

1 **Final agency action regarding decision below:**

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3 **ALJCERT ALJ decision certified as final**

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5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6  
7 ALEXANDER WINTER

8 Petitioner,

9 vs

10 CORTINA HOMEOWNERS  
11 ASSOCIATION,

12 Respondent.

**No. 13F-H1314004-BFS**

**ADMINISTRATIVE  
LAW JUDGE DECISION**

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15 **HEARING:** March 4, 2014, at 8:00 a.m., with the record open until March 6,  
16 2014.

17 **APPEARANCES:** Alexander Winter (hereinafter "Petitioner" or "Mr. Winter")  
18 appeared on his own behalf. Cortina Homeowners Association (hereinafter "Cortina,"  
19 "Respondent," or "the association") was represented by its attorney, Mark K. Sahl, Esq.,  
20 Carpenter, Hazlewood, Delgado & Bolen, P.L.C.

21 **ADMINISTRATIVE LAW JUDGE:** M. Douglas

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23 Evidence and testimony were presented and the following Findings of Fact,  
24 Conclusions of Law and Recommended Order are made:

25 **FINDINGS OF FACT**

26 **Background**

- 27 1. The Department of Fire, Building and Life Safety (the "Department") is authorized by  
28 statute to receive Petitions for Hearings from members of homeowners' associations  
29 and from homeowners' associations in Arizona.  
30 2. Cortina is a homeowners' association located in Arizona.  
3. Petitioner owns a residence in and is a member of Cortina.

1 4. On or about August 21, 2013, Petitioner filed a petition with the Department alleging  
2 that Cortina had violated the provisions of A.R.S. § 33-1805. Petitioner specifically  
3 alleged as follows:

4 I sent several HOA document request to my mgmt company  
5 between 6/30/13-8/8/13. Requested items were denied, not sent,  
6 not received, not provided or not made available within 10  
7 business days. To date, several request[ed] items are still not  
8 provided or I was told that I was denied certain items.

9 5. Respondent's Answer to the Petition provided, in relevant part, as follows:

10 The Respondent denies the allegations found in the Complaint  
11 that the Respondent violate[d] Arizona Revised Statute (A.R.S.) §  
12 33-1805. This Verified Answer and Motion to Dismiss Petition will  
13 show that A.R.S. § 33-1805 was not violated.

14 6. On November 22, 2013, Petitioner and Cortina participated in a prior administrative  
15 hearing (Docket No. 13F-H1314001-BFS). The prior hearing was based on a separate  
16 petition that asserted that Respondent had failed to provide Petitioner with all of the  
17 documents that he requested on June 12, 2013. The Administrative Law Judge in the  
18 previous hearing concluded, in relevant part, as follows:

19 5. As to the documents other than the contracts and invoices, the  
20 credible testimony established that those documents were copied  
21 and available for Petitioner to pick up. Petitioner's failure to pick  
22 up the documents does not equate to a violation of A.R.S. § 33-  
23 1805 by Respondent.

24 6. As to the invoices from Renaissance Community Partners,  
25 Petitioner established that he was not provided a copy of those  
26 documents within 10 business days of the request. However, the  
27 credible testimony established that the invoices contained  
28 financial records and information of individual members.  
29 Therefore, Respondent's records could be withheld from  
30 disclosure "to the extent that the portion withheld relates to" the  
financial records and information of individual members. A.R.S. §  
33-1805(B)(4). Accordingly, Respondent had a statutory  
obligation to provide redacted copies of those documents to  
Petitioner in accordance with his request and the failure to do so  
was a violation of the statute.

1 7. As to the contracts, Petitioner established that he was not  
2 provided a copy of or allowed to review those documents within  
3 10 business days of the request. However, Respondent argued  
4 the contracts were protected under A.R.S. § 33-1805(C) as the  
5 contracts contain trade secrets and that disclosure of those trade  
6 secrets would violate other state law.

7 8. Arizona statute defines a “trade secret” as information,  
8 including a formula, pattern, compilation, program, device,  
9 method, technique or process, that both:

10 (a) Derives independent economic value, actual or potential, from  
11 not being generally known to, and not being readily ascertainable  
12 by proper means by, other persons who can obtain economic  
13 value from its disclosure or use.

14 (b) Is the subject of efforts that are reasonable under the  
15 circumstances to maintain its secrecy.

