

I Still Have Not Found What I Am Looking For: Finding the Right Records

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Although a nonprofit corporation does not have to file an annual report, its members do have statutory inspection rights similar to those of the shareholders of a business corporation.

Rarely, however, do members or the board of directors understand exactly what corporate documents the members are entitled to inspect or the limitations accompanying such inspection rights.

Unqualified Inspection Rights for Members of Nonprofit Corporations

The North Carolina Nonprofit Corporation Act ("Act") requires nonprofit corporations to make certain documents available for its members to inspect and copy. Examples of nonprofit corporations that typically have members include yacht clubs, country clubs, community association, and business associations. Any member of a nonprofit has the right to inspect and copy nine (9) types of documents without providing any reason as to what they want to inspect, so long as the member notifies the nonprofit corporation in writing at least five (5) business days in advance of the requested inspection. This is often referred to as an "unqualified" inspection right.

The nonprofit corporation, in turn, has the right to specify the time and location for the member to inspect or copy the documents, but the time and location must be reasonable. In the alternative, the nonprofit corporation could simply provide copies of the requested documents in hard copy or electronically.

The nine (9) types of documents subject to an unqualified right to inspect and copy are:

1. The corporation's Articles of Incorporation, including all amendments;
2. The corporation's Bylaws, including all amendments;
3. All resolutions adopted by the members or the board of directors relating to the number or classification of the corporation's directors;
4. All resolutions adopted by the members or the board of directors relating to the characteristics, qualifications, rights, limitations, and obligations of its members or any class or category of members;
5. Minutes of all membership meetings for the prior three (3) years;
6. Records of all actions taken by the membership without a meeting for the prior three (3) years;
7. All written communications within the prior three (3) years from the corporation to the members as a

group;

8. The names and business or home addresses of the corporation's current directors and officers; and,
9. The annual financial statements, if any, prepared during the prior three (3) years, subject to the following requirements:
 - a. If the annual financial statement was reported upon by a public accountant, the accountant's report must accompany the financial statement.
 - b. If the annual financial statement was not reported upon by a public accountant, then the financial statement should be accompanied by the following:
 - i. A statement by the president or other person affirming that person's reasonable belief as to whether the statements were prepared on the basis of generally accepted accounting principles and, if not, describing the basis of preparation; and,
 - ii. A statement describing any respect in which the statements were not prepared on a basis of accounting practices consistent with the statements prepared for the preceding year.

However, it is important to note that the Act does not require a nonprofit corporation to maintain any financial statements at all, but if it does, such statements must be kept at the principal office of the corporation and furnished to the members upon demand, except that a charitable or religious corporation can limit or completely deny inspection of its financial statements by provisions in its Articles of Incorporation or Bylaws.

Qualified Inspection Rights for Members of Nonprofit Corporations

In addition to the unqualified rights above, each member of a nonprofit corporation has the right to inspect and copy seven (7) types of permanent records of the corporation, so long as the member notifies the corporation in writing at least five (5) business days in advance, and so long as the member satisfies ***all*** of the following requirements:

1. The member must make the demand to inspect or copy the documents in good faith and for a proper purpose;
2. The member must describe with reasonable particularity the purpose behind the member's request to inspect and copy the records and which records the member desires to inspect and copy; and,
3. The records that the member identifies must be directly connected with (or related to) the member's stated purpose for wanting to inspect or copy those records.

Just like unqualified inspections, these inspection rights are typically referred to as "qualified" inspection rights. The corporation has the right to specify the time and location for the member to inspect or copy the records, but the time and location must be reasonable.

If the member satisfies the above requirements, then the corporation must provide the member with the opportunity to inspect and copy any of the seven (7) types of permanent records below:

1. The minutes of all meetings of the corporation's members;
2. The corporation's record of all actions taken by the members without a meeting (i.e. action by written ballot or uniform written consent);
3. The minutes of all meetings of its board of directors;
4. The corporation's record of all actions taken by the directors without a meeting (i.e. uniform written consent);
5. The record of all actions taken by committees of the corporation in place of, and on behalf of, the board;
6. The accounting records of the corporation; and,
7. The corporation's membership list (names and mailing addresses), but subject to the limitation that the member's inspection of the corporation's membership list must not be used without the board's consent

for any purpose unrelated to the member's interest as a member of the corporation. Accordingly, without limiting the generality of the foregoing, and without the consent of the board, a membership list or any part thereof cannot be:

- a. Used to solicit money or property unless such money or property will be used solely to solicit the votes of the members in an election to be held by the corporation;
- b. Used for any commercial purpose; or,
- c. Sold to or purchased by any person.

Under the Act, a member of a nonprofit corporation does not have a right to view any nonprofit corporation document or record not listed on the two lists above. For example, a member does not have the right to inspect a contract between the corporation and a third party unless that contract is itself a part of one of the documents listed above or the board of directors voluntarily agrees to release the contract to the membership. So, in the unusual event that a contract was incorporated as an exhibit or attachment into the minutes from a board meeting, only then would a member have the legal right to view the contract.

Inspection Rights for Community Associations

Almost every community association in North Carolina is formed as a North Carolina nonprofit corporation. Accordingly, the Act establishes the baseline of document inspection rights for the members, the same as any other nonprofit corporation. The Planned Community Act requires all community associations, regardless of when formed, to maintain accurate records of all cash receipts and expenditures and all assets and liabilities and must make an annual income and expense statement and balance sheet available to all members at no charge within seventy-five (75) days after the close of the fiscal year to which the information relates.

Governing Documents Consideration

It is possible for the governing documents of a nonprofit corporation (i.e., Articles of Incorporation, Bylaws, etc.) to specify additional documents members are entitled to inspect, but if only "books and records" are specified, then the documents entitled to be inspected are controlled by the Act. Meaning, if the governing documents only generally identify documents a member may request, the extent of that right and the actual documents that must be made available for inspection are determined by the Act.

Rights Versus Wisdom

Of course, just because the corporation is not required to disclose a requested document does not mean it is prohibited from allowing members to inspect such document. Many fractious battles in nonprofit corporations are based on a corporation's refusal to disclose a document that members are not legally entitled to inspect, the disclosure of which would result in no harm to the corporation. Instead, the non-disclosure commonly fosters ill will and suspicions that "shenanigans" are taking place. Perhaps more often than not, disclosure would be beneficial to the corporation's reputation and bottom line. Just because the corporation is not required to disclose does not mean it shouldn't, and if the document is not on the inspection list, the corporation should ensure such document does not include a non-disclosure clause. Ultimately, sharing documents not required to be shared by the Act is a business decision for the Board.

Summary

Members of nonprofit corporations are entitled to inspect and retain copies of certain corporate records and information. Consequently, if a member of a nonprofit corporation asks to inspect or copy documents not outlined above, the nonprofit corporation has no legal obligation under North Carolina law to make such document available for inspection or copying. Unless the corporation's Articles of Incorporation or Bylaws say

otherwise, the nonprofit corporation has the right to deny the member's request to inspect or copy the documents.

This is a part of our July series: "Rights, Responsibilities, and Regulations." For more insights, click here.

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