CONDOMINIUM AUTHORITY TRIBUNAL

DATE: February 27, 2020
CASE: 2019-00156R
Citation: Sayed Bukhari v. Wentworth Condominium Corporation No.10, 2020 ONCAT 4

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

Member: Patricia McQuaid, Member

The Applicant Sayed Bukhari	Self-Represented
The Respondent Wentworth Condominium Corporation No. 10	Natalia Polis, Counsel

Hearing: October 23, 2019 – January 28, 2020, written online hearing.

REASONS FOR DECISION

A. OVERVIEW

[1] Sayed Bukhari (the "Applicant") is a unit owner of Wentworth Condominium Corporation No. 10 ("WCC 10" or the "Respondent"). He has lived there since 2013. On July 9, 2019, he submitted a Request for Records (the "Request") to WCC 10, under s. 55 of the *Condominium Act, 1998* (the "Act"). He requested approximately 35 records, both core and non-core, in electronic format. By letter dated August 11th, the Respondent provided some records to Mr. Bukhari. Mr. Bukhari filed his case with the Tribunal on August 12th. On August 22nd, the Respondent delivered its Response to the Request (the "Response").

[2] In its Response, WCC 10 indicated which records it would provide, which it determined it would not, and in addition, indicated that some records did not exist. On September 26th, the Respondent provided the Applicant with certain records pursuant to its Response.

[3] Before, I set out issues in dispute in this matter, I will address several matters that arose in the hearing.

[4] First, as noted above, WCC 10 stated in its Response that some of the documents requested do not exist. One such example is "*the report of an insurance adjuster who examined/inspected the balcony doors of the building and disapprove the claim of the corporation (regarding replacement of the balcony doors of the building) if an claim/request/demand was made by the corporation*." The Applicant withdrew his request, or as he stated in closing submissions, he was not "*pressing the request*". He noted that in some instances, the issue of the nonexistence of the requested document was a matter that fell outside of the Tribunal's current jurisdiction. However, he did wish to draw the Tribunal's attention to the request made and the response given in the context of his request for a penalty under s. 1.44 (1) 6 of the Act.

[5] Second, a concern was raised by the Applicant that the version of the Response uploaded in this Stage 3 proceeding is different from that provided to him on August 22, 2019. He has pointed out that certain information on the August 22nd response -- for example, that the documents would be provided on September 26th -- does not seem to appear on the Response uploaded. Ms. Polis stated that the Board's Response was unchanged. I considered Mr. Bukhari's submissions on this matter and decided against asking him to upload the August 22nd Board response and accepted Ms. Polis' statement as an officer of the Court. I am not prepared to infer any intent by the Respondent to mislead the Tribunal, and most importantly, note, based on the evidence and submissions, that WCC 10's position vis-a-vis the documents requested has been consistent in all substantive ways from August 12, 2019 to the close of this hearing in January 2020.

[6] Third, I appreciate that Mr. Bukhari has recognized that some matters raised by him in the context of this hearing are beyond the Tribunal's jurisdiction. His closing submissions suggest a concern about the governance of WCC 10, and its transparency with respect to financial affairs. I will not address those issues alluded to by Mr. Bukhari. I also note that closing submissions from both parties were lengthy, particularly those of the Applicant. In these reasons, I will not respond to every matter raised, but will distill the evidence and submissions to focus on the matters relevant to determining the issues to be decided, as set out below.

B. ISSUES

[7] At the outset of this hearing, the following records were in issue:

1. Record of owners and mortgagees. The record had been provided to the Applicant, but he took the position that it was incomplete. After clarification from Ms. Polis after he gave his evidence, the Applicant requested that this issue be withdrawn. He stated that he was satisfied that the record of owners and mortgagees provided by the Respondent was responsive to his Request.
2. Record of notices relating to leases of units under s.83 of the Act.
3. Periodic Information Certificates ("PIC") for the past 12 months.
4. Minutes of Board meetings within 12 months of the Request.
5. Copies of all policies of insurance and related certificates.
6. List of all permanent, temporary and contract employees of the corporation.
7. List of all of PPG (condominium service provider) employees working in the property of the corporation.
8. Annual internal independent audit report of retail services of the corporation.

