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Respondent.

# ADMINISTRATIVE LAW JUDGE DECISION

**ADMINISTRATIVE LAW JUDGE:** Adam D. Stone<sup>1</sup>

3. On or about August 26, 2020, the Hidden Valley Ranch Association (HVA) filed its ANSWER with the Department.<sup>3</sup>

4. Per the NOTICE OF HEARING, the Department referred this matter to the Office of Administrative Hearings ("OAH"), an independent state agency, for an evidentiary hearing on October 22, 2020, regarding whether HVA violated ARIZ. REV. STAT. § 33-1805 by failing to fulfill Petitioner's records request.

## THE PARTIES AND GOVERNING DOCUMENTS

5. HVA is a homeowners' association whose members own properties in a residential real estate development located in Prescott, Arizona. Membership for the Association is comprised of the Hidden Valley Ranch subdivision.

6. Petitioner is a Hidden Valley Ranch subdivision property owner and a member of the Association.

7. HVA is governed by its Covenants, Conditions, and Restrictions (“CC&Rs”) and overseen by a Board of Directors (“the Board”). The Association is also regulated by Title 33, Chapter 16, Article 1 of the Arizona Revised Statutes (“ARIZ. REV. STAT.”)

## HEARING EVIDENCE

8. Petitioner testified on his own behalf and submitted four exhibits. HVA called Gary Freed as a witness and submitted eight exhibits. The Agency Record from the Department and NOTICE OF HEARING were also admitted into the evidentiary record.

### *Petitioner's testimony*

9. Petitioner testified that on June 22, 2020, he submitted a records request to the Board of HVA, as follows:

Please provide a copy of the records retention policy for the Hidden Valley Association adopted by the Board of Directors on January 15, 2020.

Please provide copies of all communications written to or from current and former Hidden Valley Association Board and committee members, including electronic communications via email or hard copy communications, regarding any mention of information requests or open meeting law compliance, including but not limited to the use of cell phones for Board business from July 2019 to the present.

<sup>3</sup> See Response to Petition.

1 Please provide copies of all communications written to or from current and  
2 former Hidden Valley Association Board and committee members, including  
3 electronic communications via email or hard copy communications,  
4 regarding any changes to the Association bylaws that were proposed,  
5 discussed, considered, or adopted by the Board of Directors from January  
6 2019 to the present.

7 Please provide copies of any invoice, billing statement, or account record  
8 showing fees charged for legal services associated with revisions or  
9 changes to the Association bylaws from the period January 2019 to the  
10 present. Please provide copies of any records associated with the payment  
11 of legal fees to any attorney or law firm that provided legal work on revisions  
12 or changes to the Association bylaws from January 2019 to the present.  
13 This request for records associated with the bylaws includes legal fees  
14 billed by or paid to lawyers regarding procedures to adopt the Association  
15 bylaws includes but is not limited to legal work associated with the  
16 suggested recusal of any Board officer or Board member from voting on  
17 proposed changes to the Association bylaws from January 2019 to the  
18 present.<sup>4</sup>

19 10. Petitioner then testified that on June 24, 2020, he received an e-mail from  
20 HOAMCO which served as the Community Manager for HVA. HOAMCO requested that  
21 Petitioner re-submit his records request using their specific form. Petitioner promptly  
22 completed the same.

23 11. Petitioner testified that on July 1, 2020, he received a partial response to the  
24 request. Petitioner testified that he received the records retention policy and the legal  
25 invoices, but did not received the two sets of communications requests.

26 12. Petitioner testified that according to HOAMCO and HVA Board President,  
27 Gary Freed, that the communications requested were not subject to disclosure under  
28 ARIZ. REV. STAT. § 33-1805(B).<sup>5</sup>

29 <sup>4</sup> See Petitioner Exhibit 2.

30 <sup>5</sup> See Books and records kept by or on behalf of the association and the board may be withheld from disclosure to the extent that the portion withheld relates to any of the following: 1. Privileged communication between an attorney for the association and the association. 2. Pending litigation. 3. Meeting minutes or other records of a session of a board meeting that is not required to be open to all members pursuant to section 33-1804. 4. Personal, health or financial records of an individual member of the association, an individual employee of the association or an individual employee of a contractor for the association, including records of the association directly related to the personal, health or financial information about an individual member of the association, an individual employee of the association or an individual employee of

1           13.     Petitioner accused HVA of willfully failing to fulfill his request. Specifically,  
2     Petitioner alleged that HVA had records that were not protected by ARIZ. REV. STAT. § 33-  
3     1805(B), and those should have been disclosed.

