Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

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FEATURE

Here's what you need to know before granting access to books and records.

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Produced in consultation with

Carefully Consider Best Way to Disclose Books, Records to Member

Many members decide to buy into an association because much of the work that goes into typical homeownership is taken care of by the association manager and board, which can save time, effort, and money for members. Membership dues and assessments are used to keep up the community—from amenities to security measures to home improvements, like new roofs. So expect requests from time to time by members who want to know exactly where their money is going—and that it's being used effectively and for what the association's budget states.

How you handle a request from a member to examine the association's books and records (which includes the financial books, audits, contracts, correspondence, documents, plats, plans, notices, tax records, and files, among other information) can assuage her concerns, or it can create a backlash and raise red flags if the member gets the wrong idea about how you've been managing the association. Here's what you need to know before granting access to books and records.

Reasons for Requesting Information

There certainly are legitimate reasons why a member would ask to examine the association's books and records. "Typically, a member would make this request to compare actual expenditures with the budget and to see if any unbudgeted expenses exist," says community association attorney P. Michael Nagle. Essentially, the member is trying, more or less, to "audit" the financials to see if everything is above-board, he notes. "However," he adds, "the budget is typically just a guideline and can be changed or modified by the board from time to time to meet the actual needs of the association. The minutes of board meetings where such changes were approved should be provided if an owner questions any deviation from the original budget."

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Disclose Books, Records

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But there often are circumstances under which a member could try to use that information for a negative purpose or for personal gain. "Most people are looking for some form of problem or skullduggery, usually because they want to lambast the board or management or a particular officer or director—or because they want ammunition to promote their own candidacy for the board," warns Nagle. Unfortunately, there aren't true consequences for inspecting books and records for nefarious purposes. That's because most state statutes allow for inspection of the books and records by any member, who doesn't have to specify a purpose for doing so. Similarly, a "negative" purpose is not prohibited. Nagle points out that the best way to thwart those attempts is to make the books as perfect as possible with *no anomalies.*

But you don't have to hand over every document or piece of information requested. When a records review request is granted, some information can—and should—be kept confidential. This can be state-specific, so check with your association's attorney about what to divulge. Typical information to hold back could include:

- Minutes of meetings *properly* held in executive session;
- In some states, contracts under negotiation;
- Litigation documents, especially if ongoing;
- Privileged client-attorney communications;
- Ballots and proxies if voting is permitted to be secret pursuant to the governing documents;

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Disclose Books, Records

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- In some states, personnel records (though many states allow these, especially with regard to things like salary or performance reviews, among other items, as these records are the legitimate business of the people an employee serves); and
- In some states, delinquency lists.

"Pretty much everything else is fair game," Nagle warns. "So, no matter which records you're obligated to produce, make sure you've taken extra care to keep pristine and complete records," he says.

Become Familiar with Administrative Details

It's important for managers to know about how the actual process should work. For example, sometimes there is a time frame for producing the requested documents. "This varies by state or documents, but assume 'reasonable' time," says Nagle. Remember that this could also be relative, for example, if an annual meeting or other event is coming up. But usually, it is during normal business hours within a few—say, 10 to 15—days of the request, Nagle notes.

You should know ahead of time that while the member may be able to keep photocopies of the records, you can require her to pay copying costs, including the administrative time to do so. Be aware that the member isn't precluded from using that information in specific circumstances, such as sharing it with other members or talking about it at association meetings. Don't be surprised if that information pops up in a negative way. Don't get caught off guard; be prepared to answer any questions related to the information that the member takes away. You also should absolutely document who has examined the books and records, says Nagle.

Nagle stresses that, if a member is examining original documents that cannot be replaced if destroyed, damaged, or taken, she may be required to pay for the time of management personnel to supervise the inspection to make sure nothing untoward happens to important records during its course.

Pay Attention to Scope of Request

A member may ask to see information that seems to be of a sensitive nature or confidential. While you do, in most cases, have to make certain documents available in a reasonable time, you shouldn't make the mistake of assuming that the information requested is within the scope of what's permissible. It never hurts to ask the association attorney about what's been requested, and then produce what's allowable. Be prepared to explain why anything else specifically requested isn't being provided, though. The attorney can give you an accurate explanation to pass on to the member.

"However, if there are things that were not specifically requested but that are also not being provided for legitimate reasons, it may be better not to even mention what has been excluded," Nagle suggests. "If it wasn't specifically asked for, why draw attention to it?" he asks.

