

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of

No. 22F-H2222050-REL

No. 22F-H2222054-REL

4 Tom Barrs,
5 Petitioner,

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 vs.

7 Desert Ranch Homeowners Association,
8 Respondent.

9 **HEARING:** January 09-10, 2023.¹

10 **APPEARANCES:** Jonathan A. Dessauls, Esq. appeared on behalf of Tom Barrs
11 (“Petitioner”) with Petitioner as a witness. B. Austin Baillio, Esq. appeared on behalf of the
12 Desert Ranch Homeowners Association (“Respondent” and “Association”) with Brian
13 Schoeffler, Gerard Manieri, and Lori Loch-Lee as witnesses. Stephen Barrs observed.

14 **ADMINISTRATIVE LAW JUDGE:** Jenna Clark.

15
16 After review of the hearing record in this matter, the undersigned Administrative
17 Law Judge makes the following Findings of Fact and Conclusions of Law, and issues this
18 ORDER to the Commissioner of the Arizona Department of Real Estate (“Department”).

19 **FINDINGS OF FACT**

20 **BACKGROUND AND PROCEDURE**

21 1. The Department is authorized by statute to receive and to decide petitions
22 for hearings from members of homeowners’ associations and from homeowners’
23 associations in Arizona.

24 2. On April 18, 2022, Petitioner filed a single-issue petition against the
25 Association with the Department that alleged violation(s) of ARIZ. REV. STAT. § 33-1805 for
26 document requests submitted in April of 2021, November 2021, and February 2022.²

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29 ¹ With the parties permission, the record in the above-captioned matters was held open for twenty (20)
additional days to afford the Tribunal sufficient time to issue this ORDER.

30 ² See Department’s electronic file at OAH-Petition-April 2022.pdf.

1 a. On April 27, 2022, Petitioner tendered \$500.00 to the Department for this
2 petition.³

3 3. On April 18, 2022, Petitioner filed a second single-issue petition against the
4 Association with the Department that alleged violation(s) of ARIZ. REV. STAT. § 33-1804(A)
5 for an alleged audio recording preclusion and failure to provide a recording.⁴

6 a. On April 27, 2022, Petitioner tendered \$500.00 to the Department for this
7 petition.⁵

8 4. On April 18, 2022, Petitioner filed a third single-issue petition against the
9 Association with the Department that alleged violation(s) of ARIZ. REV. STAT. § 33-1805 for
10 a membership roster request submitted in October 2021.⁶

11 a. On April 27, 2022, Petitioner tendered \$500.00 to the Department for this
12 petition.⁷

13 5. On April 28, 2022, the Department issued a HOA NOTICE OF PETITION in
14 Case #HO22-22050 to Respondent.⁸

15 6. On May 11, 2022, the Department issued a HOA NOTICE OF PETITION in
16 Case #HO22-22054 to Respondent.⁹

17 a. On May 12, 2022, the Department issued a CORRECTED HOA NOTICE OF
18 PETITION in Case #HO22-22054 to Respondent.¹⁰

19 7. On May 12, 2022, Petitioner filed a fourth single-issue petition against the
20 Association with the Department that alleged violation(s) of ARIZ. REV. STAT. § 33-1805 for
21 document requests submitted in October 2021, December 2021, November 2021,
22 January 2022, February 2022, and March 2022.¹¹

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25 ³ See Department's supplemental electronic file, page 1.

26 ⁴ See Department's electronic file at #2 OAH-Petition-April 2022.pdf.

27 ⁵ See Department's supplemental electronic file, page 2.

28 ⁶ See Department's electronic file at #3 OAH-Petition-April 2022.pdf.

29 ⁷ See Department's supplemental electronic file, page 3.

30 ⁸ See Department's electronic file at Notice of Petition – Response Due.pdf.

⁹ See Department's electronic file at Notice of Petition – Response Due -.pdf.

¹⁰ See Department's electronic file at Notice of Corrected Petition – Response Due -.pdf.

¹¹ See Department's electronic file at OAH-Petition – 4 – noted correction May 12.pdf.