[8] A few of these records have been provided, such as the PIC, minutes and insurance policies. However, the Applicant asserts that they are either incomplete or overly redacted and therefore do not satisfy his Request. Further, for some of the records, the fee requested by the Respondent to prepare the records is in dispute. In addition to seeking the requested records, the Applicant has, in this hearing, asked for costs pursuant to s. 1.44 (1) 4 and a penalty of $4500 be ordered against the Respondent pursuant to s. 1.44 (1) (6) of the Act.

C. RESULT

[9] For the reasons set out below, I find that the Applicant is entitled to the records and/or clarification regarding those records requested relating to the records of leases under s. 83 of the Act, the Periodic Information Certificates, and minutes of meeting within 12 months of the Request.

[10] I also find, as set out below, that the Applicant will be required to pay a fee of $31.50 /hour for the preparation of Board minutes for the period of 2014 to July 2018, to a maximum of five hours. This is in addition to the agreed amount of $7.88 for the periodic reserve fund studies. It is, of course, an option for the Respondent to waive payment should it deem it appropriate to do so.

[11] Further, I also find, for the reasons set out below, that no penalty or costs are payable by the Respondent.

D. ISSUES AND ANALYSIS

ISSUE 1: Record of notices relating to leases of units under s. 83 of the Act

[12] The Respondent does not deny that this is a core record under the Act. In its Response, it stated that the Applicant is entitled to a copy of this record. In the August 11, 2019 letter to the Applicant, the Respondent advised that "there are 278 units here, 153 of which were involved in the Rental Association program, as of July 1, 2019". This is the rental service program that the Respondent is required to provide to owners and in which owners leasing their units must participate. The Respondent states that this information, together with copies of owners' addresses is all the information that the Applicant is entitled to. In closing submissions, the Respondent states that there is nothing in the Act that requires it to provide lessees' names to owners, nor is it required to provide a copy of the lease agreements.

[13] It is instructive to look at section 83 of the Act. Section 83 (1) requires the owner of a unit to notify the corporation within ten days of leasing their unit. Section 83 (3) requires the corporation to keep a record of the notices that it receives. It does not reference the leases themselves as a record nor the names of lessees. Nor is that what has been requested. Though the Applicant now knows the number of units in the Respondent's rental program, that information is not fully responsive to the request.

[14] On a plain reading of s. 83 (3), the Applicant is entitled to a list of the units from which it received notices under s. 83 (1). That list has not yet been provided.

[15] In the context of his closing submissions regarding this particular record request, and in relation to several others as well, the Applicant has asserted that by virtue of his Request and the Response indicating that he was entitled to obtain a copy of the record (here the record under s. 83), section 13.9 of *Ontario Regulation 48/01* (the "Regulation") was triggered. Section 13.9 deals with a waiver which is a written agreement (on a prescribed form) between the person requesting a record and authorized officers of the condominium corporation. This kind of agreement clearly acknowledges that the corporation will allow the requester to examine or obtain a copy of the record. By virtue of that agreement, the requester is deemed to have waived the right to object to any failure of the corporation to comply with certain sections of both s. 55 of the Act and s. 13 of the Regulation. There is no such written agreement in this case. Therefore s. 13.9 is not applicable here.

ISSUE 2: Periodic information certificates for the past 12 months

[16] The Respondent does not deny that these are core records to which the Applicant is entitled. The Applicant was provided with a PIC on August 12 and on September 26, 2019. However, the Applicant states that it does not contain all of the information required to be included in the PIC and therefore it cannot be considered as a PIC within the meaning of s. 11.1 of the Regulation. In particular, the Applicant states that the PIC did not contain a copy of the statements and information provided to the board during the current fiscal year in accordance with the disclosure obligations in s. 11.10 and a copy of the corporation's budget (s. 11.1 (1) (i) and (k) respectively). I do not accept the Respondent's submission that the PIC is sufficient as provided.

