



Texas Department of Insurance

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December 1, 2000

RQ-0320-jc

The Honorable John Cornyn
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

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DEC 04 2000

FILE # ML-41773-00

OPINION COMMITTEE

I.D. # 41773

Attn: Opinions Committee

Re: Request for Attorney General's opinion regarding the propriety of a bank notifying a customer of the fact that the customer's records have been subpoenaed by the Texas Department of Insurance (TDI) in connection with an investigation of insurance fraud.

Dear Attorney General Cornyn:

Pursuant to section 402.042 of the Texas Government Code, I request, on behalf of the Commissioner of Insurance (the Commissioner), an Attorney General's opinion regarding the propriety of a bank notifying a customer that the customer's records have been subpoenaed by the Commissioner in connection with an investigation of insurance fraud.¹

BACKGROUND

TDI's Insurance Fraud Unit

Article 1.10D of the Texas Insurance Code created the Insurance Fraud Unit within the Texas Department of Insurance (TDI) and charged the Commissioner with enforcing laws regarding fraudulent insurance acts. A fraudulent insurance act is defined as "any act that is a violation of any penal law and that: (A) is committed or attempted to be committed while engaging in the business of insurance or as part of or in support of an insurance transaction; or (B) is part of an attempt to defraud an insurer." TEX. INS. CODE art. 1.10D, §1(2).

The Commissioner and TDI are charged with investigating and gathering information regarding allegations of insurance fraud. The Insurance Code states,

If the commissioner has reason to believe that a person has engaged in or is engaging in an act or practice that may constitute either a fraudulent insurance act . . . or has committed, or is about to commit, a fraudulent insurance act or insurance fraud, the commissioner may make any investigation necessary inside or outside this state to determine whether

¹ Pursuant to the predecessor of section 31.041 of the Texas Insurance Code, the Commissioner delegated to the Senior Associate Commissioner for Legal & Compliance for the Texas Department of Insurance (TDI) the authority to request an opinion from your office pursuant to section 402.042 of the Texas Government Code.

or not the act has occurred, or to aid in the enforcement of the laws relating to fraudulent insurance acts or insurance fraud.

TEX. INS. CODE art. 1.10D, §2(b). In connection with the investigation of insurance fraud, TDI's Insurance Fraud Unit is authorized to and does employ peace officers commissioned by the Commissioner. TEX. CODE CRIM. PROC. art. 2.12 (28); TEX. INS. CODE art. 1.10D, §2(f).

General Obligation to Provide Information About Insurance Fraud

Under article 1.10D, a person² has an obligation to report suspected insurance fraud to the appropriate governmental entity. See, TEX. INS. CODE art. 1.10D, §1(4). Specifically, article 1.10D states,

If a person determines that a fraudulent insurance act has been committed, or is about to be committed, the person shall report the information to the commissioner or board or to an authorized governmental agency in writing not later than the 30th day after the date of the determination.

TEX. INS. CODE art. 1.10D, §4. Similarly, governmental entities are required to provide information upon request to TDI's Insurance Fraud Unit. TEX. INS. CODE art. 1.10D, §2(d-1), art. 1.10D, §4(c).

Commissioner's Subpoena Power

Another method by which TDI's Insurance Fraud Unit gathers information is through the use of subpoenas. The Commissioner has authority to issue subpoenas (referred to herein as "TDI subpoenas"). This authority is located in article 1.10D and section 36.152 of the Texas Insurance Code.

Article 1.10D of the Texas Insurance Code states, "The commissioner . . . may issue a subpoena and compel the attendance and testimony of witnesses and the production of materials relevant to an inquiry under this article [1.10D]. . . ."³ TEX. INS. CODE art. 1.10D, §3(a).⁴

The Commissioner also has general subpoena authority. The Texas Insurance Code states, "With respect to a matter that the commissioner has authority to consider or

² A "person" is defined as "an individual, corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, joint venture, association, and any other legal entity." TEX. INS. CODE art. 1.10D, §2(b).

³ This provision actually states, "The commissioner *and at least one member of the board* may issue a subpoena . . ." (Emphasis added.) However, as a result of legislation passed in 1993, the State Board of Insurance was abolished. A reference to the State Board of Insurance or the Board "means the commissioner or the department as consistent with the respective duties of the commissioner and the department under this code and other insurance laws." TEX. INS. CODE §31.007.

