

Proposed Email Archive Policy, and Report

3/7/19 submitted by Kirk Johnson and Rick Lewis

The following Policy draft is submitted from committee to the Board for their review and consideration. The Report that follows the Policy herein is the relevant information used to inform the Policy.

POLICY

The intent of this Policy is to provide requirements and guidelines for the Board of Directors (BOD), ACC, and all committees of the BOD, whether ad hoc or permanent (individually or collectively referred to as Bodies), for archiving official records of the Association that are created in email form. It is understood that each Body conducts official business and creates records that may be unique to that Body, so this Policy also facilitates the reality that each Body has a duty to initially archive their own unique records.

I. Content To Be Archived

1. All emails created or shared between members within Bodies that contain substantive information or dialog relative to the business of the Association shall be archived. Because governing documents and state statutes contain no specific description about what emails are to be archived, the determination of "substantive" is therefore discretionary and shall be left to the best judgment of Body members. However, this Policy intends that "substantive" should also mean any email containing information that, if left out of archiving, would render the reasonable understanding of the subject less complete than if the email information was included into understanding of the subject.
2. For easiest and most diligent archiving it is recommended that Body members conduct email interaction by the following protocol:
 - (a) Keep a single subject of business contained in a single email chain, and if that subject becomes revisited at a later time Body members should, if reasonably possible, continue in the same email chain as before.
 - (b) Limit email language to only Association business, do not include Body member personal information or non-HOA business conversation, and do not conduct side-but-attached dialog in the same email chain that is unofficial Association business.
 - (c) Keep an email subject that contains executive/privileged information in an email chain of its own and do not co-mingle it with non-privileged subjects.
 - (d) If possible, begin substantive emails by utilizing an email distribution list for the appropriate audience. By entering the distribution list in the "To" section of the email it will identify it as a business communication. An example is using the "bod@9mileranchhoa.com" distribution list.

II. Designation of Emails

Each Body shall appoint a person (Designator) who is responsible for designating and outputting which Body emails are to be archived; this appointment should ideally be made in meeting at the same time the Body is formed. Upon appointment the name of the appointed Designator shall be made known to the BOD president and the president shall read the name of the Designator into the minutes of that or the next BOD meeting if such information was not already contained in a recorded motion.

The Designator shall output designated emails and shall also redact or exclude any sensitive, personal, and/or executive information within the emails according to the standards expressed at RCW64.38.035(4). Entire emails considered to be regarding executive subjects shall be excluded from archiving except that if an email

documents an action taken which is executive in nature then that action alone shall be recorded in a separate email according to the executive standard in RCW 64.38.035(4), having “reasonably identified” the action and having excluded personal/sensitive information from the description.

III. Form, Submission and Custody of Email Records

Email Records shall be kept in paper form, and optionally in digital form in addition to the paper form. Each Body Designator shall turn over accumulated designated emails to the BOD secretary on a quarterly basis or at the next BOD meeting, whichever is most prudent and not unduly burdensome.

IV. Availability of Email Records to the Membership

Because the volume of physical archived email records will likely accumulate to be significant, the BOD secretary is not required to provide digital or physical copies of records to Association members but rather is required to allow inspection and copying of email records pursuant to RCW64.38.045(2).

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REPORT

I. Background information supporting/shaping this proposed policy:

1. Excerpt from HOA attorney Bergh Q&A, 12/1/18, page 11,
 1. “[Board question] What email correspondence between HOA Board members (if any) must be maintained with official records (i.e. like how we are required to keep record of meeting minutes, motions, etc)?”

“[attorney answer] RCW 64.38.045 provides, in part: “(1) The association or its managing agent shall keep financial and other records sufficiently detailed to fully declare to each owner the true statement of of its financial status. All financial and other records of the association, including but not limited to checks, bank records, and invoices, in whatever form thy are kept, are the property of the association. Each association managing agent shall turn over all original books and records to the association immediately upon termination of the management relationship with the association, or upon such other demand as is made by the board of directors. An association managing agent is entitled to keep copies of association records. All records which the managing agent has turned over to the association shall be made reasonably available for the examination and copying by the managing agent. (2) All records of the association, including the names and addresses of owners and other occupants of the lots, shall be available for examination by all owners, holders of mortgages on the lots, and their respective authorized agents on reasonable advance notice during normal working hours at the offices of the association or its managing agent. The association shall not release the unlisted telephone number of any owner. The association may impose and collect a reasonable charge for copies and any reasonable costs incurred by the association in providing access to records.”

While the scope of the term "all records of the association" is not defined in Chapter 64.38 RCW, I believe that caution would dictate that substantive emails should be considered to be records of the Association. You may want to review the parallel provision of the WUCIOA (RCW 64.90.495), which has a more detailed list of what the legislature considers to be association records that must be disclosed and those which may be withheld.”

2. As the attorney recommends above, please see RCW 64.90.495. According to attorney Bergh¹, our HOA is not *required* to follow the cited RCW but rather he is recommending that we consider it because it will likely cover us legally in any event because it is the most recent legal 'standard' legislated. You will note upon your review of RCW 64.90.495 that it gives no more specific indication of email records to be kept beyond RCW 64.38.045. So, we are left with the most substantial guidance being the attorney language above as highlighted in blue, which involves a level of discretionary decision making a certain amount of time.
2. Fact: Bylaws at Article VIII, Section 8(c) stipulate that the secretary shall "... keep the minutes of all meetings and proceedings of the Board and of the members...". Merriam-Webster dictionary defines "proceedings as, "An official record of things said or done."
3. Fact: Each body of the HOA 'government' (e.g. the board, the ACC, each individual committee) would have some emails exclusive to it, hence the reason for the clause in the draft Policy to name a Designator of emails for each body/committee.
4. Fact/consideration: the most efficient practical way to conduct email interaction in order to make archiving as complete and feasible as possible is to cause committee/board interactions to be confined to one subject per email chain, and strive to always re-link an original email chain to that same subject if/whenever it comes up again.
5. Fact/consideration: For easy archiving and limiting time in having to edit executive/privileged information within emails, it is recommended that executive information/subjects be kept to their own email stream.
6. Fact: Regarding archiving of emails containing executive/privileged information: The only requirement for our HOA regarding keeping records of executive privileged information is at RCW 64.38.035(4), stated in part: *"Upon the affirmative vote in open meeting to assemble in closed session, the board of directors may convene in closed executive session to consider personnel matters; consult with legal counsel or consider communications with legal counsel; and discuss likely or pending litigation, matters involving possible violations of the governing documents of the association; and matters involving the possible liability of an owner of the association... No motion or other action adopted, passed, or agreed to in closed session may become effective unless the board of directors, following the closed session, reconvenes in open meeting and votes in the open meeting on such motion, or other action **which is reasonably identified** [emphasis added]."* It appears that the cited clause implies that the required record of executive information is limited to 'reasonably identifying' any action that may result, having omitted personal information or any other specific information that fits with the description in the RCW clause cited above.

Another consideration, in keeping with attorney Bergh's recommendation that we consult with the provisions of RCW 64.90.495: At (1)(b) it states, *"An association must retain the following: ...Minutes of all meetings of its unit owners and board **other than executive sessions**..."*

It may be interpreted from the cited RCWs and attorney comments above that the cumulative legal requirement and intent is that executive/privileged information in emails should not be kept.

¹ See Bergh's publication at www.gnbergh.com entitled, "HOA Mini Report – July 2018, Volume 7, Issue"