

## **Testimony of Chuck Sheketoff**

### **Supporting HB 2584**

**February 10, 2015**

My name is Chuck Sheketoff and I live in Silverton in a home on property within the bounds of a planned community and homeowners association (HOA), the Abiqua Heights Homeowners Association (Abiqua Heights). My wife and I purchased the home in 2008. I am a member of the HOA and a past board member and president.

I am here today to urge you to support HB 2584.

The amendments clarify existing law for the layperson boards of the private governments that run homeowner and condominium associations. The bill addresses problems that have arisen in Abiqua Heights that I am confident are problems in other HOAs: HOA property owners/members being denied access to HOA business records.

#### Clarifying Existing Right to Business Records of the Association

The bill defines the terms in current law “records of an association” and “records kept by or on behalf of an association.” The definition is consistent with the definition of public records in Oregon’s Public Records Law (ORS Chapter 192) and ensures that communications to and from board members and board-sanctioned committees that are working on association business as they exercise their responsibilities to the planned community are business records that HOA members may inspect.

The bill also clarifies that a board may withhold only those records ORS 670(9)(b) allows to be withheld.<sup>1</sup> Under the bill, an HOA board may not make documents confidential that are not set forth in that statute as permissibly confidential. Last, the bill makes clear that requests in writing include electronic mail – email – requests and gives a time frame for responding to requests.

Each of these issues stem from problems at Abiqua Heights. Moreover, according to both a prior board president and treasurer, Abiqua Heights’ attorney at Vial Fotheringham, a law firm specializing in representing HOAs, advised the board that the board can refuse to release comments

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<sup>1</sup> ORS 94.670(9)(b) provides “(b) Records kept by or on behalf of the association may be withheld from examination and duplication to the extent the records concern:

(A) Personnel matters relating to a specific identified person or a person’s medical records.

(B) Contracts, leases and other business transactions that are currently under negotiation to purchase or provide goods or services.

(C) Communications with legal counsel that relate to matters specified in subparagraphs (A) and (B) of this paragraph and the rights and duties of the association regarding existing or potential litigation or criminal matters.

(D) Disclosure of information in violation of law.

(E) Documents, correspondence or management or board reports compiled for or on behalf of the association or the board of directors by its agents or committees for consideration by the board of directors in executive session held in accordance with ORS 94.640 (7).

(F) Documents, correspondence or other matters considered by the board of directors in executive session held in accordance with ORS 94.640 (7).

(G) Files of individual owners, other than those of a requesting owner or requesting mortgagee of an individual owner, including any individual owner’s file kept by or on behalf of the association.”

## Testimony of Chuck Sheketoff in Support HB 2584

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submitted to the board if the person submitting the comment did not first “release” the document when s/he submitted it to the board. In other words, the attorney, according to the board president and treasurer, advised that documents are presumed confidential unless the author states otherwise, the list at ORS 94.670 be damned. This amendments to the law contained in this bill will hopefully provide the clarity that law firm needs to understand that that business records are generally available to members.

The Vial Fotheringham firm also wrote a blog post that advised HOA board members to shield HOA business conducted with their personal email accounts by adopting “a resolution specifying that any emails, text messages, voicemails, or other electronic communications that are the private property of any board member are NOT association documents or records.” This bill would clarify that such a resolution creating an end run around access to HOA business records would not be authorized under law.

This behavior by Vial Fotheringham is admittedly a bit odd given that in training materials (attached) the firm tell their clients that “ALL” records are public to members except the current list in statute. This bill merely takes Vial Fotheringham’s instructions and interpretation of current law and them into statutory language: all records are available to members except those enumerated in statute.

In January 2013, when I asked the board treasurer to tell me the extent to which accounts receivable as of the previous September 1 were cleared by the end of the year, the board secretary wrote back saying “At this point it is NOYB.” While you cannot legislate against rudeness, this bill clarifies that it is the members’ business to understand the financial situation of the HOA.

When I sent an email asking for copies of a maintenance committee report submitted to the board and two contracts that already had been signed, I was told I had to put my request in writing and into the mail. The Abiqua Heights treasurer claimed, “I can not verify the validity of the sender of an email.” Never mind that he could have called me to verify. This bill makes clear that “written requests” for business records includes email.

