CONDOMINIUM AUTHORITY TRIBUNAL

DATE: February 14, 2019
CASE: 2018-00390R
CITATION: Bryan Mellon v. Halton Condominium Corporation No. 70 2019 ONCAT 2

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

Adjudicator: Michael Clifton, Vice-Chair

The Applicant
Bryan Mellon — Self-represented

The Respondent
Halton Condominium Corporation No. 70 — Victor Yee, Counsel

Written Online Hearing: January 20, 2019 through January 24, 2019.

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant, Bryan Mellon, is the owner of a unit of the Respondent, Halton Condominium Corporation No. 70.

[2] The Applicant submitted a request for records to the Respondent under section 55 of the Condominium Act, 1998, (the “Act”), dated October 2, 2018, asking for copies of the following core records in electronic format: the minutes of the Respondent’s board of directors (“board”) meeting held November 27, 2017, and the Respondent’s most recent approved financial statements.

[3] The Respondent provided its response to the Applicant, dated October 31, 2018, by email along with electronic copies of the Respondent’s most recent auditor’s report and redacted copies of minutes of all of the Respondent’s board meetings from November 2017 to September 2018.

[4] There were no factual disputes relating to either the request for records or the response to the request. The only issue of non-compliance with the Act and Ontario Regulation 48/01 (the “Regulation”) raised regarding those forms and procedures concerned the failure by the Respondent to include a written statement relating to the redaction of the board minutes as required by subsection 13.8(1)(b) of the Regulation. Upon being notified of this deficiency by the Applicant, the Respondent’s property manager immediately corrected it by providing the missing statement.

[5] A question also arose as to whether, by providing the copies of board minutes from November 2017 to September 2018, the Respondent unnecessarily exceeded the Applicant's request. The Users agreed that the Tribunal need not address this question.

[6] The issues to be decided by this Tribunal, and a brief summary of my conclusions, are as follows:

1. **What records constitute the "most recent approved financial statements" on the statutory Request for Records form?**

   I conclude that this refers to the most recent audited financial statements approved by the board for delivery to an annual general meeting of the condominium corporation.

2. **Is the Applicant entitled to an order requiring the Respondent to deliver the most recent unaudited monthly financial statements?**

   The Applicant is not entitled to the order; but the order is made for other reasons that are set out in this decision.

3. **If such an order is made, should any fee be charged to the Applicant by the Respondent for providing the most recent unaudited monthly financial statements, and to whom should it be paid?**

   The Respondent is entitled to charge a fee, which is payable to the Respondent.

4. **Should only the names and unit numbers of unit owners be redacted from the board minutes?**

   I conclude that redaction is not restricted to just unit owners' names and unit numbers, but that the Respondent appears to have redacted more information than was necessary to comply with the legislation.

5. **Should costs, fees or penalties be awarded in favour of either User?**

   No costs, fees or penalties are awarded in this case.

[7] The reasons for my decisions follow.

B. ISSUES & ANALYSIS

Issue 1: What records constitute the "most recent approved financial statements" on the statutory Request for Records form?

[8] On the Request for Records form, the Applicant selected “most recent approved financial statements” under the general heading, “Request for core records”. In response, the Respondent provided a copy of the most recent auditor’s report that was delivered to unit owners for the Respondent’s most recent annual general meeting. The auditor’s report included copies of the most recent audited financial statements.

[9] The Applicant took the position that “most recent approved financial statements” refers to the latest financial statements reviewed and approved by the Respondent’s board at its most recent monthly meeting. The Applicant stated that the Respondent should have provided its unaudited financial records for September 2018 (that would have been reviewed by the Respondent’s board at its October 2018 meeting).

[10] The Respondent took the position that “most recent approved financial statements” refers only to the financial statements approved by the board under subsection 66(3) of the Act, which are the financial statements placed before the unit owners at the annual general meeting as required by subsection 69(1)(a) of the Act.

[11] Subsection 1(1) of the Regulation lists ten types of record that constitute “core records” for the purposes of section 55 of the Act, including the following:

> 4. The most recent financial statements that the board has approved under subsection 66(3) of the Act.
>
> 5. The most recent auditor’s report presented to the audit committee or to the board under subsection 67(6) of the Act.