1 a. On May 11, 2022, Petitioner tendered \$500.00 to the Department for the
2 corrected petition.¹²

3 8. On May 16, 2022, the Association filed its ANSWER for Case #HO22-22050
4 with the Department whereby it denied all 3 petition issues.¹³

5 9. On May 16, 2022, the Association filed its ANSWER for Case #HO22-22054
6 with the Department whereby it denied all issues in the petition.¹⁴

7 10. On May 25, 2022, the Department referred the above-captioned matters to
8 the Office of Administrative Hearings (“OAH”), an independent state agency, for an
9 evidentiary hearing on July 25, 2022.¹⁵ Per the NOTICE OF HEARING, the following issues
10 were to be adjudicated based on Petitioner’s petition(s):

11 **Petitioner states that Respondent “has failed and/or is refusing to**
12 **provide various records requested pursuant to A.R.S. § 33-1805**
13 **(sic.)”, and that Respondent “forbids video and audio recordings of**
14 **meetings” in violation of A.R.S. § 33-1804(A).**

15 *(All errors in original.)*

16 THE PARTIES AND GOVERNING DOCUMENTS

17 11. Respondent is a homeowners’ association whose members own properties
18 in a residential real estate development located in Scottsdale, Arizona. Membership for
19 the Association is compromised of the Desert Ranch subdivision.

20 a. Respondent is managed by Associated Asset Management, LLC (“AAM”).

21 12. Petitioner is a Desert Ranch subdivision property owner and a member of
22 the Association.

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

27 ¹² See Department’s supplemental electronic file, page 4.

28 ¹³ See Department’s electronic file at Responses_to_First_Three_Petitions_(signed).pdf.

29 ¹⁴ See Department’s electronic file at Responses_to_4th_Petition_(signed).pdf.

30 ¹⁵ The Department also requested that OAH consolidate the above-captioned matters. See Department’s
electronic file at Combine Files – MC.pdf. On July 06, 2022, the matter(s) were continued and reset for
hearing on September 27, 2022. On September 27, 2022, the matter(s) were continued and reset again for
hearing January 09-10, 2023, whereby the matter(s) were heard.

HEARING EVIDENCE

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2 14. Petitioner testified on his own behalf and submitted a Prehearing
3 Memorandum and Exhibits 1-420, 439-483, and 485-524. Respondent called Brian
4 Schoeffler, Gerard Manieri, and Lori Loch-Lee as witnesses and submitted a Prehearing
5 Memorandum and Exhibits 1-305. The Department’s agency record, including the NOTICE
6 OF HEARING, and September 27, 2022, MINUTE ENTRY – GRANTING CONTINUANCE were
7 also admitted into the evidentiary record as their own exhibits. The substantive evidence
8 of record is as follows:

- 9 a. Petitioner has been a member of the Association for the last 21 years. Over
10 time, the relationship between the parties has dissolved into an acrimonious
11 state, due in large part, to the number and manner of requests submitted by
12 Petitioner to the Association, and the Association’s responses thereto, or
13 lack thereof, to Petitioner and the intent perceived behind them.

14 *Alleged violation of ARIZ. REV. STAT. § 33-1804(A)*

- 15 b. On April 27, 2021, Petitioner submitted a written request to the Association
16 and AAM for “the audio/video for today’s board meeting.”¹⁶
17 i. On an unknown date the Association provided Petitioner with a video
18 copy of the requested meeting.¹⁷ However, at approximately 17:20,
19 the video noticeably stops and immediately restarts, largely due to
20 the fact that Petitioner was escorted out of the meeting, which was
21 held at a private residence, after he showed up in-person and
22 insisted to observe and/or participate. The exact amount of lapsed
23 time is unknown. The recording was also stopped at 30:24 for an
24 unknown amount of time.
25 c. On October 22, 2021, Petitioner submitted a written request to the
26 Association and AAM for “[A] copy of the full UNEDITED Video/ audio from
27 today’s October 22nd Board Meeting.”¹⁸ [sic]

28 ¹⁶ See Petitioner Exhibit 7.
29 ¹⁷ See Respondent Exhibits 5-6.
30 ¹⁸ See Petitioner Exhibit 17.

