

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: October 4, 2019

CASE: 2019-00069R

Citation: HiLevel International Corp. v Toronto Standard Condominium Corporation No. 1858, 2019 ONCAT 40

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

Member: Mary Ann Spencer, Member

The Applicant

HiLevel International Corp.

Jian Zheng, Agent

The Respondent

Toronto Standard Condominium Corporation No.1858

Rachel Fielding, Counsel

Hearing: July 25, 2019 to September 17, 2019, Written electronic hearing

REASONS FOR DECISION

A. OVERVIEW

- [1] HiLevel International Corp. (the “Applicant”) is the owner of a commercial condominium unit at Toronto Standard Condominium Corporation No. 1858 (the “Respondent”).
- [2] The Applicant submitted a Request for Records dated February 18, 2019 to the Respondent asking for electronic copies of various records including the minutes of board meetings the Respondent held within the last twelve months.
- [3] The Applicant does not dispute that between March 25, 2019 and July 9, 2019, the Respondent provided the requested minutes of board meetings. The Applicant’s position is that without reasonable excuse, the Respondent refused to provide all of the requested minutes in its initial response. The Applicant requests that the Tribunal assess a penalty to the Respondent. The Applicant also requests its costs in this matter.
- [4] The Respondent’s position is that it did not refuse to provide the requested minutes of its board meetings to the Applicant; rather, all of the minutes were not provided initially due to administrative oversight. The Respondent submits that it was not necessary for the Applicant to pursue this matter to a Stage 3 proceeding and requests its costs.
- [5] I find that the Respondent did not refuse to provide the requested records to the Applicant without reasonable excuse and therefore I assess no penalty in this

matter. However, for the reasons set out below, I award the Applicant costs of \$210.

B. PRELIMINARY MATTERS

[6] The Stage 2 Summary and Order in this matter indicated that the Applicant's request for the minutes of the Respondent's board meetings held within the last twelve months and for the Respondent's most recent approved financial statements were both at issue in this matter. However, at the outset of this Stage 3 proceeding, the Applicant and the Respondent confirmed that only the Applicant's request for the minutes of board meetings was at issue.

C. BACKGROUND

[7] On February 21, 2019, the Applicant's agent, Jian Zheng, submitted a Request for Records (dated February 18, 2019) to the Respondent asking for electronic copies of its declaration, bylaws, rules, record of owners and mortgagees, records of notices relating to leases of units, budget for the current fiscal year, most recent approved financial statements and auditors' report, the current plan for future funding of the reserve, mutual use agreements and the minutes of board meetings held within the last twelve months. In its Response to the Request for Records, the Respondent indicated it would provide all of the requested records at no cost to the Applicant.

[8] There is no dispute that the Applicant has received all of the requested minutes of board meetings.

[9] On March 25, 2019, the Respondent provided the minutes of the meetings held on March 19, May 30, and August 13, 2018 to the Applicant.

[10] On March 29, 2019, Mr. Zheng sent an e-mail to the Respondent's Property Manager Ronald Ho asking if there were any board meetings held after August 13, 2018.

[11] On April 16, 2019, the Applicant filed its application with this Tribunal.

[12] On April 24, 2019, the Respondent provided the Applicant with the minutes of the December 5, 2018 board meeting.

[13] On June 8, 2019, the Applicant filed a further Request for Records. Among other records, the Applicant requested electronic copies of the minutes of board meetings held within the past twelve months.

[14] On July 7, 2019, the Respondent provided a second copy of the minutes of board meetings held on August 13, 2018 and December 5, 2018, and the minutes of meetings held on January 9, 2019 and January 30, 2019.

D. ISSUES

[15] There is no dispute that, in accordance with s. 55(3) of the *Condominium Act, 1998* (the “Act”), the Applicant is entitled to examine or obtain copies of the requested minutes of board meetings. The issues to be addressed relate to the manner and completeness of the Respondent’s response to the Applicant’s Request for Records:

1. Did the Respondent provide all of the board minutes requested in the Applicant’s February 21, 2019 Request for Records in accordance with the requirements set out in the Act and in Ontario Regulation 48/01 (“O. Reg. 48/01”)?
2. If the Respondent did not comply with the provisions of the Act and/or O. Reg. 48/01, should it be assessed a penalty?