16 A.R.S. § 44-401.

17 9. It is not necessary for the Administrative Law Judge to  
18 determine if the contracts at issue contain any trade secrets.  
19 While Respondent argued it could not disclose any trade secrets,  
20 it was willing to allow Petitioner to review the contracts in the  
21 presence of a Renaissance Community Partners employee and a  
22 representative from the vendor. In fact, the testimony established  
23 Petitioner had been allowed to review the contracts after the filing  
24 of the petition in this matter.

25 10. It is noted, however, that on the request Petitioner initialed the  
26 acknowledgement that copies of contracts were not provided, but  
27 could be reviewed at Respondent’s office. Therefore, Petitioner’s  
28 request, on its face does not request copies of the contracts.

29 11. Even though Petitioner’s request may be interpreted to be  
30 seeking only an inspection of the contracts, Respondent failed to  
make those documents available for review within 10 business  
days of the request as evidenced by Mr. Bishop’s email reply that  
he was on vacation and Petitioner could make an appointment  
after July 7, 2013, 18 business days after the request was made,  
which is a violation of A.R.S. § 33-1805(A).

Therefore, Petitioner established by a preponderance of the  
evidence that Respondent violated A.R.S. § 33-1805.

1 13. The Administrative Law Judge concludes that Petitioner's  
2 Petition should be granted.

3 7. The Administrative Law Judge recommended, in relevant part, as follows:

4 Respondent is ordered to comply with A.R.S. § 33-1805 and  
5 provide Petitioner with copies of all of the documents required  
6 under the statute within ten days of the Order entered in this  
7 matter. Those documents may be redacted as provided for in  
8 A.R.S. § 33-1805(B)(4).

9 Respondent is further ordered to pay Petitioner [his] filing  
10 fee of \$550.00 within 30 days of the effective date of the Order  
11 entered in this matter.

12 8. The Recommended Order in Docket No. 13F-H1314001-BFS was certified as  
13 Final on January 17, 2014.

14 9. On or about February 19, 2014, Respondent filed a Motion to Dismiss and  
15 Vacate Hearing. Respondent's motion provided, in relevant part, as follows:

16 Since the setting of the Hearing regarding this matter, the  
17 Honorable Tammy L. Eigenheer, in that certain action referenced  
18 as Docket # 13F-H1314001-BFS, ordered the [Respondent] to  
19 "comply with A.R.S. § 33-1805 and provide [Petitioner] with copies  
20 of all the documents required under the statute within ten days of  
21 the Order entered in this matter. Those documents may be  
22 redacted as provided for in A.R.S. § 33-1805(B)(4)." The  
23 Respondent in complying with the Honorable Tammy L.  
24 Eigenheer's Order, has provided the Petitioner with the requested  
25 documents. . . .

26 10. Petitioner's response to the Motion to Dismiss and Vacate Hearing provides, in  
27 relevant part, as follows:

28 The reason for this subsequent DFBLs application is not for  
29 duplication or harassment, but because the Association again has  
30 failed to comply with Arizona statute.

The ARS 33-1805 Statute states that "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."

1 Docket # 13F-H1314001-BFS did result in the association being  
2 found guilty of violation of state statute and the court did order  
3 Cortina to fully comply with the law. This complaint was in regards  
4 to a request asking, in part, for the Renaissance Community  
Partners Contract, CleanCuts Contract, invoices, 2012 GL Detail  
Report and Budgets.

5 Case #HO 13-14/004 Docket # 13F-H1314004-BFS, this  
6 complaint, is in regards to a request for the Cortina General  
7 Session Minutes, Cortina Delinquency Reports, Committee  
8 Meeting Minutes, additional invoices, Operating Budgets from  
9 2007-2013, monthly Balance Sheets, Duford Inc contract and  
10 invoices, C&G Communication bid, Compilation Reports, Annual  
11 Meeting Minutes, JSJ Enterprises Contract and Bid, Detailed  
12 Monthly Income Expense Reports, evidence of email votes  
between Board meetings, Monthly Violation Report and Bank  
Statements.

13 As a homeowner in Cortina, the Petitioner made two separate  
14 requests and those separate requests were made at completely  
15 different points in time. Furthermore, the Petitioner's request was  
16 not fulfilled within ten business days as required by ARS 33-1805.  
17 In addition, as of the filing of this response motion, Petitioner still  
does not have copies of the requested association records  
mentioned in my complaint Docket # 13F-H131404-BFS.