1 i. On October 28, 2021, Mr. Schoeffler replied with the following:

2 The attached audio file is from the DRHa Board meeting held on
3 October 22, 2021. The file is unedited and starts when the meeting was
4 called to order @ 10:10am until meeting was adjournment at
5 10:45am.¹⁹ [sic]

6 Alleged violation of ARIZ. REV. STAT. § 33-1805

7 d. During the September 19, 2020, Board of Directors Meeting, Mr. Schoeffler
8 agreed to take responsibility for “getting estimates for a survey and clean-up
9 of the common areas as required by the CCR’s.”²⁰ On November 16, 2020,
10 the Association’s Board Secretary-Treasurer, submitted the following
11 inquiry, in pertinent parts, to a local surveying company:

12 “I’m the Secretary and Treasurer for a small HOA in north Scottsdale.
13 We’re working on our 2021 budget and need an estimate to have
14 boundary surveys done of our three Common Areas.”²¹

15 i. On November 17, 2020, the company responded with an attached
16 quote.²²

17 e. On March 04, 2021, the Association’s Board President issued the following
18 correspondence, in pertinent parts, to its Members:

19 “Your Board of Directors is organizing a cleanup of the three Common
20 Areas that border the streets. This is necessary to keep the Desert Ranch
21 HOA pristine. If you are interested in helping please reply to this email.”²³

22 On March 07, 2021, Petitioner replied, offering to volunteer.²⁴

23 f. On March 26, 2021, Petitioner submitted a written request to the
24 Association for “the approved 2020 Annual Meeting minutes,” “Any/all
25 election materials for the 2021 Desert Ranch Election,” and “volunteer
26 responses for the common area cleanup project.”²⁵

27 ¹⁹ See Respondent Exhibits 18-19.

28 ²⁰ See Petitioner Exhibits 74-75.

29 ²¹ See Petitioner Exhibits 204-205.

30 ²² *Id.*

²³ See Petitioner Exhibit 211.

²⁴ *Id.*

²⁵ See Petitioner Exhibit 6.

- 1 i. On April 09, 2021, AAM provided a copy of the approved 2020
2 Annual Meeting minutes and election materials to Petitioner.²⁶
3 Regarding Petitioner’s cleanup project volunteer responses request,
4 AAM denied it on the grounds that “Communications between
5 individual Members & the Board are not HOA documents.
6 Correspondence by the Board that hasn’t been voted on or acted on
7 are not Board Documents.”²⁷ [sic] Thus, none were provided.
- 8 ii. On April 13, 2021, Petitioner replied with his belief that Respondent’s
9 response to his requests were insufficient or otherwise incomplete,
10 querying “Why so secretive?”²⁸ “The board does not have to vote on
11 an item in order for it to become a record.”²⁹
- 12 iii. On April 23, 2021, AAM replied that “There is nothing secretive,” and
13 argued that Petitioner’s requests had been complied with, opining
14 that its ballot count was correct and further noting “It was a private
15 communication between a Member of the community and another
16 Member, who happens to be on the Board. If the Member who sent
17 their communication wanted you included, we would make the
18 assumption that the individual would have copied you.”³⁰
- 19 g. On April 27, 2021, Petitioner submitted a written request to the Association
20 and AAM for “Copy of any and all survey bids received by and voted on by
21 the association and/or its affiliates,” “Copy of any and all landscape bids
22 received by and voted on by the association and/or its affiliates,” “Copy of
23 any and all contracts related to the above mentioned cleanup and surveys,
24 “copy of the January 18, 2021 minutes,” “copy of the Annual meeting
25 minutes,” “copy of the new directors and committee members,” and “copy of
26 the updated bylaws.”³¹ [sic]

26 ²⁶ See Petitioner Exhibits 3-4, 192-194, and 145-168.

27 ²⁷ See Petitioner Exhibits 3-4.

28 ²⁸ See Petitioner Exhibit 3.

29 ²⁹ *Id.*

30 ³⁰ See Petitioner Exhibit 217.

31 ³¹ See Petitioner Exhibit 7.

