



Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

OCTOBER 2017

FEATURE

Set a code of conduct for maintenance workers that will reduce the risk of costly discrimination complaints.

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Train Maintenance Staff to Follow Fair Housing Rules

No matter how large or small the community association you manage is, you'll need to employ at least a few staff members. While they should receive training that's specific to their job, there's one type of training that's necessary for everyone: how to abide by the Fair Housing Act (FHA). It's easy to forget that maintenance workers, who fulfill many of their job duties without coming into contact with the community's members, will sooner or later have interactions with home or condo owners.

If an association fails to give its maintenance staff fair housing training and a member believes that a maintenance worker's conduct violated fair housing law, you could receive a discrimination complaint. You can prevent such complaints at your community—and avoid a potential lawsuit against the association—by setting a fair housing code of conduct for maintenance workers and properly training them on how to follow it.

How the FHA Relates to You

The FHA makes it unlawful to discriminate in housing—including the provision of maintenance services—based on race, color, religion, sex, national origin, familial status (that is, families with children), or disability. In addition, some state and local laws offer fair housing protections based on other characteristics, such as marital status, age, sexual orientation or identity, and source of income (such as government assistance).

The way to handle certain fair housing issues with maintenance workers isn't always clear cut—especially when the FHA doesn't specifically ban a certain type of action. For example, sexual harassment isn't specifically banned under the FHA. However, creating a sexually offensive environment constitutes sexual discrimination, which the law does prohibit.

For example, a female member could claim that a maintenance staff worker's—or even your—conduct interfered with her ability to enjoy

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her rights under the FHA. That's why it's important to educate maintenance workers about how to avoid not only situations that are expressly banned by the FHA, but also behavior that isn't specified but can create a situation that's tantamount to banned activity.

It's also important to tell your workers to be aware that they should abide by the code of conduct when interacting with all members, not just those members who traditionally complain about certain behavior. For example, harassment can be a problem especially for women, but in some cases for men.

Implement Code of Conduct

Education is a crucial part of the solution to fair housing compliance problems, but teaching your maintenance staff about fair housing law isn't enough because that doesn't necessarily teach them exactly how they're expected to behave according to the law. Give specific rules, with examples, to maintenance workers. Even if your rules don't cover every possible scenario, you can cover the most common mistakes and how to avoid making them.

Incorporate these rules into a fair housing code of conduct that instructs maintenance staff on how to behave around members and gives examples of how those rules work in practice. Your code of conduct, like our *Model Policy: Draft Fair Housing Code of Conduct for Maintenance Staff*, should cover these six rules. Remember to provide maintenance workers with examples of how failing to follow the code of conduct could end in a lawsuit.

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COMMUNITY ASSOCIATION MANAGEMENT INSIDER [ISSN 1537-1093 (PRINT), 1938-3088 (ONLINE)]
is published by Vendome Group, LLC, 216 East 45th St., 6th Fl., New York, NY 10017.

Volume 17, Issue 3

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Rule #1: Treat all members the same way. Tell your staff to avoid giving some members preferential treatment. Members who aren't favored by staff could interpret that as being discriminatory behavior. For example, you make repairs for members that you know well without requiring them to fill out the maintenance request paperwork required by association policy, but you ask other members to submit the paperwork before you'll make repairs. Because you've treated some members differently, it could open the association up to a discrimination charge.

Rule #2: Don't fraternize with members. Remind your maintenance staff that a worker who gets overly involved with community members might cross the line between friendly service and harassment. For example, you frequently see a particular female member around the community and often talk about the weather and current events. You ask her out to lunch. But if your attempt to take her on a date makes her uncomfortable, she could sue both you and the association for sexual harassment.

Rule #3: Don't enter a unit unless a member lets you in. Review with your maintenance staff the rule that they shouldn't go into members' units unless they are invited in. If a member is surprised by an unknown worker or is found in an embarrassing situation when he thought he was alone, he could complain that he was harassed. For example, after knocking on the door to a unit and getting no answer, you let yourself in to make some requested repairs. A female member, wrapped in a towel, walks into the room you're in. She had been in the shower but didn't hear you knock. The intrusion was an accident, but she may think that you acted inappropriately and file a sexual harassment lawsuit.

Rule #4: Don't be alone in a unit with a minor child. Emphasize to your maintenance staff that—unless it's an emergency—maintenance workers should never enter a unit if the only person home is a minor child. A parent may later claim that something inappropriate took place and, because children are susceptible to parental pressure, the child may confirm a claim that isn't true.

Instead, maintenance workers should immediately notify a supervisor of the situation, and the supervisor should make a record of what happened, including why the maintenance worker refused to enter the unit. The maintenance appointment should be rescheduled for a time when an adult will be at home.

