

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: July 15, 2020

CASE: 2019-00323R

CITATION: Sinclair v. Peel Condominium Corporation No. 3, 2020 ONCAT 25

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

Member: Ian Darling, Chair

The Applicant

Henry Sinclair

Self-represented

The Respondent

Peel Condominium Corporation No. 3

Naresh Dhami, Agent

Hearing: Written Online Hearing - March 22 to April 19, and May 20 to June 24, 2020

REASONS FOR DECISION

A. **INTRODUCTION**

[1] This case was a simple question about entitlement to records, but the underlying dispute was about more than the records in question. At its root, the request for records started from the Applicant's concerns with how condominium fees were being spent, condominium governance and common fees owing. Although both parties sought to expand the case to deal with these non-jurisdictional issues, the decision is about what falls within the Tribunal's jurisdiction – entitlement to the requested records; the process to produce the records; and associated costs and penalties.

[2] I find that the Applicant is entitled to the records. I further find that the Respondent refused to provide the records without a reasonable excuse. I award a penalty of \$1500 and \$200 in costs to be paid to the Applicant.

B. **BACKGROUND**

[3] Henry Sinclair (the "Applicant") requested records from Peel Condominium Corporation No. 3 (PCC#3 or the "Respondent") in October 2019 using the statutory Records Request form. The Applicant requested the following records:

- Periodic Information Certificates for the period of October 2018-October 2019.
- Budget for the corporation's 2019 fiscal year, including any amendments.
- Most recent approved financial statements.
- Most recent auditor's report.
- The current plan for future funding of the reserve fund.
- Minutes of meetings held from October 2018 to October 2019.
- Record of counts for selecting board members for the period of January 2012 to October 2019.
- Bank statement for Reserve Fund for the period of January 2012 to October 2019.
- Financial records complete with bank statements for the period of January 2012 to October 2019.

[4] For the purposes of this decision "current", "most recent" and "within the last 12 months" from the Applicant's Request Form are based on October 2019, the date when the Request for Records was first submitted to the Respondent.

[5] The Respondent was represented by Naresh Dhani, president of PCC #3. The Respondent participated intermittently through the process of identifying the issues that needed to be decided. During this time, the Respondent missed several deadlines. The Respondent then requested an adjournment to allow them to prepare for the case, and conduct board of director elections. The Respondent requested an open-ended adjournment, because they were unsure when they would be able to hold elections due to the COVID-19 emergency orders that limited the size of gatherings.

[6] I granted a one-month adjournment. I explained to the parties in my ruling that it should allow enough time to prepare for the hearing, while balancing unfairness to the Applicant that would be caused by a lengthy adjournment.

[7] When the case reconvened, the Respondent did not rejoin the case or participate any further. The Tribunal clerks notified the Respondent that the case was resuming, but they did not participate in the process. I was satisfied that they had been notified that the case was reconvening, and that they would continue to receive notifications from the Tribunal about activity in the case. The case proceeded without the Respondent's participation.

[8] There are four issues to be decided in this case:

- Is the Applicant entitled to receive copies of the requested records?
- Is the Respondent entitled to charge a fee for the production of the records?
- Should the Respondent be Required to pay a penalty under s.1.44 (6) of the Act for failure to provide the Applicant with the records requested without reasonable excuse, and if so, in what amount?
- Should the Applicant be awarded any costs?

[9] Like so many CAT cases, the parties were engaged in a separate dispute that extends beyond the jurisdiction of the Tribunal. Both sought to use the Tribunal to resolve the underlying disputes or sought relief beyond what the Tribunal could offer. At various times during the process I reminded the parties of these limitations. I understand their frustration; however, it is beyond the authority of the Tribunal to deal with issues beyond its assigned jurisdiction.

C. ISSUES & ANALYSIS

Issue 1: Is the Applicant entitled to receive copies of the requested records?

[10] Prior to the adjournment, the Respondent confirmed that they intended to provide the records to the Applicant. However, they did not provide the records during any stage of the Tribunal process, nor did they provide a timeline for their production.

