



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 18, 1995

Ms. Christine T. Rodriguez
Staff Attorney
Legal Services, MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR95-1428

Dear Ms. Rodriguez:

Your predecessor asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. This request was assigned ID# 22819.

The Texas Department of Insurance (the "department") received an open records request for "all non-privileged documents reflecting the Department's position on the classification of reinsurance claims under . . . [Insurance Code article 21.28, section 8] and all documents relied upon by the Department in making such determination or taking such position."¹ You have submitted a "representative sample" of what you believe to be the requested documents.² These documents consist of a "Memorandum" dated October 22, 1993; faxed transmissions that the department received on August 2 and July 7, 1993, from a special deputy receiver for a specific company in receivership; and related correspondence from the special deputy receiver seeking guidance on how to handle particular claims.

¹Article 21.28, section 8 of the Insurance Code addresses the distribution of assets from the estate of an insurer in receivership.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision No. 499 (1988), 497 (1988). We do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

The department contends that the Commissioner of Insurance possesses these records in the capacity of receiver in accordance with article 21.28 of the Insurance Code, which pertains to the appointment of a receiver for insolvent insurance companies, and that the records are therefore not subject to the Open Records Act because they are records of the judiciary. *See* Gov't Code § 552.003(b) (judiciary not subject to Open Records Act). In Open Records Decision No. 610 (1992), this office relied on specific language in article 21.28 to determine that the court-appointed receiver of insolvent insurance companies held the records of the insurer under the direction and authority of the court or as an agent of the court. We concluded that the insurer's records were the records of the judiciary and thus not subject to the Open Records Act.

The holding of Open Records Decision No. 610 (1992) did not reach all records related to the receivership or all records of the receivership held by the receiver. Accordingly, Open Records Decision No. 610 (1992) does not control here. The department does not possess the records at issue "subject to the control and supervision" of the court, nor are they records of an insurance company held by the receiver pursuant to court order. These records merely reflect generally the department's procedural guidelines on the classification and subsequent payment of claims. Because the department maintains these records in its own right, the records cannot be considered to be records of the judiciary. These records therefore are subject to the provisions of the Open Records Act and may be withheld only if they come under the protection of the act's exceptions to required public disclosure.

You contend that the information is protected by both sections 552.107(1) and 552.111 of the Government Code. The memorandum at issue is from attorneys within the department's Oversight Division and is addressed to all "SDR'S," the special deputy receivers designated by the commissioner under contract to act as receivers for specific insurance companies. Ins. Code art. 21.28, §§ 1(d), 2(a).

Section 552.107(1), as it read at the time of your request for an open records decision, protects "information that the attorney general or a attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas."³ *See* Open Records Decision No. 574 (1990) (copy enclosed). In instances where an attorney represents a governmental entity, the attorney-client privilege protects confidential attorney-client communications as well as legal advice or opinion rendered by the attorney to the client or to an associated attorney in furtherance of the rendition of legal services to the client. *Id.* The memorandum summarizes and

³Effective September 1, 1995, section 552.107(1) protects "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." *See* Act of May 29, 1995, 74th Leg., R.S., ch. 1035, 1995 Tex. Sess. Law Serv. 5127, 5131 (Vernon).

explains the law relating to distribution of assets. It also instructs the SDR's on the handling of specific problems that might arise in a particular receivership. It constitutes legal advice rendered by an attorney to associated attorneys in furtherance of the rendition of legal services to the client.⁴ Accordingly, the department may withhold the marked portions of the memorandum based on section 552.107(1) of the Government Code.

You also contend that section 552.107(1) protects the faxed transmission dated August 2 from a special deputy receiver for a specific company in receivership to an attorney in the Oversight Division. The transmission deals with the law relating to distribution of assets of an insurer in receivership and its application in a specific case. We agree that it is excepted from disclosure by section 552.107(1) of the Open Records Act.

Finally, you contend that sections 552.107(1) and 552.111 except from disclosure portions of a letter that deals with the law relating to distribution of assets of an insurer in receivership and its application in a specific case. You apparently did not mark any part of the July 7, 1993 memorandum you enclosed as excepted from disclosure. We agree that the marked information in the letter is excepted from disclosure by section 552.107(1) of the Government Code.

In view of our determination that you may withhold the information from disclosure under section 552.107(1), we need not address your claim under section 552.111. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay H. Guajardo
Assistant Attorney General
Open Records Division

KHG/RWP/rho

⁴You appear to identify the commissioner in her capacity as receiver and the "SDR's" as the "clients" in this case. In our opinion, the client is the Texas Department of Insurance, which was "created to regulate the business of insurance in this state." Ins. Code art. 1.01A(b).

Ref.: ID# 22819

Enclosures: Marked documents

cc: Ms. Kerri Fields
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(w/o enclosures)