⁴ Pursuant to the predecessor to section 31.041 of the Texas Insurance Code, the Commissioner delegated the authority to subpoena records under article 1.10D to the Associate Commissioner for Insurance Fraud.

investigate, the commissioner may issue a subpoena applicable throughout the state that requires . . . the production of records.” TEX. INS. CODE §36.152(a)(2).⁵

Confidentiality of Subpoenaed Information

The Commissioner has authority to protect information acquired by subpoena. The information obtained by the Insurance Fraud Unit in connection with an investigation of insurance fraud is normally considered confidential by law. Article 1.10D states,

Any information or material acquired by the department that is relevant to an inquiry by the insurance fraud unit is not a public record for as long as the commissioner considers reasonably necessary to complete the investigation, protect the person under investigation from unwarranted injury, or serve the public interest. . . .

TEX. INS. CODE art. 1.10D, §5(a).⁶

Similarly, information obtained by TDI pursuant to the Commissioner’s general subpoena authority may be protected from disclosure. The Insurance Code states,

A record or other evidence acquired under a subpoena under this subchapter [Subchapter C, Chapter 36] is not a public record for the period the commissioner considers reasonably necessary to (1) complete the investigation; (2) protect the person being investigated from unwarranted injury; or (3) serve the public interest.

TEX. INS. CODE §36.158(a). Therefore, the Commissioner has been granted the authority to maintain the confidentiality of information obtained by TDI’s Insurance Fraud Unit.⁷

Immunity for Disclosure to Insurance Fraud Unit

Entities or individuals acting in good faith are not liable for providing information to the TDI Insurance Fraud Unit. Article 1.10D states,

A person acting without malice, fraudulent intent, or bad faith is not subject to liability based on filing reports or furnishing, orally or in writing, other information concerning suspected, anticipated, or completed fraudulent insurance acts if the reports or information are provided to:

- (1) a law enforcement officer or an agent or employee of a law enforcement officer;
- (2) the National Association of Insurance Commissioners, a state or federal governmental agency established to detect and prevent

⁵ Pursuant to the predecessor to section 31.041 of the Texas Insurance Code, the Commissioner delegated the authority to subpoena records under the predecessor of section 36.152 to the Associate Commissioner for Insurance Fraud and the Senior Associate Commissioner for Legal & Compliance.

⁶ Pursuant to the predecessor to section 31.041 of the Texas Insurance Code, the Commissioner delegated the authority to make a determination under this provision to the Associate Commissioner for Insurance Fraud.

⁷ Some information that is subject to a Commissioner’s subpoena may also be confidential pursuant to other legal principles, such as common law privacy. See, e.g., Tex. Att’y Gen. ORD-600 (1992).

- fraudulent insurance acts or to regulate the business of insurance, or an employee of that association or governmental agency; or
- (3) an authorized governmental agency or the department.

TEX. INS. CODE art. 1.10D, §6(a), *see, also*, TEX. INS. CODE §34.002. Therefore, a person is entitled to protection from liability for providing information to TDI in connection with an investigation of insurance fraud.

NOTIFICATION OF BANK CUSTOMERS

Among the entities to which subpoenas may be issued are banks. In issuing subpoenas to banks in connection with an investigation of alleged insurance fraud, TDI normally asks the bank not to notify the customers involved. It has come to TDI's attention that before complying with a TDI subpoena, at least one bank has been notifying the customers whose account information is the subject of the subpoena. The bank is not unwilling to comply with the subpoena. However, applicable law does not require notification of a bank customer.

Federal Right to Financial Privacy Act

TDI recognizes that in some circumstances, a bank may be obligated to notify the account holder that his or her records have been subpoenaed. For example, the federal Right to Financial Privacy Act calls for notification of a bank customer if a "governmental entity" seeks information from a bank. 12 U.S.C. §3408. However, a "governmental entity" under that statute is defined as "any agency or department of the United States, or any officer, employee, or agent thereof." 12 U.S.C. §3401(4). Therefore, the provisions in the federal Right to Financial Privacy Act do not apply to a TDI subpoena. As one court noted, "Disclosure of financial records to state and local governments is regulated, if at all, by state law." *United States v. Zimmerman*, 957 F.Supp. 94, 96 (N.D. Va. 1997).

Texas Finance Code and the Civil Practices and Remedies Code

Similarly, Texas state law does require notification of a bank customer before complying with a TDI subpoena. The Texas Finance Code does require notification of a bank customer regarding compelled discovery of the customer's account information under certain circumstances. TEX. FIN. CODE §59.006. However, the Texas Finance Code expressly states that its provisions regarding compelled discovery do not apply to investigations of criminal offenses. Specifically, the Finance Code states,

This section provides the exclusive method for compelled discovery of a record of a financial institution relating to one or more customers. This section does not create a right of privacy in a record and does not apply to: . . . a record request from or report to a government agency arising out of the investigation or prosecution of a criminal offense; . . .

