

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: August 2, 2018

CASE: 2017-00057R

CITATION: Salpi Bechlian v. Toronto Standard Condominium Corporation No. 2418, 2018 ONCAT 8

Order under section 1.44 of the *Condominium Act, 1998*.

Adjudicator: Deborah Anschell, Member

The Applicant

Salpi Bechlian

Self-represented

The Respondent

Toronto Standard Condominium Corporation No. 2418
1 Old Mill Drive
Toronto, Ontario, M6S 0A1

Natalie Santos, Agent

Hearing: May 3, 2018 – June 27, 2018
Online written hearing

REASONS FOR DECISION

A. OVERVIEW

[1] This hearing concerned a records request under section 55 of The Act. The written online hearing was held from April 17, 2018 through June 27, 2018. All evidence was submitted by written affidavits. Written submissions were also provided

[2] Ms. Bechlian is a unit owner of Toronto Standard Condominium Corporation No. 2418 (“TSCC 2418” or the “Respondent”). She requested a document from TSCC 2418, namely an incident report that she made with TSCC 2418 on December 9, 2017 (the “Incident Report”).

[3] Ms. Bechlian was permitted to examine the unredacted Incident Report, but TSCC 2418 has refused to provide her with a copy.

[4] Ms. Bechlian seeks a copy of the Incident Report, redacted.

[5] Ms. Bechlian has also requested the penalty for non-compliance under the Condominium Act, 1998 (the “Act”).

[6] Ms. Bechlian's position is that TSCC 2418 has acted contrary to the limited advice it received from its lawyer. It has treated her dismissively, on the basis that TSCC 2418 does not want to give owners incident reports as a general rule.

[7] TSCC 2418 makes five arguments. First, it maintains that Ms. Bechlian's dispute does not fall within the scope of disputes prescribed by Regulation 179/17 and as such, the Condominium Authority Tribunal (the "Tribunal") does not have jurisdiction over the dispute between Ms. Bechlian and TSCC 2418. Second, TSCC 2418 states that if the Tribunal has jurisdiction, then the Tribunal should not order production of the Incident Report. Third, TSCC 2418 submits that two of the statutory exceptions apply in this case regarding an owner's right to obtain a copy of a record. Fourth, TSCC submits that if the Tribunal orders production of the Incident Report despite the statutory exceptions, it seeks an order allowing redaction of the names and unit numbers of the other residents and the references to their actions and activities. Finally, TSCC 2418 submits that there are no grounds to order a monetary penalty against the Respondent.

[8] For the reasons set out below, I find that the Incident Report, redacted, should be provided to Ms. Bechlian.

B. THE EVIDENCE

[9] The facts in this matter are largely agreed to. Ms. Bechlian provided an affidavit May 3, 2018 ("Exhibit 1"). TSCC 2418 initially provided two affidavits: the first sworn May 10, 2018 by Natalie Santos ("Santos"), an employee of Del Property Management, the property manager at 1 Old Mill Drive (the "Property") ("Exhibit 2"), and the second affidavit sworn May 10, 2018 by Klaus Buechner ("Buechner"), the current President of TSCC 2418 ("Exhibit 3").

[10] Ms. Bechlian provided a series of cross-examination questions for both Santos and Buechner ("Exhibit 4"). In response, Santos swore a second affidavit dated May 29, 2018 ("Exhibit 5"), and Buechner also swore a second affidavit dated May 29, 2018 ("Exhibit 6").

[11] Ms. Bechlian's evidence is that she owns and resides in a unit at the Property. Ms. Bechlian alleges that on Sunday, December 9, 2017, she was verbally assaulted in the Property's lobby by strangers visiting the Property. These individuals were on site doing a basket drive for the holidays. Ms. Bechlian states that she was referred to as a "piece of shit," a "witch" and that she was "unloved."

[12] Ms. Bechlian states that she was in the lobby in the morning of December 9, 2017 and saw men entering the lobby, leaving charity baskets in various locations throughout the lobby. She indicates that the activity was chaotic. She approached

the concierge to ask about what was going on and to express her concern about the activity. That's when the name-calling took place.

