



# STATE BOARD OF INSURANCE

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August 3, 1990

RQ-22

The Honorable Jim Mattox  
Attorney General  
State of Texas  
Supreme Court Building  
Austin, Texas 78711-2548

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Open Records Committee

RE: Open Records Request

Dear General Mattox:

Please find enclosed a letter from Mr. John Daly of the Tillinghast firm, management consultants and actuaries, of Dallas, Texas, requesting documents from the State Board of Insurance under the Open Records Act, article 6252-17a, Texas Revised Civil Statutes. Mr. Daly requests certain actuarial reports filed with the State Board of Insurance by or on behalf of three continuing care retirement facilities. We have notified Mr. Daly that the information he requests may be exempt from public disclosure and that an opinion has been requested from your office regarding this question.

The actuarial reports Mr. Daly requests are disclosed to the State Board of Insurance (hereinafter, "SBI") pursuant to portions of Chapter 246 of the Texas Health and Safety Code, the Texas Continuing Care Facility Disclosure and Rehabilitation Act, which confers upon the SBI the duty to monitor and examine continuing care retirement facilities or corporations (hereinafter, "CCRCs"). Specifically, §246.003 imposes upon the SBI the duty to regulate CCRCs, but §246.006 does prohibit the Commissioner of Insurance from involving the SBI in any manner in the "quality of care" the CCRCs provide. §246.022 requires CCRCs to make application to the Commissioner of Insurance for a Certificate of Authority to do business in this State and §246.025 permits the Commissioner of Insurance to suspend or revoke the Certificate of Authority under certain circumstances. Section 246.003(b) permits the SBI to adopt rules and take other action as necessary to administer and enforce Chapter 246. Various provisions in Chapter 246 require CCRCs to report financial information to the SBI, such as the actuarial reports in question.

The apparent purpose of the Chapter 246 requirement that CCRCs disclose financial information to the SBI is to

facilitate the monitoring of CCRCs' ongoing operations and solvency, and thereby protect CCRCs' customers and the public. The SBI's function in monitoring the solvency of CCRCs is very similar to the SBI's function vis-a-vis insurance companies. §246.041 requires CCRCs to file disclosure statements with the SBI containing various information, much of which is designed to facilitate financial monitoring. For example, §246.050 requires CCRCs to disclose information regarding reserve funding, evidence of escrow accounts or trusts, and financial statements of the CCRC including a balance sheet for the most recent fiscal year and annual income statements. §246.112 entitled "Investigations" is significant because it grants the Commissioner of Insurance the power to conduct examinations or investigations as necessary to:

1. determine whether a person has violated or is about to violate Chapter 246;
2. aid in the enforcement of Chapter 246;
3. determine the financial solvency of a facility; or
4. verify a statement contained in a disclosure statement filed or delivered under Chapter 246.

The actuarial reports which Mr. Daly requests are disclosed pursuant to §246.114 of the Health and Safety Code. §246.114 (as amended by Acts 1989, 71st Leg., Ch. 770 §8) requires facilities whose contracts offer future guarantees of long-term nursing care that develop actuarial liabilities to submit to the SBI their most recent actuarial review and then to file follow-up actuarial reviews at five year intervals. Facilities that have not had an actuarial review performed within five years of the effective date of the 1989 amendment are required to have an actuarial review performed within two years and file it with the SBI. The Board had adopted Title 28 Texas Administrative Code, Chapter 33, to guide in the implementation of the Texas Continuing Care Facility Disclosure and Rehabilitation Act. A copy of 28 TAC Chapter 33 is included herewith.

Title 28 TAC §33.204(13) requires submission of an actuarial review as a requirement for issuance of an original Certificate of Authority to a CCRC to do business in the State. 28 TAC §33.506 further details the requirement that providers of a facility whose contracts offer future guarantees of long-term nursing care in excess of one year which develop actuarial liabilities file their actuarial reports. "Actuarial Review" is defined by 28 TAC §33.2 as:

"An analysis which is performed by a qualified actuary in accordance with generally accepted actuarial principles and practices (GAAPP) and which addresses the current actuarial balance of the financial condition of a facility. (emphasis added) An actuarial

review should include, but not be limited to, the following:

- (A) actuarial report;
- (B) statement of actuarial opinion;
- (C) actuarial balance sheet;
- (D) cash flow projection; and
- (E) actuarial methodology, formulae, and assumptions."

Title 28 TAC §33.506 also provides certain standards regarding when the financial condition of a facility is considered to be in satisfactory actuarial balance.

