

## Maintaining Confidentiality in a Transparent Age

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Despite the fact that we live in a transparent age, there are legitimate concerns and reasons for board members to keep certain information confidential. Disclosure of confidential information by a board member could compromise the association or present an unwarranted invasion of privacy upon another. For example, liability on

the part of the corporation or the individual board members could arise from disclosure of sensitive matters such as delinquencies, litigation, contract negotiation, staff employment and the retention of contractors and professionals. For this reason, encompassed within the fiduciary obligations of the board is the requirement that the corporation's information be kept confidential to the extent that the information is privileged or that its release may compromise the corporation.[1]

While transparency is important, keeping certain information concerning the corporation's activities confidential may be required as it prevents undue harm to the corporation, its board members, members, staff and related third-parties. The members of a common interest community elect a board of directors or trustees who are responsible for managing the activities of the association, thereby requiring the board to act in a fiduciary capacity. The members of the board owe fiduciary obligations to the corporation itself and to the unit owners, similar to that of a corporate board to its shareholders.[2] Included within these fiduciary obligations are the duty of care and the duty of loyalty.[3] The duty of care requires trustees to "discharge their duties in good faith and with that degree of diligence, care and skill which ordinary, prudent persons would exercise under similar circumstances, in like positions." [4] The duty of loyalty requires trustees to act in the best interests of the corporation and its members, especially in those circumstances where the trustee has a material conflict of interest.[5] The duty of loyalty requires trustees to discharge their duties in a manner that the trustee believes to be in the corporation's best interest. Therefore, implicit within the duty of loyalty is some degree of a duty of confidentiality. For example, there is no doubt that a director must maintain

the confidentiality of attorney-client privileged information. Many courts have also held that a board members right to learn of privileged information comes with the obligation to maintain the confidentiality of that communication, as the privilege belongs to the corporation and is not that of the board member's to waive.[6]

Ultimately, board members are expected to protect and maintain the confidentiality of certain information. If you have any question as to whether or not you may be required to keep information confidential, please consult with your attorney.

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[1] See N.J.S.A. 46:8B-13; N.J.S.A 45:22A-46(a); See *Moore v. Radburn Ass'n, Inc.*, A-4284-07T2, 2010 WL 910189 (App. Div. Mar. 18, 2010) (upholding a resolution adopted by the board excluding residents from working sessions of the board and, at the board's discretion, from certain confidential discussions that occurred during voting meetings. While not commenting directly on the issue of confidentiality, the court noted that applicable statutes clearly permitted boards to exclude members from conference or working sessions at which no binding votes are to be taken. Moreover, the court found nothing in the statutes requiring that any meetings where there was a quorum present and association affairs being discussed to be considered open meetings as opposed to conference or working sessions to which residents could be properly excluded and therefore information kept confidential).

[2] See *Siller v. Hartz Mountain Associates*, 93 N.J. 370, 382 (1983); *Siddons v. Cook*, 382 N.J. Super. 1 (App. Div. 2005); See also *Thanasoulis v. Winston Towers 200 Ass'n, Inc.*, 110 N.J. 650, 657 (1988).

[3] See N.J.S.A. 15A:6-14; N.J.S.A. 15A:2-8(c). [4] See Nonprofit Act, N.J.S.A. 15A:6-14.

[5] See Business Act, N.J.S.A. 14A:2-7(3).

[6] See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348-49 (1985); See *People ex. rel. Spitzer v. Greenberg*, 50 A.D.3d 195, N.Y.S. 2d 196, 200-01 (2008); See *Stewart Equip. Co. v. Gallo*, 32 N.J. Super. 15 (Law Div. 1954)