



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

September 7, 1989

Mr. A. W. Pogue
Commissioner
State Board of Insurance
1110 San Jacinto
Austin, Texas 78701-1998

Open Records Decision No. 528

Re: Whether records held by a court-appointed Liquidator-Receiver in the Liquidation Division of the State Board of Insurance are subject to the Texas Open Records Act, article 6252-17a, V.T.C.S. (RQ-1581)

Dear Mr. Pogue:

The court-appointed receiver for the State Board of Insurance (the "board") received, on or about August 8, 1988, a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for information concerning an investigation into allegations of collusion between two regulated companies. The requestor sought the information after a television station reported that the board had informed one of its reporters about the existence of the investigation. The requestor repeated his requests by letters dated August 22 and 29. By letter dated August 25, the board responded to the requestor by stating that the court-appointed insurance receiver is not subject to the Open Records Act. On September 16, the board requested a decision from the attorney general on the applicability of the act to the receiver and on the public availability of the requested information.

The Open Records Act makes public all information that governmental bodies hold and that one of the act's exceptions does not protect. V.T.C.S. art. 6252-17a, § 3(a); Attorney General Opinion JM-821 (1987). Section 2(1)(A) of the act defines "governmental body" to include:

(A) any board, commission, department, committee, institution, agency, or office within the executive or legislative branch of the state government, or which is created by either the executive or legislative branch of the state government, and which is under the

direction of one or more elected or appointed members. (Emphasis added.)

The State Board of Insurance is clearly a governmental body subject to the act. See, e.g., Open Records Decision No. 503 (1988).

The board claims, however, that the court-appointed insurance receiver's office is an arm of the court rather than a division of the board. Section 2(1)(G) of the Open Records Act expressly exempts the judiciary from the act's definition of "governmental body." This office disagrees that the liquidator-receiver's office is exempt from the Open Records Act.

The liquidator-receiver's office is "under the direction" of the board within the meaning of section 2(1)(A) of the Open Records Act. Section 1(d) of article 21.28 of the Texas Insurance Code defines the liquidator as the person designated by the State Board of Insurance. Section 2(a) of article 21.28 requires the court to appoint the liquidator designated by the board as the receiver when the court establishes a receivership. Section 12(a) of article 21.28 grants the board authority to appoint and remove the person who serves as the statutory liquidator-receiver for insurance companies operating in Texas. Article 21.28, section 12(b), grants the board authority to fix the compensation of the liquidator-receiver and the authority to appoint and fix the compensation for the liquidator-receiver's staff. See also Ins. Code art. 21.28, § 12A. Sections 2(f) and 12(c) of article 21.28 provide, inter alia, that the liquidator-receiver must file reports and inventories with both the court and the board. These provisions of article 21.28 make it clear that the board supervises the liquidator-receiver.

The board contends that the liquidator and receiver are two distinct offices, and that the receiver is but an arm of the court. The district court, however, must appoint the statutory liquidator who is designated by the board as the receiver of an insolvent insurance company. See State Bd. of Ins. v. Betts, 315 S.W.2d 279 (Tex. 1958). The statutory receivership established by section 12 of article 21.28 thus differs from ordinary judicial receiverships in which the court holds the authority to appoint and specify the powers of a receiver. See generally Mid-Continent Supply Co. v. Conway, 240 S.W. 796 (Tex. Civ. App. - Texarkana 1951, writ ref'd n.r.e.). Texas case law on insurance liquidator-receivers emphasizes that receiverships are under the joint supervision of the court and the board.

The district courts supervising receiverships cannot remove or diminish the board's statutory authority over the liquidator-receiver. State Bd. of Ins. v. Betts, 315 S.W.2d 286 (Tex. 1958); State Bd. of Ins. v. Betts, 315 S.W.2d 279 (Tex. 1958); State Bd. of Ins. v. Betts, 308 S.W.2d 846, mand. granted on reh'g, 315 S.W.2d 279, 315 S.W.2d 286 (Tex. 1958).

