



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

July 17, 2018

Ralph S. Northam
Governor

Esther Lee
Secretary of
Commerce and Trade

Complainant: Ralph Debnam
Association: Lake of the Woods Association, Inc.
File Number: 2018-03085

The Office of the Common Interest Community Ombudsman has been designated to review final adverse decisions and determine if they may be in conflict with laws or regulations governing common interest communities. Such determination is within the sole discretion of the Office of the Common Interest Community Ombudsman and not subject to further review.

Complaint

The Complainant submitted a complaint to the Association, dated April 20, 2018. The Association provided a response to the Complainant dated May 22, 2018. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated May 23, 2018 and received the following day.

Determination

The Common Interest Community Ombudsman (CICO), as designee of the Director, is responsible for determining whether a "final adverse decision may be in conflict with laws or regulations governing common interest communities." (18VAC 48-70-120) The process of making such a determination begins with receipt of a NFAD that has been submitted to this office in accordance with §55-530(F) (Code of Virginia) and the Common Interest Community Ombudsman Regulations (Regulations). A NFAD results from an association complaint submitted through an association complaint procedure. The association complaint must be submitted in accordance with the applicable association complaint procedure and, as very specifically set forth in the Regulations, "shall concern a matter regarding the action, inaction, or decision by the governing board, managing agent, or association inconsistent with applicable laws and regulations.

Under the Regulations, applicable laws and regulations pertain solely to common interest community laws and regulations. Any complaint that does not concern common interest community laws or regulations is not appropriate for submission through the association complaint procedure. In the event that such a complaint is submitted to this office as part of a NFAD, a determination cannot be provided.

The Association solicited bid proposals for an upcoming project in the community. The Complainant has alleged that the Association violated §55-510C2¹ of the Property Owners' Association Act when it failed to disclose to him "the firms who requested bid documents, firms who were sent bid documents, firms who were sent the RFP solicitation, copy of the publication for the bid announcements in trade publications, newspapers and/or other widely distributed publications seeking construction services." The Complainant believed, at the time he requested the list of firms that had received bid documents or an RFP, (April 12, 2018) that negotiations had not yet commenced and therefore the information he had requested should be made available to him.

The Association responded to the Complaint by stating that a list of bidders had been provided to the Complainant at the same time the Complaint was considered, both on May 16. The list was emailed to the Complainant since he was not present at the meeting when consideration of his complaint took place. The Association further stated that the failure to provide the list of bidders was not a violation of the Property Owners' Association Act and the matter was moot since the list had been provided to the Complainant.

As part of the email chain between the Complainant and the Association that was included in the NFAD, the Association stated that it did not provide the documents at the time they were requested, because "contact with the general contractors is protected under state law under the contracts negotiation exemption." The Association further explained that it was concerned about competition and getting a good price on the project. The Association told the Complainant that the names would be available as soon as the award date arrived.

Based on the information provided in the NFAD, which consisted, in part, of a series of emails between the Complainant and the Association, the Complainant had requested a list of bidders who had requested contract documents as well as names of the firms that were sent contract documents for bid proposals. There was no evidence of a request for some of the other documents contained in the Complaint, namely the "firms who were sent RFP solicitation and copy of the publication for the bid announcements in trade publications, newspapers and/or widely distributed publications seeking construction services." As such, only the two requests (list of bidders requesting contract documents and list of firms that were sent contract documents) found in the email chain will be considered in this Determination.

The key provision from the statute referenced by the Complainant is §55-510C2. This provision allows an association to withhold certain books and records, "to the extent that they concern contracts, leases, and other commercial transactions to purchase goods or services, currently in or under negotiation." In the present situation, it is clear that the RFP was issued to ultimately obtain a contract or enter into a commercial transaction to

¹ C. Books and records kept by or on behalf of an association may be withheld from inspection and copying to the extent that they concern:

1. Personnel matters relating to specific, identified persons or a person's medical records;
2. Contracts, leases, and other commercial transactions to purchase or provide goods or services, currently in or under negotiation;

purchase services. While I can understand the perspective of both parties, I do find that the list of bidders and businesses to whom contract documents had been sent does concern a contract, lease or commercial transaction that is currently under negotiation. It appears that the process of negotiation began when the RFP was issued and it will end when a contract is signed. As a result, I do not believe that the Association has violated 55-510C2.

If we were to limit the books and records that can be withheld under the statute to only the contract itself and no other aspects of the contractual process this would diminish the ultimate confidentiality of the contract process. The bidders would be known to anyone that requested such information and such knowledge could potentially impact the process of negotiation.

To the extent that it matters, if this office had found the Association to be in violation of 55-510C2, the outcome of such an NFAD would have been that the Association would have to provide the requested list to the Complainant. That has already been done.

Required Actions

No actions are required.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Lake of the Woods Association, Inc.