



**THE ATTORNEY GENERAL  
OF TEXAS**

**M. MATTOK  
ATTORNEY GENERAL**

October 24, 1990

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

Open Records Decision No. 573

Re: Whether a notice of cancellation of appointment of an agent of an insurance company is excepted from disclosure under the Open Records Act, article 6252-17a, V.T.C.S., (RQ-1967)

Dear Mr. Pogue:

You have received a request under the Open Records Act, article 6252-17a, V.T.C.S., for all information in your custody regarding five listed licensees. You state that you are making available to the requestor all of the requested information, with the exception of notices of cancellation of appointment of agents licensed under article 21.07-1 of the Insurance Code. That article governs the examination, licensing, and regulation of legal reserve life insurance agents. You claim that such notices are excepted from required disclosure under section 3(a)(1) of the Open Records Act and section 11 of article 21.07-1 of the Insurance Code. We disagree.

Section 3(a)(1) of the Open Records Act excepts from required public disclosure:

information deemed confidential by law, either Constitutional, statutory, or by judicial decision.

You assert that notices of cancellation of appointment of legal reserve life insurance agents are excepted from disclosure by virtue of section 11 of article 21.07-1 of the Insurance Code. That section provides:

(a) Every legal reserve life insurance company shall, upon termination of the appointment of any life insurance agent, immediately file with the Life Insurance Commissioner a statement of the facts

relative to the termination of the appointment and the date and cause thereof. The Commissioner shall thereupon terminate the license of such agent to represent such insurer in this State.

(b) Any information, document, record or statement required to be made or disclosed to the Commissioner pursuant to this Section shall be deemed a privileged communication and shall not be admissible in evidence in any court action or proceeding except pursuant to subpoena of a court of record.  
(Emphasis added.)

This office has been asked before whether a statute making specific information "privileged" for certain purposes also renders that information "confidential" for purposes of section 3(a)(1) of the Open Records Act. For example, in Open Records Decision No. 384 (1983), this office construed former article 4447d, V.T.C.S.,<sup>1</sup> which related to immunization data gathered on individuals. That article governed the receipt of information by the Department of Health and others from certain other listed organizations "relating to the condition and treatment of any person . . . to be used in the course of any study for the purpose of reducing morbidity or mortality." V.T.C.S. art. 4447d, § 1. Section 2 of the article deemed certain information "privileged" and provided:

The State Department of Health, medical organizations, hospitals and hospital committees shall use or publish said material only for the purpose of advancing medical research or medical education in the interest of reducing morbidity or mortality, except that a summary of such studies may be released by any such group for general publication. The identity of any person whose condition or treatment has been studied shall be confidential and shall not be revealed under any

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1. Sections 1 and 2 of article 4447d, V.T.C.S., have been recodified as sections 161.021 and 161.022 of the Health and Safety Code. Acts 1989, 71st Leg., ch. 678, § 1, at 2389-90.

circumstances except in the case of immunization surveys conducted under the auspices of the State Department of Health for the purpose of identifying persons who may be in need of immunization. With the exception of immunization information, all information, interviews, reports, statements, memoranda, or other data furnished by reason of this Act and any findings or conclusions resulting from such studies are declared to be privileged.

Id. § 2 (emphasis added).

The decision concluded that illness and accident reports received by the department from a county EMS unit were received pursuant to section 1 and, assuming that the information was used for the purposes described in section 2, were "privileged" by virtue of that section. The issue was whether information made "privileged" by section 2 of article 4447d was also "confidential" for purposes of section 3(a)(1) of the Open Records Act.

The decision concluded that, reading the statute as a whole, the legislature intended that information that was considered "privileged" for purposes of section 2 of article 4447d also should be considered "confidential" for purposes of section 3(a)(1) of the Open Records Act. The decision reasoned that if such were not the case, the legislature would not have imposed such stringent limitations on the uses of the information gathered. See Open Records Decision Nos. 186 (1978); 94, 66 (1975); 62 (1974) (construing Alcoholic Beverage Code provision and its predecessor statute that makes certain information "privileged unless introduced in evidence in a hearing"); see also Open Records Decision No. 122 (1976) (construing statute governing the State Securities Board that provided that "all information of every kind and nature contained therein shall be treated as confidential by the Commissioner and shall not be disclosed to the public except under order of court").

