

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 William M. Brown

No. 17F-H1716005-REL

4 Petitioner,
5 vs.

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 Terravita Country Club, Inc.
7 Respondent
8
9

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11 **HEARING:** June 19, 2017

12 **APPEARANCES:** Petitioner William M. Brown appeared on behalf of himself.
13 Joshua Bolen, Esq. appeared on behalf of Respondent Terravita Country Club, Inc.

14 **ADMINISTRATIVE LAW JUDGE:** Velva Moses-Thompson
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16 1. At all times relevant to this matter, Petitioner William M. Brown was a
17 member of Respondent Terravita Country Club, Inc., (hereinafter "Terravita").

18 2. On February 12, 2016, Anita Bell requested records of Terravita. Ms. Bell
19 submitted the request to Terravita's Secretary, Fran Wiley, via electronic mail,
20 (hereinafter "e-mail"), through Mr. Brown's e-mail account.

21 3. On February 12, 2016, Ms. Wiley forwarded Ms. Bell's records request to
22 Terravita's general manager, Tom Forbes.

23 4. On February 19, 2016, Mr. Forbes informed Ms. Bell that her records
24 request would "be ready after 9am on Monday, February 22 in the Administration office
25 of the Clubhouse."

26 5. On March 14, 2016, Ms. Bell requested records of Terravita. Ms. Bell
27 submitted the request to Ms. Wiley via e-mail, through Mr. Brown's e-mail account.

28 6. On March 15, 2016, Mr. Forbes forwarded Mr. Bell's March 14, 2016
29 records request to Cici Rausch, Terravita's Director of Administration.

30 7. On March 18, 2016, Ms. Rausch informed Ms. Bell via e-mail of the date
and time that Ms. Bell could retrieve the requested records.

1 8. On July 30, 2016, Mr. Brown requested records of Terravita Community
2 Association, Inc., (hereinafter "TCA"). Mr. Brown submitted the records request by e-
3 mail.

4 9. On August 8, 2016, TCA informed Mr. Brown that it received its records
5 request on July 30, 2016, and provided Mr. Brown with information regarding his
6 request.

7 10. On July 30, 2016, Mr. Brown requested records of Terravita. Mr. Brown
8 submitted the records request to Ms. Wiley, by e-mail on July 30, 2016. The date of the
9 records request was July 29, 2016.

10 11. Terravita did not respond to Mr. Brown's records request within 10
11 business days.

12 13. On August 6, 2016, Mr. Brown requested records of Terravita to Ms.
13 Wiley. On August 12, 2016, Terravita responded to the request.

14 12. On August 18, 2016, the Arizona Department of Real Estate, (hereinafter
15 "Department"), received a Petition for Hearing from Mr. Brown alleging that Terravita
16 failed to timely respond to his July 30, 2016 records request, pursuant to A.R.S. § 33-
17 1805(A).

18 13. On September 9, 2016, Terravita filed a response to Mr. Brown's Petition
19 for Hearing. In its Answer, Terravita alleged that it did not receive Mr. Brown's July 30,
20 2016 records request.

21 14. On September 13, 2016, Department issued a Notice of Hearing setting
22 the above-captioned matter for hearing on November 9, 2016 at 8:30 a.m.¹ The
23 September 13, 2016 Notice of Hearing provides, in relevant part, as follows:

24 YOU ARE HEREBY NOTIFIED that pursuant to Arizona Revised Statutes
25 ("A.R.S."), § 41-1092.01, your request for hearing upon the charges made in the
26 Petition for Hearing will be conducted through the Office of Administrative
27 Hearings, an independent agency..., "

28 15. At hearing, Mr. Brown testified that he requested records of Terravita via
29 email to Ms. Wiley on July 30, 2016. Mr. Brown testified that Terravita failed to timely
30 respond to his request.

¹ The matter was continued to June 19, 2017.

1 16. I find Mr. Brown's testimony to be credible.

2 17. Mr. Brown had admitted into evidence an August 12, 2016 forwarded e-
3 mail containing a July 30, 2016 email to Ms. Wiley requesting records of Terravita.
4 See Exhibit P2.

5 18. Terravita contended that it did not receive Mr. Brown's July 30, 2016
6 records request.

7 19. Terravita offered the testimony of Ms. Wiley in support of its case.
8 Ms. Wiley testified that she did not receive a records request from Mr. Brown on July 29,
9 2016 nor July 30, 2016. Ms. Wiley testified she did not use the e-mail address where
10 Mr. Brown alleged he sent the records request for Terravita affairs. Ms. Wiley testified
11 that she used a different e-mail address in her role as the Secretary of Terravita.

