



Hall Render Killian Heath & Lyman, PC
600 108th Avenue NE, Ste. 320
Bellevue, WA 98804
(425) 278-9378

Emily R. Studebaker
estudebaker@hallrender.com

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John M. Steel
DLA Piper LLP
701 Fifth Avenue, Suite 7000
Seattle, WA 98104-7044

Re: WDS Member Access to Video Recordings

Dear Mr. Steel:

Thank you for your letter of September 12, 2017. By this response, I am reiterating Dr. Bernard J. Larson's request to inspect and copy all video recordings of the September 6, 2017 special meetings in the possession of Washington Dental Service ("WDS") or its counsel. As a member of WDS, Dr. Larson is entitled to inspect and copy these materials under the Washington Nonprofit Corporation Act ("NCA"). Additionally, we request that you send a current copy of the WDS bylaws, which are to be available to members at no charge per the NCA.

In your letter, you stated that the NCA "does not require inspection or copying of any meeting materials other than the minutes." This is incorrect. RCW 24.03.135 provides that a nonprofit corporation's "corporate records shall be open at any reasonable time to inspection by any member of more than three months standing." The NCA defines "record" to mean "information inscribed on a tangible medium or contained in an electronic transmission." RCW 24.03.005(18). The video recordings at issue clearly fall within this definition, and as there is no dispute over the duration of Dr. Larson's membership in WDS, he is entitled to inspect and copy these recordings.

Your position may be premised on a reading of RCW 24.03.135 that would have the list of five types of "documents"¹ that a corporation must maintain "in the form of a record" act as a limit on the types of "corporate records" that are to be made available to member inspection.

¹ "(1) Current articles and bylaws; (2) A list of members, including names, addresses, and classes of membership, if any; (3) Correct and adequate statements of accounts and finances; (4) A list of officers' and directors' names and addresses; (5) Minutes of the proceedings of the members, if any, the board, and any minutes which may be maintained by committees of the board." RCW 24.03.135.

This is an erroneous interpretation of the text and structure of RCW 24.03.135, and it is unsupported by the statute's history. Instead, RCW 24.03.135 creates two separate obligations for nonprofit corporations: first, that they maintain particular documents "in the form of a record" (the "Maintenance Obligation") and second, that they make their "corporate records" available to member inspection and copying (the "Disclosure Obligation").

It is evident from the language of RCW 24.03.135 that the scope of the Disclosure Obligation extends beyond the five types of documents identified in the Maintenance Obligation. As a matter of basic statutory interpretation, the NCA uses different words to define their separate scopes. If the legislature had intended the Maintenance Obligation and the Disclosure Obligation to be coextensive, then it would have expressed this by using the same word to describe them, or by allowing the statute's structure to be interpreted in this way. This is not the case. Instead, RCW 24.03.135 describes the scope of the Maintenance Obligation by requiring that the corporation keep certain "documents" – a term which is not defined in the NCA – "in the form of a record". Separately, RCW 24.03.135 describes the scope of the Disclosure Obligation by requiring that the corporation make its "records" available to inspection. As the term "record" is defined in the NCA to include any information in written or electronic form, the scope of materials available for inspection is clearly broader than the five types of "documents" that the corporation is obligated to keep.

The history of RCW 24.03.135 demonstrates that the distinction between "documents" and "records" is intentional. The Washington legislature amended the NCA in 2004 to accommodate the rise of electronic communication and information storage. 2004 Wash. Sess. Laws 1110-30 ("2004 Act"). As is important here, the 2004 Act created the definition of "record" quoted above and made significant changes to RCW 24.03.135. *Id.* at 1111, 1118-19. In particular, the 2004 Act replaced several instances of the word previously undefined word "record" in the list of documents that define the scope of the Maintenance Obligation with more specific words "list" and "statements". The 2004 Act further required that these documents be kept "in the form of a record." *Id.* at 1118.²

The 2004 Act also added the word "corporate" into the sentence defining the scope of the Disclosure Obligation.³ *Id.* at 1119. Without this change, RCW 24.03.135 might have been interpreted to create the close relationship between the list of "documents" to be maintained and

² "Each corporation shall keep at its registered office, principal place of business in this state, or at its secretary's office if in this state, the following documents in the form of a record:

- (1) Current articles and bylaws;
- (2) A ~~((record))~~ list of members, including names, addresses, and classes of membership, if any;
- (3) Correct and adequate ~~((records))~~ statements of accounts and finances;
- (4) A ~~((record))~~ list of officers' and directors' names and addresses;
- (5) Minutes of the proceedings of the members, if any, the board, and any minutes which may be maintained by committees of the board. ~~((Records may be written, or electronic if capable of being converted to writing.))~~" 2004 Wash. Sess. Laws 1118.

³ "The corporate records shall be open at any reasonable time to inspection by any member of more than three months standing or a representative of more than five percent of the membership." *Id.* at 1119.

the “corporate records” to be available for inspection that you seem to rely on. That is, absent the addition of “corporate”, RCW 24.03.135 would have first required that certain “documents” be kept “in the form of a record,” then listed those “documents”, then provided that “the records” be open to inspection.⁴ The 2004 Act’s addition of “corporate” reflects the legislature’s intentional choice to break this chain of reasoning. Rather than the Disclosure Obligation pertaining only to the “records” described above, it applies to “the corporate records, *i.e.*, the “information inscribed on a tangible medium or contained in an electronic transmission” that is owned by the corporation. Thus, where the legislature saw that its revisions to the Maintenance Obligation created ambiguity, it chose to clarify the language so as to create a broad Disclosure Obligation. If it had favored the interpretation you likely rely on, the Legislature would instead have replaced “the records” with a phrase such as “the documents” or “such documents.” Instead, it did the opposite.

Dr. Larson is entitled to inspect and copy the video recordings of the September 6 special meetings. His purpose for doing so is to ensure that a record of his own actions at the special meetings is preserved into the future. This purpose is reasonably related to his membership interests.

We understand that you are in possession of the recordings.⁵ As the records must be available to in section “at any reasonable time,” Dr. Larson will be at your offices on October 16, 2017 at 11:00 a.m. and 1:00 p.m. to inspect and copy the video recordings. If you assert that the recordings are protected privilege or are work product, please advise us of the basis for these assertions as soon as possible.

Very Truly Yours,

HALL, RENDER, KILLIAN, HEATH & LYMAN, P.C.



EMILY R. STUDEBAKER

⁴ We do not concede that this is an accurate interpretation of the statute.

⁵ We note that your possession of the recordings does not affect their status as “corporate” records. Under settled law, a client owns the material contained in an attorney’s file.