By way of contrast, in Open Records Decision No. 290 (1981), this office concluded that language in a statute governing disciplinary hearings involving licensees of the Texas State Board of Examiners of Psychologists that made certain information "privileged" for purposes of that act did not also make that information "confidential" for purposes of section 3(a)(1) of the Open Records Act. The statute declared in pertinent part: "All charges,

complaints, notices, orders, records, and publications authorized or required by the terms of this Act shall be privileged." V.T.C.S. art. 4512c, § 23(e). The decision pointed out that if the terms of the section were followed literally, the results would be clearly unreasonable:

In literal terms, the declaration of section 23 is applicable to charges, complaints, notices, orders, records and publications 'authorized or required by the terms of this Act.' (Emphasis added). Thus, it would prohibit disclosure of the roster of licensed psychologists which the board is required to publish annually and which section 18 of the act specifically deems public information. It would except from disclosure the 'standards for qualification' of sub-doctoral personnel which section 19 directs the board to set. It would even make confidential the board's annual report required by section 10.

Because of these absurd results, we believe it is clear that the declaration of section 23 was not intended to prohibit disclosure of all board records. It might be argued that, since the declaration appears in section 23, which is concerned exclusively with disciplinary proceedings, its effect should be limited to records which relate to such proceedings. Even if so restricted, however, the declaration conflicts both with specific portions of section 23 and with other law.

Open Records Decision No. 290 (1981) at 3. The decision finally noted that "privileged" also refers to communications that are not actionable as libel without proof of malice. Id. at 4.

Thus, this office has never invoked a per se rule construing "privileged" to be synonymous with "confidential." Rather, we have examined the statute at issue and determined whether, taken as a whole, it contains language that indicates legislative intent that certain information deemed "privileged" for some purposes be considered "confidential" for purposes of section 3(a)(1) of the Open Records Act. We have examined article 21.07-1 of the Insurance Code and conclude that section 11 was intended

to be an evidentiary privilege only and not intended to make information confidential for purposes of the Open Records Act.

Subsection (b) of section 11 of article 21.07-1 of the Insurance Code, by its terms, creates what is clearly an evidentiary privilege. It provides that any information required to be submitted to the commissioner under subsection (a) of section 11 shall be deemed a "privileged communication and shall not be admissible in evidence in any court action or proceeding except pursuant to subpoena of a court of record."

The privilege, by its terms, applies only in the context of admitting evidence in a court action or proceeding. The section was held to establish a privilege in the sense that termination letters cannot be made the basis of a suit for libel, regardless of the truth or falsity of the communication. See Thornton v. Rio Grande Nat'l Life Ins. Co., 367 S.W.2d 950 (Tex. Civ. App. - Waco 1963, writ ref'd n.r.e.); see also Reagan v. Guardian Life Ins. Co., 166 S.W.2d 909 (Tex. 1942) (negative information about an insurance agent submitted by employer to Board of Insurance Commissioners was "absolutely privileged" in libel suit). There is no language comparable to the statutory language discussed in Open Records Decision Nos. 384 and 290 in section 11 or in any other section of the article that further restricts the use to which such information may be put.

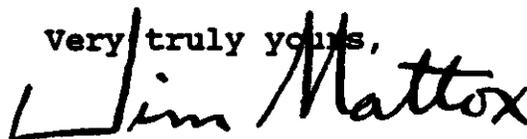
Accordingly, we conclude that the evidentiary privilege accorded information submitted to the Insurance Commissioner pursuant to section 11 of article 21.07-1 of the Insurance Code does not render such information confidential for purposes of section 3(a)(1) of the Open Records Act, article 6252-17a, V.T.C.S. Therefore, the requested notices of cancellation of appointment must be disclosed. Open Records Decision No. 375 (1983) is hereby overruled.

#### S U M M A R Y

The evidentiary privilege accorded information submitted to the Insurance Commissioner pursuant to section 11 of article 21.07-1 of the Insurance Code does not render such information confidential for purposes of the Open Records Act, article 6252-17a, V.T.C.S. Therefore, the requested

notices of cancellation of appointment must  
be disclosed.

Very truly yours,

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

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