More recently, my wife and I have tried to get copies of minutes of the Architectural Review Committee, a committee established in the CC&Rs and appointed by the board. The Board receives minutes from the ARC almost every month, and those minutes describe ARC approvals and denials of changes that were requested by homeowners in applications for approval to the ARC. Our Board refuses to make those minutes available to members.

### Summary

HB 2584 clarifies HOA members’ rights to access to HOA business records and that those rights may not be abridged by board resolutions, attorney end-runs, or procedural hurdles. I urge you to adopt them.

Thank you for your consideration of HB 2584. I hope you will support the bill.

# Transparency and Records

Mike Vial and Kyle Grant





*“Let’s never forget that the public’s desire for transparency  
has to be balanced by our need for concealment.”*

# Open Meetings Law

- Oregon Law
  - “All meetings shall be open to owners.” ORS 94.640; ORS 100.420
  - Exceptions for executive session
- What is a violation of the open meetings law?
  - Convening a quorum of the board without
  - Hitting “reply all”



# Open Meetings Law

- Who is the “assembly”?
  - Board meetings
  - Annual meetings
  - Special meetings
- Open forums at board meetings
  - Technically, owners may not speak at board meetings
  - But, we recommend opening up the forum for owners’ comments
  - Chair recognizes owners and can give a time limit
  - The Chair may remove a disruptive owner from a board meeting



# Open Meetings Law

- What is a violation of the open meetings law?
  - Making decisions in meetings closed to owners
  - Hitting “reply all” in non-privileged communications



# Who May Attend Meetings

- Title owners
  - Multiple owners
  - Significant other of title owner
  - Attorneys for owners
- Non-owner Residents?
  - Board's discretion to allow
  - Recommended that non-owner residents be allowed to attend





# Tips on Increasing Transparency

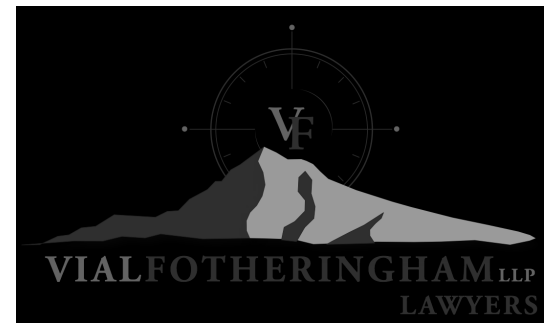
- Notices
  - Make sure all owners get notice of meetings
  - Include the agenda
  - State whether experts (i.e., attorney, manager, accountants) will be attending
- Newsletters and Websites
  - Keep owners in the know
  - Websites can avoid burdensome records requests
  - Provide methods for feedback such as surveys and online forums
  - Provide a calendar of events and meetings
  - Map of neighborhood
- Budget



# Tips on Increasing Transparency

"Whether it's good news, bad news or indifferent news, people will want to know."

– Frank Rathbun, CAI Spokesman



# What is an association record?

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## Records Request



**“You want to review the association’s records?”**

# What is an association record?

- Emails between board members?
- Tape recordings of board meetings?
- Owner lists?
- Electronic notices?



# Record Retention

- Applicable statutes
  - Planned community: ORS 94.670
  - Condominium: ORS 100.210



# Record Retention

- Technological considerations
- Record retention policies
  - How long, how, and where
  - Destruction
  - Litigation procedures
  - Responsibility for enforcing and monitoring



# Record Retention

- Records to keep permanently:
  - Architectural, structural, engineering, electrical and plumbing plans
  - Plans for underground site service, grading, drainage
  - All plans related to repairs and maintenance of property
  - Meeting minutes
    - Annual meetings
    - Board meetings
  - Corporate action taken without a meeting
  - Resolutions



# Record Retention

- Records to keep for at least 3 years:
  - All written communications related to general membership matters





# Record Retention

- Records to keep for at least 1 year:
  - Proxies and ballots



# Record Retention

- Records to keep current copies of:
  - List of names and addresses for current board members
  - Most recent annual report delivered to the secretary of state



