CONDOMINIUM AUTHORITY TRIBUNAL

DATE: December 14, 2020
CASE: 2020-00076R
Citation: Ravells v Metropolitan Toronto Condominium Corporation No. 564, 2020 ONCAT 44

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

Member: Mary Ann Spencer, Member

The Applicant,
Shelley Ravells
Self-Represented

The Respondent,
Metropolitan Toronto Condominium Corporation No. 564
Represented by Megan Molloy, Counsel (July 27 – September 8, 2020); Victor Yee, Counsel (September 9 – November 27, 2020)

Hearing: Written Online Hearing – July 29, 2020 to November 27, 2020

REASONS FOR DECISION

A. INTRODUCTION

[1] Shelley Ravells (the "Applicant") is the owner of a unit of Metropolitan Toronto Condominium Corporation No. 564 (the "Respondent"). She alleges that the corporation either failed to provide or delayed the provision of records which she is entitled to receive. She further alleges that the records she did receive are not "adequate, sufficient or accurate." She requests that the Tribunal order the provision of records current to the date of this decision and assess a $25,000 penalty to the Respondent. She also requests her costs in this matter.

[2] The Respondent submits that the Applicant's Request for Records was not in accordance with the requirements of the *Condominium Act, 1998* (the "Act") because it was improperly delivered; and, if it is determined the request was valid, there was no unreasonable refusal to provide records and therefore no basis for penalty. The Respondent submits that the Applicant has received all of the requested records and that she is seeking information about their content which the Respondent is not required to provide. Further, the Respondent submits that

the Tribunal's jurisdiction does not extend to the records' content.

[3] For the reasons set out below, I find that the Request for Records delivered by the Applicant on March 26, 2020 is valid. Subject to confirmation that the 2014 reserve fund study provided is the final version and to the provision of an amended list of directors and the minutes of the January 31, 2020 board meeting, I find that the Applicant's request has been fulfilled and that the Respondent is keeping adequate records in accordance with the provisions of s. 55 (1) of the Act. However, I also find that the Respondent's delay in providing some records is a refusal to provide records without reasonable excuse and I order a penalty of $500. Finally, I order the Respondent to pay costs of $200 to the Applicant.

B. BACKGROUND

[4] The Applicant originally submitted a Request for Records form dated December 7, 2018 to the Respondent's former condominium management firm by registered mail. The request was delivered on December 11, 2018 but the Applicant received no reply from the corporation.

[5] On March 26, 2020, the Applicant re-submitted the December 7, 2018 request form to the Respondent's former condominium manager by e-mail. She wrote *"understanding that the original ask may be deemed an abandoned request past 6 mos, I assure that it is not an abandoned issue and I am requesting an urgent acceleration of completion most immediately."*

[6] On March 27, 2020, Leo Kong of BV Condominium Management responded to the Applicant by e-mail, apologized for the oversight in not responding to her original request and indicated that he needed some time to gather the requested records. In a further e-mail dated April 3, 2020, Mr. Kong sent the Applicant electronic copies of some of the requested records. On May 26, 2020, the Applicant filed her application with the Tribunal.

C. PROCEDURAL MATTERS

[7] This was a lengthy hearing with two adjournments, the first of which, from August 19 to September 2, 2020, was due to unavailability of the Applicant. The second adjournment was the result of a motion filed by the Applicant on September 15, 2020 in which she alleged that the Respondent's board did not have quorum and could not direct its representative in this matter. After receiving submissions from both parties, I issued my decision on October 8, 2020 and adjourned the hearing for fourteen days to allow the Respondent adequate time to produce documentation confirming the board's quorum. On October 22, 2020, based on the

documentation provided, I ruled that the Tribunal would accept submissions from the Respondent's representative and the hearing resumed.

[8] On November 5, 2020, the Respondent filed a motion to dismiss the case before hearing testimony. The Respondent argued that because the Request for Records sent on March 26, 2020 was a re-submission of the Applicant's December 7, 2018 request that it had no force or effect as of June, 2019 and therefore the application before the Tribunal was statute-barred pursuant to section 13.10 (2) of Ontario Regulation 48/01 ("O. Reg. 48/01").

[9] I denied the Respondent's motion on the basis that the Respondent did not reject the Applicant's request; its former condominium manager responded to the Applicant and indicated he would provide the records. After I posted this ruling, the Respondent's representative advised that the request had not been delivered on March 26, 2020 in accordance with the requirements of section 13.3 (4) of O. Reg. 48/01. I advised that this issue would remain live and I address it below as a preliminary issue.

