



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

January 9, 2003

Mr. Steve Aragon  
General Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2003-0202

Dear Mr. Aragon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174800.

The Texas Health & Human Services Commission (the "commission") received three requests for information relating to a Texas Medicaid Pharmacy Cost Survey that a private third party performed for the commission. The first request is for, among other things, portions of the information obtained from the pharmacies that participated in the survey. The second request is for "a copy of the data collected by [the surveyor]." The third request is for fifteen categories of information relating to the survey. You state that the commission has no information that is responsive to certain aspects of the first and third requests. We note that chapter 552 of the Government Code does not require the commission to release information that did not exist when it received this request or to create responsive information.<sup>1</sup> You also inform us that the commission has released some of the information that is responsive to the first and third requests. You assert that the commission may withhold the remaining requested information pursuant to a previous decision issued by this office. Alternatively, the commission claims that some of the remaining information is excepted from disclosure under sections 552.101, 552.107 and 552.111 of the Government Code. Under section 552.110 of the Government Code, the commission also believes that these requests for information implicate the proprietary interests of the private entity that conducted the survey and of the private entities that participated in the survey. In lieu of arguments under section 552.110, the commission notified the interested parties of these

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<sup>1</sup>See Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

requests for information and of the parties' right to submit arguments as to why the requested information should not be released.<sup>2</sup> We received correspondence from a number of the pharmacies that participated in the survey. We also received arguments from the first and third requestors.<sup>3</sup> We have considered all of the submitted arguments and have reviewed the submitted information.<sup>4</sup>

We initially note that the first request for information includes a series of questions. The commission has not addressed this aspect of the first request in asking for this decision. Chapter 552 of the Government Code does not require a governmental body that receives a request for information to answer factual questions, conduct legal research, or create new information. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Likewise, chapter 552 does not require a governmental body to take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds that information on behalf of the governmental body that received the request. *See* Gov't Code § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). However, a governmental body must make a good-faith effort to relate a request to information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). We assume that the commission has made a good-faith effort to relate the first requestor's questions to responsive information and that you have released such information, if any. If not, then you must do so at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000).

Next, we address your claim that the commission may rely on a prior decision of this office to withhold information that is responsive to the present requests. You direct our attention to a ruling dated December 31, 1987 and addressed to the Texas Department of Human Services ("DHS"). The 1987 ruling addresses pharmaceutical cost information gathered by DHS. You explain that the Texas Medicaid Pharmacy Cost Survey, formerly performed by DHS, has since become the commission's responsibility. You contend that the 1987 decision that we issued to DHS constitutes a previous determination, for purposes of section 552.301 of the Government Code, with regard to all or part of the information that the commission now seeks to withhold.

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<sup>2</sup>*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov't Code ch. 552 in certain circumstances).

<sup>3</sup>*See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

<sup>4</sup>This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the commission to withhold any information that is substantially different from the submitted information. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

A governmental body that receives a written request for information that it wishes to withhold from public disclosure must seek an attorney general decision "if there has not been a previous determination about whether the information falls within one of the exceptions [to public disclosure]." Gov't Code § 552.301(a). In Open Records Decision No. 673 (2001), this office delineated the elements of two different types of previous determinations. We explained that the first type of previous determination exists when all of the following criteria have been met:

- (1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code;
- (2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general;
- (3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and
- (4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling.<sup>5</sup>

Open Records Decision No. 673 at 6-7 (2001). In this instance, the commission does not seek to withhold the same survey information that was at issue in the 1987 decision. Furthermore, the 1987 decision was requested by and issued to DHS, a different governmental body. Therefore, the commission may not rely on the 1987 decision as the first type of previous determination to withhold the submitted information that is responsive to the present requests.

The second type of previous determination described in Open Records Decision No. 673 (2001) pertains to clearly delineated categories of information and requires that all of the following criteria be met:

- (1) the requested records or information at issue fall within a specific, clearly delineated category of information about which this office has previously rendered a decision;
- (2) the previous decision is applicable to the particular governmental body or type of governmental body from which the information is requested;

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<sup>5</sup> A governmental body must make an initial finding that it in good faith reasonably believes the requested information is excepted from disclosure. Open Records Decision No. 665 at 3 (2000). A governmental body should request a decision from this office if it is unclear to the governmental body whether there has been a change in law, facts, or circumstances on which the prior decision was based.

(3) the previous decision concludes that the specific, clearly delineated category of information is or is not excepted from disclosure under the Act;

(4) the elements of law, fact, and circumstances are met to support the previous decision's conclusion that the requested records or information at issue is or is not excepted from required disclosure; and<sup>6</sup>

(5) the previous decision explicitly provides that the governmental body or bodies to which the decision applies may withhold the information without the necessity of again seeking a decision from this office.

