

MERCERTRIGIANI

COMMON INTEREST COMMUNITY OMBUDSMAN DETERMINATIONS

BOOKS & RECORDS

The statutory right to inspect and copy association books and records does not create an association obligation to make copies for a requesting owner.

Regency at Dominion Valley Owners Association. File #2024-00556, September 25, 2023. The Ombudsman determined that Section 55.1- 1815 of the Virginia Property Owners' Association Act ("Act") required an association to permit inspection and copying of association books and records. However, the determination states that a member does not have a right to receive copies of Association books and records. Otherwise stated, the association has no obligation to make copies for the requesting owner.

This is consistent with the principle that an owner must pay for the cost of the association providing copies of requested records.

In addition, there is no five-day requirement for the Association to respond if the requesting owner asks the Association to make copies of requested records. The five-day requirement pertains to making records available for examination and copying.

A Books & Records request must state a purpose.

Pine Harbour Property Owners Association. File #2023-02205, April 3, 2023. The Ombudsman determination reiterates prior determinations that Section 55.1- 1815 of the Act requires that a Books & Records request state a purpose. While the scope of "proper" purposes is broad, an association is not obligated to provide access to books and records if the request does not state any purpose at all.

This determination also referenced the requesters members request to have books and records provided on a flash drive. These concerns were not part of the original complaint and were not considered by the ombudsman, but past determinations have stated that the Act does not require that records be offered for inspection and copying in any particular format.

Postage costs related to association complaints cannot be charged under a Books & Records fee schedule.

Chimney Hill Community Association. File #2023-01239, January 3, 2023. An association cannot charge an owner for certified mail costs when sending notices related to association complaints. The stated justification for the cost was the fee schedule of the association books and records policy. The Ombudsman determined the cost of mailing correspondence related to an association complaint is not permitted under the Books & Records provisions of the Act, and there is no other authority cited to charge such expenses to an association member.

The Ombudsman wrote that it was beyond the scope of the Ombudsman's review as to whether such a charge, if authorized by the association declaration, would be permissible. The determination was issued prior to the *Burkholder* opinion upholding a challenge to the use of assessments for expenses unrelated to the common area, but the Ombudsman's opinion is consistent with the rationale in *Burkholder*.

MEETINGS AND COMMUNICATIONS

Virtual association meetings cannot be waylaid by an owner request for an in-person alternative.

Bull Run Swim and Racquet Club. File #2024-00717, October 11, 2023. This was one of two determinations recently issued by the Ombudsman regarding an owner's challenge to association meetings that are conducted as web meetings. The Ombudsman noted that Section 55.1-1832.G of the Act requires an association to make a reasonable alternative, at its expense, for a person to conduct business with the association without use of the electronic means offered.

However, the Ombudsman determined that the term *conducting business* is not defined in the Act, and Section 55.1-1832 does not overrule Section 55.1-1832.F, which allows association meetings to be held entirely by electronic means.

The Ombudsman issued a similar opinion in a matter on October 25, 2022, Groundhog Mountain Property Owners Association, File no. 2023-00825.

Use of Executive Session

Wexford Hills Homeowners Association. File #2024-00071, July 31, 2023. This matter complained about the misuse of executive session. The Ombudsman determined that due to the lack of record as to what was said by board members in executive session, the Ombudsman was not in position to make any determination as to the propriety of executive session.

The Ombudsman reasserted this opinion on September 5, 2023 in **Unit Owners Association of Regency at McLean, A Condominium**, File #2024-00372, stating that "complaints related to executive session are always very difficult to determine since the very nature of an executive session is that it is a private meeting of the board and only for the very specific reasons set forth in common interest community law."

However, on December 19, 2023, the Ombudsman issued a determination in **Cameron Station Community Association**, File #2024-01275, that addressed the use of executive session to consult with legal counsel under Section 55.1-1816.C(ii) of the Act when legal counsel was not personally present at the executive session.

The determination stated "There is nothing in Section 55.1-1816.C that provides for review of attorney-client privileged legal advice. The only reference to legal counsel is that a board may enter executive session to consult with legal counsel. There is no language in the statute that allows for the review of written advice from an attorney in executive session." The Ombudsman found the association to be in violation of the Act when it entered executive session for the purpose of discussing written legal advice.

Blocking Facebook posts on an Owner communication platform

Great Creek Landing Property Owners Association. File #2024-00070, July 26, 2023. The Ombudsman addressed a complaint alleging the association violated Section 55.1-1817 of the Act by disapproving pending Facebook posts by members using the statutorily-mandated means of communication amongst the membership.

The Ombudsman determined that without a reason given to block a members Facebook post, and without providing a reason for blocking such posts, the member was denied the right to communicate among other owners. The Ombudsman required the association to reconsider its rules governing its Facebook page and ensure that the association is not denying owners the right to use this method of communications. Associations must ensure a lawful right exists to prohibit an owner's post to a designated platform, and may wish to consult an attorney to discuss its communication policy.

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