[10] November 9, 2020 was set as the date for teleconference testimony. The Applicant initially indicated her intent to call four witnesses, all of whom were challenged by the Respondent's original counsel. I refused to allow two of those witnesses on the basis that the proposed testimony related to matters over which this Tribunal has no jurisdiction. The Applicant chose not to proceed with her request that the Tribunal issue summonses for her other two proposed witnesses.

[11] The Respondent originally proposed to call its former condominium manager. The Applicant objected to this witness who I allowed on the basis that their proposed testimony was relevant to the issues before me. On October 22, 2020, the Respondent's counsel advised of an alternate witness due to a change in the Respondent's condominium management firm. The Applicant also objected to this witness. I ruled the witness could testify and advised the Applicant that I would allow her to add witnesses. On October 23, 2020 she advised she did not wish to do so.

[12] The Applicant failed to join the teleconference on November 9, 2020. Following receipt of her explanation, the teleconference was rescheduled to November 16, 2020. On November 10, 2020, the Applicant asked if she could add the Respondent's previous condominium manager as a witness. I advised that it was too late to issue a summons for the rescheduled teleconference.

D. PRELIMINARY ISSUES

[13] The first preliminary issue before me is whether the e-mail method of delivery the Applicant used to re-submit her Request for Records on March 26, 2020 invalidates the request.

[14] Section 13.3 (4) of O. Reg. 48/01 sets out that a request for records is sufficiently delivered to a corporation if it is "sent by facsimile transmission, electronic mail or any other method of electronic communication if the board has, by resolution, decided that it is a method for receiving delivery of the request."

[15] The evidence is that the delivery of the Request for Records on March 26, 2020 was not in accordance with section 13.3 (4) of O. Reg. 48/01. The Respondent's current condominium manager, Phoenix Chen, testified that the corporation does not have a board resolution authorizing the receipt of delivery of Requests for Records by e-mail. However, the evidence is also that the Respondent acted upon the request. Rather than refusing it or returning it to the Applicant, the Respondent's previous condominium management firm provided records on April 3, 2020 and later represented the Respondent in the Tribunal's Stage 2 mediation process. Even if it could be argued that the condominium manager acted out of goodwill without the knowledge or direction of the Respondent's board, the Respondent has been represented by counsel throughout the Stage 3 hearing which began on July 29, 2020. Counsel had ample opportunity to raise the issue of the validity of the request before doing so in November. I find that the Respondent, through its actions, accepted delivery of the request and that it is valid.

[16] The second preliminary issue is the determination of the period covered by the Applicant's request. When she re-submitted the Request for Records form, she did not amend its original December 7, 2018 date. The date of request is relevant as it applies to date-sensitive records such as minutes of meetings "held within the last 12 months." I find that the re-submitted form was in fact a new request and that any date-sensitive records should reference March 26, 2020.

[17] In her testimony and submissions, the Applicant indicated that she was seeking records current to the date of the Tribunal's decision. As set out in s.13 of O. Reg. 48/01, the Applicant is required to formally request records from a corporation. The corporation must have the opportunity to consider and respond to that request. Therefore this hearing will not address any records dated after March 26, 2020.

E. ISSUES AND ANALYSIS

[18] The parties agreed the issues to be addressed in this matter are:

1. Has the Respondent provided the Applicant with the records which she is entitled to receive?

2. Is the Respondent keeping adequate records in accordance with the requirements of the Act?

3. Should a penalty be assessed against the Respondent?

4. Should an award of costs be assessed?

[19] The Applicant and Phoenix Chen, the Respondent's condominium manager since October 1, 2020, testified in this hearing. Ms Chen indicated that she is responsible for maintaining the Respondent's records and that her testimony with respect to events prior to October 1, 2020 was based on her review of those records.

[20] During her testimony, the Applicant raised a number of issues or questions unrelated to her Request for Records, including, among others, whether the corporation provides notice to owners of major expenditures and restrictions placed on its visitors parking. These are outside of the Tribunal's jurisdiction as set out in Ontario Regulation 179/17 and will not be addressed in this hearing. When this hearing began, the Tribunal's jurisdiction was limited to disputes relating to certain parts of section 55 of the Act dealing with records. Only the evidence most relevant to the records issues to be decided is set out in this decision.