# Record Retention

- Financial records
  - Types
    - Accounts payable
    - Bank statements and cancelled checks
    - CDs
    - Budgets
    - Inventories
    - Tax information
      - » *Keep tax returns permanently*
      - » *Preparation documents for at least 6 years from filing*



# Record Retention

- Non-statutory recommendations:
  - Contracts: 10 years from date of completion
  - Insurance policies: 10 years
  - Legal files: 10 years



# Inspection of Records

- Who may inspect?
  - Owners
  - Mortgagees



# Inspection of Records

- What may be inspected?
  - ALL records except:
    - Personnel matters
    - Contracts under negotiation
    - Documents compiled for executive session
    - Individual files of members
    - Any item that if disclosed would be a violation of the law
    - Communications with legal counsel



# Inspection of Records

## ○ Process

- Request must be in writing
- Must be for a proper purpose and in good faith
- Board may establish a record inspection policy
  - Reasonable fees for inspection
  - Time and place of inspection



# Attorney-Client Documents

- Considerations:
  - Once disclosed, privilege may be waived
  - Take precautions to prevent disclosure
  - Do not share opinions with the membership





**THE END**



# Association Records: Oregon Specifics and Information

Vial Fotheringham LLP Lawyers

Date: March 2012

By: Kevin Harker



Association records, especially for older associations, may become voluminous over time. While there is no clear definition of what constitutes an “association record,” generally, any document that involves association business is considered a “record.” And yes, that probably means email communications between board members.

Records are important for obvious reasons. They may show how or why certain board decisions were made, the financial status of the association, or the maintenance and repair history for common property. If the association is ever involved in litigation, records related to the litigation must be produced; the association may be sanctioned if it destroys or withholds relevant documents.

The question, then, is which records must be kept and for how long? With current technology, thousands of documents can be stored on a single disk or portable drive. Regardless of which documents are kept and how they are stored, every association should adopt a record retention policy or resolution for the current and future boards to follow.

For more information, speak with your attorney or check your state’s statutes for record retention requirements and general recommendations.

Below are some statutory record retention requirements, along with some general recommendations. For condominiums, turn to ORS 100.210; ORS 100.480(1); ORS 65.771, and for planned communities, review ORS 94.670(1); ORS 65.771.

## **I. Statutory Retention Periods**

### **A. Permanent Records**

1. The following documents, if received (at turnover):

a.. As-built architectural, structural, engineering, mechanical, electrical, and plumbing plans. ORS 100.480(1)(a); ORS 100.210(5)(j)(A); ORS 94.670(1)(a); ORS 94.616(3)(o)(A).

b. Original specifications indicating thereon all material changes. ORS 100.480(1)(a); ORS 100.210(5)(j)(B); ORS 94.670(1)(a); ORS 94.616(3)(o)(B).

c. Plans for underground site service, site grading, drainage and landscaping together with cable television drawings. ORS 100.480(1); ORS 100.210(5)(j)(C); ORS 94.670(1)(a); ORS 94.616(3)(o)(C).

d. All other plans and information relevant to future repair or maintenance of the property. ORS 100.480(1);

ORS 100.210(5)(j)(D); ORS 94.670(1)(a); ORS 94.616(3)(o)(D).

e. A list of the general contractor and the electrical, heating and plumbing subcontractors responsible for construction or installation of common property. ORS 94.670(1)(a); ORS 94.616(3)(o)(E). Does not apply to condominiums.

2. Minutes of meetings of members. ORS 65.771(1).

3. Minutes of meetings of board of directors. ORS 65.771(1).

4. Corporate action taken by members or directors without a meeting. ORS 65.771(1).

5. Records of all actions taken by committees of the board of directors in place of the board on behalf of the association. ORS 65.771(1).

6. Resolutions adopted by the board relating to characteristics, qualifications, rights, limitations and obligations of members. ORS 65.771(5)(c).

#### B. Three years

1. All written communications with the prior three years required by ORS Chapter 65 (Oregon Nonprofit Corporation Act). ORS 65.771(5)(e).

