THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

JOHN L. HILL
ATTORNEY GENERAL

April 11, 1977

The Honorable Joseph D. Hawkins
Commissioner of Insurance
State Board of Insurance
1110 San Jacinto
Austin, Texas 78786

Open Records Decision No. 158

Re: Whether examination reports on Group Hospital Services, Inc. and a life insurance company are public.

Dear Commissioner Hawkins:

The State Board of Insurance has received a request for its examination reports of Group Hospital Services, Inc. (Blue Cross), a nonprofit hospital service plan organized pursuant to Chapter 20 of the Insurance Code. The reports resulted from examinations conducted under article 20.21 of the Code. You have also received a request for an examination report of a life insurance company, organized pursuant to Chapter 3 and examined under article 1.19 of the Insurance Code.

Pursuant to section 7 of the Open Records Act, article 6252-17a, V.T.C.S., you have asked whether the reports must be disclosed. You suggest that sections 3(a)(1) and 3(a)(12) of the Open Records Act except them from disclosure.

We first consider whether the reports are "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." V.T.C.S. art. 6252-17a, § 3(a)(1). In your brief, you discuss several provisions of the Code, contending that they make this information confidential. Article 1.18 of the Code contains the following language:

> Each examiner and assistant examiner shall take . . . an oath . . . that he will not reveal the condition of, nor any information secured in the course of any examination of any corporation, firm or person examined by him to anyone except the Members of the Board of Insurance Commissioners, or their authorized representative, or when required as a witness in Court.

This provision governs revelation of examination reports by the examiners, while the request seeks information held by the Board. Nothing in article 1.18 prevents the Board from revealing the information gathered by examiners. In fact, another provision permits the Board to publish reports it receives. Article 1.10, section 6, states as follows:

> The Board shall publish the result of its examination of the affairs of any company whenever the Board deems it for the interest of the public.

(Emphasis added). Section 11 of article 1.10, which applies to all records in the Board's office, reads as follows:

> At the request of any person, and on the payment of the legal fee, the Board shall give certified copies of any record or papers in its office, when it deems it not prejudicial to public interest. . . .

(Emphasis added). We do not believe that under either section 6 or section 11 the reports are "information deemed confidential by law." Compare Ins. Code arts. 5.43 and 20A.27; see Open Records Decision No. 134 (1976). In fact, sections 6 and 11 make the information public when publication is "for the interest of the public" or "not prejudicial to [the] public interest." The Open Records Act declares the public policy to be that all persons are entitled to full and complete information regarding the affairs of government, unless otherwise expressly provided by law. V.T.C.S. art. 6252-17a, § 1. We believe that this declaration of public policy establishes that the public interest is served by disclosure, and withdraws from the Board any power it may have had under article 1.10, sections 6 and 11 to decide that the public interest is served by withholding information. Although the Supreme Court in Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 677 (Tex. 1976), cert. denied, No. 76-840 (U.S. Mar. 21, 1977) has recognized that a specific statutory grant of authority to make rules limiting disclosure may prevail over the Open Records Act, sections 6 and 11 of article 1.10 are not, in our opinion, such grants of authority. In view of the declaration of public policy in the Act, and the admonition that it be liberally construed in favor of granting requests for disclosure, we believe that the Open Records Act must prevail over any grant of authority to limit disclosure found in these Insurance Code provisions. See V.T.C.S. art. 6252-17a, § 14(c).

In article 20A.27 of the Insurance Code, enacted in 1975, the Legislature used the language it believed necessary to prevail over the Open Records Act:

> All applications, filings, and reports required under [the Health Maintenance Organization Act] shall be treated as public documents, except that examination reports shall be considered confidential documents which may be released if, in the opinion of the commissioner, it is in the public interest.

This provision reflects a legislative decision that certain documents be confidential. See also V.T.C.S. art. 5521b-9(e); Attorney General Opinion H-626 (1975). Sections 6 and 11 of article 1.10 contain no similar express directions that documents be confidential. Article 20A.27 authorizes the commissioner only to release documents in the public interest, and not to withhold them. We conclude that article 1.10, sections 6 and 11 neither make the examination reports confidential, nor authorize the Board to withhold them from someone who requests them pursuant to the Open Records Act.