Issue 1: Has the Respondent provided the Applicant with the records which she is entitled to receive?
Issue 2: Is the Respondent keeping adequate records in accordance with the Act?

[21] The Applicant requested the following records in her March 26, 2020 request:

<u>Core Records:</u>

- Condominium Corporation declaration, by-laws and rules
- Record of Owners & Mortgagees
- Periodic Information Certificates from the past 12 months
- Budget for the current fiscal year
- Most recent approved financial statements
- Most recent auditor's report
- Current plan for future funding of the reserve fund
- Meetings of minutes held within the last 12 months
- Additional records specified in a by-law of the corporation

<u>Non-Core Records:</u>

- Historical Budget Format - 4 years

- Full Reserve Fund Spend History – 10 years

In addition, as set out in the Tribunal's Stage 2 Summary and Order, the parties agreed to add the following records:

- Last 5 reserve fund studies
- List of board members for the last 10 years, election dates, and proof of director training.

[22] At the outset of this hearing, I asked the Applicant to clarify the specific records which were outstanding. She indicated that none of the requests were complete and that all of the records were "unsatisfactory." In her closing statement, she wrote that she continues to question the "adequacy, sufficiency and accuracy" of the records she received and "the corporation has failed to provide the requested core and non-core documents required to allow owners to gain a true understanding of their investment."

[23] Because the Applicant's position is that the inadequacy of the records she received in effect nullifies their receipt, I will address the issues of receipt and adequacy of the records together in this decision. Where the requested records are related, I have grouped them together.

[24] In *McKay v. Waterloo North Condominium Corp. No. 23, 1992* CanLII 7501 (ON SC) ("McKay"), a case which addressed the entitlement of owners to access corporation records, Cavarzan J. set out the principle that the affairs of a condominium corporation are an "open book":

> The Act embodies a legislative scheme of individual rights and mutual obligations whereby condominium units are separately owned and the common elements of the condominium complex are co-operatively owned, managed and financed. In the interest of administrative efficiency an elected board of directors is authorized to make decisions on behalf of the collectively organized as a condominium corporation, on condition that the affairs and dealings of the corporation and its board of directors are an open book to the members of the corporation, the unit owners.

I note that there is no dispute in this matter that, in accordance with s. 55 (3) of the Act, the Applicant is entitled to examine or obtain copies of the records she requested. However, the extent to which a corporation's records enable an owner to gain a "true understanding of their investment" is necessarily a subjective assessment. Each owner of a corporation might have a different perspective based on their own priorities and understanding of the records. The issue before me is not whether the Applicant finds the records she received sufficient for her purposes

but whether the Respondent is keeping adequate records in accordance with s. 55 (1) of the Act.

[25] Section 55 (1) of the Act states “the corporation shall keep adequate records” and sets out a list of the records which must be kept. The word “adequate” is not defined in the Act. Cavarzan J. provides some guidance in *McKay*:

> The Act obliges the corporation to keep adequate records. One is impelled to ask – adequate for what? An examination of the Act provides some answers. The objects of the corporation are to manage the property and any assets of the corporation (s. 12 (1)). It has a duty to control, manage and administer the common elements and the assets of the corporation (s. 12 (2)). It has a duty to effect compliance by the owners with the Act, the declaration, the by-laws and the rules (s. 12 (3)). Each owner enjoys the correlative right to the performance of any duty of the corporation specified by the Act, the declaration, the by-laws and the rules. The records of the corporation must be adequate, therefore, to permit it to fulfil its duties and obligations.

[26] In *Yeung v. Metropolitan Toronto Condominium Corporation No. 1136,* 2020 ONCAT 33, a case addressing the accuracy of the minutes of a board meeting, the Tribunal determined that accuracy of a record is a component of adequacy:

> Considering the scheme and provisions of the Act and the submissions of both parties in this case, I have no hesitation in affirming that accuracy is a component of adequacy in respect of condominium records. I also find that the use of the word “adequate” in the legislation suggests, in and of itself, tolerance for a degree of imperfection. The question is just how much inaccuracy may be tolerated before a record is rendered inadequate to, as Cavarzan J. stated, “permit [the condominium corporation] to fulfill its duties and obligations.”

The Tribunal ordered the corporation to correct the minutes based on undisputed evidence of inaccuracy and noted that owners should be “entitled to expect that the minutes correctly described the procedures followed by the board of directors.”

