

39--Can an Association Prohibit a Member from Inspecting Association Records?

Associations cannot prohibit members from inspecting most financial and other records related to management, operation, and financial health of the property and the Association itself.¹

Associations can prohibit members from accessing records the Owner has requested for an improper purpose.² Additionally, if an Association or HOA believes it has legitimate reasons for withholding records based on the specific circumstances surrounding the Owner's request, it can seek a protective order from a court.³ Finally, Associations can adopt procedures members are required to follow to request records, require members to pay for copies of records, and impose other reasonable limits related to the time and place the records are inspected.⁴

Records Requests Made for an Improper Purpose

An Owner's right to inspect Association records derives from his or her status as a member who owns property in the community. Thus, an Owner does not have a right to inspect records for *any* purpose he or she may have, only for any "proper purpose."⁵ A proper purpose would be one "reasonably related to [the owner's] membership interests."⁶ Other states have determined that "a proper purpose is shown when an Owner has an honest motive, is acting in good faith, and is not proceeding for vexatious or speculative reasons."⁷

It is important to note, however, that an Owner requesting to inspect records does not need to prove that his or her purpose is proper, or even say what the purpose is.⁸ In other words, there is a presumption that an Owner requesting access to Association records is doing so for a proper purpose, and the burden is on the

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Association to show otherwise. An Association may require an Owner to fill out a form stating the records he or she wants to inspect and why, but the Association may not require a detailed explanation or proof of the purpose the Owner states. For example, an Owner could simply state that he or she wanted to inspect the records to gain a better understanding of the Association's expenses, and this would likely be sufficient.

If an Association believes that the Owner's purpose is improper, it must provide the court with evidence establishing the lack of propriety.⁹ Merely asserting that records were withheld because the Owner has an improper purpose does not shift the burden of proof to the Owner.

Since the burden is on the Association to show that the Owner's purpose in requesting the records is improper, it will likely be difficult for an Association to withhold records for this reason. For example, an Owner who requested records on employees of the housekeeping service because he or she was stalking the employee would lack a proper purpose.

Although it will be rare for an Owner to request records for an improper purpose, Associations should nevertheless remember that this is a basis for denying an Owner's request in appropriate circumstances.

Board Member Communications

Associations can most likely withhold emails and transcripts of oral communications between Board Members because they would not qualify as "records" at all.¹⁰ (See Chapter 38, "Association Records: What Is Considered an Association Record?") Conversations do not become records simply because they are memorialized in writing. Emails may contain information that itself constitutes a record (e.g. invoices contained in the body of an email), but in these cases the Owner could request "the July housekeeping invoice" and not "all emails between Board

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members in July.” As such, the Association could simply provide the Owner with access to the specific email containing the invoice. Associations should keep in mind that emails and transcripts of oral communications could still be disclosed to Owners during the discovery phase of litigation. The fact that they are not “records” under the Condo Acts or HOA Act only means that Associations have no statutory duty to make them available to Owners, not that they are privileged and exempt from disclosure under all circumstances.

Limiting Availability of Records

Associations not covered by WUCIOA are required to make records “reasonably available” to Owners. Thus, these Associations may adopt certain policies and procedures regarding an Owner’s inspection of records, provided that the policies and procedures are reasonable. WUCIOA is more specific in what is deemed reasonable and requires the documents be made available during reasonable business hours, at the Association’s or its manager’s office.¹¹

Associations may also require that Owners provide reasonable advance notice that they want to inspect certain records. There is no specific number of days that is defined to be “reasonable advance notice” and what is considered “reasonable” may vary depending on factors such as the location of the records, the quantity of records, and the time required to prepare them for the owner. However, requiring an Owner to give more than a month’s notice is likely to be deemed unreasonable under all circumstances because a court is unlikely to find that an Association has a justifiable reason to take more than a month to locate and gather records in its possession.¹²

For the New Act, Old Act and HOA Act there was no explicit requirement to make the records available electronically.¹³ WUCIOA provides that an Owner may request a copy of the records be delivered “through an electronic transmission if

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available.”¹⁴ This language suggests that if a record is stored electronically and can be emailed, then an Association cannot refuse to send the record to the Owner by email. However, there is not an obligation to digitize the record just so that it can be emailed to an Owner.

