Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 9, 1996

Ms. Christine T. Rodriguez
Staff Attorney
Legal and Compliance, MC110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR96-0165

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 38686 (formerly ID# 29873).

You inform us that on September 30, 1994, the Texas Department of Insurance (the "department") received a request for information concerning Texas Medical Liability Insurance Underwriting Association (the "Association"). You say that some of the requested information will be released to the requestor. However, the department seeks to withhold some of the requested information based on sections 552.101 and 552.112 of the Government Code.

Section 552.301(a) of the Government Code provides that:

> A governmental body that receives a written request for information that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. *The governmental body must ask for the attorney general's decision within a reasonable time but not later than the 10th calendar day after the date of receiving the request.* [Emphasis added].

Since the department received the request on September 30, 1994, and requested a decision from this office on October 18, 1994, the department failed to seek our decision within the ten-day period mandated by section 552.301(a). Because the department did not request an attorney general decision within the deadline provided by section 552.301(a), the requested information is presumed to be public information. Gov't Code § 552.302; *see Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ).

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Hancock*, 797 S.W.2d at 381. The department asserts that section 552.101 is applicable. Section 552.101 excepts from required public disclosure information that is confidential by law, including information made confidential by statute. The presumption that requested information is public information may be overcome by a showing that the information at issue is deemed confidential by some source of law outside the act, and is therefore excepted from disclosure by section 552.101 of the Government Code. *See* Open Records Decision No. 150 (1977). You raise section 552.101 in conjunction with section 9 of article 1.15 of the Insurance Code, which provides in part as follows:

> A final or preliminary examination report, and any information obtained during the course of an examination, is confidential and is not subject to disclosure under the open records law, ... This section applies if the carrier examined is under supervision or conservation but does not apply to an examination conducted in connection with a liquidation or a receivership under this code or another insurance law of this state.

This provision makes confidential the examination reports and related work papers the department obtains or creates during the course of an examination of a carrier that is under supervision or conservation. *See* Open Records Decision No. 637 (1995). The provision does not apply to examination reports and related work papers of carriers under liquidation or receivership or to routine periodic examinations of carriers not under supervision or conservation. *See id.*

You have submitted three items of information as a "representative sample" of the information the department seeks to withhold from required public disclosure. This sample includes an examination report, the work papers that pertain to that report, and an interoffice memorandum concerning an annual statement. You informed us by telephone that the department has no record that the association is under supervision or conservation. The examination report does not indicate that the association is under supervision or conservation. The report appears to be a report of an annual examination

of the association conducted pursuant to section 10 of article 21.49-3 of the Insurance Code. Absent information that would demonstrate that the association is under supervision or conservation, we cannot conclude that section 9 of article 1.15 applies to the samples of the requested information and that the information is excepted from required public disclosure under section 552.101 of the Government Code.

You also raise section 552.112 of the Government Code, which excepts from required public disclosure

> (a) . . . information contained in or related to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both.

Insurance companies are included within the term "financial institutions" for purposes of section 552.112(a). Open Records Decision No. 158 (1977) at 5-6. We must consider whether the department's arguments for withholding the requested information from disclosure pursuant to section 552.112 constitute a compelling reason sufficient to overcome the presumption of openness that arose when the department failed to request an attorney general decision within ten days of receiving the request.

You state as follows:

> It is absolutely imperative for the regulatory efforts of [the department] that the examination reports remain confidential. The harm that could occur to an agency by suspicion and innuendo within the insurance industry due to rumored examination findings could conceivably prove irreparable to the industry. In fairness to all insurance agencies, [the department] must be allowed to examine and investigate, discipline, and rehabilitate agencies in statutory confidentiality. Positive regulatory outcomes cannot be produced otherwise.

We do not believe the department has demonstrated a compelling reason to withhold the requested information. As we stated above, the presumption that the requested information is public information may be overcome only by a showing that the information at issue is deemed confidential by some source of law outside the act, and is therefore excepted from disclosure by section 552.101 of the Government Code or by a showing that the privacy or property interest of a third party is at stake. *See* Open Records Decision Nos. 630 (1994); 150 (1977). We have concluded that section 9 of article 1.15 of the Insurance Code is inapplicable. Moreover, withholding the requested information to produce "positive regulatory outcomes" would protect the department's regulatory interests, rather than those of a third party insurance carrier.

Furthermore, given the fact that the legislature imparted mandatory statutory confidentiality to the examination reports of only those insurance companies under supervision or conservation, *see* Ins. Code art. 1.15, § 9; Open Records Decision No. 637 (1995), we believe the legislature authorized the commissioner to waive any interest a company may have in protecting information from disclosure except during conservation or supervision. *See* Ins. Code art. 1.10, § 6 (department shall publish result of examination of any company's affairs whenever commissioner deems release is in public's interest), art. 20A.27 (commissioner may release health maintenance organization examination reports if, in opinion of commissioner, it is in public interest), art. 21.49-1, § 10 (commissioner may release information obtained during examination or investigation made pursuant to § 9 of art. 21.49-1, if commissioner determines that release is in interest of policyholders). Consequently, we do not believe any interest an insurance company has in protecting the information from disclosure is sufficiently compelling to overcome the presumption of openness.

With the exception of the examination reports of a carrier that is in supervision or conservation, we believe the legislature intended the commissioner to have the discretion to release a carrier's examination reports. Thus, we believe the legislature intended the commissioner to have the discretion to withhold requested information under section 552.112 of the Government Code. When given the discretion to withhold information, we believe the department must do so in a timely manner. *Cf.* Open Records Decision Nos. 630 (1995), 515 (1988) (permissive exceptions must be timely raised or else they are waived).

Accordingly, we conclude that the department has not made a compelling demonstration why the information should not be released to the public. You raise no other exception to the release of the requested information. We conclude that the department must release the requested information.[1]

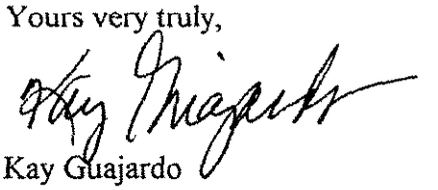
We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous

---

[1]In reaching our conclusion here, we 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 Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/ch

Ref.: ID# 38686 (formerly ID# 29873)

Enclosures: Submitted documents

cc: Mr. Norton Rosenthal
Carrington, Coleman, Sloman &
Blumenthal, L.L.P.
200 Crescent Court, Suite 1500
Dallas, Texas 75201
(w/o enclosures)