12 20. However, Ms. Wiley testified that she did not receive a records request of
13 Terravita directly from Mr. Brown on August 5, 2016. Ms. Wiley testified indirectly,
14 Terravita was informed that perhaps Mr. Brown had made the request.

15 21. I find Ms. Wiley's testimony to be unreliable.

16 22. Terravita contended that the written evidence offered by Mr. Brown of a
17 forwarded e-mail of an e-mail sent on July 30, 2016 of a July 29, 2016 records request,
18 was falsified. However, Terravita did not contend that the written evidence of Mr.
19 Brown's August 5, 2016 records request, sent by e-mail to Ms. Wiley, was falsified.

20 23. Terravita also contended that Mr. Brown did not submit the records
21 request in compliance with its Rules, Policies and Procedures. Terravita contended that
22 under its Rules, Policies and Procedures, members are required to submit records
23 requests to its General Manager and/or Director of Administration.

24 24. Terravita maintained that it would provide the records requested by Mr.
25 Brown if he submitted a second request.

26 **CONCLUSIONS OF LAW**

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

1 2. Petitioner bears the burden of proof to establish that Respondent violated
2 A.R.S. § 33-1258 by a preponderance of the evidence.² Respondent bears the burden to
3 establish affirmative defenses by the same evidentiary standard.³

4 3. "A preponderance of the evidence is such proof as convinces the trier of fact
5 that the contention is more probably true than not."⁴ A preponderance of the evidence is
6 "[t]he greater weight of the evidence, not necessarily established by the greater number of
7 witnesses testifying to a fact but by evidence that has the most convincing force; superior
8 evidentiary weight that, though not sufficient to free the mind wholly from all reasonable
9 doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather
10 than the other."⁵

11 4. A.R.S. § 33-1805 provides as follows:

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

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

28 1. Privileged communication between an attorney for the
29 association and the association.

30 2. Pending litigation.

² See A.R.S. § 41-1092.07(G)(2); A.A.C. R2-19-119(A) and (B)(1); see also *Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952).

³ See A.A.C. R2-19-119(B)(2).

⁴ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁵ BLACK'S LAW DICTIONARY at page 1220 (8th ed. 1999).

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

4 4. Personal, health or financial records of an individual member of
5 the association, an individual employee of the association or an
6 individual employee of a contractor for the association, including
7 records of the association directly related to the personal, health
8 or financial information about an individual member of the
9 association, an individual employee of the association or an
10 individual employee of a contractor for the association.

11 5. Records relating to the job performance of, compensation of,
12 health records of or specific complaints against an individual
13 employee of the association or an individual employee of a
14 contractor of the association who works under the direction of the
15 association.

16 C. The association shall not be required to disclose financial and
17 other records of the association if disclosure would violate any
18 state or federal law.

19 5. Mr. Brown established by a preponderance of the evidence that he submitted
20 a July 29, 2016 request for records of Terravita to its Secretary, Ms. Wiley, via e-mail on
21 July 30, 2016. Mr. Brown established by a preponderance of the evidence that
22 Terravita failed to fulfill his request for examination of records within 10 business days.
23 Mr. Brown established by a preponderance of the evidence that he sent a July 29, 2016
24 request for records for Terravita to its Secretary, Ms. Wiley, via e-mail on July 30, 2016.

25 6. "In applying a statute . . . its words are to be given their ordinary meaning
26 unless the legislature has offered its own definition of the words or it appears from the
27 context that a special meaning was intended."⁶ The plain meaning of A.R.S. § 33-1805
28 is that homeowners' associations must provide access to financial and other records to
29 its members within 10 business days of such a request for such documents. Terravita
30 failed to do so. Terravita did not even contend that any of the exceptions listed in
A.R.S. 33-1805(B) or A.R.S. 33-1805(C) applied.

7. This Tribunal concludes that Terravita violated the charged provision of
A.R.S. § 33-1805.

⁶ MORRIS K. UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

RECOMMENDED ORDER

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

It is further ORDERED that Terravita comply with the applicable provisions of A.R.S. § 33-1805 regarding Petitioner's request of Terravita's records within 10 days of the Order entered in this matter.

It is further ORDERED that Terravita pay Petitioner his filing fee of \$500.00, to be paid directly to Petitioner within thirty (30) days of this Order.

No Civil Penalty is found to be appropriate in this matter.

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

Done this day, July 10, 2017

Velva Moses-Thompson
Administrative Law Judge

Transmitted electronically to:

Judy Lowe, Commissioner
Arizona Department of Real Estate