**CONDOMINIUM AUTHORITY TRIBUNAL**

**DATE:** January 29, 2021
**CASE:** 2020-00136R
**Citation:** Wei v. Toronto Standard Condominium Corporation No. 2297, 2021 ONCAT 8

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

**Member:** Brian Cook, Member

**The Applicant,**
Maureen Wei
Self-represented

**The Respondent,**
Toronto Standard Condominium Corporation No. 2297
Represented by Justin McLarty, counsel

**Hearing**: Written electronic hearing – August 21, 2020 to December 7, 2020
Teleconference hearing – December 7, 2020

## REASONS FOR DECISION

## A. INTRODUCTION

[1] Maureen Wei is the owner and occupier of a unit in Toronto Standard Condominium Corporation No. 2297 and the Applicant in this case. She filed a Request for Records on March 15, 2020.

[2] A hearing was held by telephone conference call on December 7, 2020. Pre-hearing discussions were conducted in writing and in a case management conference call.

[3] In advance of the hearing, many of the issues related to the Applicant's record request had been resolved by the parties. At the start of Stage 3, the Applicant provided a list of the records that are still in dispute. Many of the issues related to alleged deficiencies in the minutes of the board of directors and to records relating to contracts. At the hearing, the parties made submissions about each of the records in dispute. This was done sequentially so that the Applicant made her submissions about a record and then the Respondent made submissions on the

same document. This process was completed for the records on the Applicant's list of issues regarding the records in dispute.

[4] In this decision, a reference to "the Act" is a reference to the *Condominium Act*, 1998, SO 1998, c 19. A reference to "the Regulation" is a reference to Ontario Regulation 48/01.

## B. ISSUES

[5] This decision deals with the Applicant's request for records including:

- The record of owners and mortgagees
- The record of leases
- Records related to the reserve fund
- Minutes of board meetings
- Records relating to the purchase of a parking unit
- Records related to litigation
- Records related to certain contracts

## C. PRELIMINARY ISSUES

### Issue 1: Observer

[6] In advance of the hearing, Mr. McLarty advised that a representative from ICC Property Management ("ICC") which is retained by the Corporation to provide condominium management services, wished to observe the hearing. I advised that this was fine on the understanding that the observer would not be participating in the hearing but would only observe. At the hearing, the Applicant complained that this was unfair because she did not have an observer.

[7] The request regarding the observer was made in advance of the hearing and the Applicant was aware of the request. Even if she was not aware before that she could have an observer as well, she would have known this from the request from the Respondent. In any case, there was no unfairness or prejudice arising from the fact that there was an observer.

### Issue 2: Request to disqualify a witness

[8] In advance of the hearing, the Respondent provided a witness statement from Romina Petraco, who is the condominium manager, employed by ICC.

[9] The Applicant submitted that Ms. Petraco could not be a witness for the Respondent because she was directly involved in the discussions about records

and was therefore not an objective witness. I determined that this was not a basis to disqualify Ms. Petraco as a witness. There is no requirement that a witness in a proceeding be objective. In fact, as in this case, it is usually important to hear directly from those who have been involved in the events that have led to the dispute as they will have direct knowledge of the events.

**Issue 3: Request to disqualify counsel**

[10] The Applicant also asked that Mr. McLarty be disqualified as counsel for the Respondent on the grounds that he has a conflict of interest.

[11] This issue arose after the board of directors directed Mr. McLarty to send the Applicant a letter concerning her conduct in her dealings with staff and agents of the corporation. Mr. McLarty clarified that the letter was not related to the issues before the Tribunal. Mr. McLarty's invoice for writing the letter was $566.70. This amount was added to the Applicant's account as an amount owing to the Corporation.

[12] The Applicant submits that since she has been required to pay legal fees, she has in effect paid Mr. McLarty and that as a result, she had in effect hired him which created a conflict of interest since a lawyer cannot be hired by both parties to the dispute.

[13] The Applicant further argues that there was no legal basis for the costs associated with the letter to be added to her account as there was no order from a court.

[14] I determined that there was no basis to disqualify Mr. McLarty from representing the Respondent. The fact that his fee was added to the Applicant's account does not create a lawyer-client relationship and there is no conflict of interest.

