



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 28, 2013

Mr. Scott R. Shoemaker  
Counsel for Crystal Clear Water Supply Corporation  
The Terrill Firm, P.C.  
810 West 10th Street  
Austin, Texas 78701

OR2013-09399A

Dear Mr. Shoemaker:

This office issued Open Records Letter No. 2013-09399 on June 6, 2013. In that ruling, we found the corporation failed to comply with the procedural requirements mandated by section 552.301 of the Government Code. *See* Gov't Code §§ 552.301(b), .302. You now submit an affidavit informing this office your request for a ruling from this office was sent via first-class United States mail, properly addressed with postage prepaid on March 26, 2013, the ten-business day deadline. Because your request for a ruling was therefore timely for purposes of section 552.301(b), and the information required by section 552.301(e) was also timely submitted to this office, we have determined the prior ruling should be corrected. *See id.* §§ 552.306, 552.352. Consequently, this decision is a substitute for Open Records Letter No. 2013-09399 and serves as the correct ruling. *See generally* Gov't Code § 552.011 (Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). This ruling was assigned ID# 496497.

The Crystal Clear Water Supply Corporation (the "corporation"), which you represent, received a request for all records relating to the corporation's application to the United States Department of Agriculture for a specified loan. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have

considered the exception you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

*Id.* § 552.022(a)(1). The information we have marked consists of a completed report made for the corporation that is subject to subsection 552.022(a)(1). The corporation must release the completed report pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). Although you raise section 552.103 of the Government Code for the completed report, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none of the information subject to subsection 552.022(a)(1), which we have marked, may be withheld under section 552.103. As no further exceptions to disclosure are raised for this information, you must release the completed report we have marked under section 552.022(a)(1) of the Government Code. However, we will consider your argument under section 552.103 for the remaining information not subject to section 552.022.

Section 552.103 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

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<sup>1</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

You contend the remaining information is related to active litigation to which the corporation is a party. You inform us, and have provided documentation demonstrating, litigation is active in the District Court of Travis County, Texas, 345th Judicial District, styled *Crystal Clear Water Supply Corporation v. Zachary Covar*, Cause No. D-1-GN-12-000305. You state the remaining information is related to the active lawsuit. You explain the remaining information contains information related to the corporation's assets and service area, which is directly related to the litigation at issue. Based on your representations, the submitted documentation, and our review of the remaining information, we find litigation was active when the corporation received this request for information and the remaining information is related to the active litigation for the purposes of section 552.103. Therefore, the corporation may withhold the remaining information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to the active litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the corporation must release the completed report we have marked under section 552.022(a)(1) of the Government Code. The corporation may withhold the remaining information under section 552.103 of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



David L. Wheelus  
Assistant Attorney General  
Open Records Division

DLW/dls

Ref: ID# 496497

Enc. Submitted documents

c: Requestor  
(w/o enclosures)