<u>Condominium Corporation Declaration, By-laws and Rules; Additional Records Specified in a By-law of the Corporation</u>

[27] The Stage 2 Summary and Order in this matter indicates the Applicant clarified that in requesting “additional records specified in a by-law of the corporation” she was seeking any amendments made to by-laws. The documentary evidence and the testimony of Ms Chen is that the Respondent’s declaration and by-laws, the latter of which include the corporation’s rules, were sent to the Applicant by the Respondent’s former condominium manager on April 3, 2020.

[28] The Applicant testified that she believes that the records she received are not complete because they do not reflect changes the Respondent has made to make individual owners responsible for the maintenance of some building components defined as common elements in the declaration and to the way common expense assessments are collected.

[29] The Act requires notification to the owners and sets out specific approval processes for the amendment of each of a corporation's declaration, by-laws or rules. There is no evidence before me to indicate such amendments have been made and therefore no evidence that these records are inaccurate. I note that the Applicant's concern that the documents do not reflect an alleged divestment of the Respondent's maintenance responsibilities appears to be an issue relating to compliance, which is outside this Tribunal's jurisdiction, rather than to record-keeping. The evidence is that the Applicant has received the complete declaration, by-laws and rules of the Respondent and that these records are adequate.

Record of Owners and Mortgagees

[30] Section 55(1) of the Act sets out that the corporation must keep the record of owners and mortgagees required to be kept under s. 46.1(3). This record must include the unit number, the owner or mortgagee's name, and the address for service in Ontario.

[31] The evidence is that the Applicant was provided with a list of owners and mortgagees during the Stage 2 mediation but the record was incomplete because it did not include the prescribed address for service. I note, however, that the Respondent's representative uploaded a copy of the full record as an appendix to his closing submissions, advising that the omission of the addresses in the record originally provided had been inadvertent. Therefore, I find that the Applicant has now received the record of owners and mortgagees and that the corporation is keeping an adequate record.

Periodic Information Certificates

[32] The evidence is that during the Stage 2 mediation, the Applicant was provided with Periodic Information Certificates ("PIC's") dated May 14 and November 28, 2019. The Applicant testified that none had been issued for 2020.

[33] The effective date of the Applicant's Request for Records is March 26, 2020. The Act requires a corporation to produce PICs within 60 days of the end of the first

and third quarters of its fiscal year. In the case of the Respondent, the first PIC in 2020 would be due in May, after the date of the Applicant's request. Therefore I find that the Respondent has fulfilled the Applicant's request.

[34] The Applicant testified that the information on the PIC's she received is inaccurate with respect to the number of units leased. Section 83 (1) of the Act places the onus on an owner to notify the corporation if they lease their unit. The corporation is required, in accordance with s. 11.1 of O. Reg. 48/01, to include the number of units for which it received notice in a PIC. There is no evidence that the corporation has incorrectly recorded or reported the number of notices it received. Further, as the Tribunal noted in its decision in *Yeung v. Metropolitan Toronto Condominium Corporation No. 1136*, 2020 ONCAT 28, a case that dealt with alleged errors in PIC's, "section 55 [of the Act] does not provide for a mechanism for disputes over the content of the records." Therefore, I find that the Respondent is keeping adequate PIC records.

[35] During her testimony the Applicant expressed concern that she had not received any Information Certificate Updates, the requirements for which are set out in s. 11.2 of O. Reg. 48/01. She requested that she be provided with "up to date" records. However, she did not request copies of these records in her Request for Records and therefore there was no requirement that the Respondent provide them in the context of this case.

Budget for the Current Fiscal Year and Historical Budget Format – 4 Years

[36] The evidence is that the Applicant has received the requested records; the Respondent provided her with copies of its budgets for the 2016 to 2019 fiscal years during the Stage 2 mediation and a copy of the 2020 budget was uploaded to the Tribunal's ODR system in August, 2020 as part of the Respondent's disclosure.

[37] The Applicant testified that she is concerned that the budget documents she received are not signed and therefore are not a legal record. She also noted there is inconsistent formatting in the budgets.

[38] I find that the Respondent is keeping adequate budget records. There is no legislated requirement that a condominium corporation's budget be signed. In fact, s. 83.1 of the Act, which sets out the requirements for preparation and delivery of a budget to owners, has not yet been proclaimed into law. I note that all of the records provided to the Applicant contain the same expenditure line items and set out the annual forecast operating budget and contribution to the reserve fund

which is the information the Respondent requires to calculate the common expense assessments.

