

Statutes, Good Business and Good Sense Require Effective Records Management

A homeowner association is really a small business, and like any business, it generates volumes of documents. Invoices, bank statements, minutes of board meetings, contracts, communications with owners and vendors, committee reports — the list is endless and the document management task can be onerous.

All of the varied documents associations produce are not equally important, of course, but for trustees wrestling with mounds of paper, the distinctions between what is essential and what is irrelevant aren't always clear. While some boards might be tempted to base those distinctions primarily on the amount of storage space and administrative help available to them, it is state laws, the association's governing documents, and good business practices that dictate which records associations must preserve and for how long.

Homeowner association records generally fall under two broad categories — financial and corporate — with retention requirements varying from “save forever” to “dump at will,” depending on the risks incurred by either preserving the documents or failing to do so.

Some Things Are Forever

Financial records include many that should be stamped permanent, because they help to chart the community's financial history and because the information they

contain could help to inform current decisions. This list includes the association's general ledgers, journals, and cash books along with year-end financial statements, annual tax returns and the worksheets related to them, audit reports, and depreciation schedules.

On the second tier of important financial records are those that might be subject to an IRS audit or other accounting-related challenge: Accounts payable and accounts receivable ledgers, expense records, canceled checks, electronic payment records, purchase orders, and vendor invoices, are all examples of records associations probably don't have to keep forever, but should preserve for at least seven years. Less significant but still important financial documents, such as bank statements, deposit slips, budgets, and petty cash vouchers, should be held for at least four years.

The various retention periods I've suggested for financial records are just that — suggestions. Some industry professionals have different views about the appropriate retention periods for different records, so boards should follow the schedules their accountants and attorneys recommend.

Creating a Corporate History

Vital corporate records, like some financial records, are part of the community's infrastructure and so should be retained forever. The association's governing documents — the articles of incorporation, the by-laws, and the CC&Rs (covenants,

conditions, and restrictions) are obvious candidates for that list, along with deeds, major contracts, and board resolutions. The historical perspective these documents provide is important, among other reasons, because the membership of boards changes over time, and you don't want departing trustees to take the association's collective memory with them when they leave. New trustees need a basis for understanding the policies and procedures established by former boards, and trustees who have served for many years need a written record to remind them of the reasons for decisions in which they may have participated long ago.

For obvious reasons, associations should retain copies of their rules and regulations for as long as they are in effect, but there are also good arguments for retaining old rules even after they have been overturned, to provide a record of how the existing rules have evolved and a reminder of the need to review old rules periodically, to make sure they are still necessary and relevant.

Associations should hold on to most records related to former employees for at least seven years, with the exception of their medical records, which, some experts say, should be retained for at least 30 years. Seven years is also a good retention benchmark for expired contracts and old leases, insurance records, accident reports, and settled insurance claims.

Minutes of board meetings should be retained, if not forever, then at least for as long as the policies and decisions they document can be challenged in court. A similar

retention policy applies to the recommendations and actions of association committees, along with records documenting complaints filed by homeowners and how they were resolved.

Corporate records relating to individual units or unit owners should be retained in separate unit owner files as well as in the board's general corporate files. General correspondence with unit owners, copies of work orders, complaints, and violation notices all should be retained until the expiration of the statute of limitations on any legal action they might trigger. Requests for architectural modifications, decisions on those requests and other documents related to them, on the other hand, should become part of each unit's permanent record to provide the background information future owners will require. Some states require the sellers of condominium units or the associations to give prospective buyers detailed information about any structural changes prior owners have made. Whether that disclosure is required or not, buyers will want to verify that any changes in the unit comply with local building codes, and that prior owners obtained all of the association and other approvals required for the alterations they made.

E-mail Caution Advised

While boards should be scrupulous about preserving essential records and documenting vital information, everything board members say and do should not necessarily be recorded. Electronic communications come immediately to mind. E-mail messages have become ubiquitous, speeding the exchange of information or impeding

it, depending on how you feel about the dozens, or hundreds, or thousands of messages that flow through e-mail in-boxes every day.

Volume isn't the only issue. As some former corporate executives now serving time in various prisons can tell you, e-mail messages can be used in legal proceedings — a prospect that should make anyone who communicates via e-mail at least somewhat cautious about what they say.

For members of association governing boards, state open meeting laws may create another potential concern. Those laws, requiring governmental entities to conduct their business in public, don't apply to community associations in all states. But where they do, trustees who conduct association business or even discuss association issues in e-mails could be accused of violating the open meeting requirement, subjecting board decisions to legal challenges and possibly invalidating them.

