

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 JOHN & DEBBORAH SELLERS,  
8 Petitioners,

**No. 15F-H1515003-BFS**

9 vs

**ADMINISTRATIVE  
LAW JUDGE DECISION**

10 THE CROSSINGS AT WILLOW CREEK,  
11 Respondent.

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12 **HEARING:** June 17, 2015

13 **APPEARANCES:** Petitioners John and Debborah Sellers appeared on their own  
14 behalf. Brenda Dozier and Peter Giambanco appeared on behalf of Respondent The  
15 Crossings at Willow Creek.

16 **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer

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18 **RULING**

19 This hearing involved an allegation made by Petitioners John and Debborah  
20 Sellers that The Crossings at Willow Creek (Respondent) violated A.R.S. § 33-1805 by  
21 failing to provide them with the all the documents they requested on January 29, 2015.  
22 The Administrative Law Judge concludes that Petitioners established a violation by  
23 Respondent.

24 **FINDINGS OF FACT**

25 1. Respondent is an association of homeowners located in  
26 Prescott, Arizona.

27 2. On January 29, 2015, Petitioners emailed a written request to  
28 Dennis May, the president of AMCOR Property Professionals, Inc. (AMCOR), the  
29 property management company for Respondent. The request reads as follows:

30 **RECORDS COPY REQUESTS**

Please supply us with copies of the following:

Office of Administrative Hearings  
1400 West Washington, Suite 101  
Phoenix, Arizona 85007  
(602) 542-9826

1           **1. The Giambanco affidavit**

- 2           o This affidavit signed by Board Member Giambanco was dated  
3           sometime in November 2007. It was prepared by the  
4           Associations Counsel, Ekmark & Ekmark, and presented in the  
5           public hearing of Case #08F-H078005 before the OAH in  
6           December 2007.  
7           o Pursuant to the Associations [sic] record retention policy, this is  
8           to be kept permanently and surely is in the hands of that  
9           counsel.

10           **2. Records related to employee dishonesty insurance**

- 11           o This was approved at the October 1, 2013 Board meeting.  
12           o To include copies of the policy and communications with  
13           insurers/agents etc.

14           **3. Records relevant to any amendments to the members notification  
15           policy adopted at the 6/6/13 Board Meeting**

- 16           o This was a policy wherein members would be notified by post of  
17           future Board Meetings. If none exists, please advise

18           **4. Copies of records relevant to access via the Association owned  
19           RV Road to Pioneer Park.**

- 20           o To help you, I sent you the Yavapai County Board of  
21           Supervisors minutes wherein this access was dedicated and  
22           accepted by the County  
23           o To include any invoices relevant to the closure of that public  
24           access by the Association by posting signs

25           **5. The Managers Report presented at the Jan 21, 2015 Board  
26           Meeting**

- 27           o This represents pages 21-23 of the Board Package prepared by  
28           you.  
29           o The contemporaneous notes of that meeting which are  
30           obviously subject to approval. I assume these were kept by  
            Mrs. Giambanco.

**6. Copies of all competing bids and presentations by other  
            companies than AMCOR**

- o Per the Board Minutes dated November 12, 2014, three  
            companies, other than you, were approached as candidates for  
            Management Company. They were Hoamco, Liberty  
            Management and G&D Development. Per the minutes, two  
            submitted written proposals in addition to you. Please supply  
            copies of them.

**7. Statements required pursuant to ARS 10.11620<sup>1</sup>**

- o These are the explanatory statements required to be supplied to  
            members upon request.

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<sup>1</sup> Petitioners stated at the hearing that this issue was now moot based on further information provided to them.

- o Thank you for the 2014 Accounts but they differ substantially in both format and presentation from last years [sic]. There has also been a change in accounting policy
- o I'm a trained banker and I cannot understand them. How other members would interpret them I have no idea.

Exhibit A2.<sup>2</sup>

3. Petitioners did not direct the Administrative Law Judge to any document alleged to be a direct response to the request at issue. Petitioners provided voluminous emails from Mr. Sellers to various individuals showing requests for documents and his comments on emails received by him (without the emails attached), but those requests are not the subject of the instant matter.

4. Petitioners alleged they did not receive any documents responsive to the records request within the 10-day statutory timeframe.

5. Respondent argued that the documents requested by Petitioners did not exist, were not in the possession of Respondent, or were provided to Petitioners. Specifically, with respect to each of requests responded as follows:

- a. The Giambanco affidavit – The affidavit was not in Respondent's possession. Respondent's representative at the hearing stated that she did not know why Petitioners needed the affidavit. Respondent acknowledged it did not contact the attorneys Petitioners referred to in the request to determine if the affidavit was available.
- b. Records related to employee dishonesty insurance – Respondent did not have any documentation relating to the additional coverage. After receiving Petitioners' request, Respondent contacted the insurance carrier and requested a copy of the document. Once Respondent received the document, it notified Petitioners the document was available and could be provided to them.

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<sup>2</sup> The email sent also included a section labeled "**Inspection Requests**" in which Petitioners requested that AMCOR make the Association's electronic records available for inspection during normal business hours. Per the Petition filed by Petitioners, the factual basis for this petition was "a written records request" submitted to AMCOR "to supply copies of Association records." Petitioners did not reference the failure to comply with the "inspection request."