You suggest that article 21.28-D, section 12(2) of the Code makes the report confidential. Article 21.28-D, section 6 creates a Life, Accident, Health and Hospital Service Insurance Guaranty Association with a board of directors, which advises the Commissioner on the solvency of insurers. The directors meet with the Commissioner to discuss insurers in danger of insolvency or impairment, and the Commissioner may divulge to them examination reports. Article 21.28-D, section 12(2) of the Code states:

> Members of the board of directors shall not reveal information received in such meetings to anyone unless authorized by the commissioner of the State Board of Insurance or when required as witnesses in court. Board. . . members shall be subject to the same standard of confidentiality as imposed upon examiners under Article 1.18 of the Insurance Code. . . .

This provision deals only with information provided directors of the association at special meetings on insolvency and impairment. It does not prevent the Commissioner or State Board of Insurance from disclosing the information and permits

them to authorize the directors to disclose it. The provision applies to examination reports only in the narrow context of the meeting on insolvency or impairment, and it does not make the reports confidential to the extent that it does apply to them.

Article 9.48, section 12 and article 21.28-E, section 14 of the Code establish for other companies advisory associations that receive information subject to the confidentiality standard of article 1.18. These provisions do not confer on the State Board of Insurance any additional power to withhold examination reports.

Article 21.49-1, section 10, provides for confidential treatment of certain documents and reports relating to insurers that belong to a holding company. This confidentiality requirement applies only to information obtained under sections 3 and 9 of article 21.49-1, and does not affect the availability of examination reports made under article 1.19 of the Code. We conclude that the examination reports are not information deemed confidential by any provision of the Insurance Code.

You also contend that group hospital service and life insurance company examination reports fall within the section 3(a)(12), article 6252-17a, exemption for

> [i]nformation contained in or related to examination, operating or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions, and/or securities, as that term is defined in the Texas Securities Act.

We read this provision to exempt from disclosure information in examination reports on a financial institution prepared by or for the agency that regulates it, as well as information in reports on securities prepared by or for the agency regulating those securities. The provision does not exempt all examination, operating or condition reports concerning entities other than financial institutions merely because they are held by an agency that also regulates financial institutions. Nor are reports that do not concern securities exempt from disclosure merely because held by an agency that regulates securities. Such a sweeping interpretation of the section 3(a)(12) exemption would ignore

the admonition that the Act be liberally construed in favor of granting any request for information. V.T.C.S. art. 6252-17a, § 14(d). Thus, section 3(a)(12) of the Act will apply only if the corporation examined is a financial institution, or if the examination report was prepared for the State Board of Insurance to use in regulating securities.

We first consider your claim that insurers are financial institutions, so that examination reports prepared by or for the regulating agency are excepted from disclosure. The Open Records Act does not define "financial institution" and Texas case law does not discuss the scope of that term. "Financial institution" is defined in article 1528(g), V.T.C.S., the Business Development Corporation Act of Texas, as follows:

> "Financial institution" means any banking corporation or trust company, building and loan association, governmental agency, insurance company, or related corporation, partnership, foundation, or the other institutions engaged primarily in lending or investing funds.

Sec. 1(3). Webster's Third International Dictionary defines financial institution in similar terms:

> [A]n enterprise specializing in the handling and investment of funds (as a bank, trust company, insurance company, savings and loan association, or investment company).

Legislative history indicates that the Senate Jurisprudence Committee may have had insurance companies in mind when it added the exemption for examination reports on financial institutions. R. Etnyre, The Texas Open Records Act: A History and An Assessment, 32, 39 (unpublished M.A. thesis, The University of Texas at Austin, 1975). An insurance commissioner testifying before the Senate Committee on Jurisprudence requested an exception to the Open Records Act for insurance company examination reports, stating that "[h]istorically, of course, examination reports of financial institutions have been confidential . . . ." Transcript of testimony presented on House Bill No. 6 before Jurisprudence Committee, April 10, 1973, at 31-32. This legislative history indicates that the Legislature intended to include insurance companies regulated by the State Board of Insurance within the term "financial

institutions" in section 3(a)(12). However, we do not believe that a group hospital service corporation is the kind of insurance company the Legislature intended to include in section 3(a)(12). We base this belief on Insurance Code provisions that describe the purpose of the group hospital service and distinguish it from insurance companies. Article 20.09 of the Insurance Code states that "such corporations . . . shall not be construed as being engaged in the business of insurance under the laws of this State." Thus, a definition of financial institution which included all companies engaged in the insurance business would not necessarily include group hospital service corporations. We must instead determine whether such corporations nonetheless fit into one of the more general definitions of financial institution. Those definitions require that the institution be "engaged primarily in lending or investing funds" or specialize "in the handling and investment of funds." The Insurance Code states the purpose of a group hospital service corporation:

> Any seven (7) or more persons . . . may be incorporated for the purpose of establishing, maintaining and operating a nonprofit hospital service plan, whereby hospital care may be provided by said corporation through an established hospital or hospitals, and sanitariums with which it has contracted for such care. . . .