Most Recent Approved Financial Statements, Most Recent Auditors Report, Full Reserve Fund Spend History – 10 Years

[39] I find the Applicant has received the records she requested. The evidence is that the Respondent's former condominium manager sent the approved audited financial statements and the auditors' reports for the fiscal years 2010 to 2018 inclusive to the Applicant on April 3, 2020. During her testimony, the Applicant advised that the document labelled "2013" was a second copy of the 2014 statements. I note the Respondent's representative provided a copy of the 2013 statements as an appendix to his closing statement, advising that the second copy of the 2014 statement had been inadvertently uploaded in error.

[40] The Applicant testified that she did not receive the record of the Respondent's full reserve fund spending for the past ten years which she stated "should definitely be part of the financial records of the corporation." Ms Chen testified that the Respondent does not keep this information as a distinct record and the actual reserve fund expenditures are listed in the audited financial statements.

[41] Section 55 (1) of the Act requires a corporation to keep adequate financial records but does not specify the form of those records. There is no requirement for the Respondent to keep the history of its reserve fund expenditures as one distinct record. The Applicant has received the approved audited financial statements dating back to 2010 which contain the information responsive to her request. I note that in the April 3, 2020 e-mail accompanying the financial statements, the Respondent's former condominium manager advised the Applicant they set out the budget, reserve fund balances and spending.

[42] The Applicant testified that she is concerned that the financial statements are signed with the name of the auditing firm and not by an individual. She also testified that she does not understand the documentation. Specifically, she indicated that it is unclear to her how audited financial statements can be based on unaudited budgets and she expressed concern about recorded transfers between reserve and operating funds. She testified that she has been unable to get a "clear picture" of the Respondent's financials.

[43] There is no evidence before me to indicate that the audited financial statements the corporation is keeping as records are inaccurate or incomplete; they have been signed by a firm of licenced public accountants and the auditors' reports indicate they were prepared in accordance with Canadian generally accepted auditing

standards. Therefore, I find that with respect to the financial statements and auditors' reports, the Respondent is keeping adequate records.

[44] The Applicant's concerns relate to the content of the records and are outside of the scope of this hearing. As noted earlier, the requirement for a corporation to keep adequate records does not mean that each owner will find the information contained in those records to be understandable or sufficient for their individual purposes. For the Applicant's information, s. 45 (3) of the Act provides that an owner may raise any matter "relevant to the affairs or business of the corporation" at the corporation's annual general meeting. Section 70 (3) of the Act permits any owner to demand that the auditor attend an owners' meeting with a duty to answer questions at the meeting.

Current Plan for Future Funding of the Reserve Fund and Last 5 Reserve Fund Studies

[45] The evidence is that the Respondent has provided the Applicant with the requested records. A Notice of Future Funding of the Reserve Fund dated September 28, 2017 and reserve fund studies dated September 28, 2017 and March 18, 2014 were provided during the Stage 2 mediation when the request for the studies was added. Reserve fund studies dated March 2, 2007 and November 2, 2010 were uploaded to the Tribunal's ODR system in August 2020 as part of the Respondent's disclosure and the Respondent's counsel provided the reserve fund study dated February 16, 2004 as an appendix to his closing submission.

[46] The Applicant indicated a concern that the most recent Notice of Future Funding of the Reserve Fund she received dates from 2017 and is based on an "unexecuted" reserve fund study, explaining that the Notice contained in the September 28, 2017 reserve fund study is unsigned. She also noted that the 2014 reserve fund study she received is marked as a draft. Ms Chen explained that the Act requires that reserve fund studies be conducted every three years and that normal practice would be for a board to review a draft before accepting it.

[47] There is no evidence before me to indicate that the September 28, 2017 Notice of Future Funding of the Reserve provided to the Applicant was not the Respondent's current plan as of March 26, 2020, the date of the Applicant's Request for Records. As Ms Chen testified, the Act requires that reserve fund studies be updated every three years.

[48] I note that the September 28, 2017 reserve fund study provided to the Applicant is not "unexecuted"; it is signed by the engineering firm which conducted the study. While the document does include an unsigned Notice of Future Funding form, the

study's covering letter advises this is to be completed by the corporation's board. The September 28, 2017 Notice provided to the Applicant was completed and signed by members of the Respondent's board. However, the copy provided to the Applicant does appear to be incomplete as it refers to "Brown and Beattie's attached Cash Flow Summary/Contribution Schedule/ Funding Plan" which is not attached to the document. Because this missing attachment can be found in the September 28, 2017 reserve fund study provided to the Applicant, I am not ordering the Respondent to provide a further copy of the Notice.