- 1 i. On May 11, 2021, AAM responded to Petitioner, copying the Board
2 was copied on the correspondence.³² The reply did not include a
3 survey proposal or landscaping bid. The recording did not include the
4 first portion of the meeting.
- 5 ii. Later that same day, Petitioner replied, overall, that the information
6 provided was incomplete, insufficient, and otherwise missing.³³
- 7 iii. On May 12, 2021, the Secretary-Treasurer replied to AAM with
8 suggested responses to Petitioner, including to inform Petitioner that
9 the survey proposal was not in the Board's possession as "It is with a
10 Board Member who is currently unavailable."³⁴ Petitioner was
11 unintentionally copied on the correspondence.
- 12 iv. On May 14, 2021, in response to an email from Petitioner dated May
13 11, 2021, AAM advised that "The [survey] proposal is not in our files,"
14 "[t]he [landscaping] proposal was oral so there is nothing to send,"
15 "The Annual Meeting minutes will be made available prior to next
16 year's Annual Meeting," "[T]he same people that were on the
17 Committee are continuing their duties," and "The beginning of the
18 meeting was missing, not cut or edited in any way."³⁵
- 19 h. On May 06, 2021, AAM emailed the following, in pertinent parts, to
20 bdsplans@gmail.com:
21 "The Association] received a delinquent notice dated 04/03/21 from the AZ
22 Corporate Commission for the 2020 ACC Report that did not get properly
23 filed by the ACC itself. I assure you the issue had been resolved with the
24 ACC ... AAM has evidence of the cashed check dated 07/09/20 which was
25 mailed with a paper copy of the annual report in 2020 in mid0June 2020.
26 [The Association is current in its ACC filings.]"[sic]³⁶
- 27 i. On October 21, 2021, Petitioner submitted a written request to the
28 Association and AAM for "A copy of all check images and bank statements

27 ³² See Petitioner Exhibits 175-176; see also Respondent Exhibits 5-6.

28 ³³ *Id.*

28 ³⁴ See Petitioner Exhibit 175.

29 ³⁵ See Petitioner Exhibits 177-178 and 180.

30 ³⁶ See Petitioner Exhibit 287.

1 for September 2020 – October 2021,” “A copy of all 2021 Monthly Financial
2 statements,” “A copy of the 2022 proposed budget,” “A copy of the April 27,
3 2021 Board meeting minutes and any other Board and Committee meeting
4 minutes from 2021,” “A copy of all 2019, 2020 and 2021 Annual Reports as
5 ‘filed’ with the Arizona Corporation Commission,” “A copy of any contracts
6 approved/entered into/signed by any Board member or designee of the
7 board (September 2020-October 2021),” “Dates of all committee meeting
8 and actions (January 2020-October 2021) by any legal or bylaw committee
9 member,” “A copy of the EDC actions spreadsheet(s) for 2020 and 2021,”
10 and “A copy of any/all corresponding EDC submittals, requests, approvals,
11 denials, correspondence to / from / between EDC / board / contractor /
12 applicant / homeowner, etc (September 2020 – October 2021) ... including
13 attachments.”³⁷ [sic]

- 14 i. On November 01, 2021, Mr. Schoeffler provided AAM with copies of
15 “any/all corresponding EDC submittals, requests, approvals, denials,
16 correspondence to / from / between EDC / board / contractor /
17 applicant / homeowner, etc (September 2020 – October 2021) ...
18 including attachments,” but advised that it could not supply a copy of
19 the “EDC actions spreadsheet(s) for 2020 and 2021,” as it was
20 nonexistent.³⁸
- 21 ii. AAM provided the documents to Petitioner the same date.³⁹
- 22 j. On October 21, 2021, Petitioner also submitted a written request to the
23 Association and AAM, noting “I need a copy of the most current Desert
24 Ranch Association roster for my personal records.”⁴⁰
 - 25 i. Although AAM generated a Resident Directory on June 06, 2020,⁴¹
26 the information was not provided to Petitioner. Instead, Petitioner

27 ³⁷ See Petitioner Exhibit 12.

28 ³⁸ See Respondent Exhibit 276.

29 ³⁹ See Respondent Exhibits 277-294.

30 ⁴⁰ See Petitioner Exhibit 52.