E. EVIDENCE AND ANALYSIS

[16] The evidence comprised documents submitted by the Applicant and the Respondent and the written testimony of Mr. Zheng and of the Respondent’s witness Elizabeth Suen.

[17] I note that in his reply statement, Mr. Zheng included excerpts from the Stage 2 mediation in this matter. I advised him that this breach of confidentiality was inappropriate and I have disregarded that information in deciding the issues before me.

Issue 1: Did the Respondent provide all of the board minutes requested in the Applicant’s February 21, 2019 Request for Records in accordance with the requirements set out in the Act and in O. Reg. 48/01?

[18] The process that a person entitled to examine or obtain copies of records must follow is set out in s.13.3 of O. Reg. 48/01. The Act requires that a condominium corporation reply to a Request for Records within 30 days of its receipt. The requirements for the corporation’s response are set out in s.13.3(6):

When the corporation receives a request for records in accordance with this section, the board shall determine whether the corporation will allow the requester to examine or obtain a copy of the record that the requester has requested and shall respond to the requester within 30 days in English or French, using the form that the Minister responsible for the administration of subsection 55 (3) of the Act specifies.

[19] Minutes of board meetings of the corporation are defined as core records in s. 1(1) of O. Reg. 48/01. Section 13.4(1) addresses the specific process involved when

the request is for a core record which is kept in electronic form:

If the request for records provides that the requester wishes to examine a core record, if the board determines under subsection 13.3 (6) that the corporation will allow the requester to examine the record and that it is a core record and if the corporation keeps the record in electronic form, the corporation shall, within the time period that subsection requires the board to deliver its response, deliver a copy of the record in electronic form to the requester,
(a) by electronic communication if the requester so agrees in the request;

[20] The Respondent does not dispute the fact that it did not provide all of the requested records in accordance with the regulated requirements. As set out above, the Applicant received a copy of the minutes of the December 5, 2018 meeting by e-mail on April 24, 2019, more than 60 days after he submitted his Request for Records. Copies of the minutes of the meetings held on January 9 and January 30, 2019 were not provided until July 7, 2019, in response to the Applicant's second Request for Records.

[21] The Applicant's February 21, 2019 request for copies of the minutes of board meetings has been fulfilled. The Applicant received minutes with the date range of March 19, 2018 to January 30, 2019 inclusive. While the Applicant's agent did not suggest that the Applicant had not received all of the requested minutes, for certainty, I reviewed the minutes submitted as evidence. Those indicate that the minutes of the board meetings held within the requested date range have all been provided to the Applicant.

Issue 2: Should the Respondent be assessed a penalty for its failure to comply with the provisions of the Act and/or O. Reg. 48/01?

[22] Elizabeth Suen testified on behalf of the Respondent. Ms. Suen has worked as the Respondent's site administrator since 2007. Arrangements are made by the Respondent's board for her to be employed by its condominium management firm. In mid-March 2019, when the Respondent terminated its management contract with Property Services Enterprises Inc., Ms. Suen's employment was transferred to the current condominium management company, Shiu Pong Management Limited. Ms. Suen's duties include filing, collection and deposit of common element assessment fees and addressing owner and tenant concerns.

[23] Ms. Suen testified that to respond to the Applicant's February 21, 2019 Request for Records, Ronald Ho, the Respondent's current Property Manager, asked her to remove the relevant minutes from the Respondent's hard copy minute book and scan them. Mr. Ho then sent them to the Applicant by e-mail on March 20, 2019. She did not become aware that minutes for the meetings held on January 9 and January 30, 2019 were "missing" from the minute book until the Applicant filed his June 8, 2019 Request for Records.

