

# Delaware Supreme Court Orders Company To Turn Over Emails To Stockholder In Response To Books And Records Request

by Thomas P. Swigert

The Delaware Supreme Court recently ordered a corporation to produce emails and other electronic documents in response to a stockholder's request to inspect books and records under Section 220 of the Delaware General Corporation Law. See KT4 Partners LLC v. Palantir Technologies, Inc., C.A. No. 2017-0177-JRS (Del. January 29, 2019).

The key take away of the case is that corporations should be aware of the manner in which they make and document decisions. A corporation should maintain regular, formalized business records to avoid having to perform burdensome searches through electronic data in response to a books and records request. As the Delaware Supreme Court explained, if a corporation does not formally document its decisions, the corporation could open up its electronic data to searches:

If a respondent in a § 220 [books and records] action conducts formal corporate business without documenting its actions in minutes and board resolutions or other formal means, but maintains its records of the key communications only in emails, the respondent has no one to blame but itself for making the production of those emails necessary.

A corporation should therefore thoroughly document its actions in minutes, board resolutions, or other formal means to avoid more intrusive searches.

## The KT4 Decision

KT4 was a major investor in a privately-held Delaware corporation named Palantir Technologies, Inc. After Palantir and its founder got into a dispute with KT4 and its principal over intellectual property rights, among other things, Palantir orchestrated an amendment of a key stockholder agreement to remove KT4's inspection rights. In the words of the Delaware Supreme Court, Palantir "gutted KT4's rights under a key stockholder agreement." In response to the amendments, KT4 submitted a Section 220 books and records request to Palantir for the purpose of understanding the reasons for the amendments.

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While the Delaware Court of Chancery allowed KT4 access to books and records to investigate the purpose of the amendments, it excluded emails from KT4's inspection. On appeal, the Delaware Supreme Court held the lower court abused its discretion in excluding emails on a wholesale basis. The court reasoned that Palantir did not produce formal board minutes or other documents relating to the amendments to the stockholder agreement and, because those formal documents did not exist, Palantir must have conducted business "informally." The Court concluded: "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." On the other hand, if evidence shows the corporation conducts business informally, then the corporation "has no one to blame but itself for making the production of these emails necessary."

The court also provided guidance on what sort of evidence a petitioner can provide to show that it is entitled to emails in response to a books and records request. The petitioner, for example, could show that the company does not observe required corporate formalities, such as an annual stockholder's meeting. The petitioner could also submit evidence that the company conducts other corporate business informally, including over email. Following the *KT4* opinion, creative petitioners will almost certainly find other ways to meet the low threshold of showing "some evidence" that the corporation conducts business informally to gain access to electronic data. The best way a corporation can protect itself from burdensome fishing expeditions is to keep formal corporate records in the first place.