⁴¹ See Petitioner Exhibits 19-23

1 was advised on November 22, 2021, that the owner list was not
2 provided to non-Board members as the information was personal.⁴²

3 k. On November 08, 2021, Petitioner submitted a written request to the
4 Association and AAM for “a copy of the names of those attending the
5 October 22, 2021 closed board meeting,” “a copy of the written approval by
6 Brian Schoeffler to Karen and Michelle Aerni to destroy or remove trees in
7 Monte’s NAOS,” and “a copy of the emails to Vice President Monte Matz on
8 August 15, 2020 relating to landscaping in the common area.”⁴³ [sic]

9 i. On November 19, 2021, AAM provided the requested documents to
10 Petitioner.⁴⁴ The Association’s responses were reiterated to
11 Petitioner by AAM on November 22, 2021.⁴⁵

12 l. On November 15, 2021, the City of Scottsdale received a special event
13 permit application for the Netflix series Car Masters: Rust to Riches to be
14 filmed in conjunction with the Good Guys Car Show at WestWorld. Taping
15 occurred on or about November 21, 2021, whereby some of the production
16 occurred on the Association’s private property.

17 i. On November 27, 2021, Petitioner accused the Board of negligence;
18 specifically accusing the Board of granting authorization for the
19 Netflix event and for failing to obtain Member approval or offer
20 notification.⁴⁶

21 ii. On November 29, 2021, Board President, Gerry Mangerieri, denied
22 Petitioner’s allegations.⁴⁷

23 iii. In a December 01, 2021, email the Events Manager for the City of
24 Scottsdale offered the following to Mr. Schoeffler:

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⁴² See Respondent Exhibit 21.

⁴³ See Petitioner Exhibit 1.

⁴⁴ See Respondent Exhibit 1.

⁴⁵ See Respondent Exhibits 2-3.

⁴⁶ See Petitioner Exhibit 324.

⁴⁷ See Petitioner Exhibit 323.

1 “[The] film producer exceeded what the permit request included and
2 we would not approve a request by this film producer again in the
3 future.”⁴⁸

4 m. On December 07, 2021, Petitioner submitted a written request to the
5 Association and AAM for “Mr. Schoeffler’s emails to the City of Scottsdale,”
6 “EDC records for October 21, 2021 to Present,” “A copy of Mr. Schoeffler’s
7 12/6/21 email showing the list of all homeowners that were contacted by Mr.
8 Schoeffler.”⁴⁹ [sic]

9 i. On an unknown date, AAM provided Petitioner with 1 EDC submittal
10 and advised that no other requested information could be provided
11 as it was either nonexistent or personal.⁵⁰

12 n. On January 19, 2022, Petitioner submitted a written request to the
13 Association and AAM for “All approved meeting minutes for the period
14 January 2017- January 2022,” All signed contracts between AAM and
15 Desert Ranch HOA from 2018 – Present including attachments thereto,” “All
16 Desert Ranch HOA signed contracts from 2019-Present,” “A copy of all
17 records pertaining to the survey of common areas ‘commissioned’ by the
18 Board of Directors,” “A copy of any/all proposals received by Desert Ranch
19 HOA or its affiliates relating to common areas (2019-Present),” and “A copy
20 of the Officer/Director/Shareholder Change form filed with the Arizona
21 Corporation Commission 11/3/2021.”⁵¹

22 i. On an unknown date, AAM provided Petitioner with several
23 documents from is request but advised that no other requested
24 information could be provided as it was nonexistent.⁵²

25 o. On February 28, 2022, Petitioner submitted a written request to the
26 Association and AAM for “A copy of all communications between AAM and
27 members of Desert Ranch January 2020-March 2022,” “A copy of all

28 ⁴⁸ See Petitioner Exhibit 235.

29 ⁴⁹ See Petitioner Exhibit 8.

30 ⁵⁰ See Respondent Exhibit 24.

⁵¹ See Petitioner Exhibit 11.

⁵² See Respondent Exhibit 26.

