

The “Why” of Executive Sessions

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“Executive session”: fighting words in most associations! The general complaint is that the board abuses its right to meet in “executive” (closed) session. But the fact is that most owners, and some directors, don’t understand why it is very important to keep some of the board’s deliberations under wraps, even to the point of not discussing these items with homeowners. This article explains why boards can, and *should*, preserve the confidentiality of executive sessions.

At the outset, let’s review the very short list of items which a board is permitted to take up in executive session under the Davis-Stirling Common Interest Development Act: litigation, personnel, contract negotiation, member discipline, and proposed member payment plans for overdue assessments. There is a distinctive reason for each of these items to be kept in confidence.

Litigation. Most readers are familiar with the attorney-client privilege, that is, the right to refuse to disclose, even in court, communications between an attorney and his or her client. This is considered proper, because without the guarantee of confidentiality, neither the client nor the attorney would feel safe in being completely honest. The client might withhold relevant information, and the attorney might not give an answer critical to the client’s proper defense, if either had reason to fear civil or criminal actions based on what was said. This privilege is considered of paramount importance to our system of jurisprudence: “The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases.”

Homeowners are often confused about the nature of the attorney’s representation. It is not uncommon to hear a homeowner contend that the attorney really represents individual owners, and so should answer all questions posed by owners about association (board) actions. Not so. By the rules of professional conduct, an attorney representing an organization does so by receiving information and giving advice to that organization’s highest governing body—the board of directors of a

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homeowners association. Nor does the owner pay the attorney's fees. Rather, the owner pays assessments and the board pays bills.

California courts have already considered the issue of who the attorney represents, and in the face of a claim by an owner to confidential communications between the association and its attorney, the court clearly indicated that the board, not the owner, is the holder of the privilege:

[Homeowners] argue they were the "true clients" of [the Association's attorney] rather than [the association], a "faceless" association which could only act in a "representative" capacity of the general membership. They contend [the association] owed them a fiduciary duty to act in their best interests as "the rightful owners who are paying with their assessments for the legal services being rendered on their behalf." They characterize as the "crux" of the matter the question: "For whose benefit is the lawsuit being brought?" ... We have squarely rejected this equation ... The Supreme Court was not persuaded to the contrary because the beneficiaries were indirectly paying attorney fees which came out of the trust. That is because "[p]ayment of fees does not determine ownership of the attorney-client privilege. . . . [T]his question of cost allocation does not affect ownership of the attorney-client privilege." *Smith v. Laguna Sur Villas Community Ass'n.* (2000) 79 Cal.App.4th 639 , quoting *Wells Fargo Bank v. Superior Court*, *supra*, 22 Cal. 4th at p. 213.

To summarize, the confidentiality of communications between an attorney and her client is considered a valuable social policy, encouraging free exchange of information and the fair administration of justice.

Personnel. In our highly litigious, employment-challenged society, one of the fastest ways to get sued is to interfere with someone's ability to find employment. When directors openly discuss with others—even homeowners—any perceived failings of a vendor or employee, the association (and the directors) have essentially invited a suit for defamation, invasion of privacy, or a related employment tort. See, e.g., *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468. In construing the Brown Act's very similar provision allowing personnel discussions to take place in closed sessions, the court noted that, "The purposes of the personnel exception are (1) to protect employees from public embarrassment and (2) to permit free and candid discussions of personnel matters by a local governmental body." *Morrow v. Los Angeles Unified School District* (2007) 149 Cal.App.4th 1424.¹ The same is true for personnel decisions in the association context.

Contract Negotiations. There is considerable discussion as to why "contract negotiations" should take place in executive session. Generally the rationale for doing so overlaps with the exception for personnel issues discussed above. As with

¹ The Brown Act is the California law which guarantees the *public's* right to attend and participate in meetings of *local legislative bodies*. A homeowners association is not subject to the Brown Act.

personnel issues, in contract negotiations the board needs to be able to discuss not only what it knows to be true, but what the directors or the manager speculates may be true—all without fear of being sued. In addition, discussing contract negotiations can be particularly problematic where the association is attempting to work through a valid competitive bidding procedure—open discussion of a competitor’s bids can result in information being transmitted to other bidders, and may tempt the recipient of that information to be less than frank about pricing or qualifications.

Member Discipline. While many boards (and some aggrieved neighbors) would like to broadcast the board’s disciplinary activities, that is very unwise. As with personnel matters, the board needs to be free to discuss what is known, both about the violation and about the violator. The goal of discipline is compliance, not punishment—unless punishment is the only effective tool to secure compliance. And which “tool,” whether it be fines, suspension of privileges, or the like, is likely to be effective can only be determined if the board and management are free to discuss what each knows about the violator. The question of whether to file suit against an owner, and whether such would be well-founded or defensible, are matters deserving of frank and open discussion.

Member Payment Plans. In happier economic times, some boards were in the habit of posting the names of delinquent homeowners—a “hall of shame” aimed at forcing the owner to pay up. Since then, massive delinquencies, coupled with state and federal fair debt collection laws, have combined to make this practice very unwise. An owner’s finances are private, and to the extent that information is given to the board to allow it to evaluate a proposed payment plan, the information must remain confidential.

Conclusion. As one court, in rejecting a homeowner’s claim to see privileged documents, noted, “It is no secret that crowds cannot keep them. Unlike directors, the residents owed no fiduciary duties to one another and may have been willing to waive or breach the attorney-client privilege for reasons unrelated to the best interests of the association....” *Smith v. Laguna Sur Villas Community Ass’n*. (2000) 79 Cal.App.4th 639, 645. The same may be said of the other types of confidential information received by the board from time to time. There are, quite simply, some items that are best kept confidential. And while the Association may, eventually, win a case based on the improper disclosure of confidential information by a resident or director, the cost to defend the suit, and the resulting community-wide acrimony, would be unnecessary but for “loose lips.”