[17] Section 11.1 (1) lists the information that the PIC "shall contain". This is required information. I do accept the Respondent's evidence that it does not have any disclosure statements by elected or appointed directors during this time. However, I do not accept the Respondent's submission that it could not have known that the Applicant was seeking the budget and in fact assumed he was not as he had not ticked off that item on the Request form. The Respondent also submitted that had it known Mr. Bukhari wanted a copy of the budget, prior to this hearing, it would certainly have provided it to him. In any event, now it can – as part of a PIC for the relevant period. The Regulation clearly sets out what is required to be included in the PIC. To the extent that it did not include the budget it is deficient as a PIC.

[18] Therefore, the Respondent shall provide the PICs from the 12-month period preceding the date of the Request, each of which is to include a copy of the corporation's budget as required by s. 11.1 (1) (k).

ISSUE 3: Minutes of Board meeting within the past 12 months

[19] The Board minutes (Exhibit 9) were provided to the Applicant on September 26, 2019. There are minutes from ten meetings. The Applicant asserts that the redactions are "so excessive that it patently appears illogical and inappropriate on the face of it". I have reviewed the minutes and do not agree, with the exception of the redactions that relate to directors' names, discussed below.

[20] The redactions throughout the minutes of appear to be three different types. The first is the redaction of references to specific units. This was confirmed in the Respondent's evidence (given by Sheldon Doyle a director of the Respondent's board of directors) and is a logical inference from a reading of the minutes. This type of redaction is permitted pursuant to s. 55 (4) (c) of the Act.

[21] The second type is the redaction of portions of the agenda in three different Board meeting minutes. One set of minutes shows redaction of what appears to be two paragraphs. None of the redactions are lengthy relative to the minutes in their entirety. In each 'blank space' there is a note: "*Redacted as per 55.4 of the Ontario Condominium Act 1998*". The Respondent's evidence is that the redactions relate to discussions pertaining to on-site staff or contractors including security and property management, actual or contemplated litigation and/or reports or opinions from professionals such as lawyers, all permitted under the Act. I accept that evidence.

[22] The last type of redaction (and in the Respondent's submissions they state there are 41 of these) pertain to "*individual directors who motioned or seconded motions*". There is no apparent reason for these redactions nor any exception granted in the Act. Indeed, s. 13.11 (1) of the Regulation states that for the purpose of section 55 (4) (c) of the Act, "*records relating to specific units or owners*" does not include records relating to persons in their capacity as directors or officers of the corporation". The minutes clearly state which directors are present. They are each present in their role as director and there is no evidence to suggest they were not acting in that capacity in the context of the minutes.

[23] I find no basis for these particular redactions with respect to the names of the directors who made or seconded motions and therefore the Applicant is entitled to a copy of the minutes without redaction of the directors' names.

[24] The Applicant also took exception to the manner in which the redactions were made; specifically, that the Respondent had not complied with s. 13.8 (1) (b) of the Regulation. This states that each copy of a record that the corporation makes available for examination or delivers shall be accompanied by a written statement of the board's reason for its determination (for redaction) and an indication on which provision of s. 55 of the Act or Regulation the board bases its reason.

[25] Here, the Respondent did provide a written statement within the minutes that it was relying upon s.55 (4) when it redacted certain portions. It was not explicit as to which subparagraph it was relying upon, nor has it provided clarity in its evidence. Whether or not the statement is within a separate document is less of a concern. What the Act stresses is the transparency in the way in which information is conveyed to unit owners. In this instance, I will order that the Respondent provide a statement which specifies the exception it relies upon for these particular redactions.

[26] While the Respondent did not state in each instance where it redacted a unit number that it was relying upon s. 55 (4) (c) or provide a statement to address all similar redactions, it was not only made clear in the evidence that that was the basis, it is also patently clear from a reading of the minutes. While the better practice is to provide a statement in accordance with the Act to stipulate the exception relied upon for redactions of a certain kind, like specific units in this instance, no further explanation is required.

