HOA BOOKS AND RECORDS REQUESTS: CAN THEY REALLY WITHHOLD THAT?

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Homeowners frequently complain that their community association's leadership conducts business without adequately disclosing what they are doing. While the owners' rights and duties are defined in the governing instruments, the practical exercise of such rights often requires access to records kept by management. Virginia statutes require condominium and HOAs, with limited exception, to deliberate in previously announced, open meetings conducted in person or by videoconference. HOAs often decline to divulge records and correspondence to their members. Landowners have statutory rights to inspect books and records, as set forth in the Virginia Condominium Act, Property Owners Association Act, and Nonstock Corporation Act. The Condo Act and POAA provide broad access: "all books and records kept by or on behalf of the association shall be available for examination and copying." However, Va. Code § 55.1-1815's inspection rights are subject to enumerated exceptions and limitations.[1] Management frequently asserts such exceptions as grounds to withhold certain records from review. In this article, I will examine the scope of those statutory exceptions.

Proper Purpose. Subsection (B) requires that the request be, "for a proper purpose related to his membership in the association."[2] What is a "proper purpose?" Is the manager allowed to object on the grounds that they do not like the owner's motive in trying to discern what the HOA is doing with the assessment money, the maintenance obligations, and architectural controls? I don't think that's what this means. To define "proper purposes," one ought not look to a subjective standard, but rather the declaration of covenants, which functions as the "contract" between the lot owners and the board.[3] Looking to the rights and duties of the parties under the governing instruments and applicable law provides a context for the relevance of a particular request. A request submitted in good faith can be tied to a proper purpose.

Member in Good Standing. The statutes allow HOAs to resist books and records requests on the grounds that the member is not in good standing.[4] The POAA doesn't define what "good standing" means. Suppose the HOA sends out a notice stating that the owner hasn't paid an assessment or is in violation of the covenants. The owner responds with a books and records request relating to disputed issues. The HOA then refuses to produce the documents, asserting that the owner is in violation. Few governing instruments define "in good standing." However, if the HOA and owner are in a dispute where one or both sides are accusing the other of violating the instruments, it is incumbent upon the HOA to answer questions and provide documentation to substantiate the alleged violation. The "good standing" limitation is inappropriate where the request concerns the alleged violation. If the HOA is using a debt collector or law firm to collect an assessment, the federal Fair Debt Collection Practices Act allows the owner to request, independent of limitations under state

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[1] Analogous rules for condominiums are at Va. Code § 55.1-1945.

[2] Va. Code § 55.1-1815(B)(POAA) &Va. Code § 55.1-1945(B)(Condo Act).

[3] The Supreme Court has held that the relationship between a community association and its members is "contractual" in nature. *Unit Owners Ass'n of Buildamerica-1 Condo. v. Gillman* 223 Va. 752, 766 (1982) & *White v. Boundary Ass'n, Inc.,* 271 Va. 50, 55 (2006).

[4] Va. Code § 55.1-1815(B)(POAA) & Va. Code § 55.1-1945(B)(Condo Act).

law, that the law firm or collector "validate" the debt.[5] This pauses the debt collection activity during the verification process.

Personnel Matters. Subsection (C)(1) allows HOAs to deny requests for records pertaining to "personnel matters relating to specific, identified persons."[6] Generally speaking, employers are not allowed to divulge employee files to shareholders or customers. In 1992, the Supreme Court of Virginia considered *Grillo v. Montebello Condominium,* where a unit owner sought disclosure of the salaries of certain employees under an older (and since revised) version of Va. Code § 55.1-1945.[7] The court found the statute to be clear and unambiguous, rejecting the association's argument that because the statute did not specifically allow disclosure of salary information, such records could not be obtained. The specific amounts paid by the association to identified employees were, "records of the receipts and expenditures" of the condominium. Montebello's board had adopted a resolution excluding employee compensation figures from the books and records inspection. The court ruled that a condominium board could not abrogate an owner's statutory rights by adopting a contrary policy resolution.[8]