TEX. FIN. CODE §59.006(a)(3). Similar language is also located in the section of the Texas Civil Practices and Remedies Code addressing production of financial institution records, which states,

This section provides the exclusive method for compelled discovery of a record of a financial institution relating to one or more customers. This section does not create a right of privacy in a record and does not apply to: . . . a record request from a state or federal government agency or instrumentality under statutory or administrative authority that provides for, or is accompanied by, a specific mechanism for discovery and protection of a customer record of a financial institution. . . .

TEX. CIV. PRAC. & REMEDIES CODE, §30.007(2nd)(b)(2). By its terms, this provision does not apply to subpoenas issued by TDI. Furthermore, the Texas Insurance Code states, "A subpoena issued to a bank or other financial institution as part of a criminal investigation is not subject to Section 30.007, Civil Practices and Remedies Code." TEX. INS. CODE §36.161.

United States Constitution

A bank customer has no right under the United States Constitution to notice of an investigation or a subpoena. Neither the due process clause of the Fifth and Fourteenth Amendments, the self incrimination clause of the Fifth Amendment, the search and seizure provisions of the Fourth Amendment, nor the confrontation clause of the Sixth Amendment would require notice to the target of the investigation. *Securities and Exchange Commission v. O'Brien*, 467 U.S. 735, 742-743, 104 S.Ct. 2720, 2725 (1984).

Therefore, neither the procedures set out in the Right to Financial Privacy Act, the Texas Finance Code, nor the Civil Practices & Remedies Code apply to subpoenas issued in connection with the investigation by TDI's Insurance Fraud Unit. Furthermore, a customer has no constitutional right to notice of a TDI subpoena. As a result, a bank is not compelled by law to notify its customers that their account information has been subpoenaed by TDI.

NON-DISCLOSURE REQUIREMENT

Public policy and article 1.10D of the Texas Insurance Code suggest that disclosure of a subpoena to a bank customer should be prohibited.

Public Policy

Your office has previously commented on the public policy in favor of supplying information to a governmental body in connection with a criminal investigation. Op. Tex. Att'y Gen. No. JC-161 (2000). For such information to be useful, it is important that the person or entity under investigation not be made aware of the investigation prematurely.

The United States Supreme Court, in addressing a similar issue involving the Securities and Exchange Commission, noted that imposing a notice requirement where such a requirement did not exist in statute "would substantially increase the ability of persons who have something to hide to impede legitimate investigations" The Supreme Court further noted that such notice could ultimately "enable an unscrupulous target to destroy or alter documents, intimidate witnesses, or transfer securities or funds so that they could not be reached by the Government." *Securities*

and Exchange Commission v. O'Brien, 467 U.S. 735, 750, 104 S.Ct. 2720, 2729 (1984).

Article 1.10D Principles

Article 1.10D of the Texas Insurance Code is structured to ensure that (1) information regarding suspected insurance fraud is provided to the appropriate law enforcement agency or governmental entity, including TDI's Insurance Fraud Unit, and (2) information regarding an investigation of suspected insurance fraud is kept confidential as necessary to complete the investigation, protect the person being investigated from unwarranted injury, or serve the public interest. The Commissioner, rather than a private entity, has been granted the authority to make a determination regarding the confidentiality of information provided to the Insurance Fraud Unit. The Insurance Code's confidentiality protections would be meaningless if a bank receiving a subpoena were allowed to freely disclose a subpoena to a bank customer who may be the target of the investigation. Furthermore, revealing information about a TDI subpoena to a bank customer would impair the Commissioner's ability to "to complete the investigation, protect the person under investigation from unwarranted injury, or serve the public interest." See, TEX. INS. CODE art. 1.10D, §5(a).

CONCLUSION

It is TDI's position that a bank is under no obligation to notify a customer that TDI has served the bank with a subpoena for the customer's records. Furthermore, such notice may unduly interfere with or compromise TDI's investigation of fraudulent insurance acts. To ensure that the Commissioner is able to complete the investigation, protect the person under investigation from unwarranted injury, or serve the public interest, a bank should be required to comply with TDI's request that it not notify its customers of the receipt of a TDI subpoena. Therefore, TDI respectfully requests an opinion from your office regarding the propriety of a bank notifying a customer that the customer's records have been subpoenaed by the Texas Department of Insurance (TDI) in connection with an investigation of insurance fraud.

Your attention to this matter is appreciated. If you have questions or need further assistance, please do not hesitate to contact my office.

Sincerely,



Sara Shiplet Waitt
Senior Associate Commissioner
Legal and Compliance Division

SSW/LAB

cc: Randall S. James
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The Honorable John Cornyn
December 1, 2000
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