STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES

IN RE: PETITION FOR ARBITRATION

Theresa L. Funk,

Petitioner,

v. **Case No. 2005-00-0712**

Hallmark of Hollywood Condominium Association, Inc.,

Respondent.
_____/

Mark J. Hanna,

Petitioner,

v. **Case No. 2005-00-0499**

Hallmark of Hollywood Condominium Association, Inc.,

Respondent.
_____/

SUMMARY FINAL ORDER

Comes now, the undersigned arbitrator, and issues this summary final order as follows:

Petitioner Funk filed her petition for arbitration in this matter on January 4, 2005, alleging that the association had deprived her of access to the official records, to wit: the unit roster of the unit owners and the telephone numbers maintained by the association, and other information. Petitioner Hanna filed a similar petition for arbitration also on January 4, 2005. Each petitioner seeks entry of a final order requiring the

association to produce the requested records for inspection, and an award of statutory damages for the association's alleged willful violation of the statute. The association has filed its answer in each case, and on February 22, 2005, the arbitrator entered an order permitting the parties to file memoranda of law. Each side filed arguments in support of its position, with the last memorandum being filed on March 15, 2005. The two cases, initially filed separately, have been consolidated.[1]

The facts are not in dispute. On or about June 9, 2004, Mark Hanna made a request by certified mail to the president of the association to make available for viewing certain official records, to wit: a current roster of all unit owners and their mailing addresses, unit identifications, voting certificates, and telephone numbers. Also, Mr. Hanna requested the unit owners' fax numbers and email addresses, if known. The association responded by letter dated June 11, 2004, in part as follows:

> The Association is providing you with a roster of all unit owners and their mailing addresses (in Florida and outside the country) and unit identifications. However, the Association must omit the requests for all unit telephone numbers, fax numbers and email addresses due to the "Privacy Act Law."

The association, as suggested above, ultimately failed to provide access to

[1] Any reference to one petitioner is deemed to include the other unless the context indicates to the contrary.

the telephone numbers, fax numbers, or any email addresses of the owners, and Mr. Hanna filed a condominium complaint with the Division of Florida Land Sales, Condominiums, and Mobile Homes pursuant to section. 718.501, Florida Statutes. At the conclusion of the investigation, the association was issued a warning letter after the division found a probable violation of the statute. In the meantime, the association had filed a petition for declaratory statement with the division which was dismissed due to the pendency of these arbitration proceedings.

The association raises a number of matters as affirmative defenses in these proceedings. The association argued in its answer that the owners have an expectation of privacy in their telephone numbers, fax numbers, and email addresses, and they do not wish to release this information to Mr. Hanna and Ms. Funk. Secondly, the association asserts that fax numbers and emails are not "official records" as set forth within s. 718.111(12), Florida Statutes. As its third affirmative defense, the association states that the petition fails to state a cognizable request for relief insofar as petitioner does not seek a determination regarding petitioner's entitlement to the documents so requested. As to this last matter, the arbitrator deems the petition to implicitly include this request for relief, as it is obvious that in writing their letter to the association and in subsequently filing a condominium complaint and the petition for arbitration, petitioners seek access to the records refused by the association.

Section 718.111(12), Florida Statutes, provides in part:

12) OFFICIAL RECORDS.--

(a) From the inception of the association, the association shall maintain each of the following items, when applicable, which shall constitute the official records of the association:

7. A current roster of all unit owners and their mailing addresses, unit identifications, voting certifications, and, if known, telephone numbers. The association shall also maintain the electronic mailing addresses and the numbers designated by unit owners for receiving notice sent by electronic transmission of those unit owners consenting to receive notice by electronic transmission. The electronic mailing addresses and numbers provided by unit owners to receive notice by electronic transmission shall be removed from association records when consent to receive notice by electronic transmission is revoked. However, the association is not liable for an erroneous disclosure of the electronic mail address or the number for receiving electronic transmission of notices.

15. All other records of the association not specifically included in the foregoing which are related to the operation of the association.

(b) The official records of the association shall be maintained within the state. The records of the association shall be made available to a unit owner within 5 working days after receipt of written request by the board or its designee. This paragraph may be complied with by having a copy of the official records of the association available for inspection or copying on the condominium property or association property.

