

Delaware Supreme Court Clarifies When Emails Should Be Produced

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On January 29, 2019, the Delaware Supreme Court provided guidance to the Court of Chancery regarding the scope of a stockholder's inspection rights under Section 220 of the Delaware General Corporation Law or similar LLC or contractual provisions, stating that "if a company observes traditional formalities, such as documenting its actions through board minutes, resolutions, and official letters, it will likely be able to satisfy a § 220 petitioner's needs solely by producing those books and records."

Section 220 provides stockholders with a qualified right to obtain copies of the corporation's books and records upon a showing of a "proper purpose." Delaware courts have held that investigating wrongdoing by directors and officers is a proper purpose, but the stockholder must show a "credible basis" to suspect that wrongdoing has occurred. A production of documents under Section 220 is narrower than typical litigation discovery — the stockholder can only inspect the documents that are "essential and sufficient" to satisfy its stated purpose.

In setting the scope of an inspection, courts have usually allowed access to formal board-level documents, such as meeting minutes and board presentations. On rare occasions, they have required Delaware corporations to produce email.

In *KT4 Partners LLC v. Palantir Technologies Inc.*, No. 281, 2018 (Del. Jan. 29, 2019), the Delaware Supreme Court reversed a decision of the Court of Chancery that limited a stockholder's inspection to formal board documents, holding that the lower court should have also allowed access to electronic documents. The plaintiff stockholder sought to inspect various categories of documents, including "books and records" related to amendments to an investors' rights agreement. The Court of Chancery held that the plaintiff had shown a proper purpose of investigating suspected wrongdoing related to those amendments and granted it access to board-level documents. The Court of Chancery refused to order Palantir to produce email communications related to the amendments.

On appeal, the plaintiff argued that board-level materials were insufficient because Palantir lacked formal minutes and board materials. It conducted its business informally through email. In light of these circumstances, the Delaware Supreme Court held that the Court of Chancery abused its discretion in refusing to allow the plaintiff to inspect email communications relating to the amendments. The court reasoned that "[i]f the only documentary evidence of the board's and the company's involvement in the amendments comes in the form of emails, then those emails must be produced." The Supreme Court further suggested that "if the Vice Chancellor doubted that the production of emails was necessary for KT4's proper purposes, he could have ordered emails to be produced only if Palantir could not in good faith produce other documents sufficient to fairly address the proper subjects of the inspection."

The court noted, however, that corporations are not "defenseless" to requests for email and other less formal electronic information. A company that observes corporate formalities would be much less likely to have to produce email if it "has traditional, non-electronic documents sufficient to satisfy the petitioner's needs."

The decision underscores the importance of formally documenting meetings and resolutions in order to reduce the risk of a stockholder obtaining access to the email or text messages of directors and senior management. A company that documents its decision-making in minutes, resolutions and formal board presentations faces a much lower risk of producing informal communications that may have been written with less care. Additionally, because Delaware courts view electronic communications to or from outside directors as corporate books and records, directors should consider using a company email address for all company business in order to avoid inspection of their personal devices and accounts by stockholders.