[49] There is insufficient information before me to determine whether the draft 2014 reserve fund study provided to the Applicant is in fact the final version. Therefore, I will order the Respondent either to confirm that the provided draft is the final version or to provide the Applicant with a copy of the final version. Subject to this confirmation, I find that the Applicant has received the records she requested and that the reserve fund records the Respondent is keeping are adequate.

Minutes of Meetings Held Within the Last 12 Months

[50] The effective date for date-sensitive records in this matter is March 26, 2020. The evidence is that during the Stage 2 mediation, the Applicant received minutes of board meetings dated October 17, 2018, March 14, 2019 and September 19, 2019. Ms Chen testified that the Applicant had been sent the minutes of all meetings relevant to her request.

[51] The Applicant questioned whether the Respondent held a board meeting on January 31, 2020 for which she received no minutes. I note that the affidavit submitted by the Respondent in response to the Order in my decision on the Applicant's motion indicates an individual was appointed to the board on January 31, 2020 by resolution of the board. Therefore, I will order the Respondent to provide the Applicant with a copy of the minutes of the January 31, 2020 meeting.

[52] The Applicant expressed concern that the Respondent's board is holding only two meetings each year. The frequency of board meetings is an issue outside of the jurisdiction of this Tribunal. The only issues before me are whether the Respondent is keeping adequate records in the form of the minutes of the meetings it holds and if the Applicant has received copies of the minutes she requested. Subject to the provision of the minutes of the January 31, 2020 board meeting, I find that the Applicant has received the minutes responsive to her request and that the Respondent is keeping adequate records.

List of Board Members for the Last 10 Years, Election Dates, and Proof of Director Training

[53] The evidence is that during the Stage 2 mediation, the Applicant received a list of the Respondent's board members from 2010 to 2020 and proof of director training, the latter in the form of a screen shot of information maintained by the Condominium Authority of Ontario ("CAO"). I note that the list of directors was not completely responsive to the Applicant's request as it included the year but not the specific date of their election.

[54] The composition of the Respondent's board was the subject of the motion filed by the Applicant on September 15, 2020. The affidavit filed by the Respondent in response to my order does set out the specific dates of directors' election and/or appointment to the board from 2017 forward.

[55] The list of adequate records which s. 55 (1) of the Act requires the corporation to keep includes "any additional records specified in the by-laws of the corporation." I note that the Respondent's By-law No. 1 submitted as evidence in this hearing requires the Respondent to maintain a "register of directors" with "the several dates on which each became or ceased to be a director." Therefore, the specific dates of directors' election should have been available for inclusion on the list of directors the Respondent provided to the Applicant. I am ordering the Respondent to provide a further copy of this list amended to set out the specific dates of the directors' election. There is insufficient information before me to determine whether the Respondent has kept the required register and therefore I make no finding with respect to the adequacy of its record keeping in respect of this record.

[56] The Respondent's affidavit includes, where applicable, the dates on which the board members listed therein completed the training which s 11.7 of O. Reg. 48/01 requires directors elected or appointed after November 1, 2017 to complete. I note that while s. 11.8 of O. Reg. 48/01 requires directors to provide evidence of completion of training to the corporation, it also sets out that it is the CAO that is required to keep adequate records of the names of directors and the date of completion of training. Given the dates of training were included in the affidavit which was uploaded to the Tribunal's ODR system and thereby provided to the Applicant, I find that the Applicant has received the information she requested with respect to director training.

Issue 3: Should a penalty be assessed against the Respondent?

[57] Section 1.44 (1) 6 of 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. The maximum penalty payable is

$5,000.

[58] The Applicant requests the assessment of a penalty of $25,000 and submits that the Respondent did not respond to her Request for Records in the prescribed format, delayed providing her records and, as I previously noted, failed “to provide the requested core and non-core documents required to allow owners to gain a true understanding of their investment.”