(c) The official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times. The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the association member. The association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying. The failure of an association to provide the records within 10 working days after receipt of a written request shall create a rebuttable presumption that the association willfully failed to comply

> with this paragraph. A unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association's willful failure to comply with this paragraph. The minimum damages shall be $50 per calendar day up to 10 days, the calculation to begin on the 11th working day after receipt of the written request. The failure to permit inspection of the association records as provided herein entitles any person prevailing in an enforcement action to recover reasonable attorney's fees from the person in control of the records who, directly or indirectly, knowingly denied access to the records for inspection….Notwithstanding the provisions of this paragraph, the following records shall not be accessible to unit owners:
>
> 1. Any record protected by the lawyer-client privilege as described in s. 90.502; and any record protected by the work-product privilege, including any record prepared by an association attorney or prepared at the attorney's express direction; which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings until the conclusion of the litigation or adversarial administrative proceedings.
>
> 2. Information obtained by an association in connection with the approval of the lease, sale, or other transfer of a unit.
>
> 3. Medical records of unit owners. [emphasis added.]

In its memorandum of law, the association argues that since the statute allows email addresses and fax numbers to be removed from the ranks of the official records where consent to receive electronic notice has been revoked by the owner, the statute should be construed to allow for the withholding of such information whenever the owner does not wish to receive an email from other owners. Further, the association argues that the statute, in permitting an association to adopt reasonable rules regarding the frequency, time, location, notice and manner of records inspections, permits the

association here to regulate the manner in which inspections would (or, as occurred here would *not*) occur. Finally, the association argues that any violation of the statute was not willful because the association "has been involved in a balancing act trying to protect the privacy concerns of its residents against the arguable requirements of Florida Statute 718.111(12)."

Whether the requested records constitute official records of the association.

Although the association initially argued in its answer that the requested records did not constitute official records under the statute, the association presented no argument on this issue in its memorandum of law. The arbitrator concludes that these documents are, in fact, part of the official records. The statute plainly requires this conclusion:

> (a) From the inception of the association, the association shall maintain each of the following items, when applicable, which shall constitute the official records of the association:
>
> 7. A current roster of all unit owners and their mailing addresses, unit identifications, voting certifications, and, if known, telephone numbers. The association shall also maintain the electronic mailing addresses and the numbers designated by unit owners for receiving notice sent by electronic transmission of those unit owners consenting to receive notice by electronic transmission. The electronic mailing addresses and numbers provided by unit owners to receive notice by electronic transmission shall be removed from association records when consent to receive notice by electronic transmission is revoked. [emphasis added].

The statute specifically includes telephone numbers, fax numbers, and email addresses among those specified official records. The Division has previously concluded that telephone numbers are part of the official records subject to disclosure. See, Nassif v.

Continental Towers, Inc., Arb. Case Nos. 96-0403/97-2228, Order Severing Case No. 96-0403 and Amending Final Order in Case No. 96-0403 (September 18, 1998):

> The petitioner claims that the document that was provided to her on January 8, 1996, does not comply with Section 718.111(12)(a)7., Florida Statutes, because it does not contain the telephone numbers of the unit owners….The document produced on January 8, 1996, does not fully comply with the statute because it does not contain unit owners' telephone numbers (which appear to have been known by the association).

See further, Brin v. Nobel Point Condominium Association, Inc., Arb. Case No. 01-2354, Summary Final Order (July 20, 2001) where the owner sought to obtain the telephone numbers of the owners from the association. The arbitrator concluded:

> The request is abundantly clear and does not seek access to confidential records. It asks to view all association records and then proceeds to identify certain specific records required to be maintained by the association such as the unit owner roster, addresses and telephone numbers. None of this information is privileged or otherwise exempt from disclosure under the statute.

Email addresses and "the numbers designated by unit owners for receiving notice sent by electronic transmission" (e.g., fax numbers) that are provided to the association by an owner for the purpose of receiving notice[2] are specifically made official records unless consent to receive notice by electronic transmission is revoked by the owners. Until such

[2] It should be presumed as suggested in the statute that owners who provide their email addresses or fax numbers to the association do so with the expectation that the information will be used for official communications and notices from the association. Email addresses and fax numbers that are provided by owners for a purpose *other than* receiving notice would constitute official records subject to disclosure under section 718.111(12)(a)(15), Florida Statutes, providing that the official records also include all other records of the association not specifically included in the specified list that are related to the operation of the association and not otherwise specifically exempted. It must be said that where a corporation seeks to officially communicate with its members, whether by letter, telephone, fax, or email, the communication is related to the operation of the association and must therefore be considered an official record of the association.

revocation is received by the association, this information is doubtless subject to disclosure.

Whether the requested records are exempt from disclosure?