- [13] Santos notes in her affidavit that a charity event was being held in the Property's party room on December 8 and 9, 2017. The party room was booked and paid for by the resident hosting the event.
- [14] Santos states that Ms. Bechlian complained, in person, to concierge staff. She wanted to know if the Respondent was paying for the party room, and how many guests a person was allowed to have in the party room. Ms. Bechlian was apparently concerned that the furniture might be damaged, and the fact that strangers were coming into the building to participate in the charity event. Ms. Bechlian was also concerned that guests were holding the door open, and that the charity baskets were blocking the lobby. Santos indicates that the Incident Report identifies two other residents of the Property, and their unit numbers, including the resident who organized the charity event.
- [15] Ms. Bechlian asked the building security/concierge on duty to draft a report of the incident. Ms. Bechlian was told by the concierge that she could get a copy of the report the following Monday. Santos reviewed the Incident Report and the video from the relevant time period and concluded that nothing further needed to be done in relation to the events on December 8 and 9 as no rules had been violated, and there were no security or safety issues.
- [16] On December 10, 2017 Ms. Bechlian sent an email to Buechner, asking for a meeting. According to Buechner, he was not in the province at that time, but was scheduled to return on December 11, 2017. Accordingly, he suggested that they meet to have a discussion after his return. A meeting was scheduled for December 14, 2017.
- [17] On December 14, 2017 Buechner met with Ms. Bechlian for over an hour. At the meeting, Ms. Bechlian discussed the December 9, 2017 incident and she asked Buechner for a copy of the Incident Report. Ms. Bechlian examined the Incident Report in the presence of Buechner. However, Buechner refused to provide a copy of the Incident Report and advised Ms. Bechlian that she could only read the report in front of the building manager, or a board member. They reviewed what happened on December 9, 2017, specifically that Ms. Bechlian directed participants to move items. Before the meeting concluded, Ms. Bechlian reiterated her request for the Incident Report. Buechner offered to let her see the Incident Report at any reasonable time in the presence of a director or the Property Manager. He also indicated that he would check with the Respondent's lawyers to see whether such reports should or could be released.
- [18] On December 18, 2017 Buechner sent Ms. Bechlian an email advising her that he was not prepared to provide her with a copy of the Incident Report. He indicated that he had already shown her the Incident Report, and she could access it anytime

through the Property Manager or a director. Buechner indicated that providing a copy would set a precedent that could lead to substantial overhead and additional costs. Buechner indicated that TSCC 2418's lawyer would be consulted for his position on providing a copy of the Incident Report.

[19] On December 20, 2017 Buechner sent another email indicating that Ms. Bechlian could access the Incident Report at any time either with the Property Manager or a director. Further, Buechner indicated that he was advised that:

Although Incident Reports are not official condo records per the Condo Act, we have input from our lawyer that we can choose to treat them as such and release them; but only if they do not contravene a bunch of conditions. Unfortunately, several of the stipulated conditions apply in this case thus we cannot agree to release them to you. (Exhibit 1, at par. 14)

[20] In cross-examination, Buechner indicated that the advice from the Respondent's lawyer was based on his discussion with the lawyer. Buechner recollects that the lawyer clearly stated that Incident Reports are not condominium records as defined by that Act, but the Respondent could choose to treat them as such if the Incident Reports did not "contravene a number of conditions." It appears that the lawyer did not provide a list of those conditions. Buechner understood this to mean the exceptions set out in the Act that could prohibit disclosure, such as, records relating to pending litigation and records that disclosed information about other residents. (Exhibit 6, par. 9)

[21] Ms. Bechlian testified that she found Buechner's December 20, 2017 response dismissive and belittling. She was never provided with an explanation as to what the "bunch of conditions" were.

[22] Ms. Bechlian then submitted a Request for Records to the Respondent on March 20, 2018 by email. She received a response, which refused to provide the Incident Report, on the basis that it was not a core or non-core record.