2. All written communications made to members in prior three years. ORS 65.771(5)(e).

#### C. One year

1. Proxies and Ballots-one year from date of determination. ORS 100.480(1)(b); ORS 94.670(1)(b).

*Recommendation: Retain proxies and ballots for amendments to governing documents which need to be recorded for one year from date of recording the amendment.*

#### D. Current Only

a. Articles of Incorporation and amendments currently in effect. ORS 65.771(5)(a).

b. Bylaws and amendments currently in effect. ORS 65.771(5)(b).

c. List of names and business or home addresses of the current directors and officers. ORS 65.771(5)(f).

d. Most recent annual report delivered to the Secretary of State. ORS 65.771(5)(h).

#### E. Indefinite

1. Financial Records - sufficient for proper accounting. ORS 100.480(2); ORS 94.670(3); ORS 65.771(2)

a. The last three annual financial statements, if any, must be available for inspection. ORS 65.771(5)(g).

b. The last three accountant's reports if annual financial statements are reported by a public accountant, must be kept for inspection. ORS 65.771(5)(h).

2. Types of Financial Records: Accounts payable and receivable ledgers; Bank statements, cancelled check; Certificates of deposit; Budgets; Tax returns; Audits, etc.

#### F. Recommended Non-Statutory Retention Periods

1. Contracts - ten years from date of completion of contract
2. Insurance Policies - ten years
3. Insurance Claims-ten years
4. Legal files-pleadings, judgments, other documentation - ten years
5. Tapes of board and association meetings - one
6. Miscellaneous records - ten years

### **IV. Disclosure And Inspection of Records**

A. Who may inspect. ORS 94.670( 8); ORS 100.480(8)(a).

1. Owners
2. Mortgagees

B. What may be examined. ORS 94.670( 8); ORS 100.480(8)(a).

1. All records of the association must be reasonably available for examination, except:

- a. Personnel matters relating to specific identified person or person's medical records. ORS 94.670(8)(a); ORS 100.480(8)(b)(A).
- b. Contracts, leases, and other business transactions under negotiation. ORS 94.670(8)(b);ORS 100.480(8)(b)(B).
- c. Communications with legal counsel that relate to matters (a) and (b) above. ORS 94.670(8)(c); ORS 100.480(8)(b)(C).
- d. Disclosure which would be in violation of the law. ORS 94.670(8)(d); ORS 100.480(8)(b)(D)

e. Documents, correspondence, management or board reports compiled for board or association by agents or committees for consideration by board in executive session. ORS 94.670(8)(e); ORS 100.480(8)(b)(E).

f. Documents, correspondence, or other matters considered by board in executive session. ORS 94.670(8)(f); ORS 100.480(8)(b)(F).

g. Files of individual owners. ORS 94.670(8)(g); ORS 100.480(8)(b)(G).

2. Must provide records within 5 business days. ORS 65.774(1).

C. Duplication of Records ORS 94.670(8).

1. Request must be in writing

2. Request must be in good faith and for a proper purpose

a. The purpose and the records the member desires to inspect must be described with reasonable particularity. ORS 65.774(3)(b).

b. Records must be directly connected with the purpose. ORS 65.774(3)(c).

D. Association must keep a copy, suitable for duplication, of certain records:

1. Which records

a. Declaration and bylaws, including amendments and supplements currently in effect; and recorded plat, if feasible. ORS 94.670(9)(a); ORS 100.480(9)(a).

b. Current rules and regulations. ORS 94.670(9)(a); ORS 100.480(9)(a).

c. Most recent financial statement. ORS 94.670(9)(b); ORS 100.480(9)(b).

d. Current operation budget. ORS 94.670(9)(c); ORS 100.480(9)(c).

e. Reserve study. ORS 94.670(9)(d); ORS 100.480(9)(d).

f. Architectural standards and guidelines. ORS 94.670(9)(e); ORS 100.480(9)(e).

2. These records must be furnished within 10 business days of request. ORS 94.670(10); ORS 100.480(10).

E. By resolution, Board may establish reasonable rules. ORS 94.670(11), ORS 100.480(11).

1. Governing frequency, time, location, notice and manner of examination and duplication of records

2. May impose reasonable fee for furnishing copies of documents

a. May include reasonable personnel and material costs for furnishing documents. ORS 94.670(11); ORS 100.480(11); ORS 65.777(3).

b. The charge may not exceed the estimated cost of production or reproduction of the records. ORS 65.777(3).