Associations may limit the availability of records containing unpublished phone numbers and email addresses. Phone numbers of Owners qualify as “records,” but we believe they should not be released. WUCIOA expressly permits the Association to withhold records related to:¹⁵

- (a) Personnel and medical records;
- (b) Contracts, leases, and other commercial transactions 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;
- (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.

Associations may also be able to limit the availability of records containing information on employees, Board Members, or other

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Owners who could be in danger due to concerns such as domestic violence or stalking. Apart from withholding records from a specific individual the Association believes has an improper purpose for making the request (e.g. stalking), an Association may be able to withhold all records containing certain information (e.g. contact information, locations an employee is scheduled to be at certain times, etc.) about specific people where there are legitimate safety concerns. The Violence Against Women Act (VAWA) extends various protections to victims of domestic violence, and an individual who has a restraining order under VAWA (or similar state statutes) could submit documentation to an Association requesting that all information that could be used to identify and harm him or her be withheld from *all* Owners.¹⁶

Establishing Procedures for Records Requests

Associations can establish reasonable procedures Owners must follow to request and inspect records. For example, Associations can require Owners to inspect records in the Association's office during normal business hours.¹⁷ Associations may also require Owners to submit a written request or complete a form listing the records they are requesting to inspect and the purpose of the inspection.¹⁸ However, Associations should keep in mind that the purpose of the written request or form is not to act as a barrier to giving the Owner the access to which he or she is entitled, but rather to ensure that the request is processed accurately and in a timely manner by the Association. Accordingly, an Association cannot require Owners to give a lengthy explanation of their purpose or prove that their purpose is proper.

Finally, Associations may require Owners to pay for copies and other reasonable costs incurred by the Association in providing access to the records. There is no case law addressing what constitutes a reasonable cost, but courts would likely find it reasonable for an Association to charge an Owner for the cost of photocopies at the rate charged to the Association, and to pay for a clerical employee to gather documents for review.

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¹ Under the New Act, "All financial and other records of the association...are the property of the association, but shall be made reasonably available for *examination and copying* by the manager of the association, any unit owner, or the owner's authorized agents." RCW 64.34.372

This New Act provision is applicable to Old Act condos. RCW 64.34.010.

The HOA Act states that "all records of the association, including the names and addresses of owners and other occupants of the lots, shall be available for examination by all owners, holders of mortgages on the lots, and their respective authorized agents on reasonable advance notice during normal working hours at the offices of the association or its managing agent." RCW 64.38.045

² Neither the Condo Acts nor the HOA Act state that the owner must have a "proper purpose" for inspecting the records. However, both RCW 24.03.135 and RCW 24.06.160, under which condo associations and HOAs are incorporated, qualify the owner's right to inspect records:

"Any such member must have a purpose for inspection reasonably related to membership interests." RCW 24.03.135

"All books and records of a corporation may be inspected by any member or shareholder, or his or her agent or attorney, for any proper purpose at any reasonable time." RCW 24.06.160

³ Alternatively, an association could deny the owner's request and move for a protective order if the owner sues the Association.

⁴ The HOA Act and WUCIOA permit associations to "impose and collect a reasonable charge for copies and any reasonable costs incurred by the association in providing access to records." RCW 64.38.045(2). *See also*, RCW 64.90.495(4). ("An association may charge a reasonable fee for producing and providing copies of any records under this section and for supervising the unit owner's inspection.")

The Condo Acts make no reference to the cost of copies or other costs associated with records, but an association incorporated under RCW 24.03 could require owners to cover the costs of inspecting and copying all records other than the articles and Bylaws, which must be provided to owners free of charge. "Cost of inspecting or copying shall be borne by such member except for costs for copies of articles or Bylaws." RCW 24.03.135(5)

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RCW 24.06.160, the provision of the Nonprofit Miscellaneous and Mutual Corporations Act dealing with records, is silent on the cost of copying records, but given that RCW 24.03 and the HOA permit Associations to charge owners for copies of records other than articles and Bylaws, there is no reason to think a court would not permit an Association incorporated under RCW 24.06 to do the same thing.

⁵ RCW 24.06.160

⁶ RCW 24.03.135

⁷ *Oviedo v. 1270 S. Blue Island Condominium Ass'n*, 2014 IL App (1st) 133460 at 240-41 (2014).

