



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 26, 2007

Mr. John Feldt  
Assistant District Attorney  
Denton County Criminal District Attorney's Office  
P.O. Box 2850  
Denton, Texas 76202

OR2007-08030

Dear Mr. Feldt:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 282019.

The Denton County Criminal District Attorney's Office (the "district attorney") received a request for e-mail correspondence involving District Attorney Paul Johnson or Assistant District Attorney Jamie Beck and a specified time interval. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.104, 552.107, 552.108, 552.109, and 552.111 of the Government Code. You also contend that some of the requested information is not subject to the Act. We have considered your arguments and have reviewed the information you submitted.<sup>1</sup>

We first note that some of the submitted information does not fall within the time interval specified by the requestor. Therefore, that information, which we have marked, is not

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<sup>1</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 district attorney to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

responsive to this request for information. This decision does not address the public availability of the non-responsive information, and that information need not be released.<sup>2</sup>

You assert that some of the submitted information is not subject to the Act. Section 552.002 of the Government Code provides that “public information” consists of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov’t Code § 552.002(a). Thus, virtually all of the information that is in a governmental body’s physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also is applicable to information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov’t Code § 552.002(a)(2); *see also* Open Records Decision No. 462 at 4 (1987). You contend that Exhibits J-1, J-2, L-1, and L-2 do not contain “public information,” as defined by section 552.002. Having reviewed the information in question, we agree that Exhibits L-1 and L-2 contain information of a personal nature and are not subject to the Act. *See* Open Records Decision No. 635 at 4 (1995) (Gov’t Code § 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving de minimis use of state resources). Thus, Exhibits L-1 and L-2 need not be released. Conversely, Exhibits J-1 and J-2 involve public officials and employees and matters pertaining to public employment. We therefore conclude that Exhibits J-1 and J-2 constitute “public information” under section 552.002 and must be released unless they contain information that falls within an exception to disclosure. *See* Gov’t Code §§ 552.021, .301, .302.

You also contend that user names and passwords in Exhibit E are not subject to the Act. In Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property, is not the kind of information that is made public under section 552.021 of the Act. *See* ORD 581 at 6 (construing predecessor statute).

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<sup>2</sup>Because the non-responsive information includes the information that you seek to withhold under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code, this ruling does not address your claim under section 261.201.

We agree that the user names and passwords that we have marked in Exhibit E function solely as tools to maintain, manipulate, or protect public property and have no other significance. *Id.* As such, the marked items are not public information, as defined by section 552.002 of the Government Code, and thus are not subject to the Act. Therefore, the district attorney need not release the marked user names and passwords.

We note that Exhibit J contains agendas for county commissioners' meetings. The agenda of a public meeting of a governmental body is made public by section 551.041 of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code § 551.041 (governmental body shall give written notice of date, hour, place, and subject of each meeting held by governmental body). As a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the agendas that we have marked must be released to the requestor.

Turning to your exceptions to disclosure, we begin with your claims under section 552.108 of the Government Code. Section 552.108 provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(1), (a)(4), (b)(1)-(3). Section 552.108 protects certain specific types of law enforcement information. Section 552.108(a)(1) is applicable to information whose release would interfere with a pending criminal investigation or prosecution. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Section 552.108(b)(1) protects internal records of a law enforcement agency whose release would interfere with law enforcement and crime prevention. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (Gov't Code § 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws); Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989). Section 552.108(b)(2) is applicable only if the information at issue relates to a concluded case that did not result in a conviction or a deferred adjudication. Sections 552.108(a)(4) and 552.108(b)(3) are applicable to information that was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or that reflects the mental impressions or legal reasoning of an attorney representing the state.

A governmental body must reasonably explain how and why section 552.108 is applicable to the information that it seeks to withhold under this exception. *See Gov't Code § 552.301(e)(1)(A); Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You seek to withhold all of the submitted information, including Exhibits A through C in particular, under section 552.108(a)(1), section 552.108(a)(4), section 552.108(b)(1), and section 552.108(b)(3). You also claim that Exhibit B is excepted from disclosure under section 552.108(b)(2). You also appear to claim that Exhibit D is excepted from disclosure under section 552.108(b)(3). Based on your representations with respect to Exhibit A, we conclude that the district attorney may withhold Exhibits A-1 and A-5 and most of the information in Exhibit A-3 under section 552.108(a)(1). Additionally, we conclude that the district attorney may withhold the remaining information in Exhibit A-3 under

section 552.108(b)(1). Based on your arguments under section 552.108(a)(4) and (b)(3), we have marked information in Exhibits A, B, C and D that the district attorney may withhold on that basis.<sup>3</sup> Because you have not sufficiently explained how or why section 552.108 is applicable to any of the remaining information, the district attorney may not withhold any other information under that exception.

Next, we address the other exceptions you claim. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. You raise section 552.101 in conjunction with the common-law right to privacy. Common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

Common-law privacy also encompasses certain types of personal financial information. This office has determined that financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public’s interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).

Section 552.102 of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). Section 552.102(a) protects information that

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<sup>3</sup>As we are able to make this determination under section 552.108, we need not address your claim under section 552.101 in conjunction with section 58.007 of the Family Code.

relates to public officials and employees. The privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 and *Industrial Foundation*. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App. – Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor to Gov't Code § 552.102).

