



**Office of the Attorney General  
State of Texas**

**DAN MORALES**  
ATTORNEY GENERAL

July 29, 1994

Ms. Mary F. Keller  
Senior Associate Commissioner  
Legal and Compliance  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

Letter Opinion No. 94-061

Re: Request for an opinion construing Texas  
Insurance Code art. 1.24D (RQ-665)

Dear Ms. Keller:

On behalf of the Texas Department of Insurance (the "department"), you request an opinion regarding the construction of article 1.24D of the Insurance Code. The department intends to publish a pamphlet entitled "Health Insurance for Texans with Pre-existing Conditions," but you ask whether release of the information contained in the pamphlet would violate article 1.24D.

You state that

[t]his pamphlet is a list of companies who responded to a Department survey asking whether they would consider offering individual health policies to consumers with pre-existing conditions. The publication lists whether "some" or "all" conditions are considered, dependents considered and methods by which coverage may be limited. . . . As noted in the pamphlet, all companies listed in the document agreed to be listed as companies willing to consider consumers with pre-existing conditions.

You ask two questions with regard to article 1.24D. First you ask whether this provision applies to all underwriting guidelines obtained by the department or only to those obtained through a request specifically under article 1.24D and for which the insurer providing the guidelines has requested confidentiality. Your second question is whether the terms "underwriting guidelines" in article 1.24D apply to a complete set of factors a company uses to underwrite a risk or to each separate underwriting factor. For the reasons set forth below, we decline to answer these two questions because any protection that the confidentiality provision may have afforded has been waived under these circumstances.

Article 1.24D, which provides confidentiality for "underwriting guidelines," states in relevant part:

(a) The department or the office of public insurance counsel may request and receive copies of an insurer's underwriting guidelines. Underwriting guidelines are confidential and the department or the office of public insurance counsel may not make the guidelines available to the public, provided, however, that the department or the office of public insurance counsel may disclose a summary of the underwriting guidelines in a manner that does not directly or indirectly identify the insurer who provided the guidelines.

It is clear that the purpose of section 1.24D is to protect the proprietary interests of insurers that submit underwriting guidelines to the department or OPIC. Although there is no language in section 1.24D that provides for waiver or release of the information with the consent of the insurer, there is no indication in the legislative history of section 1.24D that the statute, which merely protects a proprietary interest, cannot be waived by the holder of the interest. *See Hutchins v. Tex. Rehab. Comm.*, 544 S.W.2d 802 (Tex. App.--Austin 1976 no writ) (holding that a former Texas Rehabilitation patient may waive statutory privacy when the statute has no waiver provision). *Cf.* Open Records Decision No. 609 (concluding that underwriting guidelines are protected as trade secrets under section 552.110 of the Government Code if insurers or a governmental body provide evidence of the trade secret factors, among which include "the extent of measures taken to guard the secrecy of the information"). Accordingly, an insurer that submits underwriting guidelines to the department or OPIC may expressly consent to disclosure of the information and therefore waive the protection afforded by section 1.24D of the Insurance Code.

We assume for purposes of this opinion that the information provided to the department by the responding insurers are "underwriting guidelines."<sup>1</sup> You state that the insurance companies that responded to the questionnaire prepared by the department agreed to be listed in the pamphlet as companies that were willing to consider offering health insurance policies to individuals with pre-existing conditions. If the responding insurers expressly consented to disclosure of the information provided in response to the

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<sup>1</sup>The Office of Public Insurance Counsel in its brief to this office states that

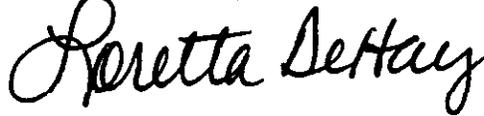
[a]lthough the term "underwriting guidelines" is not defined in the statute, in any Texas law or case, nor in insurance dictionaries reviewed by OPIC, "underwriting guidelines" has been defined by the insurance industry to mean the "rules by which [the insurance company] qualif[ies] the risks for the rate [the company] charges." . . . In other words, underwriting guidelines are the internal rules an insurance company develops to determine to whom they will sell insurance. [Citations omitted.]

questionnaire, we believe that such insurers waived the protection that section 1.24D may have afforded to that information. Therefore, the department may distribute the publication entitled "Health Insurance for Texans with Pre-existing Conditions" without violating article 1.24D of the Insurance Code.<sup>2</sup>

**S U M M A R Y**

Article 1.24D of the Insurance Code does not prohibit the Texas Department of Insurance from distributing the publication entitled "Health Insurance for Texans with Pre-existing Conditions" if the insurers listed in the pamphlet have expressly consented to disclosure of this information.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Opinion Committee

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<sup>2</sup>We note that the department can avoid indirectly identifying insurers that do not consider individuals with pre-existing conditions by stating that the pamphlet only includes insurers that consider for coverage individuals with pre-existing conditions and that have voluntarily agreed to make the information publicly available.