[11] The Applicant relied on the entitlement to the records under s.55 of the *Condominium Act, 1998* (the Act). He further confirmed that he had followed the process to request the records outlined in section 13.3 of Ontario Regulation (O. Reg.) 48/01 (the "Regulation").

[12] Most of the records requested by the Applicant are specifically enumerated in section 55(1) of the Act and section 13.1(1) of the Regulation. However, an owner's entitlement to records is not restricted by whether or not the record is specifically identified in those sections. All records of the corporation may be subject to a request for disclosure under section 55(3) of the Act.

[13] During the hearing, the Respondent stated that they had recently provided the auditor's report. The Applicant agreed that an auditor had created the document that he received, but it was incomplete. The Respondent did not provide any evidence to counter the Applicant's assertion. Therefore, I accept the Applicant's submission that it was incomplete.

[14] The Respondent provided no evidence to justify why they did not provide the Records. Based on the submissions of the parties and a reading of the Act and Regulation, I find that the Applicant is entitled to all the requested records.

Issue 2: Is the Respondent entitled to charge a fee for the production of the records?

[15] In the hearing, the Respondent indicated that the Applicant would be charged \$50 per hour and would need to provide a \$200 deposit to receive any additional documents.

[16] The Applicant contended that no fee should be paid. He pointed to a recent Tribunal decision (*Nakashima v Metropolitan Toronto Condominium Corporation No. 818, 2020 ONCAT 17*) as the basis for his assertion that he should not have to pay for the records.

[17] Sections 13.3(3-7) of O. Reg. 48/01 outline the process for requesting records and how corporations must respond. Section 13.3(8) deals with circumstances when fees can be requested. It indicates that core records should be provided at no cost to Owners if they request an electronic version. The Applicant requested electronic records, so there shall be no charge for the production of the requested core records.

[18] The bank statements for the Reserve Fund and Operating accounts (for the period of January 2012-October 2019), and the record of counts for selecting board members are non-core records, therefore, it may be appropriate to allow a fee for their production. There is no evidence that the Respondent followed the process to provide the cost estimate as part of their response to the records request as required in s.13.3(7) to justify the fee when the record was requested.

[19] Section 13.3(8) of the Regulation establishes circumstances when the Respondent is entitled to charge a reasonable rate for labour, delivery and copying of the records. While the Respondent stated that work to provide any additional records would be subject to a \$50.00 per hour rate, they did not provide any evidence during the hearing to support the proposed fees. I cannot conclude that this demand is reasonable or justified. The Respondent did not request a fee when the records were requested, nor did they provide any justification for the costs during the hearing. There is no evidence before me to justify the Respondent's hourly rate, or projected time to complete the request. These are more than procedural

errors in the response, as I have no basis to determine if the proposed fee is legitimate. Therefore, no fee shall be required.

Issue 3: Should the Respondent be Required to pay a penalty under s.1.44 (6) of the Act for failure to provide the Applicant with the records requested without reasonable excuse, and if so, in what amount?

[20] The relevant section of the Act relating to the imposition of a penalty is s.1.44(1)6. It states that the Tribunal may make:

[a]n 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.

Under s. 1.44(3), the Tribunal has authority to award a penalty of up to \$5000. Therefore, the two initial questions for me to consider are whether the Respondent refused to provide the requested records to the Applicant, and, if so, whether there was a reasonable excuse for such refusal. If I determine a penalty is justified, the next question is as to the appropriate amount that should be paid, up to a maximum of \$5000.

[21] The Respondent did not respond to the Applicant's request for records. It did not provide the records during Stage 1 or Stage 2 of the Tribunal proceedings. During the hearing, the Respondent did not refuse to provide access to the records; they indicated that they would provide them, but never actually supplied the records or provide a specific timeframe for their provision. The Respondent indicated that the corporation has had some difficulty managing their responsibilities and maintaining an effective board. Even if the board is having trouble managing its affairs, the obligation to maintain and provide access to records remains.

