

New 2006 Legislation

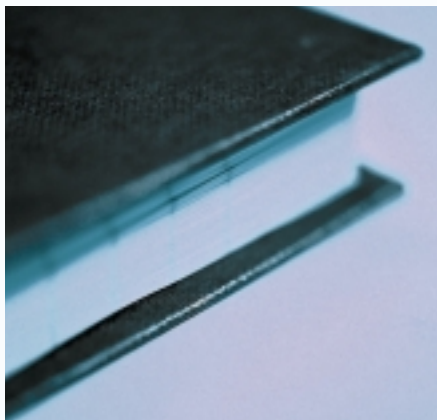
▶ CONTINUED FROM PAGE 3

- Perform any acts as may be proper to conduct the election with fairness to all members and all applicable rules of the association regarding the conduct of the election that are not in conflict with law.

Section 1363.03(e) requires specific procedures for voting ballots. Ballots and two pre-addressed envelopes with instructions on how to return ballots must be mailed by first-class mail or delivered to every member not less than 30 days prior to the deadline for voting. In order to preserve confidentiality, a voter may not be identified by name, address, or Lot or Unit number on the ballot.

Associations are encouraged to use, as a model, those procedures used by California counties for ensuring confidentiality of voter absentee ballots, including:

- The ballot itself is not signed by the voter, but is inserted into an envelope that is sealed. This envelope is inserted into a second envelope that is sealed. In the upper left hand corner of the second envelope, the voter prints and signs his or her name, address, and Lot or Unit number, that entitles him or her to vote; and
- The second envelope is addressed to the inspector or inspectors of election, who will be tallying the votes. The envelope may be mailed or delivered by hand to a location specified by the inspector or inspectors of election. The member may request a receipt for delivery.



Proxies – Any instruction given in a proxy issued for an election that directs the manner in which the proxy holder is to cast the vote must be set forth on a separate page of the proxy that can be detached and given to the proxy holder to retain. The proxy holder is required to cast the vote by secret ballot.

Secret ballots – Note that the law specifically requires secret ballots for voting on (a) assessments, (b) selection of directors, (c) amendments to the governing documents, and (d) any grant of exclusive use of common area property to any owner.

Publicize – Within 15 days of the election, the board is required to publicize the results of an election in a communication directed to all members of the association.

Storing – After counting, election ballots must be stored by the association in a secure place for at least one year. In the event of a recount or other challenge, the association is required to make the ballots available for inspection and review by members or their authorized representatives. Any recount must be conducted in a manner that preserves the confidentiality of the vote.

Campaign funds – Another new law prohibits the use of association funds for campaign purposes. Campaign purposes can include pushing for an election or defeat of any candidate, or including candidate photographs or names in association publications within 30 days of the election.

So, what happens if you don't do all of this? You can get sued. Members can file civil lawsuits for violations; even in small claims court! If they win, members get their "reasonable" attorneys' fees and court costs, and the association can be fined an additional civil penalty of \$500.00 for each violation. The election results can also be voided.



3. Member Inspection Rights – AB 1098

Beginning July 1, 2006, the new law provides more certainty as to what "accounting books and records" members of the association may see. These records are:

- Any financial documents (e.g. budgets, reserve studies, insurance, etc.).
- Interim unaudited financial statements, periodic or as compiled, containing any of the following: (a) balance sheet; (b) income and expense statement; (c) budget comparison; and (d) general ledger. A "general ledger" is a report that shows all transactions that occurred in an association account over a specified period of time. The records described in this paragraph must be prepared in accordance with generally accepted accounting principles.
- Executed contracts not otherwise privileged under law. Privileged contracts do not include contracts for maintenance, management, or legal services, and must be available for inspection.
- Written board approval of vendor or contractor proposals or invoices.
- State and federal tax returns.
- Reserve account balances and records of payments made from reserve accounts.
- Agendas and minutes of meetings of the members, the directors and any committees appointed by the board, excluding information from executive sessions.
- Check registers.
- Membership lists, including name, property address, and mailing address, with the rights of members to "opt out."

There are additional documents to which members have a right of access; they are called by the statute "Enhanced Association Records."

Enhanced association records include:

- Invoices.
- Receipts and canceled checks for payments made by the Association.
- Purchase orders approved by the Association.
- Credit card statements for credit cards issued in the name of the Association.
- Statements for services rendered.
- Reimbursement requests submitted to the Association.

Note: Reimbursement requests can include some very personal information, including account numbers and other identifying information. The person submitting the reimbursement request is solely responsible for removing all personal identification information.

These records include those for the current fiscal year, and the previous two fiscal years. However, minutes of meetings (board, member and committee meetings) must be *permanently* available. That means forever.

Associations are obligated to make the records available for inspection and copying in any on-site business office. If there is no business office on the project, the parties can agree on a place for inspection. If they cannot agree, or if the member specifically requests copies, these obligations can be satisfied by mailing copies by first-class mail.

Associations can charge the requesting member for the direct and actual cost of copying and mailing requested documents, with prior notice and agreement to pay. If the association has to remove certain information from the records first, it can bill the requesting member an amount not in excess of \$10 per hour, and not to exceed \$200 total per written request, for the time actually and reasonably involved in removing sensitive information that is allowed to be removed. Again, there must be prior notice and an agreement to pay first.

Associations are entitled to remove information from the records for any of the following reasons:

- The release of the information is reasonably likely to lead to identity theft.
- The release of the information is reasonably likely to lead to fraud.
- The information is privileged under law.
- The release of the information is reasonably likely to compromise the privacy of an individual member of the association.
- Records of "...a-la-carte goods or services..." provided to individual members of the association for which the association received monetary consideration other than assessments.



- Records of disciplinary actions, collection activities, or payment plans of homeowners other than the homeowner requesting the records.
- Any person's personal identification information (social security number, tax identification number, driver's license number, etc.).
- Agendas, minutes, and other information from executive sessions.
- Personal personnel records. This does not include compensation paid to employees, vendors, or contractors.
- Interior architectural plans, including security features, for individual homes.

If requested by the member, when the association denies or redacts records, it must specify the legal basis for its actions.

Timeline to respond – Request for records for the current fiscal year must be provided within 10 business days

following receipt of the request. Records prepared during the previous two fiscal years must be provided within 30 calendar days following receipt of the request. For minutes, provide within 30 days of the meeting.

Methods of transmission –

Requesting parties have the option of receiving specifically identified records by electronic transmission (e.g., e-mail) or machine-readable storage media (e.g. CD) as long as those records can be transmitted in a redacted format that does not allow the records to be altered. The cost of duplication is to be limited to the direct cost of producing the copy of a record in that electronic format.

Good-faith protections – The association, nor any officer, director,

employee, agent or volunteer can be liable for damages to a member of the association as the result of identity theft or other breach of privacy because of the failure to withhold or redact that member's information, unless the failure to withhold or redact the information was intentional, willful, or negligent. Also, there is no liability for failing to retain

records for the periods specified herein that were created prior to January 1, 2006.

Again, members have the right to bring a civil action to enforce their right to inspect and copy the records, even in small claims court. If a court finds that the association unreasonably withheld access to the records, the court must award the member reasonable costs and expenses, including reasonable attorney's fees, and may assess a civil penalty of up to \$500 dollars for the denial of each separate written request. On the other hand, a prevailing association may recover any costs if the court finds the action to be frivolous, unreasonable, or without foundation.

If you have any questions about these or any other requirements, please consult with an appropriate legal professional. ■