

1 material available for review. The association shall have ten
2 business days to fulfill a request for examination. On request
3 for purchase of copies of records by any member or any person
4 designated by the member in writing as the member's
5 representative, the association shall have ten business days to
6 provide copies of the requested records. An association may
7 charge a fee for making copies of not more than fifteen cents
8 per page.

9 **FINDINGS OF FACT**

10 1. At all times material to this matter, Petitioner resided in a planned community run
11 by Respondent.

12 2. On October 21, 2011, at 10:09 a.m., Petitioner submitted via email the following
13 records request to Respondent's Custodian of Records, Cici Rausch ("Ms. Rausch"):

14 Pursuant to Arizona Revised Statutes and the Amended and
15 Restated Bylaws of Terravita Country Club, Inc., by return e-
16 mail please provide the following record:

17 Not-For-Profit Individual and Organization Insurance
18 Policy Including Employment Practices Liability Insurance or
19 Non-Profit Management and Organization Liability Insurance
20 Policy and/or any other such Directors and Officers Liability
21 [I]nsurance [P]olicy including any endorsements attached at
22 issuance for the current policy period.

23 3. Petitioner alleged in a Petition that was filed with the Arizona Department of Fire
24 Building and Life Safety ("Department") that Respondent failed to provide a copy of the
25 Policy, in violation of A.R.S. § 33-1805(A).¹ At hearing, Petitioner represented that he is
26 not proceeding with the allegation that Respondent violated any provision of its Bylaws.

27 4. Ms. Rausch testified that upon receipt of the above-mentioned e-mail, she did not
28 understand what Petitioner was requesting and contacted Tom Forbes ("Mr. Forbes"),
29 the General Manager of the country club, and Raquel Shull ("Ms. Shull"), Respondent's
30 Controller, and forwarded Petitioner's request to them.

5. On October 21, 2011, at 4:22 p.m., Ms. Rausch responded to Petitioner's request
via email and sent him a copy of a Certificate of Insurance Liability issued by
Philadelphia Ins. Co.

¹ Administrative notice is taken that Petitioner paid a filing fee of \$550.00 to the Department.

1 6. On October 21, 2011, at 4:48 p.m., Petitioner sent Ms. Rausch another email
2 requesting a copy of the same records he previously requested. In that request,
3 Petitioner specifically requested the Directors and Officer's Liability Insurance Policy
4 number PHSD646331 issued by Philadelphia Ins. Co.

5 7. Ms. Rausch testified that she did not understand what Petitioner was requesting
6 and again forwarded the request to Ms. Shull and Mr. Forbes. Ms. Rausch sent a
7 responsive email to Petitioner on October 24, 2011 at 1:34 p.m. indicating that she
8 would follow up with Ms. Shull.

9 8. On October 28, 2011, at 5:18 p.m., Ms. Rausch received an email from Mr.
10 Forbes with an attachment, the Policy. Ms. Rausch was unable to recall when she
11 opened that email.

12 9. On November 4, 2011 at 4:55 p.m., Petitioner sent another request to Ms.
13 Rausch via email that mirrored the request made on October 21, 2011.

14 10. On November 4, 2011, at 6:25 p.m., Ms. Rausch sent an email to Petitioner
15 referring to two prior emails, stating that "we" are still not sure what Petitioner wanted,
16 but that if what he has been sent is not what he is requesting to contact her.² Petitioner
17 acknowledged that he received the email that was sent on November 4, 2011, at 6:25
18 p.m. but does not know when he read it.

19 11. Ms. Rausch testified that on Friday November 4, 2011, she sent an email to
20 Petitioner with the Policy as an attachment. Ms. Rausch could not recall the exact time
21 the email was "sent" to Petitioner. She recalled pressing the send button to have the
22 email delivered to Petitioner and her computer screen then went blank. At that time,
23 Ms. Rausch believed she had sent the Policy to Petitioner. Ms. Rausch could not state
24 whether she sent the November 4, 2011 email at 6:25 p.m. before or after she sent the
25 email with the Policy as an attachment that became "stuck" in her outbox.

26 12. Ms. Rausch testified that sometime on Monday, November 7, 2011, she became
27 aware that the November 4, 2011 email with the attached Policy had become "stuck" in
28 her outbox and had not been delivered to Petitioner. Thus, Respondent asserted that

29 _____
30 ² Ms. Rausch was uncertain at hearing which two emails she had referenced in the November 4, 2011
email.

1 due to a "computer error" that was unintentional, the Policy was not sent to Petitioner on
2 November 4, 2011.

3 13. Ms. Rausch testified that she re-sent the email and attachment (the Policy) to
4 Petitioner on November 7, 2011 at 5:18 p.m. and Petitioner acknowledged that he
5 received the Policy but could not state when he read the email.

6 14. Petitioner asserted that Respondent did not provide a copy of the Policy to him
7 within the time frame set forth in A.R.S. § 33-1805. Petitioner represented, and the
8 facts show, that Petitioner submitted three requests to obtain the Policy, while he
9 asserted that he only had to make the request once.

