



# COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Glenn A. Youngkin  
Governor

January 21, 2022

G. Bryan Slater  
Secretary of Labor

Demetrios J. Melis  
Director

Complainant: Stephen Eisenberg  
Association: The Oronoco Association  
File Number: 2022-01153

---

*The Office of the Common Interest Community Ombudsman has been designated to review final adverse decisions and determine if they may be in conflict with laws or regulations governing common interest communities. Such determination is within the sole discretion of the Office of the Common Interest Community Ombudsman and not subject to further review.*

---

## Complaint

The Complainant submitted a complaint to the Association dated September 13, 2021. The Association provided a response to the association complaint dated November 23, 2021. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated December 2, 2021.

## Authority

The Common Interest Community Ombudsman (CICO), as designee of the Director, is responsible for determining whether a "final adverse decision may be in conflict with laws or regulations governing common interest communities." (18VAC 48-70-120) The process of making such a determination begins with receipt of a NFAD that has been submitted to this office in accordance with §54.1-2354.4 (Code of Virginia) and the Common Interest Community Ombudsman Regulations (Regulations). A NFAD results from an association complaint submitted through an association complaint procedure. The association complaint must be submitted in accordance with the applicable association complaint procedure and, as very specifically set forth in the Regulations, "shall concern a matter regarding the action, inaction, or decision by the governing board, managing agent, or association inconsistent with applicable laws and regulations.

Under the Regulations, “applicable laws and regulations” pertain solely to common interest community laws and regulations. Any complaint that does not concern common interest community laws or regulations is not appropriate for submission through the association complaint procedure and we cannot provide a determination on such a complaint. Common interest community law is limited to the Virginia Condominium Act, the Property Owners’ Association Act, and the Virginia Real Estate Cooperative Act.

Pursuant to the Regulations (18 VAC 48-70-90), the only documents that will be considered when reviewing a NFAD are the association complaint submitted by a complainant to the association (and any documents included with that original complaint), the final adverse decision from the association, and any supporting documentation related to that final adverse decision. Other documents submitted with the Notice of Final Adverse Decision cannot be reviewed or considered.

This Determination is final and not subject to further review.

### Determination

Additional documents were included with the NFAD that were not, according to the Association, included with the original complaint submitted to the Association. Several memorandums were also included that were not part of the original complaint as evidenced by their date. None of these additional documents or memorandums will be considered for this Determination. The Regulations that govern the complaint process do not provide for the submission of additional documents outside those set forth in the Regulations and this office has never utilized such additional documents since it provides an unfair advantage to the party that submitted them.

The Complainant has alleged that the Association is in violation of §55.1-1949(B)(1)<sup>1</sup> of the Condominium Act. The Complainant alleges that the executive board communicated through informal meetings, casual discussions, and similar activities rather than holding formal and properly called Board meetings.

The Complainant also alleges that the Association improperly withheld association records from unit owners when it denied him documents pertaining to a forensic audit examination. This request was denied via email by one board member on May 25, 2020 and another, also by email, on September 21, 2021. A failure to provide

---

<sup>1</sup> B. 1. Except as otherwise provided in the condominium instruments, the provisions of this subsection shall apply to executive board meetings at which business of the unit owners' association is transacted or discussed. All meetings of the unit owners' association or the executive board, including any subcommittee or other committee of such association or board, shall be open to all unit owners of record. The executive board shall not use work sessions or other informal gatherings of the executive board to circumvent the open meeting requirements of this section. Minutes of the meetings of the executive board shall be recorded and shall be available as provided in § 55.1-1945.

access to or copies of association books and records may be a violation of 55.1-1945<sup>2</sup> of the Condominium Act.

The Complainant requested that the Association hold a formal meeting to consider and grant him his request. He further requested that if he is not provided the documents, the Association adhere to its association complaint procedure and provide an in-person hearing rather than a virtual one and that a neutral, professionally qualified recorder take minutes. The Complainant also asks that the Board recuse itself from the

---

<sup>2</sup> A. The declarant, managing agent, unit owners' association, or person specified in the bylaws of the association shall keep detailed records of the receipts and expenditures affecting the operation and administration of the condominium and specifying the maintenance and repair expenses of the common elements and any other expenses incurred by or on behalf of the association. Subject to the provisions of subsections B, C, and E, upon request, any unit owner shall be provided a copy of such records and minutes. All financial books and records shall be kept in accordance with generally accepted accounting practices.

B. Subject to the provisions of subsection C, all books and records kept by or on behalf of the unit owners' association, including the unit owners' association membership list, and addresses and aggregate salary information of unit owners' association employees, shall be available for examination and copying by a unit owner in good standing or his authorized agent so long as the request is for a proper purpose related to his membership in the unit owners' association and not for pecuniary gain or commercial solicitation. Notwithstanding any provision of law to the contrary, this right of examination shall exist without reference to the duration of membership and may be exercised (i) only during reasonable business hours or at a mutually convenient time and location and (ii) upon five business days' written notice for a unit owner association managed by a common interest community manager and 10 business days' written notice for a self-managed unit owners' association, which notice shall reasonably identify the purpose for the request and the specific books and records of the unit owners' association requested.