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Take Records Request Role Seriously

As the association manager, you'll have the actual day-to-day role in producing the documents requested by a member. "Management is usually the 'keeper of the records' for an association, and this is not a task to be taken lightly," Nagle emphasizes. Of key importance is keeping everything as up to date and accurate as possible, he says. Other than that, be prepared to coordinate the inspection, supervise it, and provide copies in a reasonably timely manner. Don't be afraid to enlist help if the process is costly—for example, if the requested documents are voluminous. It may be permissible to send the requested documents to a copy center rather than use management employees if that would cost less.

Be aware that some records requests could cause a major headache. For example, in Maryland, the documents must be made available for review in the county in which the association is located. If the management office is in another county—or another state, as sometimes happens in areas like the District of Columbia metropolitan area—you may literally have to box up everything and take it to someplace in the county at issue, Nagle explains. And not all associations have a community center or office, so it can be a problem.

This can make it tempting to electronically keep association documents. And, in general, you may be trying to "go paperless" anyway. This isn't always a great idea. "There are wrinkles about electronically kept documents because management may have to provide a computer on which such documents can be reviewed, and you may have to password-protect documents that should not be reviewed," Nagle notes. He points out there is a positive aspect because it may be permissible to send requested documents to an owner electronically rather than as paper copies, saving time and aggravation for you and your staff. So you should carefully weigh the pros and cons of electronic files.

Think Strategically Before Divulging Information

Generally, having association policies that dictate how things will be handled in the community can save time, money, and even lawsuits because they spell out what's expected from members and the board. But it's important to get it right. A confusing policy can create liability. That's why, if both state law and the governing documents are somewhat vague about records requests, you should ask the association's attorney to develop a policy based upon how courts have interpreted similar language, says Nagle. "This can be delicate and tricky—I don't recommend that the board or management do it on their own," he stresses.

Keep in mind that a form may or may not be helpful, though. A form may suggest things to a member that she wouldn't have thought about on her own. You may not want a checklist of all possible documents that can be reviewed, for example. "And, if a member requests to see 'all' books and records, it may not be permissible to ask her to be more specific, as she can later claim that your requirement of specificity resulted in her leaving out an important document that would have been included in the original request to see *all,*" Nagle says.

The best way to protect yourself and the association from making mistakes when responding to a records request is to know what can—and cannot—be divulged.

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If you aren't sure, ask the association's attorney and have him make a specific list so that you have a detailed guideline to follow. Remember that a records request doesn't have to be difficult for you and your staff. If specific documents are requested, try to determine whether you can make and provide a copy of them instead of allowing an inspection. (Don't forget to send the invoice charging the member for applicable costs.)

Nagle notes that it's of utmost importance to be cordial, polite, and business-like when responding to a records request. "This year's disgruntled resident may be next year's board president," he points out. ♦

Insider Source

P. Michael Nagle, Esq.: Nagle & Zaller, P.C., 7226 Lee Deforest Drive, Ste. 102, Columbia, MD 21046.

RECENT COURT RULINGS

➤ Manager Prevailed in Defamation, Negligence Case

FACTS: Several members in a condo association posted flyers in common areas, claiming that the property manager was stealing and mismanaging association funds.

The manager sued the members for defamation. The members asked a trial court to dismiss her claims. The trial court denied the request. The members appealed.

DECISION: A Texas appeals court affirmed in part and reversed in part.

REASONING: The appeals court upheld the portion of the decision that held that the flyers were defamatory. In order to show defamation, the manager had to prove that the members: (1) published a statement; (2) that was defamatory concerning the manager; (3) while acting with negligence regarding the truth of the statement.

The appeals court noted that the flyers included statements that the manager is "incompetent, breached her contract, misappropriated funds, disregarded the law, and has been fired from three other homeowners associations for mismanagement of funds."

Those statements accused the manager of incompetence in skills necessary to her profession, as well as dishonesty, and fraudulent—even criminal—conduct in her professional activities and "adversely reflected on her fitness for her chosen profession," the appeals court said. Because the statements injure her in her profession by accusing her of dishonest, fraudulent, and criminal conduct, they are "defamatory per se," it determined.

The statements were made negligently as well. The members had access to association bylaws and records, which they could have reviewed to check "the truth

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Recent Court Rulings
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or falsity of their claims prior to making any accusation of incompetence, theft, or other wrongdoing," the appeals court stressed.

