

## 38--What Is Considered an Association Record?

WUCIOA contains an extensive list of what qualifies as a record and what records maybe withheld from an Owner. The three older acts are not as specific but do require Associations to keep records related to the operation, governance, and finances of the condominium, the Units, and the Association itself.<sup>1</sup> These Associations will need to determine, first, whether a particular document qualifies as a “record” under the relevant statute. If it is a “record,” a separate question is whether it is a record that must be made available to Owners. The WUCIOA lists may provide guidance to older Associations trying to resolve these issues.

### **Financial Records**

The New Act requires Associations to “keep financial records sufficiently detailed” to enable them to prepare a Resale Certificate containing the items enumerated in the statute.<sup>2</sup> The reference to the Resale Certificate indicates that any information an Association would be required to maintain for preparing a Resale Certificate is likely a “financial record” under the statute.

The information required for Resale Certificate constitutes only a subset of the “financial records” an Association will maintain and retain. Other examples of “financial records” cited in the three older acts include checks, bank records, invoices, and receipts.<sup>3</sup> However, all three statutes make it clear that these examples are not intended to be an exhaustive list of “financial records.” WUCIOA provides better clarity.

Given that there is no precise definition of “financial record” in the three older statutes, Associations should err on the side of caution and consider all records related to their finances, income, and

## **CondoLaw's 2018 Handbook for Community Associations**

expenses to be financial records. This could include estimates for repairs and maintenance, contracts, salary records, receipts, delinquency reports, budgets, tax returns, and anything else that either affected the property, or documents income or an expense of the Association.

### **What Qualifies as an "Other Record"?**

New Act, Old Act and HOA Act do not say what qualifies, but WUCIOA (RCW 64.90.495) does.<sup>4</sup> This list appears to be intended to settle future disputes over records and may be a guide for preexisting communities.

Washington, like most states, also references "other records of the association." Washington courts have had little occasion to rule on questions of what constitutes an "other record" of an Association, but case law from other states is instructive. Although Washington statutes governing Condo Associations are not identical to those in other states, they use very similar language with respect to provisions regarding the availability of Association records.<sup>5</sup>

Virginia courts held that records on wages paid to an Association's top employees, management contracts, and contracts for services provided to maintain facilities qualify as "financial and other records." In *Grillo*, the Virginia Supreme Court held that specific salary information of the Association's ten highest paid employees constituted a "book or record" under the Virginia Condominium Act. The court specifically rejected the Association's argument that it was only general information, such as the salary ranges of the employees, that qualified as "records." Specific salaries, the court found, were "detailed records" related to the "operation and administration of the condominium."<sup>6</sup>

Management contracts and contracts for services, such as housekeeping records, have also been construed as "records." A Colorado court held that housekeeping records qualify as "other records under the Condominium Act."<sup>7</sup> Similarly, a Pennsylvania

## CondoLaw's 2018 Handbook for Community Associations

court held that landscaping, snow removal, and property management contracts constitute "other records" of the Association.<sup>8</sup>

A Texas court also found that correspondence between Board Members qualifies as "other records of [an] association." In *Shiolen v. Sandpiper Condominiums Council of Owners, Inc.*, the court held that an Association was required to make not only general ledgers and account registers available to the Owner, but also "all correspondence" between certain Board Members during a specific date range.<sup>9</sup> The Association did not contest that the correspondence was a "record" under Texas law, but rather argued that it should be able to withhold it because the Owner had requested it for an improper purpose. (Our firm would have argued that the correspondence was not a record.)

The takeaway from these cases is that courts are likely to deem all documents related to the operations of Associations and the communities they govern as "financial and other records."<sup>10</sup> Other examples of documents that would likely qualify as "financial and other records" include Declarations, Bylaws, Rules and Regulations, policies, meeting minutes, rosters of Owners, financial reports, delinquency reports, budgets, car registrations, and names and addresses of Owners.

In contrast, documents such as evaluations of an Association's management prepared by students would not be Association records. Email communications between Board Members, and between managers and Board Members, probably wouldn't qualify as Association records because they do not reflect action taken by the Board (the meeting minutes would reflect Board actions). The fact that decisions preceding Board action were discussed via email rather than in undocumented oral discussions would not transform those discussions into "records." Finally, drafts (e.g. budget drafts or policies drafts) and unapproved meeting minutes may not be construed as records under the statutes.

