



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

November 30, 1992

Ms. Georgia Flint
Commissioner
Texas Department of Insurance
P. O. Box 2800
Austin, Texas 78768-2800

Open Records Decision No. 610

Re: Whether books and records of an insurance company in receivership are subject to disclosure under the Texas Open Records Act (RQ-443)

Dear Commissioner Flint:

The State Board of Insurance (now the Department of Insurance) received an application under the Texas Open Records Act, V.T.C.S. art. 6252-17a, for information contained in the books and records of Commodore Life Insurance Company (hereinafter "CLIC"), an insurance company in receivership under article 21.28 of the Insurance Code.¹ For example, the request asks for information about business relationships between CLIC and other entities and for information about the number of policyholders who obtained credit life and accident insurance with CLIC through specific lenders. You state that the requested information is in the custody of a district court, and therefore is not available to the public under the Open Records Act (hereinafter the "act").²

The act provides that "[a]ll information collected, assembled, or maintained by or for governmental bodies, . . . is public information and available to the public

¹Section 3A(a) of article 21.28-A provides that information in the possession of the State Board of Insurance relating to the supervision or conservatorship of an insurance company is not confidential, except for information designated confidential by the commissioner for a limited time. However, this section does not apply to information "on the appointment of a receiver for the insurance company by a court of competent jurisdiction." Ins. Code art. 21.28-A, § 3A. Thus, section 3A of article 21.28-A is not relevant to the question before us.

²A prior decision of this office, Open Records Decision No. 528 (1989), concluded that information about an insurance company in receivership held by the receiver was subject to the Open Records Act. This decision was subsequently withdrawn by Attorney General Jim Mattox in his letter of September 11, 1990 to Commissioner of Insurance A.W. Pogue closing the file on RQ-2012.

during normal business hours of any governmental body" with certain exceptions. V.T.C.S. art. 6252-17a, § 3(a). The judiciary is not a governmental body for purposes of the Open Records Act. V.T.C.S. art. 6252-17a, § 2(H). Thus, information "collected, assembled, or maintained by or for" the judiciary is not subject to the Open Records Act. See Open Records Decision Nos. 572 (1990); 411 (1984); 25 (1974).

The receiver of an insolvent insurer is appointed under article 21.28 of the Insurance Code.³ Section 2(a) of article 21.28 provides in part:

Whenever under the law of this State a court of competent jurisdiction finds that a receiver should take charge of the assets of an insurer domiciled in this State, *the commissioner of insurance or a person designated by the commissioner under contract* shall act as receiver. [Emphasis added.]⁴

After his appointment, the receiver must take possession of the assets of the insurer and deal with them in his "own name as receiver or in the name of the insurer as the court may direct." Ins. Code art. 21.28, § 2(a). The property and assets of the insurer are in the custody of the court as of the date the delinquency proceedings begin, and the receiver and his successors in office are vested with the title to all property of the insurer. *Id.* § 2(b). Upon taking possession of the assets of a delinquent insurer, the receiver is to conduct the business of the insurer, subject to the direction of the court. *Id.* § 2(e).

In *Eagle Life Ins. Co. v. Hernandez*, 743 S.W.2d 671 (Tex. App.--El Paso 1987, writ denied), the court addressed the nature of the liquidator-receiver under a

³Amendments to article 21.28 of the Insurance Code adopted in 1991 became effective January 1, 1992. Acts 1991, 72d Leg., 2d C.S., ch. 12, § 1.02. The insurance company whose records are under consideration in this decision was placed in receivership before these amendments were adopted, and the receiver was appointed under a prior version of article 21.28, section 2(a). Since our answer will be the same under either version of the statute, we will address the version that is currently in effect.

⁴Section 2(a) of article 21.28 formerly provided that the liquidator designated by the State Board of Insurance should become the receiver. Acts 1987, 70th Leg., ch. 1073, § 33, at 3644. The 1991 amendments to article 21.28 abolished the separate position of liquidator. Ins. Code art. 21.28, § 1(d). These amendments also authorized the commissioner to contract with a private individual or entity to act as special deputy receiver. Ins. Code art. 21.28, §§ 1(d), (g); 12.

former version of article 21.28. It held that the liquidator-receiver was not entitled to the exemption from payment of appellate bond that article 6.001 of the Civil Practice and Remedies Code provides for certain governmental agencies and their officers. Although the court relied in part on the fact that court costs are a first priority claim against funds held in receivership, it also reasoned as follows:

[T]he liquidator, while subject to Insurance Board approval and court appointment as receiver, stands in the shoes of the insolvent corporation, not those of the Board of Insurance Commissioners. Under Article 21.28, sec. 12(b), the Board determines the reasonable compensation to be awarded the liquidator and his or her personnel. Such award does not, however, come out of the Insurance Board budget or other state revenues. It is to be drawn from the funds or assets of the corporation in receivership.