Open Records Decision No. 673 at 7-8 (2001). In this instance, the 1987 ruling does not explicitly authorize the commission or any other governmental body to withhold information without the necessity of again seeking an attorney general decision. *Compare, e.g.*, Open Records Decision Nos. 634 (1995) (authorizing withholding of information encompassed by federal Family Educational Rights and Privacy Act of 1974), 670 (2001) (authorizing withholding of information encompassed by Gov't Code § 552.117(2)). Furthermore, we are not persuaded that the elements of law, fact, and circumstances that support the previous decision are met in this instance. Consequently, we conclude that the 1987 ruling does not constitute a previous determination with regard to any of the information that is encompassed by the present requests. Thus, the commission may not withhold any of the information that is responsive to these requests in reliance on the 1987 ruling. Accordingly, we must address the other claims of the commission and the private parties.

We begin with the arguments regarding the information that is encompassed by the first and second requests. Under section 552.110 of the Government Code, the commission claims that these requests implicate the proprietary interests of the private parties that responded to the survey. Several of the pharmacies that submitted arguments also raise section 552.110. This exception protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" *See* Gov't Code § 552.110(a)-(b).

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<sup>6</sup> Thus, in addition to the law remaining unchanged, the facts and circumstances must also have remained unchanged to the extent necessary for all of the requisite elements to be met. As with the first type of previous determination, a governmental body seeking to withhold requested information must make an initial finding that it in good faith reasonably believes the information is excepted from disclosure. With respect to previous determinations of the second type, a governmental body should request a decision from this office if it is unclear to the governmental body whether all of the elements on which the previous decision's conclusion was based have been met with respect to the requested records or information.

The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business . . . .* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>7</sup> *See Open Records Decision No. 552 at 5 (1990).*

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See Open Records Decision No. 661 at 5-6 (1999)* (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

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<sup>7</sup>The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS, § 757 cmt. b (1939); *see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).*

In this instance, the first requestor seeks access to only specified portions of the pharmacies' responses to the survey. Furthermore, both requestors have indicated that they do not seek access to any information that would identify any specific pharmacy. The commission claims, however, that de-identification of the requested information will not suffice to protect the private parties' interests. You argue that

[e]ven if the Commission redacted the survey results in the manner suggested in the requests, it may be possible for the requestors to determine the responding pharmacies' identities. For example, if a rural community only had two pharmacies – one large and one small – then, if given information on the total number of prescriptions filled, square footage of the store or total personnel costs, it would not be difficult to identify the pharmacies based on their responses or information readily available in the public domain. Because of the difficulty in adequately “de-identifying” the information, the Commission requests that your office consider both requests as if they asked for complete pharmaceutical survey responses.

At least one of the pharmacies that submitted arguments also expresses this same concern. However, having reviewed the submitted information to which the first and second requestors seek access, it is not clear to this office that the release of this information would enable the identification of any participating pharmacy. Likewise, we find that neither the commission nor the private parties have established that the information to which the first and second requestors seek access tends to reveal the identity of any particular pharmacy that participated in the survey. We therefore conclude that neither the commission nor the private parties have established that disclosure of the de-identified information to which the first and second requestors seek access will harm the proprietary interests of the pharmacies that participated in the survey. *See* Attorney General Letter Opinion No. 95-043 (1995) (concluding that Public Utility Commission could publicly disclose report without implicating proprietary interests of private entities by avoiding identification of any private entity that was required to provide information). Accordingly, none of the submitted information that is responsive to the first and second requests is excepted from disclosure under section 552.110 of the Government Code.

The pharmacies also have raised exceptions to the disclosure of the survey information under sections 552.101, 552.102, 552.113, 552.118, and 552.131 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses information that is protected by constitutional and common-law rights to privacy. We conclude, however, that the de-identified information to which the requestors seek access does not implicate any privacy rights that are protected under section 552.101. We note that section 552.101 also encompasses information that another statute makes confidential. One of the pharmacies believes that the survey responses contain confidential tax information. Section 6103(a) of title 26 of the United States Code makes federal tax return information confidential. However, return information for purposes of section 6103 does not include data

in a form that cannot be associated with, or otherwise identifies, either directly or indirectly, a particular taxpayer. *See* 26 U.S.C. § 6103(b)(2). Thus, we conclude that section 6103 is not applicable to any information contained in the de-identified survey responses. Likewise, we conclude that none of the pharmacies has demonstrated that any of the survey information comes within the scope of sections 552.102, 552.113, 552.118, or 552.131. *See* Gov't Code §§ 552.102 (exception for public official or employee's personnel file information if release would constitute clearly unwarranted invasion of personal privacy), .113 (exception for certain geological or geophysical information), .118 (information relating to official prescription form filed with Department of Public Safety or collected under Health & Safety Code § 481.075), .131 (information relating to economic development negotiations involving governmental body).