1 communications between AAM and board members of Desert Ranch
2 January 2020-March 2022,” and “A copy of all communications between
3 AAM and board members of Desert Ranch for December 2018.”⁵³

4 i. On March 14, 2022, AAM informed Petitioner that his requests could
5 not be fulfilled because the documents Petitioner sought were
6 nonexistent.⁵⁴

7 p. On February 28, 2022, Petitioner also submitted a written request to the
8 Association and AAM for “Any cashed checks dated 07/09/20.”⁵⁵

9 i. On March 14, 2022, AAM provided documents in response to
10 Petitioner’s request.⁵⁶ On March 15, 2022, AAM followed-up with
11 Petitioner, in pertinent parts, as follows:

12 “Based on your Records Request on February 28, 2022, you provided
13 me the inquiry of a cashed check of July 9, 2020 and no other
14 information as to what you were looking for, I investigated further. I have
15 attached ... a copy of the cashed check from the ACC that showed up
16 on the July 2020 bank statement; and a copy of the cashed check front
17 and back that the ACC cashed. I will now close any further inquiries on
18 a past action that was resolved nearly 20 months ago.”⁵⁷

19 q. On March 30, 2022, Petitioner submitted a written request to the
20 Association for “a copy of the financials for October 2021-April 2022,” “a
21 copy of all legal invoices for 2021-2022 showing amounts paid,” “a copy of
22 records relating to the \$100 Legal Fee reimbursements as shown in the
23 February 2021 Ledger,” “a copy of check #54 for around \$2000 on the July
24 2021 statement,” “a copy of any/all records relating to the negative \$255.92
25 late fee balance in the August 2021 Ledger,” “a copy of any/all records
26 relating to the 51155 legal fees of \$167 shown in the August 2021 Ledger,”
27 “a copy of any and all Environmental Design Committee records December
28 2021-April 2022,” “a copy of any and all plans received by Desert Ranch

27 ⁵³ See Petitioner Exhibit 9.

28 ⁵⁴ See Respondent Exhibit 14.

29 ⁵⁵ See Petitioner Exhibit 10.

30 ⁵⁶ See Respondent Exhibit 12.

⁵⁷ See Petitioner Exhibits 288 and 296-297.

1 January 2022 – Present,” “a copy of the draft minutes for the January 25,
2 2022 board meeting,” and “an unredacted copy of the entirely redacted
3 email chain presumably between AAM and the ACC regarding the Desert
4 Ranch Corporate filing for 2020.”⁵⁸ [sic]

- 5 i. On an unknown date, AAM provided some of the requested
6 documentation, noting that some of the records Petitioner sought
7 were either privileged and/or private and therefore non-disclosable.⁵⁹

8 **ADDITIONAL EVIDENCE**

9 15. In 2018, while Petitioner served on the Board, the Board stopped
10 disseminating membership rosters, in large part, due to complaints the Board received
11 regarding unsolicited emails Petitioner would “blast” to Members regarding various
12 grievances and opinions.

13 16. On April 27, 2021, Mr. Mangieri and Mr. Schoeffler volunteered to cover the
14 cost of common area survey, which the Board approved.⁶⁰

15 17. On October 29, 2021, Mr. Mangieri issued the following to Petitioner:

16 The Board of Directors commissioned a survey of the Common Areas, including
17 Tracts D & E of Block 511 and Tract F of Block 711. The purpose of the survey was
18 to facilitate the cleanup of those areas. As a result of the survey of Tract F, it has
19 come to our attention that you have encroached on the Association property. This
20 includes planting of vegetation, installing irrigation and making changes to the
21 topography of Tract F ... Please, remove any and all alterations you have made to
22 Tract F, including but not limited to, plantings, installation of irrigation and the like,
23 changes to its topography etc. by November 21, 2021.⁶¹

24 18. On January 28, 2022, Petitioner issued a Notice to Cease and Desist &
25 Request for Formal Retraction to the Board for alleged “defamatory statements” made by
26 Mr. Mangieri regarding the financial status of the Association.⁶²

27 **CLOSING ARGUMENTS**

28 ⁵⁸ See Petitioner Exhibit 2.

29 ⁵⁹ See Respondent Exhibits 22-23.

30 ⁶⁰ See Respondent Exhibits 50-51.

⁶¹ See Petitioner Exhibit 486.

⁶² See Respondent Exhibits 10-11.