743 S.W.2d at 671-72.

The court further observed that section 12A of article 21.28 provided that the liquidator and his staff, when not involved in liquidation or conservation matters, could be utilized for other insurance department work. It continued as follows:

In that case, however, compensation for this service *on behalf of the state entity* is subject to legislative appropriation. This highlights the fact that, while serving as receiver for a corporation in liquidation, the Appellant is not serving as an officer of the governmental entity and does not come under the entity's exemption.

Id. at 672 (emphasis in original). See also *State Bd. of Ins. v. Betts*, 308 S.W.2d 846 (Tex. 1958); *id.* 315 S.W.2d 279 (Tex. 1958); *id.* 315 S.W.2d 286 (Tex. 1958) (role of executive and judicial branch in supervision of receiver).

In *Eagle Life Insurance Company*, as in the other judicial decisions addressing the laws applicable to the receiver of an insurance company, the receiver is characterized as subject to the authority of the court or the authority of the Department of Insurance, depending on the question asked. An examination of the provisions of article 21.28 pertaining to records will assist us in determining the status of records held by the receiver with respect to the Open Records Act.

Article 21.28 requires the business records of the insurance company to be turned over to the receiver. The property and assets of an insurer in receivership "shall be in the custody of the court" as of the date the receivership begins, and the receiver is "vested by operation of law with the title to all of the property, contracts, and rights of action of such insurer." Ins. Code art. 21.28, § 2(b). Section 4 authorizes the court to issue various orders, including orders necessary to prevent interference with the receiver or the proceeding. It includes the following provision on records of the insurer in the possession of third parties:

All officers, directors, stockholders, members, trustees, managing general agents, agents, administrators, claims adjusters, managers, attorneys-in-fact, . . . or substitute attorneys-in-fact of the delinquent insurer shall immediately deliver to the possession of the receiver all properties, books, records, accounts, documents, and other writings of the delinquent insurer or that relate to the business of the delinquent insurer without cost to the receiver; however, if by contract or otherwise any of the properties, books, records, . . . and other writings are the property of those persons, they shall be copied, the copy delivered to the receiver, and the original retained by the owner until notification that it is no longer required in the administration of the insurer's estate or at any other time as the court, after notice and hearing, shall direct.

Id. § 4(e). "On approval by the court, the receiver may dispose of any records of the delinquent insurer that are obsolete and unnecessary to the continued administration of the receivership proceedings." *Id.* § 11(e).

The above provisions show that receiver holds the records of the insurer subject to the direction of the court.⁵ You moreover inform us that in this case the court has directed the receiver to take possession of and maintain all of the books and records of CLIC. Thus, his possession of and authority over the company's records is subject to the direction of the court.

⁵Certain provisions of article 21.28 require the receiver to file information with the Department of Insurance. See Ins. Code art. 21.28, §§ 2(f) (inventories of insurer's assets to be filed in office of board and in office of clerk of the court), 12(c) (receiver shall file reports about operation and condition of insurers with the board upon its request).

The purposes of the provision excepting the judiciary from the Open Records Act were discussed in *Benevides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ). A member of the public wished to inspect applications for the position of juvenile probation officer, which had been submitted to the Webb County Juvenile Board. The court had to determine whether the juvenile board, which was composed of judges, had to release the records. Its analysis focused on the nature of the board, since it had collected the information, and the kind of information requested:

The Board is not a court. A separate entity, the juvenile court, not the Board, exists to adjudicate matters concerning juveniles. Nor is the Board directly controlled or supervised by a court.

665 S.W.2d at 151. The court determined that the juvenile board performed administrative, and not judicial functions, and was therefore subject to the Open Records Act.

In Open Records Decision No. 572 (1990), this office determined that the Bexar County Personal Bond Program was a governmental body, subject to the Open Records Act, and not within the judicial exception, now found in section 2(1)(H). Nonetheless, it compiled the requested reports solely for judicial purposes. In preparing those reports it functioned as an arm of the judiciary and the reports were records of the judiciary which were not subject to the Open Records Act.

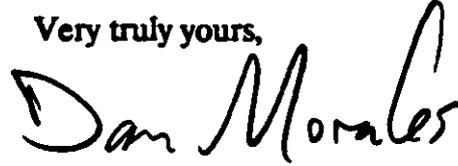
In the case before us, the receiver holds the records of the insurer because of the authority that flows from his appointment by the court. He possesses the records subject to the control and supervision of the court. Accordingly, the records of the insurer held by the receiver designated pursuant to article 21.28 of the Insurance Code are records of the judiciary, excepted from the Open Records Act by section 2(1)(H). See Open Records Decision Nos. 572, 513 (1988).

S U M M A R Y

The receiver of an insurance company appointed pursuant to article 21.28 of the Insurance Code holds the books and records of the insurer for the court. The insurer's books and records are records of the judiciary, and are therefore excepted

from the provisions of the Open Records Act by section 2(1)(H)
of that statute.

Very truly yours,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive, flowing style.

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