



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Glenn A. Youngkin
Governor

June 21, 2023

G. Bryan Slater
Secretary of Labor

Demetrios J. Melis
Director

Complainant: Nathan Schultz
Association: Chimney Hill Community Association
File Number: 2023-02607

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 January 20, 2023. The Association provided a response to the association complaints dated March 30, 2023. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated April 26, 2023 and received April 28, 2023.

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

The Complainant submitted two requests to inspect the records of the Association. The requests were to inspect the Association's mileage budget and training budget. The Complainant alleges that the Association refused to allow him to inspect the records and instead charged him \$50 and provided only some of the records he requested. The Complainant stated that the documents he was provided were not complete and that there were gaps in the records for mileage and no receipts for certain training expenses. The Complainant believes the Association is in violation of §55.1-1815.¹

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A. The association shall keep detailed records of receipts and expenditures affecting the operation and administration of the association. All financial books and records shall be kept in accordance with generally accepted accounting practices.

B. Subject to the provisions of subsection C and so long as the request is for a proper purpose related to his membership in the association, all books and records kept by or on behalf of the association shall be available for examination and copying by a member in good standing or his authorized agent, including:

1. The association's membership list and addresses, which shall not be used for purposes of pecuniary gain or commercial solicitation; and

2. The actual salary of the six highest compensated employees of the association earning over \$75,000 and aggregate salary information of all other employees of the association; however, individual salary information shall not be available for examination and copying during the declarant control period.

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 an association managed by a common interest community manager and 10 business days' written notice for a self-managed association, which notice reasonably identifies the purpose for the request and the specific books and records of the association requested.

C. Books and records kept by or on behalf of an association may be withheld from inspection and copying to the extent that they 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 association documents or rules and regulations promulgated pursuant to § 55.1-1819;
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 board of directors held in accordance with subsection C of § 55.1-1816;
8. Documentation, correspondence, or management or board reports compiled for or on behalf of the association or the board by its agents or committees for consideration by the board in executive session; or
9. Individual lot owner or member files, other than those of the requesting lot owner, including any individual lot owner's or member's files kept by or on behalf of the association.

D. Books and records kept by or on behalf of an association shall be withheld from inspection and copying in their entirety only to the extent that an exclusion from disclosure under subsection C applies to the entire content of such books and records. Otherwise, only those portions of the books and records containing information subject to an exclusion under subsection C may be withheld or redacted, and all portions of the books and records that are not so excluded shall be available for examination and copying, provided that the requesting member shall be responsible to the association for paying or reimbursing the association for any reasonable costs incurred by the association in responding to the request for the books and records and review for redaction of the same.

E. Prior to providing copies of any books and records to a member in good standing under this section, the association may impose and collect a charge, reflecting the reasonable costs of materials and labor, not to exceed the actual costs of such materials and labor. Charges may be imposed only in accordance with a cost schedule adopted by the board of directors in accordance with this subsection. The cost schedule shall (i) specify the charges for materials and labor, (ii) apply equally to all members in good standing, and (iii) be provided to such requesting member at the time the request is made.

F. Notwithstanding the provisions of subsections B and C, all books and records of the association, including individual salary information for all employees and payments to independent contractors, shall be available for examination and copying upon request by a member of the board of directors in the discharge of his duties as a director.

G. Meetings of the association shall be held in accordance with the provisions of the bylaws at least once each year after the formation of the association. The bylaws shall specify an officer or his agent who shall, at least 14 days in advance of any annual or regularly scheduled meeting and at least seven days in advance of any other meeting, send to each member notice of the time, place, and purposes of such meeting. In the event of cancellation of any annual meeting of the association at which directors are elected, the seven-day notice of any subsequent meeting scheduled to elect such directors shall include a statement that the meeting is scheduled for the purpose of the election of directors.

