CONDOMINIUM AUTHORITY TRIBUNAL

DATE: June 11, 2019
CASE: 2019-00032R
Citation: Tonu Orav v York Condominium Corporation No. 344, 2019 ONCAT 18

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

Adjudicator: Marc Bhalla, Member

The Applicant Tonu Orav	Self-Represented
The Respondent York Condominium Corporation No. 344	Lou Natale, Counsel

Hearing: April 11, 2019 to May 22, 2019

REASONS FOR DECISION

A. OVERVIEW

[1] The Applicant is a unit owner of York Condominium Corporation No. 344 ("YCC 344"). On multiple occasions, they requested records from the Respondent, under s.55 of the *Condominium Act, 1998* (the "Act"). The Applicant claimed that the Respondent provided inadequate replies to their records requests. They sought an order for the requested records. The Applicant also sought a penalty against the Respondent for failing to adequately address the Applicant's records requests, along with costs of this hearing before the Condominium Authority Tribunal (the "Tribunal" or the "CAT").

[2] The Respondent did not take part in the hearing beyond April 11, 2019.

[3] I find that the Applicant is entitled to the records they requested. I order a penalty of $2000 against the Respondent and award the Applicant $200 in filing fees.

[4] The Applicant submitted records requests on almost a monthly basis. Despite my decision, the Applicant's conduct should not be encouraged. This conduct is unreasonable and served to unnecessarily complicate this case. I caution the Applicant from making records requests at such frequency in the future.

B. PRELIMINARY ISSUES

Merger of Multiple Records Requests

[5] The Applicant requested records in December 2018, January 2019, February 2019 and March 2019. Given the similarity of the requests, the Tribunal ordered that the issues arising from those requests be heard together. This allowed for efficiency.

Respondent Non-Participation

[6] Rule 7.3 of the CAT Rules of Practice provides that users are to check the CAT's Online Dispute Resolution System ("CAT-ODR system") at least once every business day or otherwise as directed by the Tribunal.

[7] The CAT-ODR system is available 24 hours a day, 7 days a week. I set deadlines to allow the Applicant and the Respondent (collectively, the "Users") to participate at their convenience. All deadlines allowed for participation both during and beyond business hours.

[8] The Respondent's Representative communicated on the CAT-ODR system on April 11, 2019. They confirmed they would act on behalf of the Respondent. This demonstrated that the Respondent was aware that a hearing was taking place. The communications of April 11, 2019 were the last from any representative of the Respondent in the hearing.

[9] When the Respondent missed several hearing participation deadlines, I delayed the hearing. This was as a courtesy to the Respondent to provide it with a chance to request more time to participate. No request was received.

[10] The Respondent had 37 calendar days, including 25 business days, to participate in the hearing. It did not. The Respondent missed 9 participation deadlines during the hearing. I find that the Respondent had adequate knowledge of the hearing and sufficient opportunity to participate in it.

[11] The Applicant sought many items beyond the Tribunal's jurisdiction, including that:

a) the Respondent provide written acknowledgment that it "erred in not providing records on a timely basis" with a commitment to reply to all future records requests in a timely manner. The Applicant wanted the Respondent to post this on the community's notice board;

b) the Tribunal recommend that the Respondent involve the services of a professional minute taker;

c) the Respondent confirm that it has addressed any potential conflicts of interest, particularly around any relation between its President and legal representative;

d) the Respondent undertake to update its listing in the public registry of the Condominium Authority of Ontario (the "CAO"); and

e) the CAO review its procedure for verifying directors' completion of their mandatory training to make this information more easily accessible.

[12] The Applicant referenced s.1.44(1)(1) and s.1.44(1)(2) of the Act as the authority under which they felt I could rule for these items. This relief sought is not within the current jurisdiction of the Tribunal.

Dates of Requested Records

[13] In their records requests, the Applicant refers to the terms "to date", "onward", "all…after" in stating a date range of records requested. I define the end date of records requested as March 7, 2019 - the date of the last Request for Records directly involved in this case.

[14] During the hearing and within records requests, the Applicant made reference to items not listed as issues to be determined in this case. This included reference to documents related to:

a) tender for the Reserve Fund Study;
b) the selection of management service provider;
c) the selection of legal service provider;
d) garage repairs; and
e) any contract for legal services entered into by the Respondent.

[15] These items are beyond the issues identified by the Tribunal - and agreed to by the Applicant - at the outset of this hearing. They were excluded for consideration in this case.

