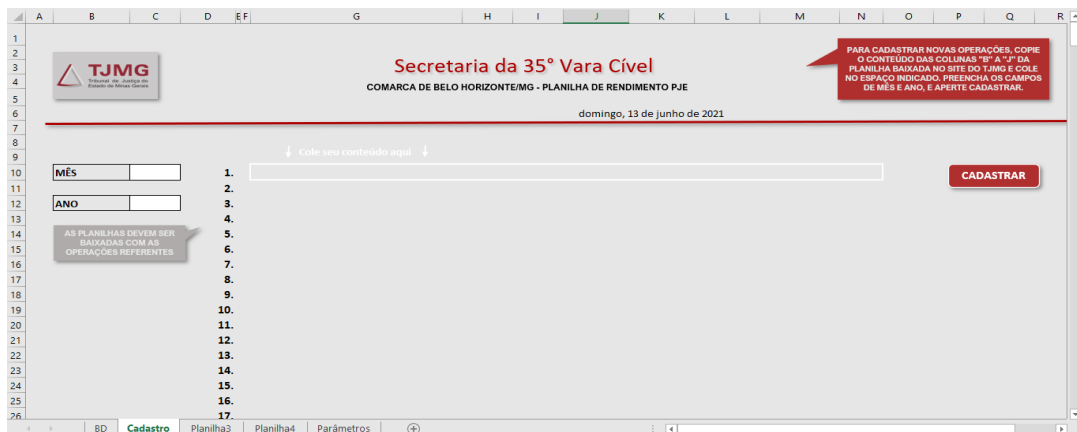


Figure 4. Transactions register

Source: Developed by the second author

Now in Power BI, the server clicks on the option to update system data, and automatically, the views are also updated. It publishes that month's reports, and an access link is generated that can be opened and viewed by anyone, whether on a computer or cell phone.

Previously, in the first version of this system, the user had to download a SIJUD report per server and upload it to the Excel spreadsheet individually. Despite the macros automating the updating of views, as the system and database were all contained in the same spreadsheet, the file was too heavy, which compromised the fluidity of automation on a computer with lower processing. In addition, the spreadsheet could only be displayed and used in Excel, software that cannot be accessed on first instance court computers for lack of a license. With the new

version, only the database would be stored in a spreadsheet, all views would be accessed via Power BI and shared via a link.

Comparing the two interfaces, the first made in Excel and the second in Power BI, it is possible to see an improvement in the arrangement of information and analysis configuration. While in the old version, the user had to swipe the screen to see the other KPI charts and the filter did not allow comparison between employees, in the second version, in addition to gathering all these possibilities, it also allows a dynamic filter for a more personalized analysis.



Figure 5. Excel performance monitoring interface
 Souce: Developed by the second author



Figure 6. Power BI performance monitoring interface
 Souce: Developed by the second author

The tool, however, provides only a partial understanding of the performance of public servers. In order to fully interpret the production and productivity of its servers in the PJE, it is necessary that the user is aware of the division of tasks that takes place within each secretary. As the PJE is a relatively new tool for justice, most secretaries still go through the transition process from physical to electronic processes, so not all servers, whose activities are 100% focused on carrying out operations with processes within the PJE. Among other activities present in the daily routine of departments today, is the sending of subpoena letters and digitization of physical processes.

This issue prevents anyone who occasionally has access to the reports from being able to discriminate against the production of servers.

Discussion

Paulo Bonavides (2019) groups the fundamental rights into generations, which follow their historical process of evolution. The history of guaranteeing fundamental rights goes back to the bourgeois revolutions, at the beginning of the 19th century, with the demand for the rights of freedom, nowadays conceived as fundamental rights of the first generation. The 20th century brought second-generation social, economic, and cultural rights. At that moment, the State is no longer just a guarantor of freedom and starts to provide services to the population. At the end of the 20th century, with the awareness of nations, the rights to peace, the environment, and communication characterize the third generation. Bonavides also highlights the fourth

generation of fundamental rights, essential for guaranteeing the citizenship and freedom of peoples in an era of globalization. These rights concern citizenship, information, and pluralism.

As a Democratic State of Law, Brazil has, in article 5 of its Constitution, the list of fundamental rights, including the right to access information, the right to privacy and the right to data protection, recognized as fundamental in the Supremo Tribunal Federal in 2020.