- [24] On July 5, 2019, Ms Suen was notified by the Respondent's counsel that minutes for later dates indicated there had been board meetings held in January 2019. After Ms. Suen unsuccessfully searched the office for hard copies, the owner of Property Services Enterprises Inc. was contacted but he advised that all records had been transferred to Shiu Pong Management Limited. Ms. Suen did locate draft minutes in a computer file. She and Mr. Ho had two board members verify the content of the minutes and sign them as a "true record." They were then sent to the Applicant's agent by Mr. Ho on July 7, 2019.
- [25] Ms. Suen testified that although she attended all of the Respondent's board meetings held between March 2018 and January 2019, she did not remember the specific dates on which board meetings were held. She further testified that she was not responsible for filing the meeting minutes and was not required to keep any index of meeting dates or to compare the electronically stored minutes with those in the hard copy minute book. Joseph Kwan, the former manager employed by Property Services Enterprises Inc., drafted the minutes, arranged for their signature by the Board and then filed the signed copy.
- [26] Ms. Suen indicated that she had no role in the transfer of records when the Respondent's condominium management company changed in March 2019. She testified that she could not explain why the January 2019 minutes were missing from the minute book. In response to a question from the Applicant's agent, she stated that no one instructed her to withhold any minutes from the Applicant.
- [27] The Applicant's agent prepared lengthy submissions to support his position that the Respondent should be assessed a penalty for refusing to provide all of the minutes in its initial response to the Applicant. He reviewed the minutes he received for potential reasons why the Respondent might have wished to withhold them and submitted that the Respondent "must have exercised unreasonable excuses to deny my access to records in the request made on February 18, 2019 for the purpose that they did not tell." He parsed each of Ms. Suen's answers to cross examination questions and submitted that because Ms. Suen is not directly responsible for managing the filing of the Respondent's minutes that her "witness statement is irrelevant and questionable to this case." He further submitted that Ms. Suen's testimony should be disregarded because her employment is controlled by the Respondent's board.
- [28] The Respondent's counsel submitted that the Respondent should be assessed no penalty because its failure to provide all of the minutes responsive to the Applicant's February 21, 2019 request was not a refusal but rather was the result of administrative oversight. When the Applicant filed his June 8, 2019 Request for Records, the Respondent's review of the minutes responsive to that request led to the discovery that minutes for a meeting held on January 30, 2019 were missing. Those minutes in turn indicated there had also been a meeting on January 9, 2019. The Respondent made all reasonable efforts to locate the minutes and then provided them to the Applicant.

[29] The Act provides that the Tribunal may order a penalty to be paid if it finds that the corporation has, without reasonable excuse, refused to permit a person to examine or obtain records:

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.

[30] The evidence does not support the Applicant's agent's allegation that the Respondent intentionally withheld the December 2018 or the January 2019 minutes when it initially responded to the Applicant's February 21, 2019 Request for Records.

[31] I accept Ms. Suen's evidence that the Respondent did not become aware that the minutes for the January 2019 meetings were missing until she was informed by the Respondent's counsel in the course of responding to the Applicant's June 8, 2019 Request for Records. I find no basis to question Ms. Suen's credibility. Her answers to numerous cross examination questions were consistent and her testimony that the minutes were not in the minute book is supported by the July 8, 2019 e-mail sent by Mr. Ho to Property Services Enterprises Inc. asking if the January minutes were still in its possession.

[32] Ms. Suen gave no evidence to indicate why the December 5, 2018 minutes were not sent to the Applicant's Agent in the Respondent's initial response to the February 21, 2019 Request for Records. She did not testify that she did not locate these minutes when she initially searched the minute book to respond to the Request. The evidence is that on March 20, 2019, Mr. Ho sent records to the Applicant's agent by e-mail and indicated that due to internet capacity, he would send more than one e-mail. On March 25, 2019, he sent a further e-mail re-sending one of the batches of attachments. However, whether the document was simply overlooked in the various e-mails sent by Mr. Ho is unknown.

