

1 and relevant records for any and all Executive Sessions of the
2 Board since the filing of the current AZDRE Petition. To
3 include the meeting where Carpenter Hazelwood were
4 retained to defend the current Petition.

5 **4.** All communications, emails, notices, of any kind related to the
6 meeting(s) of members conducted for the purposes of signing
7 the notarized petition introduced into evidence at the last
8 Hearing. Such petition alleged a vendetta on my part. Such
9 meetings are identified by the dates notarized by Town of
10 Cave Creek employees in records previously supplied to you
11 evidencing such meetings.

12 All errors in original.

13 **3.** On or about May 29, 2019, Petitioner filed a Homeowners
14 Association (HOA) Dispute Process Petition (Petition), with the Arizona Department of
15 Real Estate (Department), in which Petitioner alleged that “[t]he bulk of the request was
16 denied, with the exception of 1 1 page minute supplied on May 13, 2019.” All errors in
17 original. In the Petition, Petitioner alleged that Respondent violated A.R.S. § 33-1258
18 because Respondent failed to timely provide him with the requested documents.

19 **4.** Respondent filed an Answer with the Department denying the
20 allegations set forth in the Petition.

21 **5.** On or about June 18, 2019, the Department issued a Notice of
22 Hearing to the parties notifying them that a hearing on the Petition would be conducted
23 by the Office of Administrative Hearings.

24 **6.** On August 5, 2019, a hearing was held on the Petition and the
25 parties presented evidence and argument regarding the statute and the documents
26 provided to Petitioner.

27 **7.** At hearing, Petitioner testified that he received documents
28 responsive to item #2, on Friday, August 2, 2019. Petitioner indicated that he was
29 satisfied with Respondent’s compliance. Petitioner also testified that he received one
30 document responsive to item #3. However, Petitioner stated that the redacted copy of
that document was partially compliant with his records request.

8. Petitioner testified that Respondent previously indicated that it
did not have records of the meeting minutes responsive to item #4. He stated that he

1 requested the April 6, 2019 and April 8, 2019 meeting records because he opined that
2 Respondent could not have gotten 21 signatures from the residents without a meeting.
3 Petitioner stated that he wanted to subpoena the notary public to review what she [saw]
4 both days, but that subpoena was “quashed.”

5 9. Petitioner testified that he strongly believed that emails
6 responsive to item #1 existed. He stated that he requested those emails so that he
7 could prove Respondent communicated about Petitioner.

8 10. At hearing, Mr. Kaplan testified, on behalf of Respondent, and
9 argued that Respondent received over 400 emails from Petitioner in the last three
10 years. He stated that about 100 of the emails were records requests. Mr. Kaplan argued
11 that Respondent gave Petitioner everything in its possession, in accordance with
12 Petitioner’s Petition. He further stated that Respondent went above and beyond the
13 records request when it gave Petitioner documents that were not requested by
14 Petitioner in an effort to be transparent.

15 11. Mr. Kaplan testified that Respondent gave Petitioner all
16 documents, including but not limited to emails, contracts, tax returns, insurance records,
17 and financial documents that did not fall under the exceptions of A.R.S. § 33-1258.

18 12. Mr. Kaplan responded as follows with respect to each of
19 requests:

- 20 a. As to item #1, Mr. Kaplan stated that these records did not exist and were
21 not in Respondent’s possession.
- 22 b. As item #2, Mr. Kaplan stated that Respondent gave Petitioner redacted
23 invoices because those records fell under the attorney client privilege. He
24 discussed that the redacted content dealt with the current litigation and
25 thus, was privileged.
- 26 c. As to item #3, Mr. Kaplan stated that under A.R.S. § 33-1248, records of
27 these minutes are not the same as open meeting policies. He stated that
28 Respondent complied with the records request and gave Petitioner the
29 redacted version of the executive sessions minutes.
- 30 d. As to item #4, Mr. Kaplan testified that the signatures were that of
residents who requested that Petitioner not be awarded the house in his

1 pending divorce because they were unhappy with Petitioner and did not
2 want him as their neighbor any longer. Mr. Kaplan stated that these same
3 neighbors went to Petitioner's divorce proceedings to influence the court
4 to award the house to Petitioner's ex-wife. Mr. Kaplan further stated that
5 there were no meetings on April 6, 2019 or April 8, 2019. Thus, there were
6 no minutes in existence or in Respondent's possession. Additionally,
7 Respondent had no documents, in its possession, regarding the notary
8 public.