Ins. Code art. 20.01

> . . . .
>
> Such corporations shall be governed and conducted as nonprofit organizations for the purpose of offering and furnishing hospital services to their members. . . .

Ins. Code art. 20.10. These provisions show that the primary purpose of group hospital service corporations is to provide hospital care. See Group Hospital Service v. Armstrong, 240 S.W.2d 418, 422-23 (Tex. Civ. App. -- Amarillo 1961, writ ref'd n.r.e.). As a nonprofit corporation, the group hospital service does not loan and invest money as its primary object; these activities are secondary to and in furtherance of its

goal of providing hospital care. Members of the group are not likely to view it as an enterprise engaged in investment. They pay fees to the corporation and receive hospital care if needed, but never get a monetary return, since the group makes payments directly to the hospital. We believe that a group hospital service corporation is not "engaged primarily in lending and investing funds."

We conclude, that the group hospital service corporation is not a financial institution within the exemption of section 3(a)(12).

We believe that the examination report of a life insurance company is excepted from disclosure by subsection 3(a)(12). The Insurance Code does not distinguish life insurance companies from "companies engaged in the business of insurance," therefore providing no basis for concluding that "financial institution" referred to during hearings on the Open Records Act does not include life insurance companies. The Code distinguishes life insurance companies from group hospital services corporations in other significant ways. Life insurance companies can make a profit and issue stock to the public. Ins. Code art. 3.02, 3.02a, 3.11. We conclude that the Open Records Act does not require the disclosure of the examination report of the life insurance company.

You also state that the State Board of Insurance is "an agency responsible for the regulation or supervision of . . . securities, as that term is defined in the Texas Securities Act." V.T.C.S. art. 6252-17a, § 3(a)(12). The Board must see that group hospital service corporations comply with provisions that specify the securities they may invest in. Ins. Code arts. 3.39, 3.40, 20.10. However, the Board has no authority to affect the terms or marketability of any security. It merely ascertains that the company's investment decision complies with law. We do not believe that its supervision of investment decisions amounts to the regulation of securities. Compare V.T.C.S. art. 581-10 (powers of the securities commissioner). Legislative history suggests that the agency responsible for securities regulation referred to in section 3(a)(12) is the Securities Board. A Securities Board member testified to the Senate Jurisprudence Committee that the Open Records Act would make public securities analyses by the staff which evaluate the securities and recommend grant or denial of permits. Testimony presented on House Bill No. 6 before Jurisprudence Committee, April 10, 1973, at 40. We conclude that the

State Board of Insurance is not an agency responsible for the regulation or supervision of securities, and that the examination reports are not within section 3(a)(12) as reports prepared for such an agency.

It has also been suggested that subsections 3(a)(4) and 3(a)(10) exempt the group hospital reports from disclosure. Subsection 3(a)(4) applies to "information which, if released, would give advantage to competitors or bidders." We have received no explanation as to how the requested information would give this advantage. The agency must establish that the requested information falls within an exception, and the base claim that section 3(a)(4) applies does not carry this burden of proof. Open Records Decision No. 124 (1976); Attorney General Opinion H-436 (1974). We conclude that this provision does not exempt the requested reports.

It is asserted that subsection 3(a)(10) exempts the reports as "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." In discussing subsection 3(a)(1), we concluded that various statutes said to make the reports confidential do not in fact prohibit disclosure. We have found no judicial decision that makes the examination reports confidential. Attorney General Opinion H-258 (1974); Open Records Decision No. 10 (1973).

It is accordingly our opinion that the examination reports of Group Hospital Services, Inc., are public records.

Very truly yours,

JOHN L. HILL
Attorney General of Texas

APPROVED:

DAVID M. KENDALL, First Assistant

C. ROBERT HEATH, Chairman
Opinion Committee

kml