1 3. In this proceeding, Petitioner bears the burden of proving by a
2 preponderance of the evidence that Respondent violated ARIZ. REV. STAT. § 33-1805.⁶³

3 4. “A preponderance of the evidence is such proof as convinces the trier of fact
4 that the contention is more probably true than not.”⁶⁴ A preponderance of the evidence is
5 “[t]he greater weight of the evidence, not necessarily established by the greater number of
6 witnesses testifying to a fact but by evidence that has the most convincing force; superior
7 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
8 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than
9 the other.”⁶⁵

10 5. ARIZ. REV. STAT. § 1-243 provides, in relevant part, that “[T]he time in which
11 an act is required to be done shall be computed by excluding the first day and including
12 the last day, unless the last day is a holiday, and then it is also excluded.”

13 6. ARIZ. REV. STAT. § 33-1804(A) provides, in relevant part, as follows:

14 A. Notwithstanding any provision in the declaration, bylaws or other documents
15 to the contrary, ***all meetings of the members' association and the board of***
16 ***directors, and any regularly scheduled committee meetings, are open to***
17 ***all members of the association*** or any person designated by a member in
18 writing as the member's representative and all members or designated
19 representatives so desiring shall be permitted to attend and speak at an
20 appropriate time during the deliberations and proceedings. The board may place
21 reasonable time restrictions on those persons speaking during the meeting but
22 shall permit a member or member's designated representative to speak once
23 after the board has discussed a specific agenda item but before the board takes
24 formal action on that item in addition to any other opportunities to speak. The
25 board shall provide for a reasonable number of persons to speak on each side of
26 an issue. ***Persons attending may audiotape or videotape those portions of***
27 ***the meetings of the board of directors and meetings of the members that***
are open. The board of directors of the association shall not require
advance notice of the audiotaping or videotaping and may adopt
reasonable rules governing the audiotaping and videotaping of open
portions of the meetings of the board and the membership, but such rules
shall not preclude such audiotaping or videotaping by those attending,
unless the board audiotapes or videotapes the meeting and makes the
unedited audiotapes or videotapes available to members on request

28 ⁶³ See ARIZ. ADMIN. CODE R2-19-119.

29 ⁶⁴ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

30 ⁶⁵ BLACK'S LAW DICTIONARY 1220 (8th ed. 1999).

1 **without restrictions on its use as evidence in any dispute resolution**
2 **process.** Any portion of a meeting may be closed only if that closed portion of
3 the meeting is limited to consideration of one or more of the following:

4 1. Legal advice from an attorney for the board or the association. On final
5 resolution of any matter for which the board received legal advice or that
6 concerned pending or contemplated litigation, the board may disclose
7 information about that matter in an open meeting except for matters that are
8 required to remain confidential by the terms of a settlement agreement or
9 judgment.

10 2. Pending or contemplated litigation.

11 3. Personal, health or financial information about an individual member of
12 the association, an individual employee of the association or an individual
13 employee of a contractor for the association, including records of the
14 association directly related to the personal, health or financial information
15 about an individual member of the association, an individual employee of
16 the association or an individual employee of a contractor for the association.

17 4. Matters relating to the job performance of, compensation of, health
18 records of or specific complaints against an individual employee of the
19 association or an individual employee of a contractor of the association who
20 works under the direction of the association.

21 5. Discussion of a member's appeal of any violation cited or penalty
22 imposed by the association except on request of the affected member that
23 the meeting be held in an open session.

24 *(Emphasis added.)*

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

26 A. Except as provided in subsection B of this section, **all financial and**
27 **other records of the association shall be made reasonably available**
28 **for examination by any member** or any person designated by the member
29 in writing as the member's representative. The association shall not charge
30 a member or any person designated by the member in writing for making
material available for review. **The association shall have ten business**
days to fulfill a request for examination. On request for purchase of
copies of records by any member or any person designated by the member
in writing as the member's representative, the association shall have ten
business days to provide copies of the requested records. **An association**

1 **may charge a fee for making copies of not more than fifteen cents per**
2 **page.**

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

6 1. Privileged communication between an attorney for the association
7 and the association.

8 2. Pending litigation.

9 3. Meeting minutes or other records of a session of a board meeting
10 that is not required to be open to all members pursuant to section 33-
11 1804.

12 4. Personal, health or financial records of an individual member of the
13 association, an individual employee of the association or an
14 individual employee of a contractor for the association, including
15 records of the association directly related to the personal, health or
16 financial information about an individual member of the association,
17 an individual employee of the association or an individual employee
18 of a contractor for the association.