For example, you knock on a member's door for a scheduled maintenance visit. The member's young daughter is the only one home and invites you to make the requested repair. Even though the repair was requested and you've been invited in, you shouldn't go inside. That's because someone may later claim that something inappropriate took place and file a lawsuit. (Although it may not be a fair housing-related discrimination claim, it could still put your association at serious risk, so this rule should be part of the code of conduct.)

Rule #5: Respect members' privacy. Maintenance workers may offend members by commenting on or complimenting their possessions, or otherwise snooping around. For example, you tell a member that a piece of art in his unit strikes you as odd. If the piece of art has religious, cultural, or personal significance, you might offend the member and inadvertently commit a fair housing violation.

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Rule #6: Enter unit in team for emergency service when member is away.

Security is a big issue with members who are concerned that maintenance workers could damage or steal their belongings if they make repairs when no one is home. But if emergency repairs are needed in a unit and the member can't be there, there is a solution. Two workers should enter a unit together, if possible, to avoid or minimize later allegations of damage or theft.

For example, you answer a call to fix a plumbing problem that could flood a member's unit. The member isn't home, but you let yourself in because it's urgent that you get the leak under control. Later, the member claims that some jewelry is missing from the unit and files a lawsuit asserting that she should be able to keep valuables without fear of association employees taking them. (Again, while such a claim may not involve fair housing law, it's a good idea to include this practical advice in your maintenance staff training.)

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MODEL POLICY

Draft Fair Housing Code of Conduct for Maintenance Staff

Ask your association's attorney about how you can adapt this fair housing code of conduct for use at your community. It instructs your maintenance staff on how to act around members in a way that won't prompt a fair housing lawsuit.

FAIR HOUSING CODE OF CONDUCT

ABC Community Association follows all federal, state, and local fair housing laws. All members of our maintenance staff shall at all times conduct themselves according to this Fair Housing Code of Conduct. Failure to do so may result in termination of employment.

1. **Treat all members the same way.** You may want to give better service to members with whom you're friendly. While you may feel that giving certain members special treatment is harmless, you're actually opening up the association—and yourself—to liability for discriminating against the members who don't get special treatment. So perform every task as if you were doing it for the same member.
2. **Don't fraternize with members.** Be friendly with all members, but don't be friends with any of them. You may not know how the member feels about the relationship. A member you believe to be a true friend may think of you only as a friendly maintenance technician. If you take the relationship a step too far, you might violate fair housing law.
3. **Don't enter a unit unless a member lets you in.** When you make a scheduled service call, knock loudly and call out to let the member know you are there. Do not enter the unit until the member lets you in.
4. **Don't be alone in a unit with a minor child.** Except in case of an emergency, you should NEVER be alone in a unit with a member's minor child. If faced with this situation, notify a supervisor immediately and reschedule the maintenance appointment.
5. **Respect members' privacy.** Do not touch or comment on the items in a member's unit. Just be polite, do your job, thank the member, and leave.
6. **Enter a unit in a team for emergency service when the member is away.** If emergency repairs are needed in a unit and the member can't be there, workers should enter a unit together, if possible, to avoid or minimize later allegations of damage or theft.

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PRACTICAL POINTER: When reviewing the FHA and any additional fair housing laws imposed by your state or local government, think about what association policies you could write, if you don't already have them, to help your staff comply with fair housing requirements. This also shows that your association is taking the extra step to make sure that the law is being taken seriously.

Target Specific Issues

Even after you've created a fair housing code of conduct for the maintenance staff and given them examples of how and why they need to follow the policy, give them training that's targeted specifically to maintenance issues, such as how they should act during service calls and other interactions with your members. And don't stop there—put your maintenance staff through the same fair housing training program that you give the rest of your staff. Being well versed in fair housing law will make them less likely to violate the law.

Without maintenance-specific instructions on how to conduct themselves, workers may not understand how those laws affect them and the work they do. It's not enough for staff to be only passingly familiar with fair housing laws. This can lead to trouble, especially in situations where inappropriate conduct can also lead to criminal charges, such as sexual harassment. ♦

IN THE NEWS

► Court Cases Challenge HOA Developer

A pair of state senators expressed their support for residents of a Florida homeowners association at a recent town hall meeting primarily concerned with gaining control of their community.

Association homeowners from a community that includes about 27,000 homes are fighting legal battles with the association and with the community's developer over the number of votes the developer would be able to cast in elections. Meanwhile, the developer sued the association in Circuit Court to get the maximum number of votes for undeveloped tracts. (The disputes center on lots that are not yet platted. The developer is given one vote for every home that could be built, which residents claim the company exaggerates. Homeowners each get one vote.) Residents say that the developer's ability to cast large blocks of votes resulted in an unfavorable board election for residents.

A lawsuit filed by three homeowners claims that the association violated the 1985 agreement that would have had the developer turn control of the community over to the residents. At issue are several laws that both sides say are controversial and require interpretation.