C. ISSUES

[16] The Tribunal identified four main issues to be decided, as follows:

Issue 1: Entitlement to core records

Is the Applicant entitled to receive the following records under s.55 of the Act:

a) Condominium Corporation's Declaration;
b) Budget for the Corporation's current fiscal year, including amendments;
c) Condominium Corporation's by-laws;
d) Current Reserve Fund Study;
e) Current plan for the future funding of the reserve fund;
f) Signed and approved minutes of all Board of Directors meetings from October 2018 to March 7, 2019; and

g) Most recent Periodic Information Certificate?

Collectively, these will be referred to as the “Core Records”.

Issue 2: Entitlement to non-core records

Is the Applicant entitled to receive the following records under s.55 of the Act:

a) Copies of the contracts entered with Building Science during 2019 to March 7, 2019;
b) Monthly financial statements with detailed transaction history from November 2018 – March 7, 2019;
c) Management Reports from November 2018 - March 7, 2019;
d) Contracts entered into with Reliable Construction in 2019, up to March 7, 2019;
e) Management contract between ICC Property Management Ltd. and YCC 344;
f) Contract and cancellation notices and any report related to the cancellation of the North West Stairwell including any details of costs associated with cancellations during the period from October 2018 to March 7, 2019; and,
g) Any reports related to inspections of the property such as Fire Marshall, building department, insurance or similar during the period from October 2018 to March 7, 2019?

Collectively, these will be referred to as the “Non-Core Records”.

Issue 3: Financial penalty for failure to provide records

Is the Respondent required to pay a penalty under s.1.44(1)(6) of the Act for failure to provide the Applicant with the records requested without a reasonable excuse? If so, how much?

Issue 4: Costs

Is the Applicant entitled to recover costs related to the Tribunal process? If so, how much?

D. ANALYSIS

<u>Is the Applicant entitled to receive the Core Records?</u>

[17] The definition of “core records” is provided under s.1(1) of Ontario Regulation 48/01 (the “Regulation”). Records are also set out under s.13.1(1) of the Regulation.

[18] The Applicant submitted that the Core Records qualify as records they are entitled to receive. The Respondent made no submissions to suggest otherwise. I find that the Applicant is entitled to receive the Core Records.

[19] The Respondent may, at no cost to the Applicant, redact information contained in the Core Records as permitted under s.55(4) of the Act – such as information relating to specific units or owners – and must otherwise provide unedited copies of the Core Records to the Applicant.

[20] The Applicant indicated that they would accept the Core Records in electronic format. The Respondent may provide the Core Records in either electronic or paper form to the Applicant, at the Respondent's choice. The Respondent shall bear all costs associated with preparing and providing the Core Records to the Applicant, whether provided in electronic or paper format.

Is the Applicant entitled to receive the Non-Core Records and, if so, for what (if any) fee?

[21] The types of records that the Respondent is required to keep are set out under s. 55(1) of the Act and s.13(1) of the Regulation.

[22] The Applicant submitted that the Non-Core Records qualify as records they are entitled to receive. The Respondent made no submissions to suggest otherwise. I find that the Applicant is entitled to receive the Non-Core Records.

[23] The Respondent may, at no cost to the Applicant, redact any information contained in the Non-Core Records as permitted under s.55(4) of the Act – such as information relating to specific units or owners – and must otherwise provide unedited copies of the Non-Core Records to the Applicant.

[24] The Applicant indicated that they would accept the Non-Core Records in electronic format. The Respondent may provide the Non-Core Records in either electronic or paper form to the Applicant, at the Respondent's choice. The Respondent shall bear all costs associated with preparing and providing the Non-Core Records to the Applicant, whether provided in electronic or paper format.

Is the Respondent required to pay a penalty?

[25] The Applicant sought a penalty of $5000 against the Respondent under s.1.44(1)(6) of the Act. They cited several Tribunal cases in which penalties were awarded and suggested that *Tharani Holdings Inc. v. Metropolitan Toronto Condominium Corporation No. 812 2019 ONCAT 3* ("Tharani") most closely resembles this case. In Tharani, the Tribunal, stated:

> "In determining the amount of the penalty, I have also considered that the Respondent did not participate in this hearing process despite being

> notified several times that this hearing was to take place. The failure of the Respondent to participate in these proceedings, and its failure, before that, to respond … amplify the Respondent's refusal to provide the records and underline the lack of any reasonable excuse for so doing. Such conduct leads me to conclude that the Respondent willfully disregarded, or was willfully blind to, its legal requirements relating to the Applicant's request for records. In this circumstance, I find that a penalty of $2000 against the Respondent is appropriate."