[12] The Users agreed that item 4 in that list corresponds to the phrase “most recent approved financial statements” in the Request for Records form. However, the Applicant submitted that what the Respondent provided was not item 4, but item 5 on that list, the most recent auditor’s report presented to the audit committee or to the board under subsection 67(6) of the Act.

[13] The Respondent submitted that what was provided was both item 4 and item 5. The Respondent explained that usual industry practice is that the auditor’s report (item 5) includes the financial statements (item 4), which are provided to owners together at the annual general meeting, as required by subsection 69(1) of the Act, which states in part:

> The board shall place before each annual general meeting,
>
> a. the financial statements as approved by the board;
>
> b. the auditor’s report; …

[14] The Applicant suggested that the financial statements appended to the auditor's report are not what item 4 in the list of core records refers to, but that, since the auditor's report always contains such financial statements, item 4 and the corresponding phrase in the statutory Request for Records form must refer to something else, which the Applicant suggested are the unaudited monthly financial statements reviewed by the board at their regular meetings.

[15] After considering the submissions of both Users and the legislation, I conclude that:

1. Item 4 in the list of core records and the corresponding phrase, "most recent approved financial statements," under the heading "Request for core records" in the statutory Request for Records form, clearly references the financial statements approved by the board under subsection 66(3) of the Act;

2. Those are the financial statements that a condominium corporation is required to submit to the unit owners at the annual general meeting along with the auditor's report (item 5 in the list) under subsection 69(1) of the Act; and

3. They retain their character as the "most recent approved financial statements" even when attached to or included in the auditor's report.

[16] I also find that unaudited monthly financial statements, or similar interim financial reports, reviewed by a condominium board at its regular meetings are not the records referred to in item 4 in the list of core records or by the phrase "most recent approved financial statements" under the heading "Request for core records" in the Request for Records form. Unless defined as such by a by-law of the applicable condominium corporation (item 10 in the list of core records) such records are not "core records".

[17] Therefore, the Respondent correctly answered the Applicant's request for records by providing the auditor's report that contained the Respondent's most recent financial statements approved by the board under subsection 66(3) of the Act.

Issue 2: Is the Applicant entitled to an order requiring the Respondent to deliver the most recent unaudited monthly financial statements?

[18] The Applicant anticipated the possibility that I might conclude that the Respondent delivered the correct records in response to the Applicant's request for the "most recent approved financial statements," as I have done.

[19] Therefore, since the Applicant's intention was to obtain the latest financial statements reviewed by the Respondent's board at its most recent monthly meeting (i.e., the unaudited financial reports for September 2018), the Applicant asked this Tribunal to order the Respondent to provide those records.

[20] The Respondent submitted that the Applicant is not entitled to such an order. Although not opposed to providing the Applicant with the records, the Respondent submitted that a “proper” request “must” first be delivered, so the Respondent would have the opportunity to calculate the fee for providing the records, which are not core records, and provide a response to the Applicant in accordance with the Regulation.

[21] Having reviewed the Users’ submissions, I find that the Applicant does not have an entitlement to an order from this Tribunal that the Respondent provide it with records that the Applicant intended to request but, in fact, did not request. In a case where an applicant’s Request for Records form contains some minor and obvious misstatement that a condominium board or manager should be able to interpret correctly, an entitlement to a correct response might arise. However, in this case, there was nothing about the Applicant’s Request for Records that would have suggested to the Respondent that the records specifically asked for were not the records actually wanted. Therefore, I cannot conclude that an entitlement arises in favour of the Applicant in these circumstances.

[22] However, as stated on the Tribunal website, the Tribunal seeks “to help people resolve their disputes conveniently, quickly and affordably.” In addition, the Tribunal Rules of Practice state that the Tribunal “promotes the fair, just and efficient resolution of disputes.” I also find that the Tribunal has authority to issue the requested order under subsection 1.44(1)7 of the Act.

[23] Furthermore, the Respondent, by virtue of its participation in these proceedings, is already fully aware of the Applicant’s intended request. It makes little sense to insist that the Applicant now submit a formal request for records for this purpose, when the Tribunal has the necessary authority to order the same, and when the Respondent has clearly stated it has no objection to providing the Applicant with such records.