[23] On April 10, 2018 Ms. Bechlian sent a written request for payment of the \$5000.00 penalty for failure to provide her with a copy of the Incident Report. On April 11, 2018 the Respondent replied, acknowledging that it had failed to provide Ms. Bechlian with a copy of the Incident Report, but indicating that Ms. Bechlian was provided with an opportunity to examine the Incident Report.

[24] Ms. Bechlian indicates that she has suggested several times to the Respondent that she will accept a redacted copy of the Incident Report. She has requested either a hard copy or a soft copy of the four-page Incident Report.

[25] Santos in her Affidavit swears that over the course of a year, the Respondent creates or receives thousands of pages of records and documents. She believes that incident reports prepared by concierge staff are not required by law or by TSCC 2418's governing documents, but are part of good management practice.

[26] With respect to incident reports, Santos notes that security and concierge services are provided to TSCC 2418 by Paragon Security Services by way of a contract. Pursuant to that contract, when an incident occurs, an incident report must be completed and submitted to Paragon's Concierge Supervisor. Those reports are copied to the property manager. Other than the current request by Ms. Bechlian, Santos has never been asked for a copy of an incident report by a unit owner. Her understanding is that incident reports should only be shared in limited circumstances and not with residents.

[27] Santos indicated that she took several steps to determine how to deal with Ms. Bechlian's request for the Incident Report. Santos consulted with colleagues, course material related to the changes in condominium law, the Board, the Paragon Supervisor and her legal counsel as to whether or not the Incident Report should be provided to Ms. Bechlian. It was Santos's sincere understanding that the Incident Report should not be released, and that Ms. Bechlian had no statutory right to a copy of the Incident Report.

[28] Buechner indicates in his affidavit that his email responses to Ms. Bechlian were not intended to be dismissive or belittling. Rather, his intent was to be as expansive and helpful as possible. His evidence is that the Board later reconfirmed his decision, based on the advice from their legal counsel, not to treat incident reports as official condominium records as defined in the Act.

[29] Buechner's position is that if owners have the right to access every document that is in the possession of the Respondent, then it will establish a precedent that could add significant operating costs to running condominiums in Ontario. He believes that he was within his legal rights to deny Ms. Bechlian's request for a copy of the Incident Report.

C. ISSUES AND ANALYSIS

Issue 1: Does Ms. Bechlian's records request fall within the scope of disputes prescribed by Regulation 179/17 such that the Tribunal has jurisdiction over the dispute between the Applicant and the Respondent?

[30] Ms. Bechlian submits that the Incident Report is a Record pursuant to the Act. Section 55 of the Act defines records as follows:

55(1) The corporation shall keep adequate records, including the following records:

1. The Financial records of the corporation.
2. A minute book containing the minutes of owners' meetings and the minutes of board meetings.

3. A copy of the declaration, by-laws and rules.
- 3.1 The returns and notices that it has filed with the Registrar under Part II.1.
4. All lists, items, records and other documents mentioned in 43 (4) and (5).
5. The report described in subsection 44(8) that the corporation receives from the person who conducts a performance audit.
6. The records required under subsection 46.1 (3) and 83 (3).
7. A record of all reserve fund studies and all plans to increase the reserve fund under subsection 94 (8).
8. A copy of all agreements entered into by or on behalf of the corporation.
9. The report that the corporation receives from an inspector in accordance with subsection 130 (5).
10. All instruments appointing a proxy or ballots for a meeting of owners that are submitted at the meeting.
11. All other records, if any, that are prescribed.
12. Any additional records specified in the by-laws of the corporation.

[31] Further attention must also be had to Section 13.1(1)(7) of Ontario Regulation 48/01 (“O.Reg. 48/01”) which prescribes that a record that relates to a specific unit or owner that the Corporation creates or receives is a record:

13.1 (1) The following records of a corporation are prescribed for the purpose of paragraph 11 of subsection 55(1) of the Act:

7. Records that relate to specific units or owners and that the corporation creates or receives.

[32] Ms. Bechlian submits that the Incident Report is a record that relates to specific owner (s) that TSCC 2418 has created or received. Furthermore, the Incident Report is also enumerated under article 3.01 (j) of TSCC 2418’s general by-law as follows:

3.01 – The Corporation shall keep and maintain all records required by section 55 of the Act, including the following lists, items records and documents (hereinafter collectively referred to as the “Records”, namely (j) all records which the Corporation has or possesses (or which are under its control) relating to the units or to the employees of the Corporation.