[26] The Applicant suggested that "the actual behaviour of the respondent appears significantly more grievous in this current Case".

[27] The purpose of a penalty must be considered. The Tribunal has previously considered the purpose of penalties.

[28] In *Shaheed Mohamed v. York Condominium Corporation No. 414, 2018 ONCAT 3* ("Mohamed"), the Tribunal stated:

> "While there is no specific or clear direction in the legislation as to the purpose intended for the penalty that may be imposed, this Tribunal is committed to operating in a way that focuses on its users, resolves disputes in a way that is fair and convenient, and promotes healthy condominium communities. The penalty should at least be imposed by the Tribunal for reasons that represent those commitments."

[29] In *Terence Arrowsmith v Peel Condominium Corporation No. 94 2018 ONCAT 10*, the Tribunal stated:

> "[G]enerally penalties operate to do two things. First, they operate to sanction conduct that is considered undesirable. Second, they communicate to the class of interested people and organisations that some conduct is unacceptable. The Tribunal is committed to providing dispute resolution that is fair, convenient and timely."

[30] The Applicant attempted to introduce the Respondent's behaviour in Stage 1 – Negotiation and Stage 2 – Mediation. I did not accept this. Prior stages of the Tribunal's process are confidential and without prejudice. They have no place in a Stage 3 – Tribunal Decision hearing. This includes in consideration of a penalty.

[31] The Applicant stated that some of the requested records had been provided, yet are insufficient, and many remain outstanding. They also claimed that the Respondent failed to address the Applicant's records requests in the time and with the form required. It is clear in the evidence before me that the Respondent failed to adequately reply to the Applicant's records requests.

[32] The Applicant introduced as evidence a letter dated March 22, 2019 sent by the Respondent's Representative to the Applicant and others (the "Lawyer's Letter"). While most of the Lawyer's Letter does not relate to the focus of this case, it suggests that the Applicant interfered with the operation of the Respondent by repeatedly making records requests. The Respondent made no submissions on this matter. There is no evidence before me that the Respondent replied to all the Applicant's records requests involved in this case.

[33] I consider the Respondent's lack of participation in the hearing, together with the Lawyer's Letter, a refusal to provide the Applicant with the records requested.

[34] The Respondent has not offered a reasonable excuse for its refusal to provide the Applicant with records requested. I find that a penalty consistent with that awarded in Tharani is appropriate in this case. I award $2000 against the Respondent.

[35] The amount of the penalty awarded in this case also takes into account the Applicant's conduct relating to records requests. As mentioned, the Applicant submitted multiple and frequent records requests. This behaviour was considered disruptive by the Respondent. The Applicant's conduct complicated matters and presented an unfair burden on the Respondent. This conduct appears to have contributed to the Respondent's refusal to provide the requested records. The penalty awarded is significantly less than the Applicant sought as I have taken the conduct of both Users into account in determining the appropriate penalty amount.

[36] In *Sohail Benjamin v Peel Standard Condominium Corporation No.1008, 2019 ONCAT 10* ("Benjamin"), the Tribunal considered prior behaviour of the applicant that the condominium corporation considered disruptive. The Tribunal found that such did not prove the records requested were not related to the applicant's interests as an owner.

[37] The distinction in this case is that the Applicant's prior behaviour has not been considered. Since making a records request, the Applicant continually and frequently submitted more records requests. This complicated matters. It confused what was being requested and placed an unfair burden on the condominium corporation. This conduct does not promote healthy condominium communities. It represents conduct that should not be encouraged.

Is the Applicant entitled to recover costs?

Legal Costs

[38] The Applicant acknowledges Rule 33.1 of the Tribunal's Rules of Practice. It provides that exceptional reasons are needed for legal costs to be recoverable in Tribunal proceedings. The Applicant believed this applies to this case.

[39] Legal costs incurred by a self-represented user could be recovered, if exceptional reasons existed.

[40] The Applicant made use of the services of a condominium lawyer in preparing for Tribunal proceedings. The Applicant suggests they were inclined to do so as a result of the Respondent's conduct.

[41] Most of the legal costs incurred by the Applicant appear attributable to a self-represented party making use of unbundled legal services for guidance in the course of preparing to represent themselves in a legal proceeding. This is not exceptional.

[42] I considered whether the balance of the Applicant's legal costs - $312.45 of the cited legal costs, pertaining to the Lawyer's Letter - qualified as exceptional.

