

The Dreaded Books & Records Request...

What exactly are members entitled to see?

Author: Marilyn Ratzel, Partner

Homeowners ask much from their boards of directors and managers, but one of the most common and often contentious requests is to review association books and records. Whether the request comes from an owner simply looking for more information on community operations or a disgruntled owner with an agenda, owners' expectations of what records they may inspect often far exceed what they are legally entitled to review, spurring conflict. Likewise, some boards of directors take affront to owner requests and often are reluctant to provide records to owners, particularly disgruntled or difficult owners.

Understanding the scope of what records members are entitled to see under an association's bylaws and Georgia law can help set the expectations of the membership and of the board of directors so that books and records requests can be handled smoothly. Below are some frequently asked questions and issues that arise with record inspection requests.

Is a member entitled to see all the books and records of the association?

The answer to this depends on the association's bylaws. A member's right to review association records is usually governed by the bylaws of the association. An association's bylaws will typically address member record review rights in one of four ways:

- **All books and records.** Many association bylaws state that an owner is entitled to review and copy "all books and records" of the association. If an association's bylaws provide that members may view "all books and records," then members of the association are entitled to see all association books and records. This includes records that otherwise are not required to be provided under the

Georgia Non-Profit Corporation Code, which is the state law governing non-profit corporations ("Code"). If an association's bylaws contain a provision allowing for review of "all books and records," the association may want to consider amending its bylaws to provide that books and records reviews will be done in accordance with the Code. Doing so will not only create consistency between the law and the association's bylaws, but it will also provide a more solid framework for the association when it comes to handling books and records requests.



3520 Piedmont Rd
Suite 415
Atlanta, GA 30305
P: 404.350.1192
F: 404.350.1193

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- **Specific list of books and records open to review by members.** Some bylaws list the records which are available for member inspection and review. If an association's bylaws include a specific, all inclusive list of books and records which a member is entitled to review, then members of the association generally are entitled to review and copy only those listed records. Members will not be entitled to review or copy any other records that are not specified on the list.
- **Governed by the provisions of the Code.**
- **Contains no provisions addressing books and records.**

If an association's bylaws fall within either of these last two categories, the books and records which members are entitled to see will be governed by the Code. For those associations that are bound by the Code for record requests, the Code has two categories of books and records that a member is entitled to view and copy.

The first category are those records that members are entitled to inspect and copy, at a reasonable time and location as specified by the corporation, and upon at least five business days written notice to the corporation, as follows:

CATEGORY I:

- The association's articles of incorporation;
- The association's bylaws and amendments;
- Resolutions of the Board of Directors increasing or decreasing the number of directors, or the classification of directors, or relating to the characteristics, qualifications, rights, limitations and obligations of members or any class or category of membership;
- Resolutions adopted by either the Board of Directors or the members relating to the characteristics, qualifications, rights, limitations, and obligations of members or any class or category of members;
- The minutes of all the meetings of members, executed waivers of notice of meetings, and executed consents, delivered in writing or by electronic transmission, evidencing all actions taken or approved by the members with a meeting for the past three years;
- All communications in writing or by electronic transmission to members generally within the past three years, including the financial statements furnished for the past three years;

- A list of the names and business or home addresses of the current directors and officers;
- The most recent annual registration delivered to the Secretary of State.

In addition to this first category, members may also view certain additional records of the association, only if:

- The member's demand is made in good faith and for proper purpose that is reasonably relevant to the member's legitimate interest as a member;
- The member describes with reasonable particularity the purpose and records the member wishes to inspect;
- The records are directly connected with this purpose; and
- The records are to be used only for the stated purpose.

If a member has met the thresholds set forth above, the member may view these additional records of an association:

CATEGORY II:

- Excerpts from the minutes of any meeting of the Board of Directors, records of any action of a committee of the Board of Directors while acting in place of the Board of Directors on behalf of the corporation, minutes of any meetings of the members, and records of actions taken by the members or the Board of Directors without a meeting, to the extent not subject to inspection as set forth above;
- Accounting records of the association; and
- the membership list, so long as such list is not used for solicitation or for resale.

No member is entitled to see any books and records of the Association that are not included in either category.

What exactly are the "accounting records" of the association?

When it comes to books and records review, the question of what constitutes the accounting records of the association is a common one. The Code itself does not provide any clarification as to the meaning of "accounting records," however, as a general rule of thumb, "accounting records" will mean the association's current budget, balance sheet and profit and loss statement, as well as any documents necessary to create these accounting records, such as copies of bank statements or cancelled checks.

Are members entitled to see the records of delinquent owners?

Often times, owners will request to view the records of all delinquent owners or the records of owners who are otherwise in violation of the governing documents. If the association books and records review is governed by the terms of the Code, an accounting of all delinquent amounts is certainly part of the financial records of the association; however, there is nothing in the law which would require the association to provide the names or the addresses associated with the delinquent amounts.

Providing the names or other identifying information of delinquent owners can open an association up to liability and it is best to be avoided if possible. Specifically, it would be a violation of the Federal Fair Debt Collection Practices Act for the managing agent or for the association's attorney to provide records detailing delinquent owner information. Furthermore, the publication by an association of the names and other material information of delinquent owners can potentially give rise to claims of slander, libel or defamation if any of the association's information is incorrect or if the amounts are in dispute. For this reason, we generally recommend that only the delinquent balances be provided, with corresponding names and addresses redacted.