For their part, the senators plan to continue to fight for residents, scheduling a rally within the next month to publicize the issues.

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In the News*(continued from p. 5)***► Homeowners Ask HOA to Show Them the Money**

Homeowners in an Alabama community claim they've been paying hundreds of dollars every year but have no idea where the money is going because there are no meetings, no detailed budgets, and no communication from their association. They are blaming the developer.

The head executive of the developer and his daughter sit on the board of directors, which comports with laws governing associations in that area; however, homeowners haven't spoken with him in a decade. Meanwhile, the board collects about \$60,000 in dues annually.

While the developer, who spoke with news outlets after a complaint was filed, claims that he isn't required to disclose to homeowners where their money is going, state laws say otherwise. While associations formed after 2016 have to meet new state guidelines giving homeowners more of a say in running the organization, older associations must follow basic rules that allow homeowners to inspect certain records. Homeowners here say a court case like likely. ♦

RISK MANAGEMENT**Protect Association When Determining Disclosure of Records**

Privacy issues have always been taken into consideration when it comes to issues like medical information, but it might not occur to community members that seemingly more casual items are protected from general knowledge. So community members who want to inspect the records of their association—for a variety of reasons, some legitimate and some improper—might not realize that these records aren't automatically free game.

The issue becomes more complicated for managers and board members because it may be hard to tell whether a member wants access to records for a harmless reason, to harass the association, to gather confidential information to which the member isn't entitled, or for information that will support his case if he's planning to sue the association. This makes it difficult to know when to grant and when to deny requests when they're made. But properly controlling members' access to association records can save your association from having to deal with unnecessary arguments or even a lawsuit.

Because the job of the board is to serve the interests of the entire association, it's important for board members to know which requests for access to association records to grant and which to deny. Here's how you can screen out improper requests to obtain information that members aren't entitled to see.

Know When Confidentiality Applies

The right to inspect community association records is governed by three factors: applicable statutes, governmental regulations, and a particular association's

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governing documents. Governing documents will usually specify which records members have a right to see. And almost all states have laws on the issue.

Although the records you must share vary widely from state to state, the general rule in most states is to give members access to association records unless the requested records fall into an exception. For example, some records include information that, if disclosed, would constitute an invasion of privacy. Other records could harm the association if disclosed, such as confidential advice from the association's legal counsel.

Also familiarize yourself with the types of records that your state's law specifically bars an association from disclosing. For example, if disclosing a member's criminal past is a violation of state law, the association shouldn't give a member access to the records containing that information, or any other records that discuss that subject.

Deny Request for Certain Records

Keep the following types of records confidential unless your state law or governing documents say otherwise. As always, speak with your association attorney to help make the best decision.

Type #1: Members' documents not related to business. Don't let other members see documents provided by individual members that contain personal information not directly related to the business of the association. In some instances, an association will gather members' medical information for emergency purposes. That information should be kept private. Under most states' laws, members who seek access to association records must have a proper purpose—that is, one that's related to the member's membership interest in the association—for wanting to see them. Commercial use and personal financial gain are not valid reasons for accessing records. But even if the member establishes a proper purpose, that doesn't mean that you have to provide the sought-after records. Remember that your association must weigh the purpose against the reasons to keep the records confidential.

For example, documents and records that could allow a person to secure personal information that could be used to perform acts of identity theft should not be given to members.

Type #2: Privileged communications. Don't grant a member access to any letters or emails sent by your association's attorney to a board member or to you, if that letter or email is subject to attorney-client privilege. Documents and records cloaked in attorney-client privilege should be off-limits all of the time. Absent a vote by the board to waive the privilege, communications between a lawyer and the association should remain off-limits.

Don't be swayed if a member argues that because he's a member of the association, and because the attorney represents the association, the attorney represents the member too. This isn't true. You can explain to the member that the association's attorney is general corporate counsel whose client is the corporation, not the board or the membership.

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So how do you know if a communication is privileged? If the communication contains legal advice and was prepared in contemplation of actual or possible litigation, it's privileged and shouldn't be shared. So, for instance, if the communication involves the association's enforcement options against a member who's in violation of the rules, it would be privileged. But if it contains merely an explanation of how many votes are necessary to amend the bylaws, it wouldn't be privileged.

Type #3: Records concerning pending or potential lawsuits. The association might have records that involve a pending or anticipated lawsuit. Members shouldn't be given access to them. It could put the association at a great disadvantage in a future lawsuit if that information was shared with other members.

Type #4: Transactions in negotiations. The process of negotiating certain transactions, like contracts, is a very sensitive one, and often involves confidential information. In addition, part of the process often involves accepting bids from several vendors. It would undermine the integrity of the bidding process if members were able to access this information. For example, if a member were a friend of a vendor competing for the association's business, he might be tempted to look at the competing bids and report back to his friend.