The court's decision in Eagle Life Ins. Co. v. Hernandez, 743 S.W.2d 671 (Tex. App. - El Paso 1987, writ denied), is inapposite here. In Hernandez, the court determined that a court could require that a liquidator-receiver post an appellate cost bond under article 6.001 of the Texas Civil Practices and Remedies Code. Article 6.001 exempts certain governmental officials and agencies from the bond requirements. Because the bond was to be paid from the assets of the insurance company in receivership, the article 6.001 policy against requiring governmental entities to post the bond did not apply. Id. at 672. The Hernandez decision does not indicate that the liquidator-receiver is not under the supervision of the board or that the liquidator-receiver is an arm of the court.

Moreover, the legislature recently amended a related provision in a manner that suggests that the legislature deems the board to control the records of the liquidator-receiver. The legislature amended article 21.28-A to provide for the confidentiality of documents held by the board that relate to the supervision or conservatorship of insurance companies. Acts 1987, 70th Leg., ch. 1073, § 34, at 3653; see Open Records Decision No. 503 (1988). The legislature expressly excluded from the confidentiality provision documents held by the board "on the appointment of a receiver for the insurance company by a court of competent jurisdiction." Id. at 3654. The amendment suggests both that the records of the receiver are controlled by the board and that the records are public. See also Ins. Code art. 21.28, § 11(d) (providing that the receiver should maintain records in consultation with the records management division of the state library).

Finally, even if the liquidator-receiver were deemed an arm of the court, section 2(1)(G) of the Open Records Act would not exempt the liquidator-receiver from the scope of the act. In Benavides v. Lee, 665 S.W.2d 151 (Tex. App. - San Antonio 1983, no writ), the court held that the Webb County Juvenile Probation Board was not an extension of the judiciary under section 2(1)(G) of the Open Records Act simply because the board was composed of members of the judiciary. The court was influenced by the fact that the

probation board's function was administrative rather than judicial. Id. at 152. Because the liquidator-receiver's function is primarily administrative, see State Bd. of Ins. v. Betts, 308 S.W.2d 846, 851, the exemption in section 2(1)(G) for the judiciary does not apply.

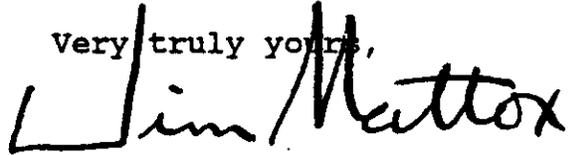
Consequently, whether records held by the liquidator-receiver are public depends on whether any of the act's exceptions protect them from required disclosure. In this case, because the board failed to comply with the act's time limits, the information is presumed public and the board may only withhold the information if it can show compelling reasons for nondisclosure. See City of Houston v. Houston Chronicle Publishing Co., 673 S.W.2d 316, 318 (Tex. App. - Houston [1st Dist.] 1984, no writ). Section 7(a) requires governmental bodies to request a decision from the attorney general "within a reasonable time, no later than ten days." See id. The fact that a governmental body contends that it is not subject to the act does not relieve it of its responsibility to request a decision; the applicability of the act is but a necessary preliminary determination under section 7. Kneeland v. National Collegiate Athletic Ass'n, 650 F.Supp. 1064, 1072-73 (W.D. Tex. 1986), rev'd on other grounds, 850 F.2d 224 (5th Cir. 1988). When a governmental body fails to request a decision in a timely manner, the requested information is presumed public. V.T.C.S. art. 6252-17a, § 7(a); Open Records Decision Nos. 515 (1988); 319 (1982). A governmental body must show a compelling interest to overcome this presumption. Id. The board received the request for this information on or about August 8, 1988. The board did not request a decision until September 16, 1988. The information therefore is presumed public. A governmental body cannot avoid or delay compliance simply by challenging the overall applicability of the act.

S U M M A R Y

Information held by a liquidator-receiver appointed pursuant to section 12 of article 21.28 of the Texas Insurance Code to administer the court-supervised receivership of insolvent insurance companies is subject to the Texas Open Records Act, article 6252-17a, V.T.C.S. Such information may be withheld only if one of the act's exceptions protects the information. When a decision on

the applicability of the act or on the applicability of the act's exceptions is not requested within 10 days, and the act applies, the information is presumed public.

Very truly yours,

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive style with a large, prominent "J" and "M".

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