To guarantee democracy, it is essential to comply with the principles of transparency and access to information, contemplated in the Federal Constitution of 1988 as fundamental rights, as provided for in item XXXIII of article 5:

“XXXIII - all persons have the right to receive, from the public agencies, information of private interest to such persons, or of collective or general interest, which shall be provided within the period established by law, subject to liability, except for the information whose secrecy is essential to the security of society and of the State”

The Magna Carta also makes it clear that access to information is a form of participation in public administration, by disciplining, in article 37, the "forms of user participation in direct and indirect public administration", which will be done through "access from users to administrative records and information on government acts”.

The right to privacy was recognized in the 20th century and reflects the consequences of the use of new technologies, which allow the disclosure of information from the private sphere in a way that was previously unimaginable. One of the first mentions of this right was in the article by Warren and Brandeis, published in the Harvard Law Review and entitled “The Right to Privacy”, which discusses the invasion of private life by technologies. At the time, the right to privacy was conceived as the “right to be let alone”, that is, any invasion of the domestic sphere was a violation of the right. Despite the importance of guaranteeing the right, authors Warren and Brandeis (1890) in the article were already concerned with defining its limits. It is noteworthy that, in the authors' view, the right to privacy cannot prevent the publication of what is of general interest.

The evolution of the right to privacy followed the digital revolution, giving rise to the creation of the concept of personal data protection. The legislative protection of this new right began in the 1970s, with the pioneering spirit of Sweden (1973) and the United States (1974) (MENDES, 2008).

There are situations in which these rights conflict. As the jurisprudence understands that no fundamental right is absolute, the principle of proportionality and reasonableness must be used to define the prevailing right in the concrete situation. The principle of proportionality uses three steps in order to evaluate an issue based on rational criteria (FERNANDES, 2010): (i) adequacy, (ii) necessity, and (iii) proportionality in the strict sense. Adequacy refers to achieving the intended end, while necessity is based on using the least burdensome means to achieve that end, and proportionality is the balance between the fundamental right that will be more relevant in the concrete situation and the one that will be subject to restrictions. The application of this principle can be summarized as a cost-benefit analysis, that is, it is verified

which fundamental right will bring more benefits to the community if protected in the case in question.

One of the most useful applications potentially contained in the principle of proportionality is that which makes it an instrument of interpretation whenever there is antagonism between fundamental rights and a conciliatory solution is sought therefrom, for which the principle is undoubtedly appropriate. (Bonavides, 2019)³

The following discussion uses the rational criteria to analyze privacy and the right to access public information.

It is the understanding of the Federal Supreme Court in cases of disclosure of public servants' remuneration that the principle of administrative publicity tends to prevail. In the Serious Regimental decision on the Security Suspension 3,902, it is highlighted that there is no collision of rights, since the information on the remuneration of employees is of a state nature, not violating intimacy and private life. In the decision “Extraordinary Appeal with Interlocutory Appeal 652,777”, Minister Marco Aurélio emphasizes that public servants:

cannot claim to have the same privacy as ordinary citizens. It is the basic principle of Public Administration, in terms of efficiency – another principle –, that of advertising. The public servant, the public agent, the political agent are in the window. They are, at first, an open book. Between individual and collective interest, the public, the collective prevails.⁴

Based on jurisprudence, the tendency to prioritize the principle of publicity contributes to the feasibility of using the management tool, considering that the information is of a public nature and collective interest, which prevails over the individual.

“public servant, invested in the public service by public tender, resembles the figure of the politician, the public man, having reduced his spectrum of personality rights, in particular the rights to privacy.” (Costa, 2016)⁵

The tool in question helps to comply with various provisions of the Access to Information Law. Law No. 12,527 aims to regulate the constitutional right of access to information, strengthening the development of participatory democracy. The law has as guideline publicity as a general principle, and secrecy as an exception, seeking to develop a culture of transparency in which society has control over public administration. For this, information must be disclosed using information technology means, even without public request (Soares et al., 2018).

Articles 5 and 8 stand out, which regulate the way in which information is transmitted to the population:

³ Free translation from Portuguese

⁴ Free translation from Portuguese

⁵ Free translation from Portuguese

Art. 5. It is the duty of the State to guarantee the right of access to information, which will be provided, through objective and agile procedures, in a transparent, clear, and easy to understand language.”

Art. 8 It is the duty of public bodies and entities to promote, regardless of requirements, the disclosure in an easily accessible place, within the scope of their competence, of information of collective or general interest produced by them or in custody.

The public server's information is presented by the tool in a transparent, clear and easy-to-understand language, contrasting with the way in which data are disclosed on the open government portal, since they are not easily transformed into information, due to the lack of indicators that allow the user to understand the information, and by an unfriendly interface. Besides that, the tool complies with what is provided for in article 8, considering that the information extracted for data creation and analysis is already available through an internet link to extract SIJUD reports, with public access.