[43] In *Mara Bossio v. Metro Toronto Condominium Corporation 965, 2018 ONCAT 6*, the Tribunal stated:

> "To find "exceptional reasons", I would need evidence that the Applicant had been grossly unreasonable, or had taken positions that unduly complicated this Application, or had acted in bad faith or with malice, or took some other step beyond being unsuccessful and unreasonable."

[44] The Applicant's legal costs pre-dated the hearing. The primary focus of the Lawyer's Letter is on subject matter beyond the scope of this case. While I accept that the Applicant was inclined to seek legal guidance upon receiving the Lawyer's Letter, it appears that this would have been the Applicant's inclination regardless of this case. This is supported by the Applicant's reply to the Lawyer's Letter of April 1, 2019. The reply follows the Applicant's review of the Lawyer's Letter with legal counsel and includes a focus on matters beyond the scope of this case. I do not consider the reasons that the Applicant incurred legal costs to be exceptional as they apply to the focus of this particular case.

Personal Hourly Rate

[45] The Applicant sought a personal hourly rate of $30 for their efforts requesting records and participating in this case, for a total of $3270. This was based on the time that the Applicant spent, 109 hours.

[46] The Applicant cited Mohamed. They claimed that the "various clerical tasks associated with preparing material for this type of case" justified the recovery of costs for that work at a proposed personal hourly rate just under the rate set in Mohamed.

[47] In Mohamed, costs were incurred by a condominium corporation preparing records following a request by an owner. Here, the Applicant's personal costs relate to work the Applicant chose to do.

[48] In *Lucian Sava v York Condominium Corporation No. 386, 2019 ONCAT 8* ("Sava"), the Tribunal found that the respondent's conduct resulted in time and expense for the applicant that could have been avoided. This was the result of the respondent partially participating in the hearing, providing conflicting explanations of why they did not provide records and delaying the hearing by attempting to change representatives. As a result, the applicant was awarded $384 for 16 hours of their time.

[49] In contrast to Sava, the Applicant increased the time and expense involved themselves, by submitting an excessive number of records requests over a short period of time. These were actions that the Applicant chose on their own. Multiple records requests are not needed to engage the Tribunal.

[50] I will not award the Applicant recovery of an amount for their time for involvement in this case. The spirit of the Tribunal's structure and rules on cost recovery should discourage users from forming any general expectation that the cost of their time in participating in the Tribunal process will be recoverable.

Filing Fees

[51] I accept the Applicant's request for the recovery of their $200 filing fees. This cost would likely not have been incurred had the Respondent been more responsive to the Applicant's records requests. I accept that the Respondent's lack of response led the Applicant to engage the Tribunal and incur these costs.

ORDER

[52] The Tribunal orders that:

1. The following Core Records be provided to the Applicant by the Respondent within 30 days of this decision, at no cost to the Applicant:

    a) Condominium Corporation's Declaration;
    b) Budget for the Corporation's current fiscal year, including amendments;
    c) Condominium Corporation's by-laws;
    d) Current Reserve Fund Study;
    e) Current plan for the future funding of the reserve fund;
    f) Signed and approved minutes of all Board of Directors meetings from October 2018 to March 7, 2019; and
    g) Most recent Periodic Information Certificate.

2. The following Non-Core Records be provided to the Applicant by the Respondent within 30 days of this decision, at no cost to the Applicant:

    a) Copies of the contracts entered with Building Science during 2019 to March 7, 2019;
    b) Monthly financial statements with detailed transaction history from November 2018 – March 7, 2019;
    c) Management Reports from November 2018 - March 7, 2019;
    d) Contracts entered into with Reliable Construction in 2019, up to March 7, 2019;
    e) Management contract between ICC Property Management Ltd. and YCC 344;
    f) Contract and cancellation notices and any report related to the cancellation of the North West Stairwell including any details of costs associated with cancellations during the period from October 2018 to March 7, 2019; and
    g) Any reports related to inspections of the property such as Fire Marshall, building department, insurance or similar during the period from October 2018 to March 7, 2019.

3. Pursuant to s. 1.44(1) of the Act, the Respondent is to pay the Applicant $2200 - being the $2000 penalty and costs of $200. In the event that the full amount is not provided to the Applicant within 30 days of this Order, the Applicant is entitled to set-off all remaining amounts due against the common expenses attributable to the Applicant's unit(s) in accordance with s.1.45(3) of the Act.

4. In order to ensure that the Applicant does not have to pay any portion of this cost award, the Applicant shall also be given a credit toward the common expenses attributable to the Applicant's unit(s) in the amount equivalent to the Applicant's proportionate share of such costs.

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Marc Bhalla
Member, Condominium Authority Tribunal

Released on: June 11, 2019