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STATE BOARD OF INSURANCE

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JAMES E. SAXTON, JR., Chairman
RICHARD F. REYNOLDS, Member
JO ANN HOWARD, Member
A.W. POGUE, Commissioner

LIQUIDATION DIVISION
OFFICE OF THE RECEIVER
STEPHEN S. DURISH
Liquidator - Receiver

RQ-26

RQ-443

November 9, 1990

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HAND DELIVERED

The Honorable Jim Mattox
Attorney General of Texas
Post Office Box 12548
Capitol Station
Austin, Texas 78711-2548

RE: Request for Attorney General Opinion — TEX. REV. CIV. STAT.
ANN. art. 6252-17a.

Dear General Mattox:

The State Board of Insurance has received an application for public information from Ms. Kate Thomas, of the Houston Post. Ms. Thomas requests information contained in the books and records of Commodore Life Insurance Company ("CLIC"), in receivership. The State Board of Insurance forwarded Ms. Thomas' request to the court-appointed Receiver of CLIC. A copy of the application is attached hereto as Exhibit "A." This letter requests an opinion that the information applied for is exempt from production under the Open Records Act, TEX. REV. CIV. STAT. ANN. art. 6252-17a. The Receiver requests that the Attorney General consider his arguments and authorities separately, cumulatively, or in any combination in support of this request for opinion.

I.

The Receiver should not be put to the task of assembling and producing the voluminous records requested by Ms. Thomas because the Receiver of CLIC is not a "governmental body" and, thus, is not subject to the Texas Open Records Act, TEX. REV. CIV. STAT. ANN. art. 6252-17a ("the Act") and because the records requested are not "public information" under the Act.

A. The information requested is not information in the custody of a governmental body as defined in TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 2(1), because the information is in *custodia legis* of a judicial district court.

On August 29, 1990, Stephen S. Durish was appointed by the Court as Temporary Receiver of CLIC in Cause No. 490,005 as a result of a lawsuit filed by the Attorney General of Texas styled The State of Texas v. Commodore Life Insurance Company, in the 201st Judicial District Court of Travis County, Texas. He was directed by the Court to take possession of and maintain all of the books and records of CLIC. In his capacity as Receiver of CLIC, Stephen S. Durish is not subject to the direction and control of the State Board of Insurance; rather, he is supervised and directed by the Court that appointed him Receiver. Accordingly, the Receiver is acting as an agent of the Court, and is not a "governmental body" as defined in art. 6252-17a, § 2(1).

- B. The information requested is not "public information" as defined TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a), because it is not information collected, assembled or maintained by or for a governmental body.

Private insurers generally maintain their records for their own purposes and use. The Receiver takes possession of the books and records as a result of and subject to the order of the Court. The books and records are actually in the legal custody of the Court, or in *custodia legis*, pursuant to TEX. INS. CODE ANN. art. 21.28, § 2(1). Accordingly, the information has not been collected, assembled or maintained by or for a governmental body, and a governmental body does not have a right of access to or ownership of the information.

II.

Alternatively, and without waiving the contention that the Open Records Act is inapplicable, if the Attorney General determines that the Open Records Act does apply here, there are additional reasons why portions of Ms. Thomas' request should be denied.

1. The information requested is exempt from disclosure pursuant to TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(1).

In The State of Texas v. Commodore Life Insurance Company, Cause No. 490,005, In the 201st Judicial District Court of Travis County, Texas, the Court has entered an injunction order imposing its authority over the books and records of CLIC. This order constitutes a judicial decision regarding the confidentiality of the records of the insurer. Accordingly, the Court has prevented the records from coming within the scope of the Act and has made the insurer's records confidential by judicial decision.

2. The information requested is exempt from disclosure pursuant to TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(3).

The State of Texas v. Commodore Life Insurance Company is ongoing litigation to which the State is a party and which involves the disposition of the assets, debts, causes of action and liabilities of CLIC. In addition, all claimants whose claims are rejected by the Receiver have a statutory right to appeal the Receiver's decision. Litigation in which the Receiver is involved relates to claims, debts, liabilities and causes of action of CLIC. The attorney for the Receiver has determined that release of the information requested by Ms. Thomas could jeopardize the Receiver's ability to obtain a reasonable judgment or settlement in these pending and contemplated suits and, thus, that the information should not be released.

3. The information requested is exempt from disclosure pursuant to TEX. REV. CIV. STAT. ANN. art. 6252-17a, §§ 3(a)(10) and 3(a)(12).

Information regarding the policyholders, premiums, commissions, and business relationships of CLIC is information of a financial nature which has been obtained by the Receiver under order of the Travis County District Court. The injunction in effect in the receivership proceeding makes this financial information confidential by judicial decision. Further, the financial information has clearly been obtained from a financial institution by the person responsible under state law for supervision of the financial institution.

Additionally, this information constitutes trade information which are confidential by law. Policyholder information is a valuable assets of any insurance company. This asset continues to have value for the receivership estate. Such information is important in the Receiver's efforts to secure continued coverage for the policyholders of an insolvent insurer through assumption reinsurance. If such information becomes public, the Receiver will be unable to secure continued coverage for policyholders and will be unable to obtain the financial benefits of negotiating the reinsurance treaties for the Guaranty Association and the estate. Such financial benefits inure also to the benefit of all policyholders and creditors of the insolvent insurer. In addition, release of such information will further diminish the value of the receivership estate by putting the Receiver at a distinct disadvantage in negotiating settlements of controversies. Many of the debts are unliquidated. The Receiver will negotiate and settle debts or reject claims and prepare to defend claims made

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by policyholders and other creditors. The attorney for the Receiver has determined that disclosure of policyholder information would have an adverse effect on resolutions, negotiations, settlements and anticipated litigation which ensues.

III.

The Receiver of CLIC is obligated by statute and by the Travis County District Court's order to act in the best interest of the policyholders and other claimants of CLIC. He is governed and supervised by the court, and must secure approval from the court to take any action not specifically authorized by TEX. INS. CODE ANN. art. 21.28.

The requests made in Ms. Thomas' application for production of records raise the same issues as those involved in the request of R. C. Stephenson, which was the subject of an opinion request dated June 1, 1990. The R. C. Stephenson matter has come before a Travis County District Court for resolution. Consequently, your office has advised that, based upon your policy of not preparing an opinion on any matter in litigation, the opinion requested dated June 1, 1990 will not be answered. At the time you determined not to go forward on the opinion request related to Mr. Stephenson's application for records, you determined also to withdraw Open Records Decision No. 528, which had previously addressed many of the issues raised in the June request. The Receiver continues to take the position that Open Records Decision No. 528 was incorrectly decided.

Please provide the Receiver an opinion from your office as to whether or not the records requested are subject to the provisions of TEX. REV. CIV. STAT. ANN. art. 6252-17a or exempt therefrom or, alternatively, advise the Receiver that you will defer to the courts pending resolution of other litigation raising virtually identical issues.

If you have any questions or require additional information, please contact Ms. Susan E. Martin, Special Counsel to the Liquidator-Receiver at 322-0223. ext. 2414.

Respectfully,



Eugene A. Brodhead
Deputy Receiver of Commodore
Life Insurance Company

EAB/SEM/ph

Attachment

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xc: Ms. Cate Thomas
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