10 **CONCLUSIONS OF LAW**

11 1. In this proceeding, Petitioner bears the burden of proving by a preponderance of
12 the evidence that Respondent violated A.R.S. § 33-1808 and A.R.S. § 33-1803(D). See
13 A.A.C. R2-19-119.

14 2. A preponderance of the evidence is "[e]vidence which is of greater weight or more
15 convincing than the evidence which is offered in opposition to it; that is, evidence which as
16 a whole shows that the fact sought to be proved is more probable than not." BLACK'S LAW
17 DICTIONARY 1182 (6th ed. 1990).

18 3. The evidence of record established that Petitioner requested that a copy of the
19 Policy be provided to him via email. The record is unclear as to why Ms. Rausch, Mr.
20 Forbes, or Ms. Shull did not understand what Petitioner was requesting from
21 Respondent. The record also reflects that Ms. Rausch received a copy of the Policy
22 from Mr. Forbes on October 28, 2011, but did not attempt to email it to Petitioner until
23 sometime on November 4, 2011.

24 4. Respondent asserted that Petitioner should have contacted Respondent to
25 confirm whether he had received the Policy on November 4, 2011, and implied that had
26 Petitioner contacted Respondent and advised that he had not received the Policy,
27 Respondent could have re-sent the Policy within the requisite time period. However,
28 that assertion is not persuasive because the email requesting confirmation of receipt of
29 the Policy was sent to Petitioner on Friday, November 4, 2011, at 6:25 p.m., and the
30 email indicates Ms. Rausch would be gone for the weekend. That means that it is more

1 likely than not that even had Petitioner responded to the email and informed
2 Respondent that he had not received the Policy, it would have most likely been re-sent
3 the following Monday, November 7, 2011. Under the circumstances, Respondent's
4 argument that Petitioner should be estopped from pursuing the instant matter because
5 Petitioner did not contact Respondent fails.

6 5. Respondent is herein held accountable for not having provided Petitioner with a
7 copy of the Policy within the requisite time period. However, the evidence of record
8 established that Respondent attempted to comply with the law, which the Administrative
9 Law Judge has taken into consideration in determining whether any civil penalty should
10 be imposed against Respondent.

11 6. After the hearing, Petitioner submitted a document alleging that Ms. Rausch
12 perjured herself at hearing, that her testimony should not be given any weight, and that
13 sanctions should apply. Respondent responded to Petitioner's filing by submitting an
14 affidavit of Ms. Rauch, wherein she explained that she did not believe her divorce
15 proceeding in Family Court was a civil action and that is why she responded "No" to
16 Petitioner's question, "Are you presently a petitioner, respondent, plaintiff or defendant
17 in any other civil litigation?" H.R. at 0:46:48-0:46:55. Petitioner submitted a Reply re-
18 alleging that Ms. Rausch provided false testimony and that Cici Rausch also did not
19 truthfully identify herself to this Tribunal because her name is Celia Anne Rausch and
20 not Cici Rausch.

21 7. The Administrative Law Judge concludes that Ms. Rausch's understanding and
22 response to Petitioner's question concerning whether she was involved in any civil
23 proceeding as set forth in her Affidavit is a reasonable explanation of her "No" response.

24 8. The Administrative Law Judge concludes that the assertion that Ms. Rausch did
25 not truthfully identify herself when asked to state and spell her name for the record is
26 not considered to be untruthful as there is documentary evidence that Ms. Rausch has
27 presented herself to others under the name "Cici".

28 9. Under the circumstances, the Administrative Law Judge does not consider Ms.
29 Rauch's responses to the questions that Petitioner contends to be false testimony or
30 perjury, and does not impact Ms. Rauch's credibility.

1 10. The evidence of record established that Respondent thought that on November
2 4, 2011, it had complied with the law and provided Petitioner with a copy of the Policy;
3 when Respondent became aware that the Policy had not been electronically
4 transmitted, Respondent re-sent it on Monday November 7, 2011. Consequently, the
5 Administrative Law Judge concludes that the imposition of sanctions against
6 Respondent is not warranted.

7 11. The Administrative Law Judge concludes that Petitioner has shown by a
8 preponderance of the evidence that Respondent violated A.R.S. § 33-1805(A).

9 12. As Petitioner is the prevailing party, Respondent is shall pay Petitioner his filing
10 fee. See A.R.S. § 41-2198.02.

11 **ORDER**

12 Based on the above, Respondent shall pay Petitioner his filing fee of \$550.00
13 within 30 days of the effective date of the Order entered in this matter, and as
14 Respondent has already provided a copy of the Policy to Petitioner, no further action is
15 required of Respondent.

16 *In the event of certification of the Administrative Law Judge Decision by the*
17 *Director of the Office of Administrative Hearings, the effective date of the Order will be 5*
18 *days from the date of that certification.*

19
20
21 Done this day, May 8, 2012.

22
23 /s/ Lewis D. Kowal
24 Administrative Law Judge

25 Transmitted electronically to:

26 Gene Palma, Director
27 Department of Fire Building and Life Safety
28
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30