Contracts in Negotiation. Subsection (C)(2) allows HOAs to withhold, "Contracts, leases and other commercial transactions to purchase or provide goods or services, currently in or under negotiation."[9] HOAs are continually making, renewing, or cancelling contracts with managers, vendors, and contractors. To qualify as a "property owners association" under law, the HOA must be obligated to maintain common areas.[10] Written contracts effectuating such duties pertain to community-wide interests. Many contracts are renegotiated every year or two. A "plain meaning" reading of this section would limit it to contracts that are actively in negotiation. Otherwise, a vendor could have a friend in the community use a books and records request to interfere with the board's deliberation regarding a contract.

Pending or Probable Litigation. Books or records concerning pending or probable litigation may be redacted or withheld pursuant to (C)(3).[11] The POAA defines "probable litigation" as "those instances where there has been a specific threat of litigation from a person." When a dispute between the HOA and an owner, vendor or other party rises to active or threatened litigation, this may be of general interest to the community. If the HOA mismanages a common area, resulting in flooding on an owner's lot, documents may reveal its causes. The lot owner may threaten litigation if the HOA refuses to abate the stormwater diversion. Nothing in this subsection suggests that it applies to the underlying facts of the case. When HOAs are sued, some presidents like to communicate with their members about the lawsuit to present their own views.

Communications with Legal Counsel. The HOA's attorney answers to the board. Many owners mistakenly believe the attorney working for the association ought to answer to the members at

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[5] 15 U.S.C. § 1692(g).

[6] Va. Code § 55.1-1815(C)(1)(POAA) & Va. Code § 55.1-1945(C)(1)(Condo Act).

[7] *Grillo v. Montebello Condo. Unit Owners Ass'n*, 243 Va. 475 (1992)(Hassell, J.).

[8] *Id.*, 477-78.

[9] Va. Code § 55.1-1815(C)(2)(POAA) & Va. Code § 55.1-1945(C)(2)(Condo Act).

[10] *Shepherd v. Conde*, 293 Va. 274, 282 (2017); Va. Code § 55.1-1800 & § 55.1-1801.

[11] Va. Code § 55.1-1815(C)(3)(POAA) & Va. Code § 55.1-1945(C)(3)(Condo Act).

large.[12] However, it's important that the board be able to obtain legal advice confidentially.[13] Otherwise, their ability to comply with state law and the governing instruments could be impaired.

Individual Lot Owner or Member Files. In my opinion, subsection (C)(9) is frequently used in an overbroad fashion.[14] HOAs keep files related to their owners for purposes of collecting assessments, architectural applications, covenant violations, parking, and common area privileges. Lot owners can usually easily access files pertaining to their own lots, including architectural applications made by their predecessors. HOAs conduct email correspondence with lot owners about a variety of matters. Disputes among lot owners is a recurring concern. The "member files" exception is controversial when it comes to architectural controls and notices of violation. In many HOA governing instruments, the purpose of the restrictive covenants is to maintain architectural uniformity, keep the community looking nice, and handle things such as easements. These stated concerns made a part of the "contractual" relationship are by their very nature a "public" or "community-wide" concern. Easements reflected on the subdivision plat that affect various lots are often treated as common areas or at least affect the rights of a group of homes. If a neighbor is using their property in a way that constitutes a nuisance to an adjoining lot, then it is useful for the affected owner to know whether the changes made by the offending owner were consistent with any decided architectural applications. If a condominium manager refuses to give an owner authorization to lease a unit because that would result in too many rental units in the development, should the manager be required to disclose all the records pertaining to rentals of units when all of them concern individually owned properties? Almost everything that is regulated by the HOA pursuant to the declaration is a matter of both personal and community concern. For purposes of Va. Code § 55.1-1815(C)(9), what does "member files" mean? There are instances where disclosure of certain HOA records by other owners could lead to harassment. Some documents legitimately are withheld pursuant to this statute. However, the approach shown in the *Grillo* case for employee matters may be analogous here for owners' files.