Section 552.109 of the Government Code protects “[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]” Gov't Code § 552.109. In determining whether information is excepted from disclosure under section 552.109, this office relies on the same common-law privacy test that is applicable under section 552.101. See Open Records Decision Nos. 506 (1988), 241 (1980), 212 (1978); see also Open Records Decision No. 40 (1974) (statutory predecessor to Gov't Code § 552.109 may protect content of information, but not fact of communication). We also have concluded that section 552.109 protects the privacy interests of elected officials and not those of their correspondents. See Open Records Decision Nos. 473 at 3 (1987), 332 at 2 (1982).

Accordingly, we consider your privacy claims under sections 552.101, 552.102, and 552.109 collectively. You seek to withhold information in Exhibits D, I, and L on privacy grounds. We note that the information in question relates to public employees. As this office has often stated, information concerning public employees and public employment is generally a matter of legitimate public interest. See, e.g., Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest). Nevertheless, having considered your arguments, we have marked information in Exhibit I that must be withheld from disclosure under section 552.101 in conjunction with common-law privacy. We conclude that the district attorney may not withhold any other information on privacy grounds under section 552.101, section 552.102, or section 552.109.

Section 552.104 of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov't Code § 552.104(a). This exception protects a governmental body's interests in competitive bidding situations. See Open Records Decision No. 592 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. See Open Records Decision No. 541 at 4 (1990). Section 552.104 does not protect information relating to competitive bidding once a contract has been awarded and is in effect. See Open Records Decision Nos. 306 (1982), 184 (1978).

You state that the information in Exhibit F is related to competitive bidding for a security contract for the Denton County Courts Building. You also inform us that a contract has not been awarded. You contend that the release of Exhibit F would be harmful to the interests of Denton County (the "county") in this particular competitive situation. Based on your representations, we conclude that the district attorney may withhold Exhibit F at this time under section 552.104. The information in question may no longer be withheld on this basis once a contract has been awarded and is in effect.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You seek to withhold the information in Exhibit H under section 552.107(1). You indicate that the information in question consists of communications that were made for the purpose of facilitating the rendition of professional legal services to the county. You have identified

the parties to the communications. You also state that the communications were intended to be and remain confidential. Based on your representations, we conclude that the district attorney may withhold Exhibit H under section 552.107(1).

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.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 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, 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 from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 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) (Gov’t Code § 552.111 not applicable to personnel-related communications that did not involve policymaking). 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). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 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).

You seek to withhold the remaining information in Exhibit D under section 552.111. You contend that the information in question pertains to the deliberative and policymaking processes of the district attorney’s office. We note that section 552.111 encompasses external communications with a party with which a governmental body shares a privity of interest or a common deliberative process. *See* Open Records Decision No. 561 at 9 (1990) (addressing statutory predecessor). Based on your arguments, we have marked information in Exhibit D that the district attorney may withhold under section 552.111. We also conclude, however, that the remaining information in Exhibit D relates to personnel and other matters that do not involve formulation of policy. We therefore conclude that the district attorney may not withhold any other information in Exhibit D under section 552.111.

We next note that section 552.117 of the Government Code may be applicable to some of the remaining information.<sup>4</sup> Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential.

We have marked telephone numbers and family member information in Exhibits I and L that may be protected by section 552.117. The district attorney must withhold the marked information under section 552.117(a)(1) to the extent that it is related to a home telephone number or family member of a current or former county employee who timely requested confidentiality for the marked information under section 552.024.

We also note that section 552.136 of the Government Code is applicable to some of the remaining information.<sup>5</sup> Section 552.136(b) states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see also id.* § 552.136(a) (defining "access device"). We have marked information that the district attorney must withhold under section 552.136.

Additionally, section 552.137 of the Government Code is applicable in this instance.<sup>6</sup> Section 552.137 states in part that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail

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<sup>4</sup>Unlike other exceptions to disclosure under the Act, this office will raise section 552.117 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

<sup>5</sup>Section 552.136 also is a mandatory exception and may not be waived. Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001).

<sup>6</sup>Section 552.137 also is mandatory and may not be waived. Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001).

address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses in Exhibits G and J that must be withheld under section 552.137 unless the owner of a particular e-mail address has affirmatively consented to its public disclosure.

In summary: (1) Exhibits L-1 and L-2 and the user names and passwords that we have marked in Exhibit E are not public information under section 552.002 of the Government Code and need not be released; (2) the marked agendas in Exhibit J must be released under section 551.041 of the Government Code; (3) the district attorney may withhold the information that we have marked in Exhibits A, B, C, and D under section 552.108 of the Government Code; (4) the district attorney must withhold the information that we have marked in Exhibit I under section 552.101 of the Government Code in conjunction with common-law privacy; (5) Exhibit F may be withheld under section 552.104 of the Government Code; (6) Exhibit H may be withheld under section 552.107(1) of the Government Code; (7) the marked information in Exhibit D may be withheld under section 552.111 of the Government Code; (8) the information that we have marked in Exhibits I and L under section 552.117(a)(1) of the Government Code must be withheld to the extent that the information is related to a home telephone number or a family member of a current or former county employee who timely requested confidentiality for the information under section 552.024 of the Government Code; (9) the information that we have marked in Exhibits E and L under section 552.136 of the Government Code must be withheld; and (10) the e-mail addresses that we have marked in Exhibits G, J, and L under section 552.137 of the Government Code must be withheld unless the owner of a particular e-mail address has consented to its disclosure. The rest of the submitted information must be released.

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, upon receiving this ruling, the governmental body

will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Dep't of Pub. 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 Office of the Attorney General 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. 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", with a long horizontal line extending to the right.

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

JWM/ma

Ref: ID# 282019

Enc: Submitted documents

c: Mr. David J. Moraine  
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