[33] The Respondent's representative submitted that a change in its condominium management companies contributed to the Respondent's failure to initially provide all of the minutes. I note that the minutes entered into evidence indicate that Duka Property Management attended the board meetings held from March 19, 2018 to January 9, 2019. The January 9, 2019 minutes record the board's decision to terminate Duka's contract. Property Services Enterprises Inc. was the management company in attendance at the January 30, 2019 board meeting. The decision to terminate its contract and retain the current management company,

Shiu Pong Management Limited, is recorded in the minutes of the March 13, 2019 board meeting.

F. DECISION

[34] All of the minutes relevant to the Applicant's request have been provided. There is no evidence to indicate that the Respondent did not intend to provide all of the minutes responsive to the February 21, 2019 Request for Records. The Respondent's Response to that request indicates no exclusions from the records it will provide. I note that the Respondent's initial e-mails attaching records were sent in March 2019, the same month that the Respondent changed its condominium management firm. The evidence is that Ms. Suen, the only employee providing continuity during that period, had no role in filing minutes. While the Respondent's board has an obligation to ensure that its records are kept in accordance with the requirements of the Act and O. Reg. 48/01, I accept that its failure to provide all of the responsive minutes initially was due to administrative oversight. Therefore, I find that the Respondent did not refuse to permit the Applicant to examine or obtain copies of the records it requested on February 21, 2019 without reasonable excuse and I assess no penalty.

G. COSTS

[35] Rule 32.1 of the Tribunal's Rules of Practice (effective July 1, 2018) states that the Tribunal may order a User to pay any reasonable expenses related to the use of the Tribunal. However, Rule 33.1 states "the Tribunal will not order one User to pay to another User any fees charged by that User's lawyer or paralegal, unless there are exceptional reasons to do this."

[36] The Applicant requests costs totalling \$6800, comprised of Tribunal fees totalling \$200, administration fees totalling \$30, and \$6570 claimed for the time spent by the Applicant's agent to participate in the three stages of the Tribunal proceedings.

[37] The Respondent requests costs representing their legal fees which total \$15120.53. The Respondent's counsel submitted that the Applicant had received all documents and pursued this case to Stage 3 "for no other reason than to incur significant costs for the Respondent." She submitted that the Applicant did not file its case with the Tribunal to obtain missing documents and that neither the Applicant nor the Respondent knew the January 2019 minutes were missing until the June 2019 Request for Records was filed. She further submitted that the Applicant unnecessarily prolonged this Stage 3 proceeding.

[38] I find Respondent's counsel's argument that neither the Applicant nor the Respondent knew the January 2019 minutes were missing until the Applicant's June 9, 2019 Request for Records was filed to be somewhat disingenuous given the December 8, 2018 minutes also were not provided initially. On March 29, 2019, the Applicant's agent wrote to Property Manager Ronald Ho asking for verification that no meetings had been held after August 13, 2018. There is no

evidence that he received any response until this case was before the Tribunal and the minutes were then provided.

[39] I award the Applicant costs of \$210, comprised of the Tribunal fees of \$75 it paid for Stages 1 and 2 of this matter and the \$135 it claimed with respect to the time the Applicant's agent spent to participate in those stages. I award no costs to the Applicant relating to Stage 3 because the Applicant was not successful in its request for assessment of a penalty, the only issue to be decided in this stage.

[40] I also award no costs for the Respondent's legal fees. The Applicant's agent prepared and submitted lengthy and detailed documents. I acknowledge that many of the numerous questions he submitted in cross-examination were repetitive and/or not relevant to the issues to be decided and that it undoubtedly took a significant amount of time to address the objections that arose. I also acknowledge that the Applicant's agent's closing arguments were unnecessarily lengthy. However, the Applicant's agent is not a legal professional. While the request for penalty was unsuccessful, I have no reason to find that the pursuit of it was either frivolous or vexatious. Therefore, I find there are no exceptional reasons to award legal costs.

H. ORDER

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

1. Toronto Standard Condominium Corporation No. 1858 pay to HiLevel International Corp. costs in the amount of \$210 within 30 days of the date of this decision.

Mary Ann Spencer
Member, Condominium Authority Tribunal

Released on: October 4, 2019