## **CondoLaw's 2018 Handbook for Community Associations**

The fact that certain documents qualify as “records” does not mean that Associations will be required to make them *available* to Owners. WUCIOA, specifically, allows some documents to be excluded.<sup>11</sup> For example, an Association would not be required to make certain contact information for Owners, such as unlisted phone numbers and email addresses, available, even though the information would qualify as an Association record.<sup>12</sup>

Establishing policies for document retention and for review by members to ensure that financial and other records are properly preserved and available is a best practice that could protect Associations and HOAs from future litigation involving records. The document retention policy should also cover documents such as email communications and drafts because, although these would not qualify as “records,” they are almost certain to be subject to discovery in litigation. As such, they, like Association records, should be handled in accordance with an official document retention policy.<sup>13</sup>

### **When Does a Record Belong to an Association?**

The New Act and HOA Act both refer to records “of the association” (i.e. records belonging to the Association). But not every record in an Association’s possession will necessarily be an Association record. Records prepared by an Association clearly belong to it, but what about records held or prepared by others?

No Washington appellate court has addressed the question of when a record is “of the association” but courts in other jurisdictions have held that any records prepared by agents of an Association, for the Association, qualify even when they legally “belong” to the entity that prepared them. In *Glenwright v. St. James Place Condominium Ass’n*, a Colorado court held that “a record in the possession of an association’s agent” qualified as an “other record” under Colorado’s Condo Act, provided that the record “reflect[ed] the activity of the agent in performing any of the association’s powers or responsibilities under CCIOA [the

## CondoLaw's 2018 Handbook for Community Associations

Colorado Common Interest Ownership Act], the association's declaration or by-laws [sic], or its agreement with that agent."<sup>14</sup>

Given that Associations frequently hire managers and other professionals, such as CPAs, to provide services for the property and Association, it is likely that Washington courts would apply the same rule the Colorado court applied in *Glenwright* and hold that records prepared by agents of the Association qualified as "other records." Thus, Associations should take care to ensure that records prepared for them by other entities are handled appropriately.

---

<sup>1</sup> Under Washington law, a condo association must "keep financial records sufficiently detailed to enable the association to comply with RCW 64.34.425 [the statute governing resale certificates]. All financial and other records of the association, including but not limited to checks, bank records, and invoices, are the property of the association..." See RCW 64.34.372. This provision of the New Act applies to Old Act condos as well.

The Old Act imposes a similar requirement. RCW 64.32.170 requires that "the manager or board of directors...shall keep complete and accurate books and records of the receipts and expenditures affecting the common areas and facilities, specifying and itemizing the maintenance and repair expenses of the common areas and facilities and any other expenses incurred."

The HOA Act says "[t]he association or its managing agent shall keep financial and other records sufficiently detailed to enable the association to fully declare to each owner the true statement of its financial status." RCW 64.38.045

<sup>2</sup> RCW 64.34.425 requires unit owners who do not qualify for one of the statutory exemptions to furnish to a purchaser a resale certificate, "signed by an officer or authorized agent of the association and based on the books and records of the association and the actual knowledge of the person signing the certificate," that must, at a minimum, contain 19 different statements or reports.

<sup>3</sup> RCW 64.34.372, RCW 64.32.170

<sup>4</sup> *Association Records*, RCW 64.90.495(1)

## CondoLaw's 2018 Handbook for Community Associations

---

An Association must retain the following:

- (a) The current budget, detailed records of receipts and expenditures affecting the operation and administration of the association, and other appropriate accounting records within the last seven years;
- (b) Minutes of all meetings of its unit owners and board other than executive sessions, a record of all actions taken by the unit owners or board without a meeting, and a record of all actions taken by a committee in place of the board on behalf of the association;
- (c) The names of current unit owners, addresses used by the association to communicate with them, and the number of votes allocated to each unit;
- (d) Its original or restated declaration, organizational documents, all amendments to the declaration and organizational documents, and all rules currently in effect;
- (e) All financial statements and tax returns of the association for the past seven years;
- (f) A list of the names and addresses of its current board members and officers;
- (g) Its most recent annual report delivered to the secretary of state, if any;
- (h) Financial and other records sufficiently detailed to enable the association to comply with [the resale certificate requirements at] RCW 64.90.640;
- (i) Copies of contracts to which it is or was a party within the last seven years;
- (j) Materials relied upon by the board or any committee to approve or deny any requests for design or architectural approval for a period of seven years after the decision is made;
- (k) Materials relied upon by the board or any committee concerning a decision to enforce the governing documents for a period of seven years after the decision is made;
- (l) Copies of insurance policies under which the association is a named insured;
- (m) Any current warranties provided to the association;
- (n) Copies of all notices provided to unit owners or the association in accordance with this chapter or the governing documents; and

## CondoLaw's 2018 Handbook for Community Associations

---

- (o) Ballots, proxies, absentee ballots, and other records related to voting by unit owners for one year after the election, action, or vote to which they relate.

