

The following Advisory Opinion is to advise the reader of the current position of the Kentucky Department of Insurance ("the Department") on the specified issue. The Advisory Opinion is not legally binding on either the Department or the reader.

Kentucky Department of Insurance

Advisory Opinion 99-03

In re: Experience-Information Reports of Insurers

RELEVANT FACTS AND STATUTES: Section 41 of House Bill 315 ("HB 315") requires all insurers authorized to write health insurance in this state and all employer-organized associations that are self insured to provide, by March 30th of each year, premium, enrollment, claims and policy cancellation information for the preceding calendar year. Department Staff has received inquiries concerning the confidential treatment of information contained in the reports.

DEPARTMENT'S POSITION: HB 315 does not expressly state that the information that is required to be reported pursuant to Section 41 of the statute shall be treated confidentially. An insurer seeking confidential treatment of the information must, therefore, demonstrate that the information qualifies for one of the statutory exemptions from disclosure, which are set out in KRS 61.878 of the Kentucky Open Records Act (KRS 61.870 to 61.884). It is noted that KRS 61.878(1)(c)1. exempts from disclosure:

[u]pon and after July 15, 1992, records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records. [Emphasis added.]

The insurer requesting confidential treatment bears the burden of proof to show that the material falls within one or more of the exclusions enumerated in KRS 61.878. The insurer should submit a letter to the Commissioner explaining why the documents are deemed confidential and proprietary, and setting forth the reasons why open disclosure would permit an unfair commercial advantage to competitors. In addition, the insurer must conspicuously mark all designated documents "CONFIDENTIAL." If an insurer submits information to the Department on diskette, portions of same containing confidential information must likewise be conspicuously marked "CONFIDENTIAL." If marking the information within a diskette(s) is claimed to be impractical, the insurer must propose some other means of properly identifying the confidential information. Text pages or portions thereof which do not contain confidential material should not be included in this identification.

Questions regarding this Advisory Opinion may be directed to Denise Payne Wade, Counsel for the Department, at (502) 564-6032.

George Nichols III

Commissioner

Date