## D. RECORDS IN DISPUTE

**Record of owners and mortgagees**

[15] The Respondent provided a record of owners and mortgagees that was current as of April 8, 2020. It sets out the unit numbers, the name of the unit owner and indicates whether the unit is owner occupied, a rental unit, or vacant. The form used to record this information has a column for the address of the owner, but this is not completed for any of the units.

[16] Section 46.1(2) of the Act requires an owner to provide the corporation with the unit number and the owner's name within 30 days of becoming an owner. Section 46.1(3) of the Act requires the corporation to maintain a record of this information.

It is also required to maintain a list of owner's address for service, but only if the owner provides an address for that purpose.

[17] Under subsection 46.1(3)(c) of the Act, the corporation is required to maintain a list of the name of any mortgagee and the mortgagee's address for service, but only if the mortgagee provides this information to the corporation.

[18] Section 46.1(3)(d) of the Act allows owners and mortgagees to provide a method of electronic communication (typically an email address) for the purpose of service. A corporation is not required to provide records of email addresses.[1]

[19] In this case, the Respondent has provided the list of the names and unit numbers of owners. It asserts that it has not received any information from any mortgagee.

[20] I conclude that the Respondent has provided the record of owners and mortgagees to the applicant.

**Record of lessees**

[21] The Applicant requested records about people who lease or rent a unit from an owner. Section 83 of the Act provides:

> 83 (1) The owner of a unit who leases the unit or renews a lease of the unit shall, within 10 days of entering into the lease or the renewal, as the case may be,
>
> (a) notify the corporation that the unit is leased;
>
> (b) provide the corporation with the lessee's name, the owner's address and a copy of the lease or renewal or a summary of it in the form prescribed by the Minister; and
>
> (c) provide the lessee with a copy of the declaration, by-laws and rules of the corporation.
>
> (2) If a lease of a unit is terminated and not renewed, the owner of the unit shall notify the corporation in writing within 10 days of the termination.
>
> (3) A corporation shall maintain a record of the notices that it receives under this section.

[22] The record of owners and mortgagees that the Respondent provided indicates for each unit whether the unit is owner occupied, vacant, or rented. This is a summary

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[1] see *Wu v. Carleton Condominium Corporation*, 2016 30525 (ON SCSM) and *Margaret Samuel v Metropolitan Toronto Condominium Corporation No. 979* and *Metropolitan Toronto Condominium Corporation No. 989*, 2019 ONCAT 9.

of information about the status of each unit that the corporation has been notified of by owners and the respondent submits that it is a record of the notices it has received under section 83 of the Act.

[23] The Applicant submits that she is also entitled to the information described in section 83(1)(b) of the Act, including the names of the renters, a copy of the lease and the address of the owner. The information described in subsection (b) is clearly information that relates to a specific unit and owner. Section 55(4)(c) of the Act provides that records relating to specific units or owners are not records that an owner is entitled to access.

[24] I conclude that the Applicant has received a record of the units that are leased or rented and that she is not entitled to access information about the name of the renter or the leases themselves, or the owner's address.

**The current plan for future funding of the reserve fund**

[25] The Applicant requested the current plan for future funding of the reserve fund. She received some information but asserts that it is not sufficient for her to understand the future funding of the reserve fund.

[26] Reserve funds are covered under sections 93 and 94 of the Act. These establish various things that must be done and reviewed in regard to the funds and it is helpful to consider the terms used to describe the things that must be done. I have put the key terms in italics.

[27] Under section 93 of the Act, a condominium corporation is required to establish one or more *reserve funds*, for the purpose of funding major repair and replacement of the common elements and assets of the corporation.

[28] Under section 94(1) of the Act, the corporation is required to conduct a periodic *study* to determine whether the amount of money in the reserve fund and the amount of contributions collected by the corporation are adequate to provide for the expected costs of major repair and replacement of the common elements and assets of the corporation.

[29] Under section 94(8) of the Act, within 120 days of receiving the study, the Board must develop a *plan for the future funding of the reserve fund*.

[30] Under section 94(9) of the Act, within 15 days of proposing the *plan*, the board shall send to the owners a notice containing a *summary of the study* and a *summary of the proposed plan.* The information required under subsection (9) is to be provided in a form prescribed by the Ministry.

[31] In this case, the Respondent provided a copy of the form required under subsection (9).