Next, we address the issues presented by the third request for information. Initially, we address the commission's assertion that items 1, 10, 13, 14, and 15 of the third request require clarification. Section 552.222 of the Government Code provides that if it is unclear to the governmental body what information is being requested, the governmental body may ask the requestor to clarify the request. *See* Gov't Code § 552.222(b); *see also* Open Records Decision No. 663 at 2-5 (1999) (addressing circumstances under which governmental body's communications with requestor to clarify or narrow request for information toll deadline to request decision under Gov't Code § 552.301(b)). The commission submitted a written request for clarification to the third requestor. The requestor's brief to this office provides a detailed explanation of the information to which she seeks access. Moreover, the commission appears to have made a good-faith effort to identify and submit the type of information that it deems to be responsive to the third request. *See* Open Records Decision No. 561 at 8-9 (1990). Accordingly, we will consider the commission's arguments with regard to the submitted information.

The commission contends that the third request implicates the interests of Myers & Stauffer, L.C., the private entity that conducted the survey for the commission. We note, however, that the commission relies on Myers & Stauffer to substantiate this claim. A private party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305 to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have received no correspondence from Myers & Stauffer. Consequently, Myers & Stauffer has not demonstrated that any of the information at issue constitutes the company's proprietary information for purposes of section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

The commission also believes that the release of information encompassed by the third request would adversely affect the proprietary interests of the participating pharmacies. The commission argues that, unlike the first and second requests, the third request is not confined to de-identified information. As to the information sought by the third request that is at issue in this decision, we disagree. The requestor's brief to this office emphasizes that the third

request “does not seek information that identifies particular pharmacies, individual pharmacies’ financial information, or particular patients.” Thus, as the third requestor disclaims any interest in identifying information, the portions of the submitted documents that would identify the participating pharmacies are not responsive to the third request and therefore need not be provided to the third requestor. We have marked that information.

The commission also contends that the information that is responsive to the third request may reveal confidential information about Medicaid recipients. Sections 12.003 and 21.012 of the Human Resources Code make confidential certain information that relates to recipients of or applicants for Medicaid. Section 12.003 provides in relevant part:

(a) Except for purposes directly connected with the administration of the department’s assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, *or any information concerning*, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

Hum. Res. Code § 12.003(a) (emphasis added). In Open Records Decision No. 584 (1991), this office concluded that “[t]he inclusion of the words ‘or any information’ juxtaposed with the prohibition on disclosure of the names of the department’s clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients’ names and addresses.” *Id.* at 3. Consequently, it is the specific information pertaining to individual clients, and not merely the clients’ identities, that is made confidential under section 12.003. *See also* 42 U.S.C. § 1396a(a)(7) (state plan for medical assistance must provide safeguards that restrict use or disclosure of information concerning applicants and recipients to purposes directly connected with administration of plan); 42 C.F.R. § 431.300 *et seq.*; Hum. Res. Code § 21.012(a) (requiring provision of safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs); Open Records Decision No. 166 (1977).

The commission is concerned that the third request might encompass information that contains “confidential Medicaid recipient data.” The commission has not demonstrated, however, and it is not otherwise clear to this office that information relating to Medicaid recipients is contained in any of the submitted documents that the commission believes to be responsive to the third request. Thus, the commission has not established that any of the requested information must be withheld from disclosure under sections 12.003 and 21.012 of the Human Resources Code.

The commission also seeks to withhold some of the information that is responsive to the third request under sections 552.107 and 552.111 of the Government Code. Section 552.107(1) excepts from public disclosure

information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]

Gov't Code § 552.107(1). Section 552.107(1) protects information that comes within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's communications made in confidence to the attorney. *See* Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information that may be withheld pursuant to the attorney-client privilege under section 552.107(1).

You assert that some of the information that is responsive to the third request consists of legal advice and/or client confidences and thus is excepted under section 552.107. Based on your representations and our review of the information in question, we have marked information that the commission may withhold under section 552.107(1). *See also* TEX. R. EVID. 503(b)(1); Open Records Decision No. 676 at 6-11 (2002) (addressing demonstration required of governmental body that claims attorney-client privilege).

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency" and incorporates the deliberative process privilege. The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ). We determined that section 552.111 excepts only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (personnel-related communications not involving policymaking not excepted from disclosure under section 552.111). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and

recommendations. *See* Open Records Decision No. 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office also has concluded that a preliminary draft of a document intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

The commission claims that the requested information includes advice, opinion, or recommendation that relates to policy-making by the commission. The commission also indicates that this information includes drafts of documents that have been released to the public in their final form. We have marked information that the commission may withhold under section 552.111.

In summary, the commission may withhold some of the submitted information that is responsive to the third request for information under sections 552.107 and 552.111 of the Government Code. The commission must release the rest of the submitted information that is responsive to the first, second, and third requests.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

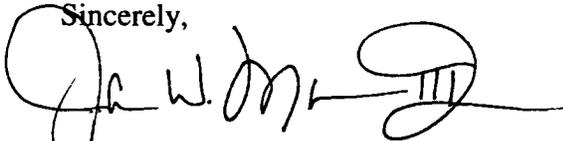
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is stylized with a large initial "J" and a long horizontal stroke extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

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