[33] In response, TSCC 2418 submits that it is clear that the type of record contemplated by Subsection 13.1(1) of O.Reg.48/01, must still be in relation to the purposes of the Act. TSCC 2418 submits that all the records listed in 13.1(1) relate to matters that a corporation undertakes by law or in the management of the assets of the corporation. None of the enumerated records refers to documents related to personal matters such as those described in the Incident Report relating to Ms. Bechlian.

[34] Further, TSCC 2418 submits that the requirement in 3.01 (j) of the By-Law requires the Corporation to keep records relating to units, rather than residents.

[35] In addition, TSCC 2418 submits that the ultimate consideration for the Tribunal in considering whether a dispute falls within its jurisdiction is whether the document is

being requested for a purpose in accordance with the Act. The Respondent states that the jurisdiction of the Tribunal cannot possibly extend to the thousands of documents prepared by a condominium corporation if they do not have a purpose in accordance with the Act.

[36] I accept the submissions of Ms. Bechlian with respect to this issue of jurisdiction. I find that the Incident Report is a record that “*relates to specific units or owners and that the corporation creates or receives*” as provided in O.Reg. 48/01.

[37] I am mindful of the language used by Chapnik J. in *Rohoman v. YCC 141*, [2000] O.J. No 2356 (ON SC), cited by Ms. Bechlian, indicating that the underlying policy of the Act is to make the affairs and dealings of the Corporation and the Board, an open book to members of the Corporation. When I consider this philosophy, together with the wording of Section 13.1(1)(7), I am satisfied that the Incident Report is a record of the Respondent.

[38] As noted by the Respondent, the Tribunal’s jurisdiction is prescribed by Ontario Regulation 179/17. The jurisdiction is limited to disputes dealing with Sections 55(1) (2) (2.1) (3) (4) (5) (6) (8) of the Act and sections 13.1 to 13.11 of O. Reg. 48/01. The Tribunal has jurisdiction to deal with records disputes.

[39] As noted above, I am satisfied that the Incident Report is a Record in accordance with and for the purpose of the Act and Regulations. Thus, the Tribunal has jurisdiction over the dispute between Ms. Bechlian and the Respondent.

Issue 2: Should the Incident Report be Produced?

[40] Ms. Bechlian submits that given that the Incident Report is a Record, it shall be produced. In response, TSCC 2418 submits that the Incident Report should not be provided because there is no possible purpose for the report pursuant to the Act.

[41] TSCC 2418 refers to Subsection 13.3(1)(a) of O.Reg. 48/01 as follows:

13.3(1)(a) The right to examine or obtain a copy of a record under subsection 55(3) of the Act does not apply unless,

(a) an owner, a purchaser or a mortgagee of a unit requests to examine or obtain the copy and the request is solely related to that person’s interests as an owner, a purchaser or a mortgagee of a unit, as the case may be, having regard to the purposes of the Act;

[42] TSCC 2418 concedes that a requester is not required to provide the Corporation with a statement of the purposes of the request. However, the Corporation argues that if a purpose in accordance with the Act is not disclosed and such a purpose cannot be inferred, or the record or request is unrelated to the Act, then the production of the record should be denied.

[43] TSCC 2418 argues that in this case, there is no self-evident or inferred purpose, and therefore Ms. Bechlian's request should be denied. It asserts that the role of the Board is to act as gatekeeper of the Corporation's documents and balance the private and communal interests between the unit owners and the corporation.

[44] Again, I prefer Ms. Bechlian's position with respect to production of the Incident Report. As acknowledged above, Ms. Bechlian is not required to state her purpose.