[59] Counsel for the Respondent submits that at no time did the Respondent refuse to provide records to the Applicant and notes that the Tribunal “has repeatedly affirmed that lateness in providing a record is not necessarily an unreasonable refusal under the Act”, citing *Joan MacDonald v. Wentworth Condominium Corporation No. 96*, 2020 ONCAT 14, *Patricia Gendreau v. Toronto Standard Condominium Corporation No. 1438*, 2020 ONCAT 18 and *HiLevel International Corp. v. Toronto Standard Condominium Corporation No. 1858*, 2019 ONCAT 40.

[60] I have found that the Respondent did provide the Applicant with the requested records, notwithstanding that clarification is required with respect to the 2014 reserve fund study and that I am ordering the provision of an amended list of board members and the minutes of a January 31, 2020 board meeting. The evidence is that while the Respondent’s previous condominium manager did not reply to the Applicant’s March 26, 2020 request using the prescribed form, he did reply by e-mail on March 27, 2020 and, on April 3, 2020 he forwarded copies of the declaration, by-laws, rules and the audited financial statements for the 2010 to 2018 years to the Applicant. However, the balance of the requested records, including core records such PICs and the minutes of board meetings, were not provided until the Stage 2 mediation.

[61] One of the purposes of a penalty is to deter future similar action. A requester should not have to apply to the Tribunal in order to receive requested records for which there is clear entitlement. I have reviewed the cases cited by the Respondent’s counsel. While I acknowledge that delay does not necessarily equate to refusal, I note that some explanation for delay was provided to the Tribunal in each of the cited cases. In the case before me, no reason or explanation was provided by the Respondent. I find that the delay in providing records to the Applicant until the Stage 2 mediation was a refusal, albeit a temporary one, to provide records without reasonable excuse.

[62] I assess a penalty of $500. In determining this amount, I have taken into account that the Respondent did provide the outstanding records during the Stage 2 mediation as well as additional records which were not included in the Applicant’s

Request for Records form. And, although the Respondent was entitled to charge a fee for the non-core records the Applicant did request, all of the records were provided at no cost to the Applicant.

Issue 4: Should an award of costs be assessed?

[63] Rule 45.1 of the Tribunal's Rules of Practices states that the Tribunal may order a User to pay to another User or the CAT any reasonable expenses or other costs related to the use of the CAT. Rule 45.2 states that if a case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final Decision, the unsuccessful User will be required to pay the successful User's CAT fees and reasonable dispute-related expenses, unless the CAT member decides otherwise.

[64] The Respondent requested no costs in this matter. The Applicant requested costs in her closing submission; however, she did not specify an amount. In response to my question, she indicated she was "requesting a very low estimate of $10,000, representative of a portion of legal fees paid out through MTCC 564 (i.e. me) for this case." The Applicant is speculating on the amount of legal fees the Respondent has paid and I cannot consider any amount she might be assessed in that regard in the future as her costs in this matter. She confirmed in her testimony that she represented herself throughout the Tribunal's process and incurred no legal fees.

[65] The Applicant was successful in this matter and I award costs of $200, the amount of the Tribunal fees she paid.

F. CONCLUSION

[66] I find that the Respondent is keeping adequate records as required by s. 55 (1) of the Act and, subject to confirmation that the 2014 reserve fund study provided to the Applicant is the final version and to the provision of a list of board members for the last ten years amended to include the dates of election and the minutes of the January 31, 2020 board meeting, I find that the Applicant has received all of the requested records. I also find that the Respondent's delay in providing the Applicant with some of the records to be a refusal, albeit a temporary one, to provide records without reasonable excuse. The Respondent shall pay a penalty of $500 and costs of $200 to the Applicant.

G. ORDER

[67] The Tribunal Orders that:

1. Within 30 days of the date of this decision, the Respondent, at no cost to the Applicant, shall provide the Applicant with:

   (i) either written confirmation that the draft 2014 Reserve Fund Study is the final version or a copy of the final version;

   (ii) a list of board members for the past ten years amended to include the specific dates of their election; and,

   (iii) the minutes of a January 31, 2020 board meeting.

2. Within 30 days of the date of this decision, the Respondent shall pay a penalty of $500 to the Applicant.

3. Within 30 days of the date of this decision, the Respondent shall pay costs of $200 to the Applicant.

4. To ensure the Applicant does not pay any portion of the costs or penalty awards, the Applicant shall be given a credit towards the common expenses attributable to her unit in the amount equivalent to her unit's proportionate share of the above costs and penalty.

Mary Ann Spencer
Member, Condominium Authority Tribunal

Released on: December 14, 2020