The association has failed to identify a single law or case creating or acknowledging any right to privacy that the owners have in the information sought by petitioners herein. Nor is there any support for the association's comment that it is seeking to strike the appropriate balance between the privacy interests of the owners and the right of access to the official records given by the legislature to the members in an association. The legislature has already "struck the balance" by adopting a statute setting forth a broad right of access with limited statutory exemptions, none of which apply here and none of which are asserted to apply. The association is not authorized to rewrite the statute and relocate the balance struck by the legislature between privacy interests and the right of access to the "public"

records. Review, in this regard, St. Augustine Condominium v. Dept. Bus. Reg., 753 So. 2d 794 (Fla. 5th DCA 2000), where the court affirmed the declaratory statement of the division[3] holding that where the association was acting as rental agent for the owners, the association was required to make available for inspection its rental records, including financial information pertaining to the owners, noting that there are only 3 exemptions from disclosure under the statute, none of which applied in that case. The court rejected the broad right to privacy asserted by the association:

> We find no basis in the language of Florida's constitutional right to privacy or in the case law to conclude that the information at issue is constitutionally protected from disclosure…. If a better balance between issues of condominium governance and the privacy concerns of individual condominium owners is to be struck, it is the legislature who must do it. [Id. at 794].

Review further, Department of Bus. Reg. v. Vantage View, Inc., Docket No. CC97033, Final Order (May 19, 1998), discussed in the St. Augustine Condominium declaratory statement, where the Division in an enforcement proceeding brought pursuant to s. 718.501, Florida Statutes, fined the association for failing to disclose, upon proper request, the unit owner roster including telephone numbers. According to the independent hearing officer assigned to hear the case, there is "no right to privacy to be asserted by a corporate condominium entity that supercedes the unambiguous mandate of the condominium law."

There is likewise no support--factual or legal--for the association's argument that since owners have the right to remove fax numbers and email addresses from among the official records by revoking their consent to receive notice in this manner, the association in effect may withhold access to these records pending notification to the

[3] The order is found at: http://www.bpr.state.fl.us/lsc/pdf/1999/StAugustineDS98-182.pdf

owners of the request to view these records and an opportunity to revoke their consents.[4] First, the record contains no revocations of consent to receive notices in this manner. Secondly, even if the record in this proceeding contained these requests, the statute does not authorize the association to act as it did here by summarily and without process suspending the petitioners' right of access while it sought revocation of consent from the other owners. Rather, section 718.111(12), Florida Statutes, provides:

> b) The official records of the association shall be maintained within the state. The records of the association shall be made available to a unit owner within 5 working days after receipt of written request by the board or its designee.
> c) The official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times. The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the association member. The association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying. The failure of an association to provide the records within 10 working days after receipt of a written request shall create a rebuttable presumption that the association willfully failed to comply with this paragraph. [e.a.]

In accordance with the statute above, there is no exception to the 5-day access mandate where the association seeks to dispute the entitlement of the owner to view what is admittedly an official record. Rather, the documents must be made available within 5 days, and after the passage of 10 days, a rebuttable presumption is created that the failure to provide access was willful, entitling the requesting owner to an award of up to $500 per offense in statutory damages. Therefore, even assuming that the association was authorized in the abstract to consult the owners and offer them an opportunity to revoke

[4] The statute does not contain any corresponding retraction mechanism for telephone numbers found in the possession of the association, so this argument of necessity is restricted to email addresses and fax numbers.

their consent after receipt of petitioners' requests for this information, any such consultation must have occurred and been concluded within 5 days of the association's receipt of the request in order to avoid the statutory consequence of its failure to timely provide access to the records.[5]

Similarly, the association's argument that it may properly deny access to these records as a reasonable regulation is rejected. Section 718.111(12)(c), Florida Statutes, only permits the association to pass reasonable regulations regarding the frequency, time, location, notice and manner of records inspections and copying. The statute does not permit the association to pass rules inconsistent with the statute; the association cannot recreate the statutory list of public records, less the documents it does not wish to disclose, under the guise of regulation.

[5] It can scarcely be said here that the association acted with due regard for the time deadlines provided by statute. Petitioner's letter requesting access to this information was dated June 6, 2004; the association declined to produce the disputed documents in its letter dated June 11, 2004, and the association's consent form to the owners allowing the owners to revoke their email addresses, telephone numbers, and fax numbers, is dated November 3, 2004, perhaps coinciding with the conduct of the investigation by the division in response to the complaint filed by petitioner Hanna.

Whether the presumption of willfulness was rebutted?