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

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

26 (*Emphasis added.*)

27 8. "In applying a statute . . . its words are to be given their ordinary meaning
28 unless the legislature has offered its own definition of the words or it appears from the
29 context that a special meaning was intended."⁶⁶ Each word, phrase, clause, and sentence
30 must be given meaning so that no part of the legislation will be void, inert, or trivial.⁶⁷

⁶⁶

MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁶⁷ See *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 204, ¶ 17 (App. 2007).

1 9. Legislation must also be given a sensible construction that avoids absurd
2 results.⁶⁸ If the words do not disclose the legislative intent, the court will scrutinize the
3 statute as a whole and give it a fair and sensible meaning.⁶⁹

4 10. Neither party clearly presented their evidence in this matter. Here, Petitioner
5 only testified about his March and April 2021, and February 2022 records requests, and
6 Respondent did not clarify the specific dates by which the Association responded the
7 multitude of Petitioner's requests. Thus, the undersigned to rely heavily on the exhibits
8 that had been admitted into the record. To that end, however, the material facts in this
9 matter are distinguishable.

10 11. The crux of this matter involves Petitioner's four (4) petitions to the
11 Department that allege Respondent violated ARIZ. REV. STAT. §§ 33-2805(A) and 33-
12 1804(A). Specifically, that Respondent failed to timely and completely fulfill records
13 request submitted March 26, 2021, April 27, 2021, October 21, 2021, November 08, 2021,
14 December 07, 2021, January 19, 2022, February 28, 2022, and March 30, 2022, in
15 violation of ARIZ. REV. STAT. § 33-2805(A), and that Respondent produces "altered"
16 copies of recorded meetings in violation of ARIZ. REV. STAT. § 33-1804(A).

17 12. The credible evidence of record reflects that an overwhelming majority of
18 Petitioner's records request were fully and timely complied with, save those that were
19 unable to be fulfilled due to their privileged and/or private nature or sheer nonexistence.
20 Notably, however, the exceptions that fall outside these specific instances include
21 Petitioner's April 27, 2021, survey request(s), and Petitioner's December 07, 2021,
22 records request regarding Brian Schoeffler's communication(s). In each of these
23 circumstances Mr. Schoeffler was clearly acting in his capacity as a Board Member, and
24 the Association was required to provide the requested records upon request – regardless
25 of whether AAM had the documents in its possession.

26 13. Therefore, based on the relevant and credible evidence of record, the
27 undersigned concludes that Petitioner did not sustain his burden of proof regarding
28 Respondent's alleged violation of ARIZ. REV. STAT. § 33-1804(A), but successfully

29 ⁶⁸ See *State v. Gonzales*, 206 Ariz. 469, 471, ¶12 (App. 2003).

30 ⁶⁹ See *Luchanski v. Congrove*, 193 Ariz. 176, 178, ¶ 9.

1 sustained his burden of proof, in part, regarding Respondent's alleged violation(s) of ARIZ.
2 REV. STAT. § 33-1805.

3 14. Based on the parties' tumultuous relationship and severity regarding the
4 violation(s) at issue, or lack thereof, the Tribunal declines to assess a civil penalty in any of
5 the petitions in this matter.

6 **ORDER**

7 **IT IS ORDERED** that petitions 1 and 4 in this matter be granted, in relevant parts.

8 **IT IS FURTHER ORDERED** that all remaining portions of petitions 1 and 4, and the
9 entirety of petitions 2 and 3, in this matter be denied.

10 **IT IS FURTHER ORDERED** that Petitioner's request to levy civil penalties against
11 Respondent is denied.

12 **IT IS FURTHER ORDERED** pursuant to ARIZ. REV. STAT. § 32-2199.02(A),
13 Respondent shall not reimburse Petitioner's filing fee as required by ARIZ. REV. STAT. §
14 32-2199.01.

15 **NOTICE**

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

21 Done this day, February 21, 2023.

22 **Office of Administrative Hearings**

23 /s/ Jenna Clark
24 Administrative Law Judge

25 Transmitted electronically to:

26 Susan Nicolson, Commissioner
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28 Arizona Department of Real Estate
29 100 N. 15th Ave., Ste. 201
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