⁸ No Washington appellate court has directly addressed this question under any of the statutes governing common interest communities. Further, the Condo Acts and HOA Act are both silent with respect to the "proper purpose" requirement, and the nonprofit corporation statutes include no provisions imposing a requirement that members state, let alone prove, what their purpose is in inspecting records. The Supreme Court has recognized that under the common law, "the burden of showing improper motives on the part of the shareholder in demanding an inspection of the books and records of the corporation is upon the [corporation]." *State ex rel. Grismer v. Merger Mines Corp.*, 3 Wash.2d 417, 420-21 (1940).

⁹ In *Shiolen v. Sandpiper Condominiums Council of Owners, Inc.*, a Texas court rejected the defendant association's contention that it had withheld records because the plaintiff wanted them for an improper purpose. The court stated that the association had failed to "provide any evidence to support its conclusory statement that Shiolen had failed to establish a proper purpose." 13-07-00312-CV, 2008 WL 2764530 1, 4.

¹⁰ The court in *Shiolen* held that correspondence between board members must be made available to the owner. However, the court does not discuss why the correspondence constituted "records" and the association did not contest this point, but rather argued that they should be withheld on different grounds. Thus, it is unclear whether the correspondence contained info that would be deemed "records", whether Texas law defines "records" in such a way that correspondence between board members is necessarily included, or whether the question simply didn't arise because both parties and the court just assumed they were records. *Shiolen* at 6.

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¹¹ RCW 64.90.495(2). (“...all records required to be retained by an association must be made available for examination and copying by all unit owners, holders of mortgages on the units, and their respective authorized agents as follows, unless agreed otherwise: (a) During reasonable business hours or at a mutually convenient time and location; and (b) At the offices of the association or its managing agent.”)

¹² There is a lack of case law on what is considered to be a reasonable amount of time, but the *Shiolen* court found that a delay of four months between an owner's request and the association's grant of access was unreasonable as a matter of law. The court also found it unreasonable for the association to tell the owner the records would only be available on a Saturday that was the date he had notified the association he was scheduled to leave town. *Shiolen* at 7.

¹³ The statutes are silent as to the form in which association records must be made available to owners. Other states permit associations to provide copies of records in electronic form (see, e.g., Title XL §718.111 (Florida), Civil Code 5200-5240(h) (California), and the HOA Act permits Associations to notify owners of meetings via email. WUCIOA provides that an owner is entitled “to receive copies by photocopying or other means, including through an electronic transmission if available...”

As associations and management companies tend to store increasingly more information electronically, associations may choose to provide owners with electronic copies of at least some documents. Associations that do this should ensure that the copies provided are protected or saved as “read-only” to ensure that metadata such as the “date created” and “date modified” is not inadvertently changed, as this could be a problem for an Association involved in litigation in the future.

¹⁴ RCW 64.90.495(5). (“A right to copy records under this section includes the right to receive copies by photocopying or other means, including through an electronic transmission if available upon request by the unit owner.”)

¹⁵ RCW 64.90.495(3).

¹⁶ 42 USC §§ 13701-14040. The concern is not that all owners pose a risk to the person, but rather that the information provided to a nonthreatening owner could inadvertently end up in the wrong hands.

¹⁷ The HOA Act makes this explicit, stating that association records shall be available “during normal working hours at the offices of the association or its managing agent.” RCW 64.38.045(5). The Old Act also

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qualifies the duty to make records available to owners, stating that associations shall do so “at any reasonable time or times.” RCW 64.32.170

The New Act does not refer to time in the records provision, but states that records “shall be made reasonably available,” and courts are unlikely to construe a requirement that owners examine records during normal business hours as unreasonable. RCW 64.34.368. Furthermore, Washington’s Nonprofit Corporations acts both include the phrase “at any reasonable time,” and it’s unlikely a court would find it unreasonable for an association to refuse to allow an owner to examine records outside of its normal business hours.

¹⁸ In *Shioleno*, the Texas Condo Act actually stated that an association was to make records available upon “written demand.” Washington law does not require a written request; however, it is very unlikely any Washington court would find it unreasonable for an association to request that an owner submit a written request listing the records they wanted to inspect and providing a brief statement of the purpose of the request.