[22] Even if the Respondent never actually said "no", over seven months elapsed since the Applicant first submitted their request and no records were provided. The Respondent has not given any justification for this. I find that this is a refusal by the Respondent to provide the records, and that the refusal is without any reasonable excuse.

[23] Having determined that the Respondent has refused to provide the record without a reasonable excuse, I turn to the appropriate amount of the penalty. At the outset

of the hearing, the Applicant did not seek a penalty. As the hearing progressed, they revised that position. The Applicant explained that they had reviewed recent Tribunal decisions and became aware that a penalty might apply to this case. The Applicant requested a penalty of \$7000, and an order to rescind any outstanding condominium fees owing by the Applicant. The Applicant stated that this was appropriate because the outstanding fees were the consequence of poor record keeping by the Respondent.

[24] \$7000 is more than maximum penalty the Tribunal is authorized to award. A dispute over condominium fees extends beyond the jurisdiction of the Tribunal, so I will not order the fees be rescinded. In assessing the amount of the penalty in this case, I note the reasoning of the Tribunal in *Shaheed Mohamed v York Condominium Corporation No. 414, 2018 ONCAT 3* when it considered that a penalty should be “substantial enough to act as a reminder to the Respondent to apply more care and diligence, and especially to be more mindful of its legal obligations, when responding to unit owners’ requests for records.”

[25] In addition, other recent Tribunal decisions have spoken to the principle of ensuring that penalties are proportional, taking into consideration the nature of the records requested, and conduct of the Respondent which led to penalty. Although the Respondent has demonstrated a degree of carelessness or avoidance of its obligations with respect to a records request, and has failed to follow through on its statements that it would provide the records to the Applicant, this is not the most egregious conduct observed in the various cases that have come before the Tribunal. The Respondent has refused to provide records that are fundamental to the principle of transparent condominium governance. By refusing to provide the records, the Corporation is not acting in the transparent, open, and accessible manner outlined in the Act. Considering these factors, I have determined that a penalty of \$1500 is appropriate.

Issue 4: Should the Applicant be awarded costs?

[26] Under s.1.44(1)4 of the Act, the Tribunal may direct a party to pay the costs of another party to a proceeding. The CAT’s Rules of Practice provide guidance as to when an award of costs is appropriate. In this case the Applicant paid \$200 to bring the case to the Tribunal. They were successful in the case, so the Tribunal fees should be paid by the Respondent.

ORDER

[27] The Tribunal Orders that:

1. The Respondent shall provide the Applicant the following of its records, in electronic format, within 30 days of the date of this decision:
 - a. Periodic Information Certificates for the period of October 2018-October 2019.
 - b. Budget for the corporation's current fiscal year, including any amendments.
 - c. Most recent approved financial statements.
 - d. Most recent auditor's report.
 - e. The current plan for future funding of the reserve fund.
 - f. Minutes of meetings held from October 2018 to October 2019.
 - g. Record of counts for selecting board members for the period of January 2012 to October 2019.
 - h. Bank statement for Reserve Fund for the period of January 2012 to October 2019.
 - i. Financial records complete with bank statements for the period of January 2012 to October 2019.
2. The Respondent shall pay a penalty of \$1500 to the Applicant within 30 days of the date of this decision.
3. The Respondent shall pay costs of \$200 to the Applicant within 30 days of the date of this decision.
4. In the event that the penalty or costs are not provided to the Applicant within 30 days of this Order, the Applicant will be entitled to set-off those amounts against the common expenses attributable to the Applicant's unit(s) in accordance with Section 1.45(3) of the Act.
5. In order to ensure that the Applicant does not have to pay any portion of the penalty and cost awards, they will also be given a credit toward the common expenses attributable to their unit(s) in the amount equivalent to their proportionate share(s) of the penalty and costs awarded.

Ian Darling
Chair, Condominium Authority Tribunal

RELEASED ON: July 15, 2020