[32] The Respondent submits that this satisfied the Applicant's request. The Applicant submits that the information provided is not sufficient for her to understand the current plan for funding the reserve fund. Mr. McLarty suggested that the reserve fund study would have more details and may provide the information the Applicant seeks. At the hearing, the Respondent advised that the Applicant may review the reserve fund study on request.

[33] The record that the Respondent has provided in this case is the *summary* that it is required to provide to the owners under section 94(9) of the Act. I note that this is a record that must be provided to all owners and not just those who request it.

[34] The Regulation includes a list of core records, including "The current *plan* proposed by the board under subsection 94(8) of the Act for future funding of the reserve fund."

[35] I conclude that Respondent has provided the *summary of the plan* but has not provided the *plan* itself. The Applicant requested the *plan for the future funding of the reserve fund*. I find that the Applicant is entitled to have access to the *plan for the future funding of the reserve fund* which is a core record.

[36] The Respondent shall provide a copy of the *plan for the future funding of the reserve fund* to the Applicant.

**Records about a legal action**

[37] The Applicant requested records about a legal action concerning an "$8,000 claim by unit owner." At the hearing, the Applicant indicated that she understands this involves an action against ICC (the condominium management company) which the Corporation is required to indemnify. She is concerned that the action initially involved $8000 but later increased significantly.

[38] The Respondent confirmed that the parties to the litigation included the condo corporation and ICC and that the legal action has been resolved through a settlement.

[39] Section 55(4) of the Act provides in part:

> (4) The right to examine or obtain copies of records under subsection (3) does not apply to,

…

(b) records relating to actual or contemplated litigation, as determined by the regulations, or insurance investigations involving the corporation

[40] Section 1(2) of the Regulation provides relevant definitions:

(2) In the Act and this Regulation,

"actual litigation" means a legal action involving a corporation;

"actual or contemplated litigation" means actual litigation or contemplated litigation;

"contemplated litigation" means any matter that might reasonably be expected to become actual litigation based on information that is within a corporation's knowledge or control.

[41] On behalf of the Respondent, Mr. McLarty submits that all records relating to the legal action are protected by section 55(4) of the Act. He submits that the protection continues even after the litigation has concluded. In support of this proposition, Mr. McLarty referred to *Robert Remillard v. Frontenac Condominium Corporation No. 18*, 2018 ONCAT 1 (*Remillard*).

[42] As discussed in *Remillard*, the section 55(4) exemption is related to litigation privilege and solicitor-client privilege. As noted in *Jack Gale v Halton Condominium Corporation No. 61*, 2019 ONCAT 46

In common law, that is the law not covered by statute, a person may claim protection from having to disclose confidential information if either the relationship or the communication is protected by the law of privilege. Privilege exists where the courts have decided that the confidentiality of the relationship or communication should take precedence over an obligation to disclose information.

[43] In *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 the Supreme Court of Canada explained that solicitor-client privilege and litigation privilege have different purposes. As summarized in *Gale*:

The purpose of solicitor-client privilege is to protect a relationship, whereas the purpose of litigation privilege is to ensure the efficacy of the adversarial process…. Solicitor-client privilege is permanent, while litigation privilege is temporary and lapses when litigation ends.

[44] In this case, the litigation has ended. At issue is whether the protection under section 55(4) of the Act continues to apply after the litigation has ended.

[45] *Remillard* concluded (at paragraph 30) that the Respondent did not need to assert privilege in order to maintain the confidentiality of the records because the Act and Regulation do not refer to privilege as the basis for the restriction. The decision concluded, at paragraph 27 that the term "actual litigation" refers to any litigation, current or completed, that exists or did exist in fact.

[46] Section 55(4) of the Act applies to "records relating to actual or contemplated litigation". "contemplated litigation" is defined in the Regulation as any matter that might reasonably be expected to become actual litigation based on information that is within a corporation's knowledge or control.

[47] In my view, this means that if the litigation has ended or there is no longer a reasonable expectation of litigation, the protection under section 55(4) of the Act no longer applies.

[48] As noted in *Blank* (at paragraph 33), sometimes, "litigants or related parties remain locked in what is essentially the same legal combat" so there may persisting related litigation. This could mean that the litigation has not in fact concluded or that there may still be contemplated litigation. I note that this seems to have been the case in *Remillard*, where the Applicant was a party to the litigation in question.