18 11. On February 26, 2014, this Tribunal denied Respondent's Motion to Dismiss on  
19 the following basis:

20 Upon review and consideration of Respondent's motion and  
21 Petitioner's response, it appears that issues of fact exist which  
22 must be appropriately determined at a hearing on the merits.  
Consequently, Respondent's Motion must be denied at this time.

### 23 Testimony

#### 24 **Testimony of Alexander Winter**

25 12. Mr. Winter testified that he had not received the Delinquency Reports that he had  
26 requested on June 30, 2013. Mr. Winter asserted that he had repeatedly asked  
27 Respondent for the Delinquency Reports and that Respondent had failed to comply  
28 with his repeated requests. Mr. Winter stated that he does not know if the requested  
29 Delinquency Reports actually exist. Mr. Winter asserted that such reports should exist.  
30 Mr. Winter acknowledged that Cortina had informed him that Delinquency Reports did

1 not exist but that Accounts Receivable ("AR") summaries did exist. Mr. Winter testified  
2 that he had not requested copies of the AR summaries. Mr. Winter acknowledged that  
3 Cortina provided him with copies of the AR summaries in January, 2014.

4 13. Mr. Winter testified that he had not received copies of each year's Operation  
5 Budgets for the years 2007 through 2013, which he had requested on August 6, 2013.  
6 Mr. Winter acknowledged that he had received the requested Operation Budgets for  
7 2009 through 2013. Mr. Winter stated that the 2009-2013 Operation Budgets were not  
8 provided by Cortina within ten business days of his request. Mr. Winters testified that  
9 the actual budgets for 2009 though 2013 were provided to him in January 2014. Mr.  
10 Winters stated that he does not know if Cortina has possession of the Operation  
11 Budgets for 2007 and 2008. Mr. Winter acknowledged that Cortina utilized a different  
12 management company for 2007 and 2008.

13 14. Mr. Winter acknowledged that he had received the requested "CleanCuts"  
14 contract. Mr. Winter testified that the contract was not provided by Cortina within ten  
15 business days of his request. Mr. Winter stated that he received the requested contract  
16 in January 2014.

17 15. Mr. Winter acknowledged that he had received the requested "CleanCuts"  
18 invoices from January 2012, through July 2013. Mr. Winter testified that the invoices  
19 were not provided by Cortina within ten business days of his request. Mr. Winter  
20 acknowledged that the invoices were made available for his review within ten days of  
21 this request.

22 16. Mr. Winter testified that he had been allowed to read and take notes from the  
23 Renaissance Community Partners (hereinafter "RCP") Contract within ten business  
24 days of his request. Mr. Winter acknowledged that he had been provided a redacted  
25 copy of the RCP Contract.<sup>1</sup> Mr. Winter asserted that the redacted copy of the RCP  
26 Contract that had been provided to him was not a true copy of the RCP contract that he  
27 had been allowed to read and take notes from.

28 17. Mr. Winter acknowledged that copies of the RCP invoices were provided to him  
29 in January 2014. Mr. Winter testified that the RCP invoices were not provided to him

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<sup>1</sup> See Exhibit No. K (Redacted RCP Contract).

1 within ten business days of his request. Mr. Winter asserted that he did not believe that  
2 the RCP invoices that Cortina had provided to him were true copies of the RCP  
3 invoices.

4 18. Mr. Winter acknowledged that the CleanCuts contracts and invoices were  
5 addressed in the parties' prior administrative hearing (Docket No. 13F-H1314001-BFS).

6 19. Mr. Winter acknowledged that the RCP contract and invoices were addressed in  
7 the parties' prior administrative hearing (Docket No. 13F-H1314001-BFS).

8 20. Mr. Winter testified that he had not been provided copies of the Duford contract  
9 and invoice. Mr. Winter stated that he provided the request for the Duford contract to  
10 Cortina in July 2013. Mr. Winter testified that he assumed that Cortina had received his  
11 request. Mr. Winter stated that he had no actual proof that an email had been sent to  
12 Cortina. Mr. Winter acknowledged that he did not know if a Duford contract actually  
13 existed.

14 21. Mr. Winter testified that Cortina had not provided him with copies of the JSJ  
15 Enterprises Contract/Bid and any competing bids. Mr. Winter stated that he did not  
16 know if a JSJ Enterprises Contract/Bid and any competing bids exist. Mr. Winter  
17 acknowledged that he did not have proof that Cortina had received his request for the  
18 JSJ Enterprises Contract/Bid.

