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J.D., LL.M., CPA



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What Church Treasurers Need to Know about Church Records - Part 2

by Richard R. Hammar, J.D., LL.M., CPA

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Introduction

Bob is a church member who writes a letter to the pastor demanding to see several records of the church, including financial records and minutes of all board and committee meetings for the past year. The pastor shares Bob's letter with the board. The board views Bob as a "troublemaker," and would like to ignore his request. Can they do so? This lesson focuses on the issue of What Church Treasurers Need to Know about Church Records - Part 2. You can review the Executive Summary to obtain the key points or read the Weekly Lesson for a more thorough presentation of this topic. Start by completing the following interactive exercise to test your knowledge.

Weekly Exercise

Instructions Click on the correct answer for each of the following questions.

Take Quiz

Executive Summary

As a church treasurer, you should know how to respond to members who ask to see church records. This week's lesson will assist you in responding to such requests. As we will see, church members generally have no right to inspect church records unless such a right is conferred by state nonprofit corporation law, a church's charter or bylaws, state securities law (if the church has issued securities), or a subpoena. It is also important for you to understand that church records enjoy no "privilege" against disclosure, with the exception of documents that are protected by the clergy-penitent privilege under state law.

Weekly Lesson

Do members have a right to inspect church records, and if so, under what circumstances? Church leaders often are unsure how to respond to these questions.

It is important to understand that church members have no inherent right to inspect church records. Such a right must be granted by some statute or legal document. Let's review 5 ways that this can occur.

1. State nonprofit corporation law

First, if a church is incorporated, then your state nonprofit corporation law may permit

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members to inspect records in some situations. Be sure that you research the correct statute, since in some states there is more than one nonprofit corporation law under which churches can incorporate. Your charter often will identify the specific law under which the church was incorporated. The Model Nonprofit Corporation Act, which has been adopted in most states, gives members of an incorporated church the right to inspect corporate records for any *proper purpose at any reasonable time*. The Act defines records as books and records of account, minutes of business meetings, minutes of board meetings, and a listing of current members.

There are a number of things to note about this provision. First, it applies only to incorporated churches. Second, it applies only to members. Persons who are not members of a church are given no right of inspection under this provision. Third, the right of inspection must be exercised at a reasonable time. And fourth, the right of inspection only applies if a member has a proper purpose in wanting to inspect church records. Unfortunately, the Act does not define this important term, and very few courts have been called upon to interpret what it means.

In many cases it will be obvious whether or not there is a proper purpose for a particular request. For example, a member's request to inspect financial records to ensure that designated funds are being spent for their designated purposes would certainly be proper. On the other hand, a member's request to find out how much another member has contributed to the church would be improper. There will be many cases where the answer is less clear. As a general rule, if a member's request relates to some legitimate question of church administration or governance, as opposed to idle curiosity, then it should be viewed as proper.

2. Church charter or bylaws

A second legal basis for a right to inspect church records is the church's own charter or bylaws. Occasionally, these documents will contain a provision addressing the inspection of church records, and so they must be reviewed.

3. State securities law

A third legal basis for a right to inspect church records is state securities law. If your church issues securities, such as bonds or notes, then state securities law will give investors, whether members or not, the right to inspect the financial records of the church.

4. Subpoena

A fourth legal basis for a right to inspect church records is a subpoena. Members and nonmembers alike may compel the disclosure or inspection of church records as part of a lawsuit against a church if the materials to be disclosed or inspected are relevant and not privileged. Under rules that have been adopted by most states and all federal courts, any party to a lawsuit may inspect records in the possession of another party to the lawsuit, and a party has the right, by a subpoena, to compel another party to turn over books, papers, and documents.

Church leaders often are confused regarding their duty to comply with a subpoena that asks the church to turn over certain records as part of a lawsuit. For example, let's say that a church is sued by a former employee who claims that she was wrongfully dismissed. The church receives a subpoena demanding that it turn over a wide range of documents pertaining to its personnel practices, employees, and finances. Does the church have to respond to such a subpoena? Does the first amendment guaranty of religious freedom somehow insulate it from having to respond to such demands? These are questions that I have been asked many times. The answer is that church records are not inherently privileged or immune from the subpoena power. Although all states consider confidential communications to be privileged when they are made to a minister acting in a professional capacity as a spiritual adviser, several courts have held that this privilege does not apply to church records.

There are two limited situations in which a church may be able to avoid responding to a subpoena. First, churches should object to subpoenas that seek correspondence or counseling notes prepared by ministers in the course of spiritual counseling—since these materials would be viewed as privileged in most states. Privileged means that they cannot be disclosed in court, and this means that a subpoena seeking such information may be quashed or rescinded by a court. Keep in mind that churches cannot make this judgment unilaterally — a proper objection must be submitted to the court. Second, subpoenas can be modified by a court if they are oppressive. This exception recognizes that some subpoenas may ask for so much

information that any attempt to comply would result in hardship or oppression. For example, a subpoena asking a church to turn over all correspondence, minutes, and financial records in its history might be viewed as oppressive. Again, only a court can make this determination, upon the filing of a proper objection.

Sometimes an attorney will ask a church to turn over certain records without a subpoena. Churches generally should not respond to such requests if the attorney is seeking information that is confidential. Voluntarily turning over confidential information may expose the church to legal liability. It is a better practice to inform the attorney that you will turn over the documents only in response to an enforceable subpoena, since this will reduce if not eliminate any liability to the church. Again, note that if the confidential information that is being requested includes a minister's counseling notes, then a timely objection should be made to the court. Check with an attorney if you are asked to turn over documents to another attorney.

There are two additional points that church leaders should understand regarding the inspection of church records. First, many church members have claimed that they have a right under the Privacy Act or the Freedom of Information Act to inspect church records. This is simply not so. These laws apply to records maintained by the government, and not churches. Second, most courts have ruled that the first amendment does not insulate church records from inspection by members. To illustrate, one court concluded that "first amendment values are not jeopardized by a civil court's enforcement of a voting member's right to examine these records."

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