[24] At the same time, the Respondent is entitled to the time that would normally be given to it under the Regulation to review and respond to a request for records, to confirm the existence and manner of delivery of the records, and to set out the estimated fee, if any. One of the reasons it would not be fair to find that the Applicant was entitled to receive the actual records wanted despite the undetectable error in the Request for Records form, is that this principle could rob the Respondent of its right to have adequate time to properly respond to the request.

[25] Therefore, I will order that the Respondent deem the Applicant to have made a request, as of the date on which this decision is issued, for electronic copies (sent to the email address set out on the Applicant’s original Request for Records form) of the Respondent’s financial records or reports dealing with September 2018 as reviewed by the Respondent’s board, likely at its October 2018 meeting.

The Respondent shall then have the time set out in the Regulation to respond to that request in the appropriate manner.

Issue 3: Should any fee be charged to the Applicant by the Respondent for providing the most recent unaudited monthly financial statements, and to whom should it be paid?

[26] As the Applicant first thought that the requested financial records were core records, the Applicant submitted there should be no fee charged for them to be provided in electronic format. However, as they are not core records, the Respondent is entitled to charge a fee as permitted by the Regulation.

[27] The Applicant raised concerns, based on prior communications from the Respondent’s property manager, that such fees could be excessive. The Respondent confirmed that no administrative fee would be charged by it, its property manager or any other person acting on its behalf, that photocopying charges (if any) would not exceed twenty cents per page, and that no labour costs for the provision of such records were anticipated.

[28] Based on those submissions, it is presumed that the fees, if any, will be minimal and not unreasonable. In any event, the Applicant will retain the right to challenge such fees, including by a new application to this Tribunal, if the Applicant believes it is necessary and reasonable to do so.

[29] On the question of to whom payment is to be made, the Applicant noted instructions previously received from the Respondent to have fees for records requested under section 55 of the Act paid to the Respondent’s property manager. The Applicant expressed a belief that such fees are to be paid to the Respondent only, and not its property manager, and asked for the Tribunal to clarify to whom such fees should be paid.

[30] The Respondent cited the Tribunal’s decision in Shaheed Mohamed v. York Condominium Corporation No. 414, 2018 ONCAT 3 to support its position that the fee could be paid by the Applicant to the Respondent’s property manager, quoting paragraph 42 of that decision, which reads as follows:

> Therefore, fees that the Applicant is required to pay in accordance with this decision are to be paid to the Respondent directly and not the Respondent’s agent (or any other third party). This does not, of course, preclude the Respondent from paying that or any other amount to the Respondent’s agent (or any other third party) for its work under the contractual arrangement between them.

[31] I find that the reference to Mohamed does not support the Respondent’s position. Applied to this case, the quoted statement indicates that fees are to be paid to the Respondent and not a third party, and that it is the Respondent that may then

use such fees to pay its costs of employing a third party, such as a property manager. The fees for requested records are to be paid by the Applicant to the Respondent.

Issue 4: Should only the names and unit numbers of unit owners be redacted from the board minutes?

[32] As noted above, the board meeting minutes provided to the Applicant were redacted. Such redactions consisted of entire paragraphs of the minutes being blacked out by marker, with the apparent intention that no information about the issues or business covered by such paragraphs would be visible or legible.

[33] The Applicant submitted that the redactions made were excessive and that the only information that should have been redacted from the minutes to comply with subsection 55(4)(c) of the Act (which removes from owners the right to examine "records relating to specific units or owners") were the names of unit owners and their unit numbers. The Applicant cited the Tribunal's decision in Salpi Bechlian v. Toronto Standard Condominium Corporation No. 2418, 2018 ONCAT 8, in support of this position, quoting the order that the respondent provide the requested records "redacted only for information relating to owners other than Ms. Bechlian, their names and unit numbers."

[34] The Applicant also noted that some of the redacted entries in the minutes concerned the Applicant even though subsection 55(5)(b) of the Act permits him to have access to such records.