Timing and Costs. The statutes impose some housekeeping limitations, such as giving the association a number of days in which to respond, limiting inspection to normal business hours, and charging copy work fees to reproduce records.[15] The statutes allow the HOA to charge not only for copies to include "materials and labor, not to exceed the actual costs of such materials and labor." Many HOAs have a resolution establishing a cost schedule.

Rules of Statutory Construction. The aforesaid exceptions to the scope of generally "discoverable" materials are a source of confusion. However, there are helpful judicial doctrines of statutory construction. Enactments constituting exceptions to a well-defined statutory policy are given strict construction.[16] For example, the principle of general disclosure in freedom of information statutes is construed broadly and courts generally construe FOIA exceptions narrowly.[17] An exception ought to be construed in the context of the statute as a whole. Virginia courts interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal. A statute is not to be construed by singling out a particular phrase.[18] The POAA and Condominium Act include

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[12] *Batt v. Manchester Oaks Homeowners Ass'n*, 80 Va. Cir. 502 (Fairfax July 6, 2010)(Ney, J.)(declining to extend the fiduciary-beneficiary exception to attorney-client privilege in the HOA context) *affirmed in part and reversed in part, on other grounds by Manchester Oaks HOA v. Batt*, 284 Va. 409 (2012).

[13] Va. Code § 55.1-1815(C)(5)(POAA) & Va. Code § 55.1-1945(C)(5)(Condo Act).

[14] Va. Code § 55.1-1815(C)(9)(POAA) & Va. Code § 55.1-1945(C)(9)(Condo Act).

[15] Va. Code § 55.1-1815(E)(POAA) & Va. Code § 55.1-1945(E)(Condo Act).

[16] *Commonwealth v. Edwards*, 235 Va. 499, 506 (1988)(cite omitted).

[17] *Roanoke City School Bd. v. Times-World Corp.*, 226 Va. 185, 191 (1983).

[18] *Va. Electric & Power Co. v. Bd. of Supervisors of Prince William Co.*, 226 Va. 382, 388 (1983).

"open meeting" requirements that limit what the board can do outside of a properly noticed meetings that members can attend in person or online.[19] Information that ought to be handled in an "open" meeting ought not to be withheld from disclosure from a books and records request. In 1999, Mark Earley, Attorney General of Virginia issued a formal opinion that because the general purpose of the association books and records statutes is to promote openness and availability of information, a HOA could not withhold the disclosure of meeting minutes until after they are formally approved by the board at a subsequent meeting.[20] Because the POAA does not include draft minutes as an exception, a homeowner can obtain them through a books and records request.

Nonstock Corporation Act & Common Law. In addition to the POAA and Condominium Act, community associations incorporated under the Nonstock Corporation Act ("NSCA") must disclose certain materials upon member request.[21] Document inspection under the NSCA varies from the POAA or Condominium Act. The NSCA enumerates specific materials that can be inspected such as accounting records, member lists, articles of incorporation, bylaws, resolutions, annual meeting minutes, communications to members, and the names and addresses of directors.[22] In the 1957 case *Bank of Giles County v. Mason*, the Supreme Court of Virginia construed the statutory record inspection rights for stock corporations.[23] The court observed that the statutory record inspection rights affirmed common law rights preceding those amendments. The court observed that the common law right of inspection rests upon the proposition that those in charge of the corporations are merely the agents of the stockholders, who are the real owners.[24] At common law, a stockholder is entitled to inspect corporate records at a proper time and place and for a proper purpose. The right must be exercised in good faith and for a reasonable purpose germane to his interest as a stockholder. However, the right is not absolute and cannot be enforced in a detrimental way. In 2018, the Circuit Court of Greene County applied the holding of *Bank of Giles County v. Mason* in an incorporated HOA case.[25]