Unfortunately, Chapter 246 of the Health and Safety Code does not state specifically whether CCRC disclosures to the SBI are open to the public or must be kept confidential. In such a case the Open Records Act makes such records presumptively available to public disclosure unless some exception applies. §1 of the Open Records Act declares this to be the public policy of the State of Texas. §3(a) of the Open Records Act states that all information collected, assembled, or maintained by or for governmental bodies, pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public with very limited exceptions set out in §3(a). However, because certain exceptions in §3 of the Open Records Act may apply and there has been no previous determination whether CCRC financial disclosures and actuarial reports fall within any of the exceptions, we forward to you this request for a decision from the Attorney General, pursuant to art. 6252-17a §7(a), regarding whether the requested information is within any exceptions to the Open Records Act.

Furthermore, certain CCRCs subject to the disclosure requirements have requested that the SBI keep disclosed financial and patient level information confidential. The SBI has made no assurances to any party that such information would be kept confidential, but this agency is concerned that the rights of all affected parties be protected by the due process of law afforded by the Open Records Act. The primary concern of those requesting confidentiality appears to be the disclosure of resident occupancy levels which might give an advantage to competitors. The reporting of occupancy levels are important to this agency's ability to determine if the CCRCs' five year actuarial projections are being met and for this agency's analysis of the CCRCs' financial ability to service debt and other operating costs. However, the Open Records Act does not require a government agency to assert arguments or make a case of confidentiality on behalf of a private party (art. 6252-17a §7(c)).

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Several exceptions to public disclosure of the actuarial review reports may apply in this case. §3(a)(1) exempts from public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Since, as stated above, neither the Insurance Code nor the Health and Safety Code clearly exempt CCRC reports from public disclosure, this exemption is not very helpful.

§3(a)(12) exempts from public disclosure "information 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..." Previous Open Records Decisions from the Attorney General have held insurance companies to be financial institutions for the purposes of §3(a)(12) (ORD No. 158, 1977). Clearly this agency's examinations of insurance companies, examination reports, interim reports, and financial analyses of insurance companies are protected from public disclosure by §3(a)(12). However, this raises the question regarding whether a CCRC constitutes a "financial institution" or an "insurance company" for the purposes of §3(a)(12) confidentiality.

In ORD No. 158 (1977) the Attorney General decided that insurance companies were "financial institutions" but that nonprofit hospital service plans organized pursuant to Chapter 20 of the Insurance Code were not "financial institutions." ORD No. 158 discusses at some length what "financial institution" means. ORD No. 158, citing several definitions of "financial institution," reaches the general conclusion that "financial institutions" specialize "in the handling and investment of funds" or are "engaged primarily in the lending or investing of funds." Life insurance companies were held to fit within this definition, but nonprofit hospital service plans were held not to be financial institutions since loaning and investing funds were not their primary objective. Nonprofit hospital service plans are primarily engaged in providing hospital care. ORD No. 158 also noted that legislative history supported the conclusion that insurance companies were intended to be included within the "financial institution" exemption. (Later MW-411 held that because of a slight change in the statute, the legislature also intended hospital service plans to come within the exemption. Currently, art. 20A.27 states that examination reports on HMO's are non-public information, and, as part of the examination process, interim financial statements have also been held to be non-public). The same analysis would seem to be applicable to CCRCs.

Logically, it would seem that the same reasons exist to protect the financial information of CCRCs, and this agency's analysis of that information, from public

disclosure that exist for insurance companies. Numerous reasons for such confidentiality have been cited, but the primary focus seems to be that confidential financial examination of insurance companies gives this agency an opportunity to have a positive effect in keeping insurance companies solvent, correcting potentially serious financial and management problems in time, and rehabilitating companies without exposing the troubled companies to the negative market pressures of publicity regarding problems, i.e., by preventing a "run on the bank" panic. The public policy expressed by the legislature is that rehabilitation and prevention of economic collapse of troubled companies, if possible, is better for the public and the economy than the liquidation of companies. (See art. 21.28A §1.) Probably more important than the rehabilitation of companies and the prevention of insolvency, the SBI's financial monitoring of companies on a regular basis helps keep solvent companies solvent and requires companies to engage in regular, systematic, financial self-analysis and planning.