Bad Words

Potential liability concerns should also restrict the level of detail contained in the minutes of board meetings and limit how and where those minutes are distributed. The minutes provide an official and permanent record of the board's actions, and the need to ensure the accuracy of that record is obvious. As a general rule, then, the minutes should remain confidential until the board has reviewed and voted to approve them, and the final, published version should be limited to a record of the salient facts — the

issues discussed, the motions made, the votes taken, the decisions made and the policies adopted. A detailed narrative of the discussion — who said what to (or about) whom, is neither necessary nor advisable.

Recording statements made during a heated discussion about a controversial issue could create serious problems for individual board members, the association, or both. I recall one situation in which a board member read into the minutes a lengthy harangue, accusing the previous president of embezzling funds and accepting kickbacks from contractors. Acting on our advice, a majority of the board voted to exclude those comments before approving the minutes of that meeting. However, several trustees left immediately after taking that vote, leaving behind a majority of members who disliked the former president. Those trustees voted to reconsider the minutes and, on reconsideration, restored the deleted diatribe. Even worse, as was this association's practice, the minutes were posted on the community's Web site, where they were accessible not just to residents but to the public at large. The former president filed a libel suit that the association eventually settled out of court, incurring a sizable expense that more sensible records management practices would have avoided.

Some states, Virginia among them, have laws requiring boards to publish and distribute to owners drafts of the minutes proposed for approval before the trustees have accepted them. In those cases, the board members charged with recording the minutes should be judicious about the notes they take, and those who speak during the meetings should be careful about what they say.

Although posting the minutes, once approved, on the association's Web site is an effective means of distributing them to owners, boards should consider locating that information in a password-restricted area of the site, accessible only to community residents. Limiting public access in this way may give boards some limited protection from libel actions under a qualified privilege that applies to information available only to owners who have a right to know it.

Libel isn't the only concern. Businesses don't broadcast details about their internal operations to the public at large and community associations shouldn't either. Accordingly, financial information, contracts, and other association business matters should be posted, if at all, on a members' only section of the Web site.

For Whose Eyes Only?

What documents and records should homeowners be allowed to see? Again, state laws and association governing documents will determine the answer.

Condominium laws in many states, including Virginia, require associations to give owners reasonable access to virtually all association records, with a few notable exceptions. These include:

- Documents covered by attorney-client privilege – for example, communications about pending litigation.
- Information about contracts currently under negotiation (although signed contracts should be available to owners who want to review them).

- Communications that might violate individual privacy rights, for example, disciplinary actions or medical issues involving association employees.

Within the framework established by statutes and/or the association's governing documents, boards should develop a policy that describes clearly which records will be accessible to owners, under what circumstances, and subject to what restrictions. Experience suggests that boards are more likely to get into trouble by disclosing information than by withholding it, so we generally advise trustees to err on the side of providing too little access rather than too much. However, some attorneys take the opposite view, arguing that restrictive policies encourage suspicion and breed distrust among owners, who assume that trustees who withhold information must have something to hide. Boards and their attorneys should consider all of these factors and develop policies that are appropriate for their communities.

Even under the most liberal policies, some information should not be disclosed. In addition to the statutory exceptions noted earlier (for legal, contractual, and some personnel matters), confidential information should include the identities of homeowners who are delinquent in the payment of their fees or assessments.

Two competing sets of rights must be balanced here. On the one hand, owners have a right to demand information about the financial condition of communities in which they have a vested interest. However, owners who

purchase homes in common interest ownership communities retain a reasonable expectation that their personal financial information will be treated confidentially, and they would have grounds for suing the board if their privacy rights are not respected. The board would also be subject to a potential libel action if an inaccurate or outdated report identifies an owner incorrectly as delinquent. To avoid these legal risks, the financial information available to owners should provide aggregate delinquency totals only; it should not identify the owners who have fallen behind in their payments.

The policies governing access to association records should be reasonable and clearly disclosed, allowing owners to review (but not remove) original documents at specified times (usually within normal business hours) and to copy those documents at the owners' expense.

Equally important, boards should establish and adhere to procedures for ensuring the safe storage and rapid recovery of all vital association documents. Among other measures, boards should:

- Regularly back up information contained in computer files.
- Maintain duplicates of computer files and paper records in a safe, off-site location.
- Require all board members to be familiar with and able to implement the association's disaster recovery plan.

For communities that have not yet developed comprehensive disaster recovery policies, Hurricanes Katrina and Rita should have provided a loud and urgent wake-up call.