C. Books and records kept by or on behalf of a unit owners' association may be withheld from examination or copying by unit owners and contract purchasers to the extent that they are drafts not yet incorporated into the books and records of the unit owners' association or if such books and records concern:

1. Personnel matters relating to specific, identified persons or a person's medical records;
2. Contracts, leases, and other commercial transactions to purchase or provide goods or services, currently in or under negotiation;
3. Pending or probable litigation. For purposes of this subdivision, "probable litigation" means those instances where there has been a specific threat of litigation from a person or the legal counsel of such person;
4. Matters involving state or local administrative or other formal proceedings before a government tribunal for enforcement of the condominium instruments or rules and regulations promulgated by the executive board;
5. Communications with legal counsel that relate to subdivisions 1 through 4 or that are protected by the attorney-client privilege or the attorney work product doctrine;
6. Disclosure of information in violation of law;
7. Meeting minutes or other confidential records of an executive session of the executive board held pursuant to subsection C of § 55.1-1949;
8. Documentation, correspondence or management or executive board reports compiled for or on behalf of the unit owners' association or the executive board by its agents or committees for consideration by the executive board in executive session; or
9. Individual unit owner or member files, other than those of the requesting unit owner, including any individual unit owner's files kept by or on behalf of the unit owners' association.

hearing due to conflicts of interest and that unit owners be appointed to review the matter instead. Finally, the Complainant asks that the Board cease communicating among themselves outside of meetings, and that meetings be formally carried out as required by law and policy. He specifically asks that the Board not use work sessions or other informal gatherings to circumvent open meeting requirements, and that duties of the Board be carried out by the Board and not individual directors.

The Association responded to the complaint by noting that the documents requested were not a forensic audit but instead were a work product of a billing review. The Association wrote that there was a dispute between the Association and the Declarant at the time the documents were requested, and the arbitrator was considering "the issue of attorneys' fees, as well as their reasonableness." The Association said, "The work product was withheld from the Declarant based upon the work-product privilege. Thus, the requested documents were properly withheld under Virginia Code §55.1-1945(C)(3)." The Association further wrote that both parties to the dispute have recently asked for dismissal and the Board of Directors announced the requested documents will be transferred to the Association's managing agent and will be available for inspection.

Regarding the allegation that the Board of Directors has met improperly, the Association stated that "the Board of Directors has regularly and continuously made all of its decisions at open Board of Directors meetings noticed and scheduled in accordance with Virginia Code §55.1-1949." The Association noted that the individual Board member responses to the Complainant's emails regarding the requested documents were simply "restating positions repeatedly discussed by the Board of Directors in open meetings and decisions made by the Board of Directors in open meetings."

It appears that the Association intends to make, or has already made, the requested documents available to the Complainant and all other owners in good standing. Determining whether the Association should have done so sooner, or even a year ago when the documents were originally requested is not something this office can do, since the Association has claimed an exclusion under §55.1-1945(C)(3). This office cannot determine what is or is not appropriate for exclusion under this statute. Determining what constitutes privileged information or work product does not fall under common interest community law. Therefore, this office can only accept an association's conclusion that a document or documents fall under the named exclusion.

As for the allegation that the Board was not holding meetings in accordance with the requirements under §55.1-1949, there is not sufficient evidence for this office to determine that such a violation of the law has occurred. The Association has countered the allegation by saying that all meetings have complied with the law and that the information passed on in emails was a result of decisions made in properly noticed meetings. I would note that association boards do not operate in a vacuum and there are times when board members will gather, communicate or otherwise share information, but they are not necessarily discussing or transacting the business of the association and thus not in violation of the law.

As to the requests from the Complainant, it appears a formal meeting was held to review his complaint. Requesting an in-person meeting over a virtual or electronic meeting is not a legal issue, but instead a preference and a decision that is up to the Association. Asking that a neutral, professionally qualified recorder take minutes is not required by common interest community law, nor is there a requirement under common interest community law that unit owners review complaints rather than executive boards. As for a cessation in communication outside of meetings among the executive board members, such a request is not required by law. What is required is that executive boards provide notice of all board meetings, to include committee and sub-committee meetings. Executive board members will always have the right to communicate outside a meeting if they are not discussing or transacting the business of the association. Executive boards may also have the right to make decisions outside of meetings if done so in a way that comports with the association's governing documents and any applicable law.

#### Required Actions

If the Association has not provided the Complainant the documents he requested, I would ask that they do so within the next fourteen days, to the extent provided under the applicable law.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie  
Common Interest Community Ombudsman

cc: Board of Directors  
The Oronoco Association