CCRCs function like insurance companies in the sense that they take a customer's money in advance in the form of a pre-payment of a fee for care, hold some of the funds in reserve to cover future liabilities, invest some of it, and hopefully, will be able to cover their liabilities when they arise. The customer pays for a promise on the part of the CCRC to provide some security and the delivery of a service in the future. (§246.002, §§(3) and (5).) The SBI's role is to monitor the financial solvency of the CCRC with the goal of protecting the public and helping to see that the CCRC has the means to make good on its promise/contract. Thus, it seems that a CCRC, in one sense, functions as an insurer and should be treated as an insurer.

Two other exceptions in the Open Records Act which may be applicable are §§3(a)(4) and 3(a)(10). §3(a)(4) exempts from public disclosure "information which, if released, would give advantage to competitors or bidders." The Attorney General has consistently interpreted the §3(a)(4) exemption to be very narrow. In ORD 463 (1987), the Attorney General held that §3(a)(4) applies only when specific harm is shown that could be caused by a specific release of information. (See similar holdings in ORD Nos. 331 and 309 (1982).) "A general allegation of a remote possibility that some unknown competitor might gain some unspecified advantage by disclosure fails to invoke the protection of §3(a)(4)." ORD No. 463 (1987); ORD No. 124 (1976). Thus, the Attorney General has usually held that the primary purpose of §3(a)(4) is to protect the government's purchasing interests by preventing unfair advantage from being gained in the competitive bidding process and is not to protect private commercial or financial interests of individuals and entities that submit

information to governmental bodies. (See Attorney General's Handbook on the Texas Open Records Act, September 1989, pp. 53 and 54.) In Apodaca v. Montes, 606 S.W. 2d 734, 736 (Tex. Civ. App. -- El Paso 1980, no writ) the Court of Civil Appeals held that, before §§3(a)(4) and 3(a)(10) may be used to keep commercial or financial information confidential, there must be a showing of "substantial harm" to the party seeking protection from disclosure.

Although §3(a)(4) may not provide an exemption in this case, §3(a)(10) might be applicable. Art. 6252-17a, §3(a)(10) exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." In this case, the information contained in the actuarial reviews is not clearly in the nature of a trade secret as defined by the Texas Supreme Court in Hyde Corp. v. Huffines, 314 S.W. 2d 763, 776 (Tex. 1958): "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors..." In Apodaca, above, two tests were set forth regarding disclosure of commercial and financial information. The first test is whether disclosure to the public will impair the state's ability to obtain such information. The Apodaca court stated, however, that if the information is required by law to be reported to the State, then this test is not met, since compliance is not voluntary and cannot be impaired. Since CCRCs are required to report actuarial reviews to the SBI by law or regulation, this exception would not clearly apply, but practically the state's ability to obtain such information voluntarily would be affected.

The second test in Apodaca is whether a party has made a showing of likely "substantial harm" to its "competitive position" by public disclosure. Disclosure of actuarial reports, occupancy levels, and other financial information might cause some decline in the competitive position of a CCRC. Certainly the disclosure of actuarial analyses and projections regarding a CCRCs' business could be used by competitors to their advantage, although no CCRC has come forward with more than a general suggestion of possible harm from such disclosure. (See ORD Nos. 271 (1981), 309 (1982) and 514 (1988)). Thus, §3(a)(10) may provide an exception to public disclosure of the requested actuarial reports if the judicial tests requiring a showing of specific harm could be met.

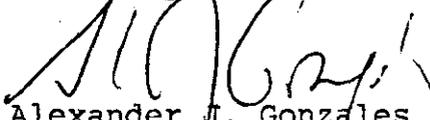
The actuarial reports which the CCRCs submit to the SBI, and which are the subject of this open records request, are in the form originally submitted to the SBI. The reports do not constitute the SBI's analysis of any CCRCs' financial condition. We would assert more vigorously that the SBI's analysis of financial data submitted to this agency as a

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part of the examination process should be exempt from public disclosure under Section 3(a)(12). It should be noted, however, that the SBI's analysis of the actuarial reports is not being requested at this time.

In conclusion, the State Board of Insurance requests an opinion from your office regarding the exemptions under the Open Records Act as outlined above. Copies of the requested information and the relevant statutes and regulations are submitted herewith. If you have any questions regarding this matter please contact Evan V. Nave, staff attorney, at (512) 463-3046.

Sincerely,



Alexander J. Gonzales  
Acting Commissioner of Insurance

AJG:EVN:fj

Enclosures

cc: Mr. Scott Nance, Director  
Financial Analysis, 015-3  
Ms. Fairy Rutland, Director  
Office of Legal Counsel, 016-1  
Mr. Bill Beversdorff, Examiner  
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