4           14.     Petitioner testified in support of his position, by presenting several e-mail  
5     messages from Mr. Freed to Petitioner (and other HVA members), stating, “[t]his  
6     communication has been received, and will be filed as an HVA business record in the files  
7     maintained by HOAMCO for the benefit of HVA”<sup>6</sup> or something substantially similar.

8           15.     Petitioner testified that these e-mails proved that there were  
9     communications which existed that did not meet the exclusions under the statute and  
10    therefore, HVA failed to fully respond to his records request.

11          16.     At the close of his testimony, Petitioner prayed for an ORDER to be issued in  
12    his favor which required the Association to abide by ARIZ. REV. STAT. § 33-1805, a  
13    reimbursement of his filing fee, and impose a civil penalty against the Association under  
14    ARIZ. REV. STAT. § 32-2199.01(A).<sup>7</sup>

15    Gary Freed’s testimony

16          17.     Mr. Freed testified that he was the Board President of HVA.

17          18.     Mr. Freed testified that as to the communications which were not disclosed  
18    to Petitioner. He testified that based upon HVA’s records retention policy as well as his  
19    experience and training with the open meeting laws, no records existed which were  
20    subject to disclosure.

21          19.     Mr. Freed also testified that neither he nor any other Board member went  
22    through every single e-mail one-by-one.

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24    a contractor for the association. 5. Records relating to the job performance of, compensation of, health  
25    records of or specific complaints against an individual employee of the association or an individual  
26    employee of a contractor of the association who works under the direction of the association.

27    <sup>6</sup> See Petitioner’s Exhibits 8, 9, 12, and 13.

28    <sup>7</sup> The administrative law judge may order any party to abide by the statute, condominium documents,  
29    community documents or contract provision at issue and may levy a civil penalty on the basis of each  
30    violation. All monies collected pursuant to this article shall be deposited in the condominium and planned  
community hearing office fund established by section 32-2199.05 to be used to offset the cost of  
administering the administrative law judge function. If the petitioner prevails, the administrative law judge  
shall order the respondent to pay to the petitioner the filing fee required by section 32-2199.01.

1           20. In addition, Mr. Freed testified as to the statements he wrote in the e-mail  
2 correspondence, that he mistakenly believed at first, that all communications needed to  
3 be retained, which he why he responded with the language that he did in Exhibits, 8, 9, 12  
4 and 13.

5           21. Further, Mr. Freed testified that all HVA business was conducted via open  
6 meetings and there were no meetings conducted solely by e-mail but for one emergency  
7 situation.

8           22. Finally, Mr. Freed testified that he may have scanned his personal e-mail for  
9 any other communications, and that he did not dismiss Petitioner's request "out-of-hand".

### 10                           **CONCLUSIONS OF LAW**

11           1. This matter lies within the Department's jurisdiction. Pursuant to ARIZ. REV.  
12 STAT. §§ 32-2102 and 32-2199 et al., regarding a dispute between an owner and a  
13 planned community association, the owner or association may petition the department for  
14 a hearing concerning violations of community documents or violations of the statutes that  
15 regulate planned communities as long as the petitioner has filed a petition with the  
16 department and paid a filing fee as outlined in ARIZ. REV. STAT. § 32-2199.05.

17           2. Pursuant to ARIZ. REV. STAT. §§ 32-2199(2), 32-2199.01(D), 32-2199.02,  
18 and 41-1092, OAH has the authority to hear and decide the contested case at bar.

19           3. In this proceeding, Petitioner bears the burden of proving by a  
20 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1805.<sup>8</sup>

21           4. "A preponderance of the evidence is such proof as convinces the trier of fact  
22 that the contention is more probably true than not."<sup>9</sup> A preponderance of the evidence is  
23 "[t]he greater weight of the evidence, not necessarily established by the greater number of  
24 witnesses testifying to a fact but by evidence that has the most convincing force; superior  
25 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable  
26 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than  
27 the other."<sup>10</sup>

28 <sup>8</sup> See ARIZ. ADMIN. CODE R2-19-119.

29 <sup>9</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

30 <sup>10</sup> BLACK'S LAW DICTIONARY 1220 (8<sup>th</sup> ed. 1999).

1           5.       ARIZ. REV. STAT. § 33-1805 provides, in relevant part, as follows:

2       A. Except as provided in subsection B of this section, all financial and other  
3       records of the association shall be made reasonably available for  
4       examination by any member or any person designated by the member in  
5       writing as the member's representative. The association shall not charge a  
6       member or any person designated by the member in writing for making  
7       material available for review. The association shall have ten business days  
8       to fulfill a request for examination. On request for purchase of copies of  
9       records by any member or any person designated by the member in writing  
10      as the member's representative, the association shall have ten business  
11      days to provide copies of the requested records. An association may  
12      charge a fee for making copies of not more than fifteen cents per page.