ISSUE 4: Copies of all policies of insurance and related certificates

[27] Under s. 13.1(1)18 of the Regulation, a corporation is required to keep a copy of all insurance policies that the corporation has obtained and maintains. Redacted policies of insurance were provided to the Applicant on September 26, 2019. In the Applicant's words, they are 'unnecessarily, unreasonably and excessively redacted". The Respondent does not deny that it is required to maintain records of its insurance policies and certificates and that the Applicant is entitled to these. However, it states that the various insurance policies are 'blanket' policies covering in excess of 25 different properties. The Respondent's evidence is that it received the policies with redactions from its insurers.

[28] A review of the various insurance policies reveals that they are issued to Platinum Properties Inc., the condominium management provider for the Respondent. Many property locations, including that of the Respondent, are covered by the policy and are named insureds under the policy. It is clear who the insurer is and what the policy covers. For example, in Exhibit 15, a commercial property policy issued by Intact, policy no. 501170705, 350 Quigley Road, the Respondent's address, is location 10. The coverage specific to the location is set out as well as the deductibles applicable to the insurance coverage for the location. The policy terms and conditions are also visible. The total amount of the premium for the blanket policy is redacted and there is no indication on the page applicable to the Respondent what its portion of the premium is. That appears to be, based on the Applicant's submissions, a significant concern about the redaction. That may well be a valid concern, but the answer may well be found in other records, such as budgets and/or financial statements or an auditor's report, all core records under the Act.

[29] In his reply submissions, the Applicant states that the real dispute between the parties is how the affairs of the Respondent are being governed. This is not an issue for the Tribunal to determine. He states that there are hundreds of questions that cannot be answered without a thorough examination of the insurance policies.

However, the policies have been provided. The redactions (aside from premium) relate to the other locations to which the blanket policies relate, which the insurer itself has redacted and is not information to which the Applicant is entitled. Further, I note that the only issue before the Tribunal is the Applicant's entitlement to receive or examine records of the Respondent; the Tribunal cannot order a Respondent to answer questions arising from those records.

[30] I find that the Respondent has complied with the records request relating to insurance. The Applicant raised the point that the redaction must be made by the board and there is a prescribed procedure for that under s. 13.8 of the Regulation. Here the evidence is that the Respondent received the insurance policies from the insurer, with redactions. Whether or not privacy laws required that redaction as suggested by the Respondent is not material to my determination

ISSUE 5: List of all permanent, temporary and contract employees of the corporation

[31] The Applicant was clear in his request. He is not seeking the details of the employees' contracts. He is not seeking disclosure of records relating to the employees. As he emphasized in closing submissions, he is just seeking a list of the employees working on the premises. His reason for the request stems from the fact that a significant part of the Respondent's budget goes towards salaries of employees/management.

[32] The Applicant points to a list that has been posted in the building (Exhibit 13) of various personnel and their roles. He points out that it does not distinguish between those who are employees of the Respondent and those who are employees of PPG.

[33] The Respondent states that the list is provided as a "courtesy for the purposes of providing owners/residents contact information of some pertinent employees" and further that this in and of itself does not indicate that a list of all permanent, temporary and/or contract employees exists or is required to exist.

[34] The Respondent is required to maintain records relating to employees as stated by the Applicant. A list of employees might be derived from those records, but a list is not legally a record that the corporation is required to keep under the Act or Regulation and therefore there is no entitlement to one if it does not, in fact, exist. I note that had the Applicant requested copies of all agreements entered into by or on behalf of the corporation (s. 55 (1) 8 of the Act) and specified in particular

employment contracts, these would be obtainable by him, as acknowledged by the Respondent. Rather ironically, by asking for less than that, he does not get the information he is seeking. As the Applicant states, this makes no sense. I do not disagree. As a practical solution to this issue and to promote transparency within the condominium community, and as good faith gesture, this information could be provided by the Respondent, but I cannot order it to do so.