- Neyland v. Thompson, et al., April 2015

➤ Association Wasn't 'Debt Collector' for Member's Late Fees

FACTS: A condominium member signed a rent-to-own contract. The purpose of the contract was for the renter to eventually own the unit. The member asserted that the renter was entirely responsible for paying condo assessments and fees. Under the governing documents, a member with a rent-to-own contract was, in fact, a "co-owner" with the renter and, therefore, jointly and severally liable for costs.

The manager sent a bill to the owner for $75 to cover the cost of cleaning the carpet outside the unit. Over the course of two years, the member refused to pay the cleaning fee, insisting that the renter was solely responsible. Eventually, with interest and fines, the bill was over $2,000, and the association foreclosed on the unit.

The member sued the association, claiming that it had violated the Fair Debt Collection Practices Act (FDCPA) by trying to collect the money from him and later foreclosing on the unit. He also alleged a breach of contract, saying that the board of directors had violated the governing documents by its collection efforts and by labeling him a co-owner, which required him to pay costs, such as the cleaning fee. The association asked a trial court for a judgment in its favor without a trial on all of the claims.

DECISION: A Michigan court ruled in favor of the association on some claims and dismissed the other claims.

REASONING: The court noted that the association's governing documents gave it the authority to collect dues, assessments, and fees associated with each condo. Therefore, collecting the cleaning fee was not a breach of contract; rather, the association was following its own rules.

Additionally, the FDCPA applied to collection agencies; the association wasn't a collection agency. The court noted that not only did the association reserve the right to collect association-related debt from members, it also didn't meet one of the major criteria to be a collection agency. That is, the association collected payments from members before the payments were overdue. While it was true that the association continued collection efforts after the owner refused to pay the cleaning bill, it initially attempted to collect the amount when the owner's account was still current. ♦

- Taylor v. Precision Prop. Mgmt., April 2015

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LEGAL COMPLIANCE

Record Accurate, Timely Meeting Minutes

Preparing community association meeting minutes may seem like it's just a matter of "taking notes." But don't be fooled into thinking that minutes are merely a record of what has happened at meetings. Meeting minutes are not only a way to refer back to decisions that affect the way you manage the community now, they could also have serious legal significance for the association later.

If you haven't already placed an emphasis on carefully keeping minutes, here are the key things you should make sure you are doing during the process—and why it's imperative that you do them.

Minutes Must Be Kept by Law

Meeting minutes are important to an association's legal compliance, says Naples and Fort Myers, Fla., attorney Joseph E. Adams. That's because, although specific laws may vary from state to state, they do have requirements for minutes. Adams points out that, at least in Florida, the law requires minutes of meetings of the board and the membership—that is, the owners—to be kept and maintained as part of the official records of the association for a minimum of seven years, although he recommends that they be kept perpetually as part of the records of the association.

Properly kept minutes can also protect an association from litigation or aid the association if a lawsuit goes forward. Adams points out that the courts have held that minutes of meetings are considered "persuasive evidence" of what occurred at a meeting (though not indisputable nor the sole source of permissible evidence of a corporate action). When a past corporate action or inaction is being challenged, the minutes are often the single most important document in a case, he stresses.

Say, for example, someone is challenging a bylaw amendment that was adopted a few years ago and claims that it didn't receive enough votes. Proper minutes would show the actual vote count, and would be very persuasive, whereas minutes simply saying "motion passed" would undermine confidence and open the issue up. The actual outcome could then be very different.

Minutes Should Reflect Actions, Not Opinions

Incomplete and/or inaccurate meeting minutes can hurt an association in other ways, as well. Adams says that the biggest error he sees is minutes that attempt to reflect what was *said,* instead of what was *done.* Typical minutes should rarely exceed one page in length and should reflect that a quorum was established and proper notice was given; every action taken should be documented through a motion, second, the name of the maker of each, and who voted for and who

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Legal Compliance

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voted against. (Remember that roll calls in member meeting minutes are not really appropriate.)

Many times, the extraneous discussion can be used against the association even though it was totally unnecessary to the vote, Adams warns. "For example, if the vote is to fire 'Smith Management' and hire 'Jones Management,' would you want your minutes to say 'Director Brown noted that he had heard Smith has been losing a lot of business lately and some people think they may be taking kickbacks'?" Adams asks. You should take into consideration how the minutes could be perceived later.