<sup>5</sup> In Virginia, associations and HOAs cannot define “records” in their Governing Documents in a way that is narrower than the statutory definition as a means of avoiding the requirement that they make records available to owners. *Grillo v. Montebello Condominium Unit Owners Ass’n.*, 243 Va. 475, 478, 416 S.E.2d 444 (1992). Thus, whether a document constitutes a “record” is based on the relevant state statute and case law, not on an association’s Governing Documents. *Id.* (“It is without question that an administrative resolution adopted by a condominium owners’ association cannot defeat a statutory right created by the General Assembly.”) However, nothing would bar an association or HOA from including in its Governing Documents a broader definition of “record” than the one provided in the relevant statutes.

<sup>6</sup> *Id.* at 478.

<sup>7</sup> In *Glenwright v. St. James Place Condominium Ass’n.*, 197 P.3d 264 (2008), the court noted that the housekeeping services at issue were funded with money from the assessments paid by unit owners, and thus that the records of those services were related to the Association’s budget and financial management. It is unclear whether the court would have reached a different conclusion if the owners did not contribute in any way to the cost of the housekeeping services. However, assuming that the request was not made for an improper purpose (i.e. that the owner had a legitimate reason, as a unit owner, to examine the records), the outcome likely would have been the same.

<sup>8</sup> *Rosianski v. Four Seasons at Farmington Condominium Ass’n.*, 2014-C-745, Pa. Dist. & Cnty. Dec. LEXIS 379 (2015)

<sup>9</sup> The question before the court was not whether the email correspondence between board members constituted a “record” at all, but rather whether the association was permitted to withhold the correspondence. We believe the correspondence would not have been subject to disclosure to the owner if it were not already deemed to be a “record of the association.” *Shiolen* at 4-5, 2008 WL 2764530.

<sup>10</sup> This is true of electronically stored information (ESI) as well as hard copy documents: a document that would qualify as a “record” if it were handwritten or printed would not be treated any differently solely because it was stored electronically and had not previously been printed.

## CondoLaw's 2018 Handbook for Community Associations

---

Accordingly, associations should ensure that ESI is preserved with the same level of care as hard copy documents.

<sup>11</sup> RCW 64.90.495(3)

Records retained by an association may be withheld from inspection and copying to the extent that they concern:

- (a) Personnel and medical records relating to specific individuals;
- (b) Contracts, leases, and other commercial transactions to purchase or provide goods or services currently being negotiated;
- (c) Existing or potential litigation or mediation, arbitration, or administrative proceedings;
- (d) Existing or potential matters involving federal, state, or local administrative or other formal proceedings before a governmental tribunal for enforcement of the governing documents;
- (e) Legal advice or communications that are otherwise protected by the attorney-client privilege or the attorney work product doctrine, including communications with the managing agent or other agent of the association;
- (f) Information the disclosure of which would violate a court order or law;
- (g) Records of an executive session of the board;
- (h) Individual unit files other than those of the requesting unit owner;
- (i) Unlisted telephone number or electronic address of any unit owner or resident;
- (j) Security access information provided to the association for emergency purposes; or
- (k) Agreements that for good cause prohibit disclosure to the members.

<sup>12</sup> RCW 64.38.045(2), the HOA Act, prohibits associations from releasing unlisted telephone numbers of owners. Email addresses would likely be treated as unlisted phone numbers given that they are not published in anything like a phone book. This is the law under WUCIOA, RCW 64.90.495(3)(i).

<sup>13</sup> Associations should also ensure that their document retention policies are applied to electronically stored information (ESI) to prevent the loss of electronic records through auto-archiving, auto-deletion, etc. Furthermore, associations should include separate provisions governing the retention of ESI to ensure that electronic records are preserved in a forensically sound manner that complies with any relevant data privacy laws. For example, ESI containing social security numbers or financial account information may need to be handled and stored differently than ESI containing less sensitive information.

<sup>14</sup> *Glenwright*, 197 P.3d 264, 267-68 (2008)