



E-mail Inspection Not Addressed in Florida Statutes

Related questions also unanswered

Fort Myers The News-Press, October 11, 2009

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Q: Do condominium unit owners have a right to inspect e-mail correspondence between the association board of directors and the property manager? **L.A. (via e-mail)**

A: I have heard knowledgeable people come to opposite conclusions on this topic. It is not specifically addressed in the Florida Statutes, though it certainly ought to be.

According to a March 2, 2002 memorandum from the Office of DBPR's General Counsel, "condominium owners do have the right to inspect e-mail correspondences between the board of directors and the property manager as long as the correspondence is related to the operation of the association and does not fall within one of the three statutorily-protected exceptions." It should be noted that there are now more statutorily-protected exceptions that have been enacted since the 2002 memo.

The DBPR's position is based on the premise that e-mail correspondence "relates to the operation of the association", and is no different than a paper record which does the same thing.

Related questions, still unanswered in the law, are whether computer data of individual board members (information kept on or deleted from

their personal computer) somehow becomes the association's property, or is the private property of the computer owner. Further, there is no guidance in the law on whether e-mail correspondence between groups of board members which do or do not constitute a quorum are "official records." Again, either side of the case could be argued, and may depend on the facts of the specific case.

It seems fairly clear to me that the overall intent of the statutes is to provide for "transparency" in the operation of associations, and that doubts should be resolved in favor of the owner's right to information.

Q: We are not happy with our management company's main office support, mostly due to financial record keeping and collections problems. The management company appears to be overwhelmed. However, we do not want to lose our on-site manager. He has been with us for several years and is top notch. We have considered hiring him directly as a full-service manager, which would actually save us money, but he pointed out a "non-competition" section in his employment contract with the management company which states that he is not allowed to work for any condominium he worked with for the management company for one year. Is this legal? **C.S. (via e-mail).**

A: A covenant not-to-compete is a fairly common provision in a community association manager's employment contract with a management company.

Non-compete clauses are limited by statute. Specifically, Section 542.335 of the Florida Statutes governs restraints on trade. A contract that restricts or prohibits competition will only be held valid if the restriction is limited to a reasonable period of time, a reasonable geographic area and a reasonable line of business. The statute creates a presumption that six months or less is valid and two years or more is invalid.

While a complete analysis of the law is too involved and too fact dependent to cover in this column, in order to enforce the non-compete agreement, the management company would need to show that the restriction serves a "legitimate business interest." These interests include preservation of substantial relationships with existing or potential clients, and client good will.

You also need to look closely at your management contract with the management company. It is not unusual for such contracts to include a provision where the association agrees to not hire a manager supplied by the company for a set period of time.

There are two potential practical solutions to this problem, assuming your attorney concludes that the non-compete clause is valid. First, if you tell the management company you are not happy and that the association is going to terminate them in any event, and if the manager is planning to quit the management company no matter what, the management company may be less concerned about the manager since all the damage will be done and they may release any claim under the non-compete covenant. Alternatively, perhaps the manager or the association could negotiate some

agreed payment to buy out the non-compete clause.

Q: The president of our condominium association refuses to follow Chapter 718, our declaration, or our bylaws, and has stated he does not have time to waste reading these documents. We have asked the board and the management company to just follow the law so that the association can be properly managed, but they continually say that everything is subject to interpretation. I do not believe a recall is the answer because it will only divide the association more. Do you have any suggestions? **B.K. (via e-mail)**

A: Pursuant to Section 718.112(2)(a)(3) of the Florida Condominium Act, every person who submits their name to run for the board must sign a certification form which attests to the fact that he or she "has read and understands to the best of his or her ability, the governing documents of the association and the provisions of this Chapter and any applicable rules." There is simply no excuse for any member of an association board to state they do not have the time to read and attempt to understand the documents which control the governance of the association. If that is the case, then they do not have the time to serve on the board and should resign.

However, if they refuse to resign, it is likely that recall is your most practical remedy. As you have suggested, recall actions are almost always divisive, often costly, and can lead to litigation. Presumably, your association will soon be coming into its annual meet cycle. The best solution you have is political. Put together a group of candidates who will agree to make a reasonable effort to follow the rules that you all agreed to live by when you bought into the condominium, and have them run for the board.

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

Send questions to Joe Adams by e-mail to jadams@becker-poliakoff.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.