If the association's bylaws provide that a member is entitled to see all books and records of the association, it could include the right to review information on delinquent accounts. However, in light of the risks outlined above, it is still a reasonable limitation to redact any identifying information, such as names or addresses associated with the amount.

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Are members entitled to review violation letters and architectural control requests?

If an association's books and records review process is governed by the Code, members are not entitled to review violation letters and architectural control requests. These are not records which are included in the list of corporate records available for review and copying by the membership. Sometimes members will be confused and believe that violation letters and architectural control request fall within the category of "all communications in writing or by electronic transmission to members generally within the past three years, including the financial statements furnished for the past three year." However, this category of records applies to communications to the membership as a whole, such as community newsletters, not individual communications to owners or occupants.

If an association's bylaws allow for a review of all books and records, a member will be entitled to see copies of the violation letters and architectural control requests or such correspondence and records of individual members.

Are members entitled to see contracts of the association?

Another common request from members is to review contracts of the association or vendor bids. Many times such requests are grounded in a member's dissatisfaction or distrust of a particular vendor. For those associations who are bound by the terms of the Code as it applies to their books and records reviews, members requesting to see such contracts are often surprised and disappointed to learn that they are not entitled to review contracts of the association. A member may, if he or she satisfies the requirements of the Code, request to review the minutes of the board meeting where a particular contract was discussed and voted on, but there is nothing in the law which would allow the member to view the contract itself.

If the association's bylaws allow a member to see all books and records, a member will be entitled to review all association contracts.

Can we charge an owner for a books and records review?

The terms of the Code provides that an association may impose a reasonable charge, covering the costs of labor and material, for copies of any documents provided to the member. Accordingly, unless otherwise provided in the bylaws of the association, an association may charge for the reasonable costs of copies as well as any labor involved with the books and records review. This will include any costs associated with making copies of the records for the reviewing member. It will also include the reasonable time value for any representative of the association either compiling and copying the records for the member's review, or attending a member while he or she reviews the records.

However, the Code also specifically provides that the charge to the owner may not exceed the estimated costs of production or reproduction of the records. This means that an association or the manager cannot mark up the actual costs or value of time associated with the books and records review. In other words, the association cannot put a premium on its time or actual costs for attending to a books and records request.

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Can a member request the books and records in a particular format?

It is common for members to include in their books and records requests that the information be provided in a certain format, such as electronically, or that the information be organized in a certain fashion. Sometimes a member will ask an association to create an entirely new type of record. An association is not required to provide the information in any other format or organization other than that in which the information already exists, nor is it required to create any type of record which does not exist. For example, a member may request to review the membership list by address. However, if the association maintains the membership list alphabetically by name, the association is not required to provide a list sorted by address. Likewise, if the association only maintains a budget comparison for the current year and the previous year, it is not required to create a budget comparison over a three or five year span if requested to do so by a member.

Should an association just provide all the books and records, in the interest of transparency?

Transparency may be the most spoken word at most community association meetings, and the number one request by owners. Unfortunately, it seems there is often an element of distrust between the membership and those who were elected to operate the association. Many times, the question is raised by both members and boards alike as to what the harm would be for full disclosure of all books and records, regardless of the requirements of the association's bylaws or the Code.

Clearly, there are some books and records which should not be open to review by all members, such as identifying information on delinquent owners, as discussed above, or any records which would be considered attorney-client privileged information. This would include any records at all between the association and its legal counsel, including, but not limited to, emails, letters, invoices or contracts by and between the association and its legal counsel. If an association opens these records up to the membership, any information contained therein is no longer considered attorney-client privileged information. In the event of any type of legal action by or against the association, this information could be considered public and discoverable, which in some cases, can be to the detriment of the association and can potentially weaken or undermine the association's case or defense.

Outside of such records, the decision as to the scope of books and records an association would like to make available for review over and above that which is required by the bylaws or by law is a matter for the board to determine. In taking this issue into consideration, a board should carefully weigh the advantages versus the

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**3520 Piedmont Rd
Suite 415
Atlanta, GA 30305
P: 404.350.1192
F: 404.350.1193**

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disadvantages of opening up all the records for review. Put simply, it is not a matter of hiding information from the membership, but rather a matter of making smart decisions to protect the interests of the corporation. Although it may seem to be a positive thing for the community, having a broad, published policy of making all books and records available for review can be detrimental to an association if a member or members attempt to use such information for improper purposes. For example, publishing the association's landscape contract may induce members to either solicit bids from other companies without authorization from the board, or to request work under the contract which is furthermore not authorized by the board. Having open books and records can potentially create an environment where the board is unable to transact the business of the corporation in an efficient manner and as it was elected to do because of constant second guessing by disgruntled members.

A better option is to create and publish a books and records policy which explains the extent of the books and records review limitations as set forth in the association's bylaws or by the Code, and which lists those records which are always available for review by the members. The policy should create a process for submitting books and records requests and for reviewing and copying the requests, including, but not limited to, the location where it will be handled, and a schedule of associated costs.

Furthermore, for those books and records which are not available at any time or required to be made available under the bylaws or the Code, the policy should explain that these requests will be handled on a case-by-case basis. In this way, the board can control the information flow so that that it can ensure that any records requested are being requested and will be used for a proper purpose.

Finally, understand that, in any lawsuit between an owner and the association, these rules go out the window. In litigation, the broader rights to open access, through legal discovery, to all relevant documents to the dispute supersede record review limits in the code or association bylaws.

If your association has questions or needs assistance with drafting a books and records policy that balances the membership's need for transparency versus the association's need to protect the interests of the corporation, please feel free to contact us.

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