Express or Implied Covenants. Although state statutes regulate HOA and condominium matters, it is the governing instrument, and the declaration in particular, that function as the "contract" between the parties.[26] The covenants, articles of incorporation, or bylaws may contain specific rules about the making, keeping and disclosure of association books and records. The statutes ought to be read in conjunction with the governing instruments. Even where the declaration does not expressly require the board to disclose relevant documentation, it is possible that the recorded covenants imply such an obligation. The Supreme Court of Virginia has found legally enforceable requirements in covenants where the language may not be explicit but to hold otherwise would deny something necessarily implied by the words used.[27] The declaration may require that certain materials be provided because they concern community-wide concerns regarding the board's obligations. This is consistent with the court's observation in the *Bank of Giles County* case that the directors, as fiduciaries, are agents of the owners with respect to the "business" of a corporation and a properly purposed request ought not to be denied. This is analogous to a common situation in commercial leasing. Most commercial leases require the tenant to pay a percentage of the "common area

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[19] Va. Code § 55.1-1815 (POAA) & § 55.1-1949 (Condo Act)

[20] Mark L. Earley, 1999 Op. Atty Gen. Va. 164.

[21] Va. Code § 13.1-932, § 13.1-933, & § 13.1-934.

[22] Va. Code § 13.1-932.

[23] *Bank of Giles County v. Mason*, 199 Va. 176 (1957).

[24] *Id.*, 181 (citation omitted).

[25] *Dogwood Valley Citizen's Ass'n v. Miller*, 99 Va. Cir. 479, 481 (Greene Co. Aug 28, 2018)(Durrer, J.).

[26] *Gillman*, 223 Va. at 766 & *White*, 271 Va. at 55.

[27] *Friedberg v. Riverpoint Bldg. Committee*, 218 Va. 659, 665 (1977).

maintenance" (CAM) for the commercial development. Landlords and tenants frequently get in disputes over CAM. Sometimes the lease expressly provides for the tenant to have a right to inspect the landlord's contracts, orders, bills, et cetera. pertaining to the disputed charges. In other instances, the lease imposes the obligation to pay, but is silent regarding the right to audit or inspect. The 2008 California appellate decision *McLain v. Octagon Plaza, LLC* is illustrative.[28] Kelly McLain signed a five-year lease with landlord Octagon Plaza, LLC to rent one of several retail shops in a commercial center. A dispute arose regarding CAM charges. McLain brought various causes of action, including a demand for an accounting of her share of CAM. McLain argued that the implied covenant required the landlord to substantiate its CAM charges. The appellate court decided that McLain was not entitled to dispute the need for the expenses or to audit the landlord's books generally. She was only entitled to disclosure of the documents supporting the landlord's itemized statement of charges for the limited purpose of verifying the accuracy of the statement. Under California law, when one-party exercises effective control over the records pertaining to a profit-sharing agreement, the implied covenant of good faith and fair dealing affords the other party the right to an accounting.[29] While not precedent in Virginia, the *McLain* case illustrates how common law principles may help construe real estate instruments.

Control over the creation, use, and dissemination of HOA and condominium records determines and delimits the practical exercise of property rights of the individual owners. To resolve an HOA dispute, one needs to know what one is looking for and how to resolve discrepancies between documents or what to conclude when a document is silent on a given question. Community associations create, amass and store large amounts of documents and information necessary to fulfill their legal duties. The exceptions and limitations on disclosure referenced in the statutes are frequently used in ways where it appears that management believes that the exceptions swallow up the general rule of disclosure. Sometimes an owner may try to abuse the books and records statutes, especially in acrimonious matters without lawyer involvement. There is scant case law interpreting the statutory books and records request rules. However, more general judicial doctrine may help attorneys construe the statutory exceptions in the context of the whole and the governing instruments. When it comes to amicably resolving disputes between HOAs and landowners, best practices call for the parties to make a good faith effort to resolve the matter without the necessity of litigation. To do this, it is necessary to properly understand the associations' duties when it comes to disclosing relevant information.

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[28] *McLain v. Octagon Plaza, LLC,* 71 Cal. Rptr. 3d 885, 159 Cal. App. 4th 784 (Jan. 31, 2008).

[29] *McLain*, 71 Cal. Rptr. 3d at 902.