[35] The Respondent submitted that subsection 55(4)(c) of the Act is intended to protect the privacy of unit owners and does not mean that only unit owners' names and unit numbers may be redacted. The Respondent also cited Bechlian, noting paragraph 60 in that decision where the Member ordered that a record be redacted "so as to eliminate any identifying information of other owners, their names and unit numbers." The Respondent further referred to the decision of Prattas D.J. in Lahrkamp v. Metropolitan Toronto Condominium Corp. No. 932, 2017 CarswellOnt 16308 (Ont. Sm. Cl. Ct.), in which the Deputy Judge ordered that "all personal, confidential, privileged and other private information shall be redacted." The Respondent cited the example of an owner's use of a wheelchair to illustrate the kind of information that might serve to identify a particular unit owner or unit even if the name and unit number are redacted but other details are not.

[36] I agree with the Respondent's submissions concerning the breadth of redaction that may be required to comply with subsection 55(4)(c) of the Act. As emphasized repeatedly by Prattas DJ in the cited Lahrkamp decision, it is appropriate for a condominium corporation to redact information that is personal, confidential, privileged or otherwise private, which includes any information that

would serve to identify the unit or unit owner, including, but not limited to, the unit owner's name and unit number.

[37] At the same time, I find that the Applicant's concern that the Respondent may have gone farther in its redactions than is necessary to comply with subsection 55(4)(c) of the Act is reasonable, and that, if it has done so, the Applicant's rights under subsection 55(3) of the Act may have been compromised, if not breached.

[38] First, it is not appropriate, and is contrary to the rights of the Applicant, if information relating to the Applicant and the Applicant's unit were redacted.

[39] Second, given that the redaction blanked out complete paragraphs and sections of the minutes, the belief that the redaction was excessive is not unreasonable. The complete redaction of all words in each of the subject paragraphs (including redaction of information relating to the Applicant and the Applicant's unit, if that was the case) suggests that the Respondent was not careful in making its redactions, but simply blanked out all contents of all paragraphs that included any reference to an owner or unit, without considering whether or not some information could be preserved without disclosing private or personal information about an owner or unit.

[40] I therefore order that the Respondent review and more carefully revise the redacted board meeting minutes and provide the revised record to the Applicant at no cost. Information relating to the Applicant and the Applicant's unit are not to be redacted. Other redactions should be restricted to information that is considered reasonably likely to identify another owner or unit, where that is the basis for the redaction. The Respondent must also provide a new statement as required by subsection 13.8(1)(b) of the Regulation that explains the reason for each redaction and an indication of the provisions of section 55 of the Act or the Regulation being relied on by the board.

[41] Since the Applicant has clarified that the request was not, in fact, for copies of minutes from all board meetings held between November 2017 and September 2018, but solely for a copy of the minutes of the board meeting held November 27, 2017, it will be sufficient if the Respondent provides a revised redaction of just that meeting's minutes. Given that, a period of seven (7) days will be allotted for completion of this work.

Issue 5: Should costs, fees or penalties be awarded in favour of either User?

[42] The Applicant requested that the Tribunal award costs against the Respondent in the amount of $500, covering the Applicant's fees and expenses, under subsection 1.44(1)4 of the Act, and also that the Tribunal order the Respondent to pay a penalty under subsection 1.44(1)6.

[43] The Respondent argued against the Applicant’s requests and submitted that the Applicant should pay costs to the Respondent. Alternatively, the Respondent suggested “that there need be no costs, charges, or penalties of either kind awarded against either party.”

[44] Relating to costs, the Applicant submitted that the Respondent was not sufficiently responsive or cooperative during the first stages (Stage 1 – Negotiation, and Stage 2 – Mediation) of the Tribunal’s online dispute resolution (ODR) process. The Applicant referenced the decision of this Tribunal in Terence Arrowsmith v Peel Condominium Corporation No. 94 2018 ONCAT 10. In response, the Respondent noted that, in Arrowsmith, costs were justified in part because of the respondent condominium corporation’s lack of participation in the ODR process, but that the Respondent did participate at all stages in this case.