Remember to restrict members' access to individual personnel records. If a member wants to know the total amount of how much the association is paying its employees, this information is permissible to share with him. But individual personnel files—including job evaluations and disciplinary actions—should be kept confidential. Employment records, including salary, benefits, and private files, are generally considered to be absolutely private, and shouldn't be shared with anyone except those people who need to know, such as a supervisor, board members, or the manager.

Give Thought to Gray-Area Records

There are two types of records that seem as though they would be private but are sometimes given to members who request them. What an association, in any gray area, should fight to keep free from inspection varies from jurisdiction to jurisdiction. Here are two items to consider:

Item #1: Closed meeting minutes. Some states permit boards to hold closed meetings, which exclude the participation of members. It seems as though the minutes of the meeting shouldn't be available, or it would defeat the purpose of having the closed meeting. And depending on the particular jurisdiction or definition of "closed meeting," minutes of closed meetings may be protected from member inspection. Or, depending on the jurisdiction, an owner may have the right to forcibly review or inspect them. In relation to "minutes," generally, if an association makes them, a court is likely to allow an owner to see them. Associations should, therefore, be judicious about making minutes when not required by law.

Item #2: Accounting records. Many members feel that they should get access to individual member accounts because they have the view that members are

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business partners with regard to the association, and if some partners aren't paying their dues, then the other partners are entitled to know this. In some jurisdictions, members have the right to inspect all generally kept/accepted accounting records, including those that reveal the names, addresses, and account balances of owners. But members' rights to force an association to allow inspection of these records vary from jurisdiction to jurisdiction.

All Requests Must Be Made in Writing

As with many things, keeping a written record can be helpful. To avoid disputes, any time a member wants access to the association's records, your association should require him to fill out a written request form. It is always the best policy in the context of any organization with respect to which laws and fiduciary duties are involved that records of inspection requests, and actual inspections, be kept. I really think that any record inspection or copying policy should include a written request component.

Ask your attorney to help you draft a form. The nature and extent of a written request form will vary from jurisdiction to jurisdiction because it may depend upon the law or other issues related to the access. For instance, if the law specifically allows an owner to inspect the association's delinquency report and that law makes no reference to any conditions, any form that imposes conditions may not be lawful. At the very least, the name, address, and contact information of the member should be requested. That's likely to be enforceable even with respect to records to which owners have a clear inspection right. He recommends that the association should also consider including on the form various disclosures and notices that may protect the association should the owner utilize the information inappropriately and/or improperly.

Your request form, like our *Model Form: Require Information from Member Requesting Records*, should require a member requesting to access association records to do the following:

Specify which records. If you don't limit the request in this way, members will ask for everything. Not only is that time consuming and unwieldy, but it might be strategically disadvantageous if the record request is because of a lawsuit between the association and the member [Form, par. 1].

State reason for access. This can help you determine whether the member has a proper purpose in seeking access to the records. You should also check to see whether the information in the requested records relates to the member's stated purpose [Form, par. 2].

Acknowledge and accept association's access, inspection procedures. Access and inspection procedures might include times, days, and locations at which the records will be made available for inspection, as well as a cost for inspecting the records. If the association requires an inspection fee, the member should have to agree to pay the cost before being given access to any records [Form, par. 3]. ♦

▶ ▶ ▶ *Model Form follows* ▶ ▶ ▶

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**MODEL
FORM****Require Information from Member
Requesting Records**

Require a member to do at least three things in order to make a request for access to your association's records. You can use this form at your community after showing it to your attorney, who might decide that additional information is wise to collect.

REQUEST FOR ACCESS TO ASSOCIATION BOOKS & RECORDS

MEMBER NAME: _____ DATE: _____

ADDRESS: _____

TEL. #: _____ EMAIL: _____

Pursuant to *[insert relevant section of state law, if any]* and *[insert relevant section of governing documents, if any]*, I hereby request that ABC Community Association (the "Association") provide access to the books and records of the Association.

1. The books and records that I wish to review are *(attach separate piece of paper if necessary)*:

a. _____

b. _____

c. _____

d. _____

2. I certify that my request to review the books and records of the Association is for a proper purpose related to my membership in the Association, and that this request is not for commercial purposes or my personal financial gain. Specifically, my reason for wanting to review the books and records of the Association is as follows:

3. I acknowledge and accept the association's records access and inspection procedures. I acknowledge and accept that the books and records of the Association will be made available to me only at such time and place as the Association's policy provides, and that there may be a cost associated with making these documents available to me. I agree to pay any costs associated with reviewing the books and records of the Association, including but not limited to the actual and reasonable costs of labor and photocopying material. I further acknowledge that these costs may be required of me prior to reviewing the books and records.

MEMBER SIGNATURE: _____ DATE: _____