



SB1196 Has Changes Regarding Privacy Rights, Records

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Today's column continues our review of SB 1196, which becomes effective July 1, 2010. Today's topic, some significant changes regarding owner privacy rights and official records.

The changes to the law involve both condominium associations and homeowners' associations, basically making the two laws the same, though there are some subtle differences. Regrettably, the Legislature ignored cooperatives in these changes.

Both the Florida Condominium Act (Chapter 718) and the Florida Homeowners' Association Act (Chapter 720) basically provide that every record kept by the association is an "official record" and available for inspection by an association member upon written request. The member need not say why they wish to inspect a record, general corporate laws requiring demonstration of "proper purpose" are inapplicable in the association context.

Notwithstanding the broad requirement that all records be made available for member inspection, the statutes contain several exceptions, meaning that certain official records are not to be produced for member inspection. The exemptions which have existed in both statutes for quite some time include certain attorney-client privileged and

"work product" information, medical records of owners, and information obtained by an association in connection with the approval of the sale, lease, or other transfer of a unit or parcel.

The Condominium Act was amended in 2008 to also exempt social security numbers, driver's license numbers, credit card numbers, and certain other "personal identifying information." SB 1196 adds these exemptions to the homeowners' association statute as well. Additionally, under both laws, "personal identifying information" of any person may not be provided except the person's name, unit designation, mailing address, and property address.

Most significantly, both statutes have now been amended to specifically exempt e-mail addresses, telephone numbers, emergency contact information, and any address of a unit or parcel owner other than as provided to fulfill the association's notice requirement from the ambit of "official records." Stated otherwise, it is now (or will be as of July 1) a violation of the statute to provide unit owner or parcel owner e-mail addresses or telephone numbers to the association membership, either under the auspices of an official records request, or generally.

Many associations publish directories which include the name of association members, address information, telephone numbers, and even e-mail addresses. Under the new law, these directories are no longer proper. Presumably, association members who wish to voluntarily disclose private information would have the right to waive their privacy rights under the new statute, for example by permitting their telephone numbers and/or e-mail addresses to be included in an association directory. Such a waiver should be clear in scope, and prepared or reviewed by the association's legal counsel.

There is one exception to the rule on e-mail privacy. Where an association provides notice to members by "electronic transmission" (which is permitted by law if so authorized in the bylaws), and a member has consented to receive notice of association meetings by electronic transmission (which must be done in writing and can be revoked at any time), the member's e-mail address is part of the "official records", since that is where official notices to the owner are sent. However, once a member revokes their consent to receive notices by electronic transmission, the e-mail address must be removed from the association's official records.

The condominium statute now provides that the association is responsible for misuse of information provided to an association member if the association has an affirmative duty not to disclose such information. For whatever reason, a similar clause was not added to the Homeowners' Association Act.

Both statutes have also been amended to provide that personnel records of association employees, including but not limited to disciplinary, payroll, health, and insurance records are exempt from the definition of "official records", and thus not available to association members. This is a completely new concept in the condominium statute. In the homeowners' association context,

the previous statute exempted disciplinary, health, insurance, and personnel records, but did not specifically apply to payroll records. SB 1196 clarifies that payroll records are also exempted for HOAs. This exception only applies to association employees, and would not apply to independent contractors, such as a management company.

Both statutes also add a couple of more exemptions. First, any electronic security measures that are used by an association to safeguard data, including passwords, are exempted from official records. Also, software and operating systems used by an association which allow the manipulation of data are exempt from the official records, even if the unit or parcel owner owns a copy of the same software used by the association. However, the data itself is part of the official records of the association, which presumably means that it would need to be supplied in a printed format.

Several changes were also made in the homeowners' association statute which do not appear in the condominium law. First, Chapter 720 now provides that an association's failure to provide access to records will only create a rebuttable presumption of willfully withholding the records if the parcel or unit owner request was submitted by certified mail, return receipt requested. Further, Chapter 720 now provides that if an owner requests copies of records which exceed twenty-five pages in length, and the copies are made by the association's management company, the owner may be charged the actual cost of copying (including any reasonable costs involving personnel fees and charges at an hourly rate for vendor or employee time to cover administrative costs to the vendor or association).

Next week's column will continue our review of SB 1196 with an emphasis on changes to annual meeting and board election procedures.

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