9 13. Mr. Kaplan testified that Petitioner always had access to
10 financial and bank records. This access was through Respondent's website and was
11 accessible to all residents. Mr. Kaplan opined that Respondent adhered to Petitioner's
12 records request to the best of its abilities. He stated that Respondent provided Petitioner
13 with all records and documents that were in their possession and that were not subject
14 to the exceptions under A.R.S. § 33-1258.

15 **CONCLUSIONS OF LAW**

16 1. The Department has jurisdiction to hear disputes between a
17 property owner and a planned community association. A.R.S. § 41-2198.01(B).

18 2. In this proceeding, Petitioner bears the burden of proving by a
19 preponderance of the evidence that Respondent violated A.R.S. § 33-1805. A.A.C. R2-
20 19-119.

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

25 4. A.R.S. § 33-1258 provides, in pertinent part:

26 A. Except as provided in subsection B of this section, all financial
27 and other records of the association shall be made reasonably
28 available for examination by any member or any person
29 designated by the member in writing as the member's
30 representative. The association shall not charge 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

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

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

- 10 1. Privileged communication between an attorney for the
11 association and the association.
- 12 2. Pending litigation.
- 13 3. Meeting minutes or other records of session of a board
14 meeting that is not required to be open to all members
15 pursuant to section 33-1248.

16 5. As to item #1 and item #4, Petitioner failed to establish by a
17 preponderance of the evidence that these documents existed at the time of the April 29,
18 2019 request such that Respondent's failure to provide the documents was a violation
19 of A.R.S. § 33-1258. Whether Respondent was required to maintain a copy of the
20 documents in accordance with the purported record retention policy is not relevant to a
21 determination as to whether Respondent complied with the statute.

22 6. Petitioner failed to establish a violation of A.R.S. § 33-1258, for
23 item #3. Petitioner did not dispute that the records were exempt from the exceptions
24 under A.R.S. § 33-1258(B).

25 7. In his testimony, Petitioner acknowledged that Respondent
26 complied with item #2.

27 8. The evidence of record established that Respondent gave
28 Petitioner access to review any and all documents that were available to all residents.
29 Moreover, Respondent gave Petitioner documents and records in addition to the
30 records request.

9. In this case, the Administrative Law Judge concludes that
Petitioner has not established by a preponderance of the evidence that Respondent
violated A.R.S. § 33-1258 as described above. The Administrative Law Judge
concludes that Petitioner's Petition should be dismissed.

ORDER

1 IT IS ORDERED that Petitioner's Petition is dismissed.

2 **NOTICE**

3 **Pursuant to A.R.S. §32-2199.02(B), this Order is binding on the**
4 **parties unless a rehearing is granted pursuant to A.R.S. § 32-**
5 **2199.04. Pursuant to A.R.S. § 41-1092.09, a request for rehearing in**
6 **this matter must be filed with the Commissioner of the Department of**
7 **Real Estate within 30 days of the service of this Order upon the**
8 **parties.**

9 Done this day, August 26, 2019.

10 /s/ Antara Nath Rivera
11 Administrative Law Judge

12 Copy mailed/e-mailed/faxed August 26, 2019 to:

13 Judy Lowe, Commissioner
14 Arizona Department of Real Estate
15 100 N. 15th Avenue, Suite 201
16 Phoenix, Arizona 85007
17 Attn: jlowe@azre.gov

18 John A Sellers
19 PO Box 3431
20 Carefree, AZ 85377

21 Edith I. Rudder & Edward D. O'Brien
22 Carpenter, Hazlewood, Delgado & Bolen LLP
23 1400 E Southern Ave., Suite 400
24 Tempe, AZ 85282-5691

25 By
26
27
28
29
30