ISSUE 6: List of employees of PPG working in the property

[35] The Applicant did specifically request a copy of the management agreement with PPG, which has been provided as referenced in paragraph 42 below. A review of that document does not disclose a list of PPG employees at the location. It does reference a manager, though not the particular individual's name. However, a list of PPG employees at its property is not a record that the Respondent must maintain and hence there is no entitlement.

ISSUE 7: Annual Internal Audit Report of Rental Services of the Corporation

[36] In its Response, WCC 10 stated that the Board had determined Mr. Bukhari was not entitled to this record because "*the document was not a record of the corporation and you are not entitled to it as it is notes/drafts for the Board to consider and then make decisions on…*" However, on September 26, 2019, the Respondent provided the Applicant with copies of documents entitled "Annual Market Comparison Reports" (Exhibit10) which it states are the documents requested but re-named for its own internal ease of reference. The Respondent points out that these are not core records and it could have charged a reasonable fee for them but chose not to do so as a gesture of good faith.

[37] The Applicant takes issue with the Respondent's changing position on this record between August 22 and September 26th, stating that "the respondent is not allowed to present or argue its case contrary to its pleading so far as this request of record is concerned." I disagree. Revisiting the initial position taken in the Response to deny the record, at any stage of the proceedings, is to be encouraged. Access to the records is the goal.

[38] The Applicant has referred to s. 18.1 (a) (ix) of the Amended Declaration of the Respondent (Exhibit 11) which outlines reporting requirements for the rental service program. It states that "*Unless waived by the Board of the Corporation, the Rental Manager shall cause an independent audit to be conducted of the Rental Services at the cost of the Rental Manager with a copy of said report to be*

provided to the Corporation." I accept the Respondent's evidence that the documents, though differently named are in fact the record requested by the Applicant. A review of those documents shows them to contain detailed information which one would anticipate in such a report.

[39] I find therefore that the Respondent has complied with this record request. Based on the Applicant's submissions, it appears that he has concerns about how the board manages the rental services program, but that too is a matter of board governance and not a matter over which the Tribunal has jurisdiction.

ISSUE 8: Fee for providing access to certain records

[40] The Respondent agreed to provide two non-core records upon payment of a fee by the Applicant. The first are the minutes of the meeting of the board in which the decision to increase the management fee of PPG was approved, from 2014 or at any time within the retention period. The Respondent did add the caveat that whether the minutes would outline the discussions alleged by the Applicant was unknown at this point in time. I agree with the Applicant that the Response does not seem to specifically address the amount of the fee though the Response did state that the minutes would be subject to redaction.

[41] The Stage 2 Summary and Order refers to a fee of $ 31.50/hour. It is both allowed and reasonable for a fee to be charged to compile, review and redact minutes that cover a five-year period. I will order that this fee be payable though I note that an estimate for the time required to compile has not been provided. Based on my review of the minutes that have already been provided, this should take no longer than five hours. The Respondent has not requested to charge a fee for photocopying in the event that the minutes are not available in electronic format and therefore none will be payable by the Applicant.

[42] The second record for which the Respondent is seeking payment of a fee is for copies of management agreements entered into by the corporation including all management and service contracts from 2013. This record has already been provided to the Applicant (Exhibit 21). It is one agreement with amendments. The Respondent states in submissions that the costs were estimated to be $31 for one hour of work, but it would reimburse the Applicant for any difference between the actual payment and the actual fee incurred as per s. 13.8 (1) (d) of the Regulation. On the facts of this case, given that the record has already been provided, appears to have been readily accessible by the Respondent and is not at all lengthy, I do not find it reasonable for a fee to be charged. The Respondent did provide Exhibit

10 to the Applicant, at no cost to him as a gesture of good faith. This too should be such.

[43] Finally, with respect to fees, I note that the Applicant and Respondent had agreed prior to this Stage 3 hearing that the periodic reserve fund studies would be provided to the Applicant at a cost of $7.88.

ISSUE 9: Penalty under s. 1.44 (1) 6 of the Act

[44] It is important to note the basis for a penalty under the Act. The Tribunal, pursuant to s. 1.44 (1) 6 may make an order directing the corporation to pay a penalty if it considers that the corporation has without reasonable excuse refused (emphasis added) to permit the person to examine or obtain copies of records under s. 55 (3) of the Act.