- 1 c. Records relevant to any amendments to the members notification policy –  
2 Respondent did not have any members notification policy; therefore,  
3 Respondent did not have any amendments to the members notification  
4 policy.
- 5 d. Records relevant to access via the Association owned RV road –  
6 Respondent provided a document showing an invoice for a sign was paid.  
7 Respondent did not retain a copy of the invoice.
- 8 e. The Managers Report – Initially, Respondent indicated that pages 21 – 23  
9 of the Board Package were blank and that there was nothing to provide.  
10 However, Respondent then acknowledged that pages 21 – 23 of the  
11 Board Package included bullet points regarding what AMCOR was going  
12 to discuss at the meeting. Respondent’s representative at the hearing did  
13 not know what was supplied to Petitioners in response to the request.
- 14 f. Copies of all competing bids and presentations by other companies –  
15 Once AMCOR was selected to be the property management company for  
16 Respondent, the competing bids were destroyed as it was believed there  
17 was no reason to keep them. Therefore, Respondent had no documents  
18 responsive to Petitioners’ request.

19 6. On or about February 27, 2015, Petitioners filed a Petition with  
20 the Department of Fire, Building and Life Safety (Department) alleging Respondent  
21 violated A.R.S. § 33-1805 by failing to provide them with the requested documents.  
22 Petitioners paid a \$550.00 filing fee.

23 7. Respondent filed an Answer with the Department denying the  
24 allegations set forth in the Petition.

25 8. On or about April 20, 2015, the Department issued a Notice of  
26 Hearing to the parties notifying them that a hearing on the Petition would be conducted  
27 by the Office of Administrative Hearings.

28 9. On June 17, 2015, a hearing was held on the Petition and the  
29 parties presented evidence and argument regarding the statute and the documents  
30 provided to Petitioners.



1           2.           In this proceeding, Petitioners bear the burden of proving by a  
2 preponderance of the evidence that Respondent violated A.R.S. § 33-1805. A.A.C. R2-  
3 19-119.

4           3.           A preponderance of the evidence is “[e]vidence which is of greater  
5 weight or more convincing than the evidence which is offered in opposition to it; that is,  
6 evidence which as a whole shows that the fact sought to be proved is more probable than  
7 not.” BLACK’S LAW DICTIONARY 1182 (6th ed. 1990).

8           4.           A.R.S. § 33-1805 provides, in pertinent part:

9           A. Except as provided in subsection B of this section, all financial and  
10 other records of the association shall be made reasonably available for  
11 examination by any member or any person designated by the member in  
12 writing as the member’s representative. The association shall not charge a  
13 member or any person designated by the member in writing for making  
14 material available for review. The association shall have ten business  
15 days to fulfill a request for examination. On request for purchase of copies  
16 of records by any member or any person designated by the member in  
17 writing as the member’s representative, the association shall have ten  
18 business days to provide copies of the requested records. An association  
19 may charge a fee for making copies of not more than fifteen cents per  
20 page.

21           5.           As to the Giambanco affidavit, the request itself referred  
22 Respondent to the law firm that represented Respondent during the 2007 hearing.  
23 While the affidavit may not have been in Respondent’s possession at the time of the  
24 request, it was an association record that was accessible to Respondent had it sought  
25 to obtain a copy from counsel. Respondent’s assertion that it did not know why  
26 Petitioners would want the affidavit was irrelevant. Respondent did not establish that  
27 the document was covered by an exception to the statute. Therefore, Respondent’s  
28 failure to provide a copy of the Giambanco affidavit constituted a failure to comply with  
29 A.R.S. § 33-1805.

30           6.           As to the Manager’s Report, the evidence of record established  
that there were three pages in the Board Packet that included at least bullet points of  
what the Manager’s Report would address. Whether that information would be useful to  
anyone is not a basis to deny the request. Again, Respondent did not establish that the  
document was covered by an exception to the statute or did not constitute an

1 association record. Therefore, Respondent's failure to provide the Manager's Report  
2 constituted a failure to comply with A.R.S. § 33-1805.

3 7. As to the remaining documents requested, Petitioners failed to  
4 establish by a preponderance of the evidence that the documents existed at the time of  
5 the January 29, 2015 request such that Respondent's failure to provide the documents  
6 was a violation of A.R.S. § 33-1805. Whether Respondent was required to maintain a  
7 copy of the documents in accordance with the purported record retention policy is not  
8 relevant to a determination as to whether Respondent complied with the statute.

9 8. While not specifically included in the petition, Petitioners also  
10 failed to establish a violation of A.R.S. § 33-1805 based on the refusal to allow  
11 Petitioners to inspect Respondent's electronic records. The evidence of record  
12 established that Respondent does not maintain electronic records any longer. While  
13 those records may have existed as some point and may still be in existence on the  
14 internet, that does not mean the records still constitute Respondent's electronic records.  
15 AMCOR took the electronic records from the thumb drive it was provided and converted  
16 those documents to hard copies to be maintained.

17 9. Therefore, Petitioners established by a preponderance of the  
18 evidence that Respondent violated A.R.S. § 33-1805 as described above.

19 10. The Administrative Law Judge concludes that Petitioner's  
20 Petition should be granted.

21 **RECOMMENDED ORDER**

22 Respondent is ordered to comply with A.R.S. § 33-1805 and provide Petitioners  
23 with copies of the Giambanco affidavit and the Manager's Report within ten days of the  
24 Order entered in this matter.

25 Respondent is further ordered to pay Petitioners their filing fee of \$550.00 within  
26 30 days of the effective date of the Order entered in this matter.

27 *In the event of certification of the Administrative Law Judge Decision by the*  
28 *Director of the Office of Administrative Hearings, the effective date of the Order will be*  
29 *five days from the date of that certification.*

30 Done this day, July 7, 2015.

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/s/ Tammy L. Eigenheer  
Administrative Law Judge

Transmitted electronically to:  
Debra Blake, Interim Director  
Department of Fire Building and Life Safety