19 22. Mr. Winter testified that the C&G communications bid had not been provided to  
20 him within ten business days of his request. Mr. Winter acknowledged that he did not  
21 know if a C&G communications bid for the 2012 Q4 newsletter existed. Mr. Winter  
22 stated that Cortina had provided him with some paperwork regarding C&G  
23 communications. Mr. Winter testified that he believed that a C&G bid or contract  
24 should exist. Mr. Winter stated that he found it hard to believe that a vendor would be  
25 allowed into Cortina to perform work without a contract.

26 23. Mr. Winter testified that Cortina's verified Answer to his Petition was incorrect.  
27 Mr. Winter stated that Cortina had indicated that it had not received four of his written  
28 requests. Mr. Winter stated that Cortina had received at least one of his written  
29 requests that Cortina stated in its verified Answer had not been received by Cortina.<sup>2</sup>

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<sup>2</sup> See Exhibits No. 11 and 12 (8/8/13 email and response).

### Testimony of Kevin H. Bishop

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24. Kevin H. Bishop (hereinafter "Mr. Bishop") testified that he is the president of RCP. Mr. Bishop stated that he is the community manager and statutory agent for Cortina. Mr. Bishop testified that the same parties participated in a prior administrative hearing (Docket No. 13F-H1314001-BFS). Mr. Bishop acknowledged that Cortina had been found to have been in violation of A.R.S. § 33-1805 after the prior administrative hearing.

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25. Mr. Bishop testified that Cortina does not have Delinquency Reports. Mr. Bishop stated that Cortina had provided Mr. Winter with a complete set of redacted AR reports, which are similar to the requested Delinquency Reports.

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26. Mr. Bishop testified that Cortina did not possess Operation Budgets for 2007 and 2008. Mr. Bishop stated that Cortina had provided Mr. Winter with all Operation Budget records that Cortina possessed.

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27. Mr. Bishop testified that the CleanCuts contract and invoices were made available to Mr. Winter for his review within ten business days of his request. Mr. Bishop stated that the CleanCuts contract and invoices were specifically addressed in the administrative hearing for Docket No. 13F-H1314001-BFS. Mr. Bishop testified that Cortina provided Petitioner with copies of the CleanCuts contract and invoices after the previous administrative hearing.

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28. Mr. Bishop testified that the RCP contract was made available to Mr. Winter within ten days of his request. Mr. Bishop acknowledged that Cortina had not allowed Mr. Winter to review the RCP invoices within ten days of Mr. Winter's request. Mr. Bishop stated that the RCP contract and RCP invoices were specifically addressed in the administrative hearing for Docket No. 13F-H1314001-BFS. Mr. Bishop testified that Cortina had provided Mr. Winter with redacted copies of the RCP contract and invoices after the previous administrative hearing. Mr. Bishop stated that Cortina provided Mr. Winter with 3,200 pages of documents after the previous administrative hearing.

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29. Mr. Bishop testified that Cortina had not received a request from Mr. Winter for a Duford contract and invoice. Mr. Bishop stated that no such a contract exists.

30. Mr. Bishop acknowledged that Cortina had not provided Mr. Winter with a copy of

1 C&G communications bid for the 2012 Q4 newsletter. Mr. Bishop testified that Cortina  
2 had never received a request from Mr. Winter for the C&G communications bid for the  
3 2012 Q4 newsletter. Mr. Bishop stated that a C&G communications bid for 2012 Q4  
4 newsletter did not exist.

5 31. Mr. Bishop acknowledged that Cortina had not provided Mr. Winter with a copy of  
6 a JSJ Enterprises Contract/Bid. Mr. Bishop testified that Cortina had not received a  
7 request from Mr. Winter for a JSJ Enterprises Contract/Bid and any competing bids.  
8 Mr. Bishop stated that a JSJ Enterprises Contract/Bid did not exist and that Cortina had  
9 provided Mr. Winter with a copy of the JSJ Enterprises invoice.

10 32. Mr. Bishop acknowledged that Cortina's verified Answer had an error in it. Mr.  
11 Bishop testified that Cortina had received Mr. Winter's August 8, 2013 request for  
12 Board Minutes. Mr. Bishop stated that Cortina's attorney had made an error in the  
13 Answer. Mr. Bishop testified that he had spent hours searching for additional requests  
14 from Mr. Winter and was unable to find any other written requests from Mr. Winter.