Neither does the arbitrator find the presence of any good faith legal dispute that may otherwise mitigate against a finding that the failure of the association to provide timely access was willful.[6] The association has pointed to no ambiguity in the statute that offers any relief in this regard. The association has likewise not shown that any arbitration precedent or court case has created an uncertainty in the rights of the parties. Review, Di Renzo v. Concord Village Condominium Association, Inc., Arb. Case No. 96-0387, Final Order (February 24, 1998) in a similar context, where that association argued that its violation was not willful where it referred the request to the association attorney. The arbitrator held that:

> The association did not produce evidence showing the timing of the referral to the association attorney and it is possible the matter was not referred to the attorney for a week or two after receipt of the request. It was incumbent upon the association to produce this type of testimony as it has the burden of diffusing the presumption created by the statute. Additionally, there was no evidence presented of a bona fide and reasonable state of confusion over the legal rights of the association vis a vis the request for access, as was the case in Brown v. Wellington, discussed above, where the association had reasonable doubts concerning its obligation to produce copies of records where it had no copy machine. In this case, the rights of the parties are set out in unambiguous manner in the statute: the association is to provide access within 5 working days, and where 10 days lapse, a presumption of a willful violation is created. There was no obscure legal issue presented for consideration by the board; neither was the request ambiguous. Where the association refers a matter such as this to counsel, it must bear the risk of an untimely result where the statute provides for a deadline and fails to contain an automatic extension of time where advice is sought. Compare, section 718.112(2)(a)2., Florida Statutes,

[6] Compare, Brin v. Nobel Point Condominium Association, an arbitration case discussed earlier, where the association failed to produce telephone numbers upon request, and the arbitrator described the request as "abundantly clear and [did] not seek access to confidential records…None of this information is privileged or otherwise exempt…"

> which requires an association to respond to the substance of written inquiries made by a unit owner within 30 days, unless legal advice has been requested, in which event the response shall be made within 10 days of receipt of the advice. Creating an exemption to the official records section where advice of counsel under these unambiguous circumstances first, lacks a statutory basis and secondly, would create unnecessary uncertainly in operation of the statute. For example, where advice of the attorney is not forthcoming for 45 or 90 days in a particular case, there are no standards from which to judge willfulness under these circumstances, and inquiry into whether the matter was handled on a timely basis by the attorney would seem to be a pointless and time consuming endeavor. [emphasis added.]

In the present case, the association is found to have willfully violated the statute, and is accordingly responsible for statutory damages of $500 for each petitioner.

WHEREFORE, the association is found to have willfully violated the right of access to official records contained in section 718.111(12), Florida Statutes, as to each petitioner. The association is ordered to produce the telephone records, email addresses and fax numbers for inspection and copying by the petitioners, within 14 days hereof. The association is further ordered to pay to each petitioner, within 30 days hereof, the sum of $500 in statutory minimum damages. The association is further ordered to comply with section 718.111(12), Florida Statutes, in the future.

DONE AND ORDERED this 25th day of April, 2005, at Tallahassee, Leon County, Florida.

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Karl M. Scheuerman, Arbitrator
Department of Business and
Professional Regulation
Arbitration Section
Northwood Centre

1940 North Monroe Street
Tallahassee, Florida 32399-1029

Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order habeen sent by U.S. Mail to the following persons on this 25th day of April, 2005:
Alan D. Sackrin, Esquire
2100 E Hallandale Beach Blvd
Suite 200
Hallandale Florida 33009-3765

Lawrence J. Shapiro, Esquire
825 Brickell Bay Drive
Suite 1751
Miami, Florida 33131

_____
Karl M. Scheuerman, Arbitrator

Right to Appeal

As provided by s. 718.1255, F.S., this final order may be appealed by filing a complaint for trial de novo with a court of competent jurisdiction in the circuit in which the condominium is located, within 30 days of the entry and mailing of this final order. This order does not constitute final agency action and is not appealable to the district courts of appeal. If this final order is not timely appealed, it will become binding on the parties and may be enforced in the courts.

Attorney's Fees

As provided by s. 718.1255, F.S., the prevailing party in this proceeding is entitled to have the other party pay its reasonable costs and attorney's fees. Rule 61B-45.048, F.A.C. requires that a party seeking an award of costs and attorney's fees must file a motion seeking the award not later than 45 days after rendition of this final order. The motion must be actually received by the Division within this 45 day period and must conform to the requirements of rule 61B-45.048, F.A.C. The filing of an appeal by trial de novo of this final order tolls the time for the filing of a motion seeking prevailing party costs

and attorney's fees until 45 days following the conclusion of the de novo appeal proceeding and any subsequent appeal.