[45] Subsection 13.3(2) of O.Reg. 48/01 sets forth as follows:

13.3 (2) Despite subsection (1), a person entitled to examine or obtain copies of records under subsection 55 (3) of the Act is not required to provide the corporation with a statement of the purpose of the request. O. Reg. 180/17, s. 17 (1).

[46] In her written submissions, Ms. Bechlian notes as follows with respect to her purpose at paragraph 42:

"While the Applicant doesn't know whether she would use the IR (Incident Report) to seek enforcement or compliance with the Act and Corporation's governing documents, the provision of a copy of the IR would enable and assist her to be fully informed, obtain professional advice and assess her position."

[47] Regarding the lack of any written reason having been given by Ms. Bechlian, I am persuaded by the following statement relating to purpose in *Lahrkamp v. Metropolitan Toronto Condominium Corporation No 932, CanLII 74184 (ON SCSM)* at paragraph. 41, that no such statement of purpose was required:

"This would therefore indicate that a reason to inspect records is not always necessary. The legislation does not specifically require a reason for every request or a reason for every refusal of a record."

[48] Thus, I reject the Respondent's argument that the Incident Report need not be produced because there was no self-evident or inferred purpose under the Act. Ms. Bechlian has identified a purpose as noted above. Her stated purpose indicated an interest having regard to the purposes of the Act; her interest as a unit owner in ensuring that the condominium is safely, effectively and properly managed. Subject to any applicable exception discussed below, the Incident Report must be produced.

Issue 3: Do Statutory Exceptions Apply in this Case?

[49] TSCC 2418 submits that if the Tribunal determines that it ought to grant the Applicant's request for a copy of the Incident Report, then two exceptions to an owner's right to examine or obtain records apply in this case pursuant to section 55(4) of the Act, namely that the record relates to contemplated litigation and/or it relates to specific units or owners.

[50] TSCC 2418 submits that Ms. Bechlian made vague assertions in her submissions as to her purpose for seeking a copy of the Incident Report. She indicated that "...the Incident Report would enable the Applicant to be fully informed and assess her position." TSCC 2418 submits that the Applicant is fishing for evidence to support contemplated litigation.

[51] TSCC relies on *Fisher v. Metropolitan Toronto Condominium Corp. No. 596* [2004] O.J. No. 5758 (Div. Ct.) in support of its position that the exception of contemplated litigation applies in this case. In that case, Justice Ground stated as follows:

"It is clear from the evidence before this court that Fisher was making a claim against Condo Corp and contemplating litigation at the time that the requests for the records were made and accordingly, the exception in clause 55(iv)(b) is applicable."

[52] I do not find that the Fisher case is helpful to this fact situation. There is no clear evidence to suggest that Ms. Bechlian is contemplating litigation against TSCC 2418. In fact, in an earlier portion of the Respondent's submissions, it suggested that any purposes behind Ms. Bechlian's request for the Incident Report was "*a vague assertion*" (at par. 32). I am not satisfied, based upon the evidence, that Ms. Bechlian is contemplating litigation, and thus I find that the exception does not apply.

[53] Furthermore, based upon the evidence before the Tribunal, I cannot conclude that this is a fishing expedition, noting that Ms. Bechlian is seeking a single specific record which documents an incident in which she was involved and of which she already had knowledge of the contents.

[54] The Respondent also relies on the exception dealing with information about other owners. Subsection 55(4)(c) of the Act provides as follows:

- (4) The right to examine or obtain copies of records under subsection (3) does not apply to,
- (c) subject to subsection (5), records relating to specific units or owners;

[55] The Respondent notes that the Incident Report refers to two other residents and their interactions with the concierge staff. The Respondent submits that on this basis the Incident Report should not be produced.

[56] I do not accept this argument. The Incident Report documents interactions with Ms. Bechlian being a key player. In that sense, the Incident Report does not relate to other owners or units.

[57] Ms. Bechlian in her submissions indicates that she offered to receive a redacted report relating to other unit owners' information. On the basis that it is possible to redact the Incident Report, I am not satisfied that this exception applies.