Show Good-Faith Effort in Worst-Case Scenario

"Not having minutes of meetings that actually occurred is a violation of the law," says Adams. But managers who have been recently hired by an association could discover when they start their position that minutes are sorely lacking—or missing. So what should you do if you discover that minutes are not being kept as they should be?

If a statute doesn't say how long an association has to generate the first draft of minutes, the law would impose a "reasonable time" (30 days, depending on the circumstances). But at some point, it's probably impossible to reconstruct minutes; how could anyone know what happened at a board meeting on a certain date five years ago if all of those people are no longer on the board, or even if they are? However, at least a good-faith effort to fix the situation should be shown, Adams recommends. ♦

Insider Source

Joseph E. Adams, Esq.: Office Managing Shareholder, Becker & Poliakoff, Six Mile Corporate Park, 12140 Carissa Commerce Ct., Ste. 200, Fort Myers, FL 33966; 4001 Tamiami Trail N., Ste. 410, Naples, FL 34103; *www.bplegal.com.*

DOS & DON'TS

Use Authority to Add Community-Wide Amenity

Internet access is now a must-have for most people, including the members in your community. But as ubiquitous as the Internet is these days, some communities still require members to arrange for and pay for Internet access in their own units. If your association has decided that it wants to provide wireless connectivity (Wi-Fi) to the entire community, you'll have to find a way to pay for it, most likely by adding the cost to the monthly assessment. Often, this is an all-or-nothing proposition, under which all members must pay for the service for their units or it won't be set up at all. If the service you'd like to contract for is attractive, most of the members could agree to this. But some members might be loyal to the service they already have, so there could be some holdouts who won't want to share the cost of the new service.

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Dos & Don'ts
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Does the board have the authority to add a service that was not originally part of the association's common expenses? If the declaration gives the board sufficient power, then a bulk buy of technology arguably enhances the value of the real estate and is appropriate and enforceable, even against those owners who won't use it—just like the swimming pool or other amenities.

Be sure to consult with your attorney to check if your community's governing documents have very limiting language about what assessments can be used for. If this is the case, an amendment may be necessary.

✗ Don't Grant 'Unreasonable' Accommodation Requests

If a member comes to the management office requesting an accessible parking space because he's disabled, and you see no obvious signs of disability, like use of a mobility device, you might have to ask for the appropriate documentation to support the request, such as a government-issued license plate. But beware of members who ask for more than they need—for example, a member who asks you to reserve an entire section of the parking lot for his exclusive use, rather than one spot. While you do need to give him an accessible space, you don't have to give him the entire section that he's asking for just because he's disabled. That's because the request is unreasonable.

Fair housing law says that you have to make whatever reasonable accommodations a disabled person needs to have an equal opportunity to enjoy his home. But it doesn't say that you have to make any accommodation a member requests, no matter how unreasonable. In this example, the request is overly broad. It's unreasonable for the member to expect the community to set aside 10 regular parking spaces for his exclusive use, so you don't have to do it.

✗ Don't Let Member Rent Out Parking Spot

If your community includes mixed-use space, your association may be afraid that members will have to battle customers who are visiting retail stores or entertainment venues for parking spaces. But worse than that is the increased risk of crimes happening at the community if nonmembers have access to parking lots or garages. This can be commonplace if a member regularly rents out his space, creating a steady stream of strangers using that spot. To prevent unwanted visitors' access to the community, many associations restrict the use of parking spaces to members only. You can do this by passing a bylaw setting such a restriction.

Your bylaw should say that each parking space must be under the exclusive control of the member who owns the corresponding unit; spaces can't be transferred to nonmembers; and members must sell their parking space along with their unit.

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Dos & Don'ts

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Require Signature When Distributing House Rules

When enforcing your community association's house rules, you've probably heard members claim they weren't aware that they were in violation because they never received a copy of the house rules in the first place. This could lead to a sticky situation if a member's violation has damaged common areas or other members' units, but the member claims that he's not liable because, without a copy of the house rules, he had no way of knowing that his behavior was prohibited. And if you can't prove that you gave a copy of the house rules to the member, it may turn into a messy dispute.

To avoid this argument and ensure that the member won't be able to claim that it's your responsibility to remedy the damage he caused, require all members to sign a form stating that they've received a copy of the house rules when you distribute them. Also, require members who rent their units to acknowledge that they've received the rules and will give copies to their tenants. ♦

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