Notice shall be sent by United States mail to all members at the address of their respective lots unless the member has provided to such officer or his agent an address other than the address of the member's lot. In lieu of sending such notice by United States mail, notice may instead be (i) hand delivered by the officer or his agent, provided that the officer or his agent certifies in writing that notice was delivered to the member, or (ii) sent to the member by

The Complainant also submitted additional record requests to inspect association records after the first request. One request was for documents previously mailed by the association so he could determine the envelope size, weight, and cost of mailing, and the second was for meeting minutes for the past year. The Complainant wrote that the Association had not responded to these requests within five days, as required by the Property Owners' Association Act. The Complainant also believes there is a due process violation since the Association Record Request Policy states that the Association can deny a request until they determine if a member is in good standing.

The Association stated in its final decision that the \$50 fee was returned to the Complainant on January 21, 2023. The Association wrote that the documents provided to the Complainant that pertained to mileage and training were the only records they had and that "[a]ll records the Association has on file that pertain to your request have been provided to you for examination and review."

It is not clear to me if the \$50 fee charged for the documents comports with the reasonable costs of material and labor as set out in the statute, but that is not a determination that needs to be made at this time since the fee was refunded to the Complainant. I understand the Complainant's concern that the Association may not have provided him all the records he requested, but if the Association has provided the records it has, it has met its obligations under the law. Whether the gaps that exist are due to faulty recordkeeping or because there were simply no records for those timeframes is not a determination this office can make.

I could not determine from the information provided if the Association ever allowed the Complainant to examine the documents he requested in January 2023. According to the Complainant they did not provide access to the documents in five days. I will note, however, that there is not a requirement in the law to provide records or allow inspection in five days, instead, the five days is a notice provision for examination of the records. There is additional information in the same paragraph that states an owner can exercise his or her right to examine the books and records only during reasonable business hours or at a mutually convenient time and location. This language dovetails with the five days' notice language and it was not clear to me if the Association or the Complainant attempted to find a mutually convenient time and

electronic mail, provided that the member has elected to receive such notice by electronic mail and, in the event that such electronic mail is returned as undeliverable, notice is subsequently sent by United States mail. Except as provided in subdivision C 7, draft minutes of the board of directors shall be open for inspection and copying (a) within 60 days from the conclusion of the meeting to which such minutes appertain or (b) when such minutes are distributed to board members as part of an agenda package for the next meeting of the board of directors, whichever occurs first.

H. Unless expressly prohibited by the governing documents, a member may vote at a meeting of the association in person, by proxy, or by absentee ballot. Such voting may take place by electronic means, provided that the board of directors has adopted guidelines for such voting by electronic means. Members voting by absentee ballot or proxy shall be deemed to be present at the meeting for all purposes.

location or if the Complainant attempted to exercise his right of examination during reasonable business hours.

The statute is quite clear that only five days' notice is required for an owner who wishes to examine the books and records in a professionally managed association, but that right of examination is also coupled with the time and location requirements as well as notice that identifies the purpose and the specific books requested. The Association did not appear to provide a response to the allegation that the Complainant was denied access to the records he requested in January 2023 and I cannot determine, based on the information provided by the Complainant, whether there was any effort to find a mutually convenient time and location and if he ever was given the opportunity to examine the records he requested.

The Complainant's due process allegation is not something that is addressed under common interest community law and therefore this office cannot provide a determination. The Association's policy on record requests is part of the books and records of the association and therefore outside the authority of this office.

Required Actions

If the Association has not responded to the Complainant's two requests to examine association records dated January 10, 2023, unless there is a reason under the law for which a response is inappropriate, it does need to provide the Complainant the right to inspect those documents.

In addition, as previously stated in a prior Determination dated January 3, 2023, §55.1-1815(B) of the Property Owners' Association Act specifically allows for examination and copying of association records by a member in good standing. While the Association may have provided the Complainant copies of records in response to his requests, since he had specifically asked that he be allowed to examine the records, rather than receive copies, he should have been given the opportunity to do so.

Please contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Chimney Hill Community Association