13      B. Books and records kept by or on behalf of the association and the board  
14      may be withheld from disclosure to the extent that the portion withheld  
15      relates to any of the following:

16               1. Privileged communication between an attorney for the association  
17               and the association.

18               2. Pending litigation.

19               3. Meeting minutes or other records of a session of a board meeting  
20               that is not required to be open to all members pursuant to section 33-  
21               1804.

22               4. Personal, health or financial records of an individual member of the  
23               association, an individual employee of the association or an  
24               individual employee of a contractor for the association, including  
25               records of the association directly related to the personal, health or  
26               financial information about an individual member of the association,  
27               an individual employee of the association or an individual employee  
28               of a contractor for the association.

29               5. Records relating to the job performance of, compensation of,  
30               health records of or specific complaints against an individual  
              employee of the association or an individual employee of a contractor  
              of the association who works under the direction of the association.

              C. The association shall not be required to disclose financial and other  
              records of the association if disclosure would violate any state or federal  
              law.

1           6.       “In applying a statute . . . its words are to be given their ordinary meaning  
2 unless the legislature has offered its own definition of the words or it appears from the  
3 context that a special meaning was intended.”<sup>11</sup> Each word, phrase, clause, and  
4 sentence must be given meaning so that no part of the legislation will be void, inert, or  
5 trivial. *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 204, ¶ 17 (App. 2007). Legislation must  
6 also be given a sensible construction that avoids absurd results. *State v. Gonzales*, 206  
7 Ariz. 469, 471, ¶12 (App. 2003). If the words do not disclose the legislative intent, the court  
8 will scrutinize the statute as a whole and give it a fair and sensible meaning. *Luchanski v.*  
9 *Congrove*, 193 Ariz. 176, 178, ¶ 9.

10           7.       The material facts in this matter are not in dispute.

11           8.       Petitioner’s June 22, 2020, records request was timely complied with by  
12 HVA/HAOMCO as to the records retention policy and the copies of the legal bills.  
13 However Petitioner has failed established by a preponderance of the evidence that the  
14 HVA was in violation of ARIZ. REV. STAT. § 33-1805 for failing to provide him with copies of  
15 the communications he requested. Essentially, Petitioner is claiming that there must be  
16 other records in existence because of the language that Mr. Freed used in Exhibits 8, 9,  
17 12 and 13. This is not persuasive as there was no evidence presented by Petitioner to  
18 prove that the records were in existence. Mr. Freed testified that he was mistaken as to  
19 the types of records he believed needed to be kept. Further, HVA’s own record retention  
20 policy specifically outlines which communications are to be kept as official records. This  
21 policy was adopted six months prior to the request at was voted on at an open meeting, at  
22 which time Petitioner could have voiced his objections to the adoption of the policy. Mr.  
23 Freed testified that all meetings, like the meeting at which the records retention policy was  
24 approved, was an open meeting thus there were no e-mails or other correspondence  
25 regarding the same. Mr. Freed testified that he believed that all documents that would  
26 been in existence were subject to the exceptions enumerated in ARIZ. REV. STAT. § 33-  
27 1805(B).

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29 <sup>11</sup> MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

1           9.       Therefore, the Administrative Law Judge concludes that the Association's  
2 conduct, as outlined above, did not violate the charged provisions of ARIZ. REV. STAT. §  
3 33-1805.

4                               **ORDER**

5           **IT IS ORDERED** that Petitioner's petition in this matter be denied.

6           **IT IS FURTHER ORDERED** that Petitioner's request to levy a civil penalty against  
7 Respondent is denied.

8           **IT IS FURTHER ORDERED** pursuant to ARIZ. REV. STAT. § 32-2199.02(A),  
9 Respondent shall not reimburse Petitioner's filing fee as required by ARIZ. REV. STAT. §  
10 32-2199.01.

11                               **NOTICE**

12           **Pursuant to ARIZ. REV. STAT. §32-2199.02(B), this ORDER is binding on the**  
13 **parties unless a rehearing is granted pursuant to ARIZ. REV. STAT. § 32-2199.04.**  
14 **Pursuant to ARIZ. REV. STAT. § 41-1092.09, a request for rehearing in this matter**  
15 **must be filed with the Commissioner of the Department of Real Estate within thirty**  
16 **(30) days of the service of this ORDER upon the parties.**

17                       Done this day, October 30, 2020.

18  
19                                               /s/ Adam D. Stone  
20                                               Administrative Law Judge

21 Transmitted electronically on November 3, 2020 to:

22 Judy Lowe, Commissioner  
23 Arizona Department of Real Estate

24 Transmitted through US Mail on November 3, 2020 to:

25 Douglas E. Kupel  
26 PO Box 878  
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