[45] The Applicant has requested a penalty on the basis of the lateness of the Response. It was not delivered within the prescribed 30 days. The Respondent has referred to the length of the Request and the fact that its previous counsel was on maternity leave, both of which caused some delay. While I am not persuaded by either of those factors, for me to award a penalty based on those, I would also have to find that the delay was tantamount to a refusal. In some circumstances, it may be, but not on these facts. The Respondent did provide some records on August 12, several days after the expiry of the 30 days, and the Response itself came ten days later on August 22nd. A significant number of records were then provided on September 26th. Any delay was relatively short and does not support a finding of a refusal.

[46] Given my findings on the records (Issues1-7), I do not conclude that there was a refusal to provide the records. The Respondent may have been incorrect in what it thought it needed to provide regarding the record of leases and regarding the redaction in the minutes of the directors' names is not appropriate, but these do not qualify as a refusal.

[47] Another basis for a penalty, as submitted by the Applicant, is that certain records were simply not maintained, as evidenced in the Response where, on several occasions, it states that the record does not exist; for example, the request for a declaration of interest submitted by two different directors or copies of all independent appraisals required to be obtained under the Declaration at the time of renewing or placing insurance policies. There is no evidence before me to suggest that the nonexistence of any of the documents requested by the Applicant

was in any way a deliberate attempt by the Respondent to subvert its obligations to provide records as set out in the Act. I do not find a refusal on which to base a penalty on these facts. Whether or not the nonexistence of these particular records is indicative of an issue of proper board governance is not a determination for me to make in the context of the Tribunal's current jurisdiction.

[48] What has become apparent through both parties' submissions is that there has been a breakdown in the relationship between them and this records dispute is a result. The Applicant has expressed distrust in the Board and concerns about their proper governance of the affairs of the Respondent, and it in turn suggests that the Applicant is on a fishing expedition, all of which is unfortunate for both parties. But again, at this juncture, the Tribunal cannot provide a remedy that will address these underlying issues.

ISSUE 10: Costs under s. 1.44 (1) 4 of the Act

[49] 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 award of costs is discretionary. Here both parties participated fully in this case and while costs do not "follow the event" in proceedings before the Tribunal, I do note that there was 'success' on both sides. At the same time, this is not a situation where but for the case being filed with the Tribunal the records would not have been provided. The Respondent provided records on August 12, 2019 immediately after which the Applicant initiated this case. I have determined that no costs shall be awarded.

ORDER

[50] Therefore, for the reasons set out above, the Tribunal orders as follows.

1. The Respondent shall provide to the Applicant a list of the units from which it received notices under s.83(1) of the Act, within 30 days of this decision.

2. The Respondent shall provide to the applicant the Periodic Information Certificates for the 12 months prior to July 2019 (the date of the Request for Records) and these shall include a copy of the corporation's budget as required by s. 11.1(1)(k) of the Regulation, within 30 days of this decision.

3. The Respondent shall provide the Applicant with the Minutes of Board meetings for the 12 months prior to July 2019, without redaction of the names

of the directors who made or seconded motions, within 30 days of this decision.

4. The Respondent shall provide the Applicant with a written statement specifying which particular subsections of s. 55(4) of the Act that it relies upon for its redactions of paragraphs within the Minutes, within 30 days of this decision.

5. The Applicant shall pay to the Respondent a fee of $31.50 per hour, to a maximum of five hours, for production/redaction of the Board minutes for the period between 2014 and July 2018, upon receipt of an invoice. Payment shall be made prior to delivery of the minutes, and the minutes shall be made available within 30 days of this decision.

6. As agreed by the parties, the Applicant will pay to the Respondent $7.88 for the periodic reserve fund study.

7. No penalty or costs are payable by the Respondent.

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Patricia McQuaid
Member, Condominium Authority Tribunal

RELEASED ON: February 27, 2020