In addition, it is observed in the current political scenario, the rise of discussions focused on the importance of mechanisms for accessing information to improve efficiency in the management of public bodies. An example is Bill No. 7843 of 2017 (2021), approved in 2021, which proposes to:

improve various instruments to improve public efficiency, having as its scope both the direct administration bodies of the Executive, Legislative and Judiciary powers, the audit courts and the Public Ministry (MP), as well as autarchies, public foundations controlled, directly or indirectly, by the Union or by the states, by the Federal District (DF) and by the municipalities (...).⁶

Among the main topics addressed by the project is the concern with the integration of systems and access to public administration databases, bringing concepts such as "government as a platform", which refers to the existence of a technological infrastructure that enables access to several agents, supporting the integration of information, in a secure and transparent way.

With the understanding that the tool developed, also expresses the concern to develop mechanisms to use data in improving the efficiency of departments of the judiciary, it is valid to question responsibilities, if initiatives like this, that seek to bring views of information of a managerial nature, should or should not come primarily from the public agency itself.

The value generated by the tool within the department where it is currently being applied is undeniable, especially if it is understood that before it there were no means of control and analysis of productivity available so that clerks could understand and report performance per server. The simplicity of the solution proposed in Excel and in its most updated version, Power BI, shows that if the servers, internally, had an access, connected to the SIJUD database, to

⁶ Free translation from Portuguese

create filters, graphs, tables, and reports, as happens in the Transparency Portal, they could have more efficient administration.



Figure 5. Example of customizable graphical visualization with data available of the Transparency Portal (Brazil, 2021)

Source: Transparency Portal

Therefore, the jurisprudence and doctrine studied point in favor of the applicability of the tool, which is shown as a way of collaborating with the fulfillment of constitutional principles, in addition to complying with the trends of a more open and participatory government.

In addition to the legal provisions, it is worth analyzing how the tool is in line with government initiatives that seek to promote participatory democracy, such as the international Open Government Partnership – OGP (Brazil’s 4th National Action Plan, 2018) initiative, in which Brazil is a founding country.

Open Government Partnership is an initiative that has 78 countries and seeks to develop action plans to promote transparency and improve the participation of the population. Open Government thus has four principles: accountability, civil participation, transparency and technology, and innovation. The tool under analysis actively contributes to the fulfillment of the four principles, at a time when: (i) it allows the verification of the progress of the work of public servants; (ii) increases society's engagement with public administration issues; (iii) enables the disclosure of data in a clear and objective way, which were previously disorganized; (iv) uses technologies to comply with other principles.

The consideration of the use of the tool with the legal institutes, principles, and initiatives demonstrate that the specific case in question tends to follow the understanding of prioritizing access to information when dealing with relevant information for the population to monitor the destination of State resources and the works performed by servers. The tool, in addition to complying with legal principles, contributes even more to their effectiveness, by providing a clear and accessible view of information so that managers can better play their role in the administration of the court. Regarding the protection of information on servers, the tool does not collect new information, it only organizes those already available on the SIJUD

website, always based on compliance with the legal provisions of the law on access to information.

Conclusion

This study discussed the relationship between two fundamental rights guaranteed by the Federal Constitution of 1988: the right to privacy and the right to access public information. Based on the discussion of the technical report "Proposal of a Performance Management System for Electronic Judicial Process" presented in ENAJUS 2020, it is important to reinforce some of its limitations, which have already been presented in the previous article.

The artifact was developed for a single TJMG secretariat, and it is difficult to guarantee its replication in different departments, and in other locations in Brazil. Moreover, by not considering the other activities performed by servers, it ends up delivering an interpretation of partial performance results.

When analyzing the function of the SIJUD within the TJMG, it is explicit that the artifact created, when exercising its management role, corroborates in the delivery of its original functions. Thus, it is possible to conclude, with regard to the discussion of which fundamental right will prevail, the answer is based on the principle of proportionality, applied in the case study presented and in the general theme of this article. The transparency and accessibility of public data explored by the tool, therefore, assume a positive role for the administration of secretariats in general, without promoting the detriment and discrimination of servers.

Considering the benefits generated by the dissemination of public management information, there is the opportunity for the development of technological initiatives by those who are not a direct member of these public institutions, which can generate, as a consequence, contributions to increase the effectiveness of their administration. This is also associated with the implementation and discussion of more modern and innovative practices for the public sector.

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