15 **Testimony of Christopher Scott Puckett**

16 33. Christopher Scott Puckett (hereinafter "Mr. Puckett") testified that he is president  
17 of the Board of Directors for Cortina. Mr. Puckett stated that he had served on the  
18 Board of Directors for nearly two years. Mr. Puckett testified that after the  
19 administrative hearing for Docket No. 13F-H1314001-BFS, Cortina turned over 3200  
20 pages of documents to Mr. Winter.

21 34. Mr. Puckett testified that RCP had notified the Board of Directors about Mr.  
22 Winter's numerous written requests for records. Mr. Puckett stated that he did not  
23 recall reviewing specific requests. Mr. Puckett testified that the Board of Directors had  
24 directed RCP to provide Mr. Winter with whatever documents Mr. Winter requested,  
25 provided that he was entitled to have the requested documents.

26 **PROVISIONS OF LAW REFERENCED AT THE HEARING**

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29 1. A.R.S. § 33-1805 provides as follows:

30 A. Except as provided in subsection B of this section, all financial  
and other records of the association shall be made reasonably

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

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

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

17 2. Pending litigation.

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

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

28 5. Records relating to the job performance of, compensation of,  
29 health records of or specific complaints against an individual  
30 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.

### **CONCLUSIONS OF LAW**

1  
2 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to  
3 file a petition with the Department for a hearing concerning violations of planned  
4 community documents or violations of statutes that regulate planned communities.  
5 That statute provides that such petitions will be heard before the Office of  
6 Administrative Hearings.

7 2. The burden of proof at an administrative hearing falls to the party asserting a  
8 claim, right, or entitlement and the standard of proof on all issue in this matter is by a  
9 preponderance of the evidence. See A.A.C. R2-19-119.

10 3. Proof by “preponderance of the evidence” means that it is sufficient to persuade  
11 the finder of fact that the proposition is “more likely true than not.” *In re Arnold and*  
12 *Baker Farms*, 177 B.R. 648, 654 (9<sup>th</sup> Cir. BAP (Ariz.) 1994).

13 4. Petitioner asserts that Cortina has failed to provide him with copies of requested  
14 Delinquency Reports, Operation Budgets for 2007 and 2008, Duford Contract and  
15 Invoice, JSJ Enterprises Contract/Bid and competing bids, and the C&G  
16 communications bid for the 2012 Q4 Newsletter.

17 5. The credible evidence of record is insufficient and fails to support a finding that  
18 the requested Delinquency Reports, Duford Contract and Invoice, JSJ Enterprises  
19 Contract/Bid, and the C&G communications bid exist. Cortina is not responsible for  
20 producing documents that do not exist or that it does not possess. There was no  
21 credible evidence that Cortina had refused or failed to provide Petitioner with any  
22 requested document that was within Cortina’s possession.

23 6. Petitioner asserts that his requests for the CleanCuts contract/invoices and the  
24 RCP contract and invoices are completely different from the requests considered in the  
25 prior administrative hearing because they were made subsequent to his first requests  
26 and prior to the results of the previous administrative hearing.

27 7. Petitioner’s requests for the CleanCuts contract/invoices and the RCP contract  
28 and invoices, including the issue of redaction, were all specifically addressed in the  
29 prior administrative hearing between these same parties (Docket No. 13F-H1314001-  
30 BFS). The matter at issue is not an appeal or rehearing of the previous administrative

1 hearing. The exact same matters between the same parties that have been specifically  
2 addressed in the prior Order in Docket No. 13F-H1314001-BFS cannot be relitigated in  
3 a subsequent hearing. Collateral estoppel precludes the relitigation of a fact or issue  
4 previously determined in a prior suit between the same parties or their privies.<sup>3</sup>

5 **RECOMMENDED ORDER**

6 In view of the foregoing, it is ORDERED that Respondent be deemed the  
7 prevailing party in this matter.

8 It is further ORDERED that this matter be dismissed.

9 *In the event of certification of the Administrative Law Judge Decision by the*  
10 *Director of the Office of Administrative Hearings, the effective date of this Order will*  
11 *be five (5) days from the date of that certification.*

12 Done this day, March 21, 2014.

13 /s/ M. Douglas  
14 Administrative Law Judge

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16 Transmitted electronically to:

17 Gene Palma, Director  
18 Department of Fire Building and Life Safety  
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<sup>3</sup> See *Wetzel v. Ariz. State Real Estate Dep't*, 151 Ariz. 330, 33, 727 P.2d 825, 828 (App. 1986).