[45] For practical and appropriate reasons, I have no direct knowledge of the Users’ participation during Stages 1 and 2 of the Tribunal ODR process. I acknowledge the statements of both Users regarding what occurred during those stages and will not repeat their submissions in detail here. I find the facts described in both submissions are credible and consistent, and that they do not disclose conduct that should give rise to a costs award. I also note that in these Stage 3 proceedings both Users were timely, thorough and cooperative in making all submissions, offering evidence, and answering questions. I find no basis on which to order costs against either User on account of their conduct or participation in the Tribunal ODR process.

[46] In regard to the suggestion that the Applicant ought to pay the Respondent’s costs, Counsel argued that the Applicant had caused the proceedings to be extended by refusing to accept statements or opinions that contradicted the Applicant’s positions on the law. Counsel described such statements and opinions as “warnings” to the Applicant about the likely outcome of this case. The Applicant took umbrage with that characterization and also submitted that, to the contrary, “all communication during the Mediation Stage was cordial and professional.”

[47] I am not persuaded by the Respondent’s submissions on this point. While there might be some exceptions to this rule, Users generally cannot be penalized for persisting in the belief that their positions on the facts or law relating to their case are correct. Users are entitled to advance and advocate for their beliefs. Such conduct does not, in and of itself, form a valid basis for a costs award.

[48] The Applicant’s request for a penalty against the Respondent was based primarily on statements made, or allegedly made, by the Respondent’s property manager regarding proposed fees for copying records and on some statements made by the board president indicating that the board would proactively make some records more accessible for all owners.

[49] A penalty under subsection 1.44(1)6 of the Act can only be issued when a condominium corporation has, without reasonable excuse, refused to permit the requester to examine or obtain copies of requested records. It is, of course, possible for a condominium corporation to use the threat of high fees to discourage or intimidate unit owners from requesting records, or to make the pretense that desired records will at some future time be freely disclosed in order to avoid such requests being made. It might also be reasonable, in some cases, to view such conduct as being effectively or functionally the same as a refusal to provide such records when requested. However, the evidence does not convince me that either is the case here.

[50] The Applicant also submitted that a penalty was warranted on account of the Respondent's excessive redaction of the board meeting minutes. Although I have concluded that the redaction appears to be excessive, the redaction is not likely as significant as the Applicant has assumed. Further, even if such excessive redaction could amount to an effective refusal to provide the records (which I do not conclude in this case), the evidence suggests that the Respondent made such redactions in good faith believing that it was complying appropriately with subsection 55(4)(c) of the Act, and therefore such refusal cannot be seen as unreasonable and does not justify the imposition of a penalty.

[51] For the reasons set out above, no penalty under subsection 1.44(1)6 and no costs award against either User shall be ordered in this case.

ORDER

The Tribunal orders as follows:

1. The Respondent shall deem the Applicant to have made a request for records as of the date of issuance of this decision for the Respondent's financial records or reports that were reviewed by the board dealing with September 2018, and:

    a. the Respondent shall provide the Applicant with a response to such deemed request in the appropriate statutory form and following the time lines and other requirements of the Regulation, as if a request for records had been properly submitted on the date of issuance of this decision, which response shall include an estimate of a minimal and reasonable fee, if any, payable for the fulfillment of the request; and

    b. the Applicant is required to pay the fee (if any) to the Respondent in order to obtain the records; and

    c. the records, when provided, shall be given in electronic format to the Applicant at the email address provided in the Applicant's request for records that is subject of this decision.

2. The Respondent shall, within seven (7) days of the date of issuance of this order and at no cost to the Applicant:

    a. review and more carefully revise the redacted minutes of the board meeting held on November 27, 2017, ensuring that information relating to the Applicant and the Applicant's unit are not redacted and that other redactions are restricted to the information that is considered reasonably likely to identify another owner or unit, where that is the basis for the redaction; and

    b. provide the revised record to the Applicant in electronic format in accordance with the original request for records of the Applicant along with a statement as required by subsection 13.8(1)(b) of the Regulation that explains the reason for each redaction and an indication of the provisions of section 55 of the Act or the Regulation being relied on.

____

Michael H. Clifton
Member, Condominium Authority Tribunal

RELEASED ON February 14, 2019