Issue 4: Should the Incident Report be Redacted?

[58] The Respondent submits that portions of the Incident Report should be redacted. In the alternative, the owners that are referenced in the Incident Report should consent to the disclosure of their names and unit numbers and the details of their activities and interactions with concierge staff.

[59] Ms. Bechlian in her submissions indicates that she "seeks a copy of the IR, redacted, to protect any information which might be excluded under the Condominium Act, 1998" (at par. 7).

[60] Both parties therefore are in agreement that the Incident Report shall be redacted before it is produced. I order that the Incident Report be redacted so as to eliminate any identifying information of other owners, their names and unit numbers.

Issue 5: Should a Monetary Penalty Be Awarded Against TSCC 2418?

[61] Ms. Bechlian submits that the Respondent was dismissive with respect to her request for the Incident Report, and treated her request as an annoyance.

[62] She submits that the \$5000.00 penalty that she has requested is prescribed; it shall be paid by a corporation that without reasonable excuse does not permit an owner to examine or to obtain copies of records. Ms. Bechlian argues that this is an appropriate circumstance to award the full sum of \$5000 to ensure that unit owners or other persons legally requesting records at TSCC 2418 do not receive the same treatment that she did.

[63] Ms. Bechlian submits that the Incident Report is only four pages long. These proceedings could have been avoided if the Respondent had simply provided a copy of the Incident Report when requested.

[64] In reply, the Respondent argues that there is absolutely no basis in fact or law to impose a penalty in the event that the Tribunal grants Ms. Bechlian's request for a copy of the Incident Report.

[65] Section 1.44 of the Act provides as follows with respect to ordering a penalty:

Orders at end of proceeding

1.44 (1) Subject to subsection (4), in a proceeding before the Tribunal, the Tribunal may make any of the following orders:

6. An order directing a corporation that is a party to a proceeding with respect to a dispute under subsection 55(3) to pay a penalty that the Tribunal considers appropriate to the person entitled to examine or obtain copies under that subsection if the Tribunal considers that the corporation has without reasonable excuse refused to permit the person to examine or obtain copies under that subsection.

[66] The Respondent notes that in this instance, the President of TSCC 2418 met with Ms. Bechlian and allowed her to examine the Incident Report. The President offered Ms. Bechlian further opportunities to examine the Incident Report.

[67] The Board and Property Manager sought legal advice on the issue of providing a copy of the Incident Report. They were told that the Incident Report should not be released, because it contained information about other owners, and might be in contemplation of litigation. Finally, the Respondent submits that there is no jurisprudence from the Tribunal or the Courts about releasing a copy of an incident report on request to an owner.

[68] I agree with the Respondent's position with respect to the imposition of a penalty. The Respondent provided Ms. Bechlian with an opportunity to examine the Incident Report. Furthermore, given that the Respondent obtained advice to refuse Ms. Bechlian's request for production of a copy of the Incident Report, the Respondent had a reasonable excuse to withhold it. While the advice of legal counsel might not constitute a reasonable excuse in every case, I believe it does so here. It was not, in my view, unreasonable for the Respondent, with the advice of its legal counsel, to believe that the record in question fell under the exceptions cited by the Respondent in this case. Accordingly, I do not see the facts of this case as giving rise to the imposition of a penalty.

D. COSTS

[69] The award of costs is in the Tribunal's discretion. Neither party made any submissions with respect to costs in their material.

[70] During these proceedings, I found both parties to be completely responsive. All of the materials were provided on a timely basis, and in compliance with the CAT-ODR system requirements.

[71] In these circumstances, I award no costs in this matter.

ORDER

Pursuant to the authority set out in section 1.44(1) of the Act, the Tribunal orders that:

1. Toronto Standard Condominium Corporation No. 2418 provide to Ms. Bechlian the Incident Report requested redacted only for information relating to owners other than Ms. Bechlian, their names and unit numbers. The redacted Incident Report should be provided within thirty days of the release date of this Decision.

Deborah Anshell
Member, Condominium Authority Tribunal

RELEASED, August 2, 2018.