



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

July 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

OR96-1085

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 40232.

The Texas Department of Insurance (the "department") received a request for the following categories of information:

1. All records, files and documents pertaining to the investigation and proceeding involving American Recreational Markets General Agency, Inc. (hereinafter "ARM"), which resulted in the entry of Order No. 95-0616 . . . on or about June 21, 1995.
2. The identity of each additional investigation, complaint or proceeding involving ARM, and records sufficient to indicate the general nature and current status of each investigation, complaint or proceedings.

You state that some of the requested information will be released, however, you claim that the remaining documents are not subject to the Open Records Act. Alternatively, you assert that the information at issue is excepted from disclosure pursuant to sections 552.107(1) and 552.111 of the Government Code. You ask this office to determine whether the information at issue regarding ARM must be disclosed under the Open Records Act.

You claim that the requested information is not subject to the Open Records Act because the receiver is not a "governmental body" under the act. You contend that the Commissioner of Insurance (the "commissioner") is not acting in the capacity of a

governmental body when acting in his capacity as receiver. Based on recent judicial opinions construing the duties and responsibilities of receivers under the Insurance Code, we agree with your assertions that the commissioner, when acting in his capacity as receiver, is not a "governmental body" subject to the provisions of the Open Records Act.¹

In Open Records Decision No. 610 (1992), this office determined that the books and records of an insurance company in receivership were records of the judiciary and, therefore, not subject to the Open Records Act. That decision relied on the provisions of article 21.28 that placed the insurer's property "in the custody of the court," that vested title of the company's property in the receiver, and that allowed the receiver to dispose of obsolete records of the insurer "[o]n approval by the court." Ins. Code art. 21.28, §§ 2(e), 11(e). Open Records Decision No. 610 (1992) concluded that the records of the insurance company were records of the judiciary because the receiver held them pursuant to court authority and because his possession of the records was subject to judicial control and supervision.

Open Records Decision No. 610 (1992) also relied on the court of appeals decision in *Eagle Life Ins. Co. v. Hernandez*, 743 S.W.2d 671 (Tex. App.--El Paso 1987, writ denied). The court in *Eagle Life* held that the liquidator (the commissioner's predecessor under article 21.28) when acting as receiver was not serving as an officer of a state agency. The court stated 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.

Id. at 671-72.

In a similar case, the Third Court of Appeals recently held that a receiver is not a state agency for purposes of the Civil Practice and Remedies Code because the receiver "stands in the shoes of the insolvent corporation." *El Paso Elec. Co. v. State Board of Ins.*, 903 S.W.2d 133 (Tex. App.--Austin 1995, writ granted). In that case, the court considered whether a statutorily appointed receiver was acting as a state agency for purposes of construing section 105.001(3) of the Civil Practice and Remedies Code, which authorizes a court to assess attorney fees against a state agency for asserting a

¹See generally Article 21.28 of the Insurance Code (upon taking possession of assets of delinquent insurer, receiver is to conduct business of insurer, subject to direction of court.). Ins. Code art. 21.28, § 2(e).

frivolous cause of action. Relying in part on the decision in *Eagle Pass*, the court held that the dominant factor to consider in determining whether an entity is a state agency is the “capacity in which the entity performed the relevant conduct.” *Id.* at 134. Because the receiver acts on behalf of the company placed in receivership and “all costs incident to . . . the receiver’s service are charged against the funds of the insolvent insurer,” the court held that a receiver is not a state agency for purposes of the Civil Practice and Remedies Code.

A similar analysis under the Open Records Act compels a conclusion that the Commissioner of Insurance acting as a receiver designated by a court is not a governmental body subject to the Act’s provisions. Section 552.003 defines a governmental body as:

a board, commission, department, committee, institution, agency, or office that is within or is created by the executive or legislative branch of state government and that is directed by one or more elected or appointed members;

. . . .

the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds. . . .

Gov’t Code § 552.003. In the instant case, we understand that all of the requested documents were submitted to the commissioner in his capacity as receiver of a specified insurance company. In addition, we understand that the commissioner does not expend public funds when acting as receiver, but only funds of insurers subject to liquidation. *See* Ins. Code art. 21.28, §§ 8(j), 12(b). We conclude that when the commissioner is acting in the capacity of receiver, he is “standing in the shoes of the insolvent corporation” based on the courts’ analyses in *El Paso Elec. Co.* and *Eagle Pass*. Similarly, because all costs for a receiver’s services are charged to the assets of the insurer under receivership, the receiver is not “supported in whole or in part by public funds.” Therefore, assuming the commissioner is acting as a court appointed receiver and does not expend public funds to oversee and designate special deputy receivers, we conclude that records held by the commissioner in his capacity as receiver are not subject to the disclosure provision of the Open Records Act.²

²We note, however, that the commissioner may obtain reports from a receiver “showing the operation, receipts, expenditures, and general condition of any organization of which the receiver may have charge at that time” pursuant to section 12(c) of article 21.28 of the Insurance Code. In addition, a receiver is required to file “a final report of each organization which has been liquidated or handled showing all receipts and expenditures.” *Id.* Since the commissioner obtains such information from a receiver, this filing requirement indicates that for purposes of section 12(c), the commissioner and receiver are distinct. Thus, we do not believe that the commissioner obtains such reports in his receiver capacity. Rather, we believe such reports are submitted to the commissioner in his regulatory capacity. In addition, we note that

We are resolving this matter with an informal letter ruling rather than with a published open records decision.³ 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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Sam Haddad
Assistant Attorney General
Open Records Division

SH/rho

Ref.: ID# 40232

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(Footnote continued)

section 2(f) of article 21.28 of the Insurance Code provides that an inventory of assets of an insurer subject to receivership is required to be filed with the commissioner and "shall be open to inspection."

³Because we resolve your request by determining that records held by the commissioner in his capacity as receiver are not subject to the disclosure provision of the Open Records Act, we need not address the other exceptions raised at this time.