[49] In other cases, the condo corporation may reasonably conclude that the Applicant has requested the records because the Applicant is contemplating litigation and wants the records to support the litigation (see *Mario Bosso v. Metropolitan Condominium Corporation 965*, 2018 ONCAT 6).

[50] Solicitor-client privilege is permanent and applies whether or not there is actual or contemplated litigation. The fact that this privilege continues is separate from the protection under section 55(4) of the Act which ends when there is no actual or contemplated litigation.

[51] In my view, this interpretation is consistent with the overall purposes of the Act which include that the records of a condominium corporation should be an "open book" freely accessible to all owners, subject to certain specific exceptions. Once litigation has concluded and there is no reasonable prospect of related litigation, and subject to other considerations including solicitor-client privilege, owners should be able to access records that relate to litigation that the corporation has been involved in just as they are entitled to access records about other commercial matters affecting the corporation.

[52] In cases such as this one where the litigation has ended in a settlement, some records that relate to the litigation may be covered by settlement privilege. If the

settlement included a confidentiality provision, this too may limit access to the records.

[53] In my view, section 55(4) of the Act requires a consideration of the status of the records in dispute and the status of any litigation that the records related to. These considerations include:

1. Are the records protected by solicitor-client privilege?

2. Is there actual litigation or a reasonable prospect or litigation?

3. Has the litigation concluded?

4. Are the records covered by some other legal consideration such as settlement privilege or a confidentiality undertaking?

[54] In this case, the litigation has been settled and there does not seem to be any concern that the litigation is not in fact concluded.

[55] The Applicant has requested records related to the litigation. I find that the fact that the records requested relate to the litigation is not a reason to refuse access. The Respondent is directed to review the records related to litigation and determine if the records relate to solicitor-client communications or if there is another basis for why the records should not be disclosed. If there is no such reason, the Respondent shall disclose the records. The respondent shall provide a written explanation to the Applicant if any of the records are not disclosed.

**Minutes of the Board**

[56] The Applicant requested copies of minutes of the board of directors' meetings for the period of March 2019 to February 2020. She agrees that she has received copies of the minutes that she requested. However, she submits that some of them are deficient.

[57] One of the identified deficiencies is that the minutes for January 2020 are not signed. The Respondent suggested that this was related to the pandemic but the Applicant pointed out that the pandemic was not a significant problem until March. The Respondent agrees that best practice is to have the minutes signed. In this case, there is no requirement in the Act or Regulation that minutes of the Board must be signed, although I agree with the Respondent that the best practice is for them to be signed. I find that the failure to sign the January 2020 minutes is not a basis to conclude that the Respondent has failed to provide the record or that the record is not adequate.

[58] Some of the deficiencies identified by the Applicant relate to the applicant's concern that the board may not be doing its job properly including its obligation to oversee and properly document financial transactions. These concerns include an alleged lack of approval in the minutes for maintenance work undertaken by the condominium management company (ICC) and that there is no record of approval of the renewal of the contract with ICC, and no record of approval for increased legal fees.

[59] I agree with the Respondent that these concerns are beyond the jurisdiction of the Tribunal. They do not relate to whether records have been provided, but rather to concerns about the governance practices of the Board, which this Tribunal does not have the jurisdiction to consider.

**Records about the purchase of parking units**

[60] This issue relates to the purchase of parking units by the corporation. The Respondent submits that the Applicant's request concerning these records was not clear. It understood that the request was for the Land Titles register, which was provided. At the hearing, it was clarified that the Applicant also seeks the Statement of Adjustments. At the hearing, the Respondent offered to provide the Statement of Adjustments to the Applicant.

**Records about an expense of $39,164**

[61] The Applicant requested records relating to "Board approval of over budget by $39,164 in repairs and maintenance with breakdown for each vendor."

[62] At the hearing, the Respondent explained that it did not initially understand the request. As discussions progressed, they understood that the Applicant was not asking for existing records but rather for an explanation of other records that relate to the expense. In her submissions, the Applicant confirmed that she wants the Board and the building management to take responsibility and to exert proper oversight.

[63] I find that the Applicant's request is not a request for records, but rather a request for an explanation of various expenditures. This is therefore not a request that this Tribunal has the jurisdiction to consider or enforce.

**Issues regarding contracts**

[64] The Applicant requested records related to "contracts of services $1,062,853" for the period March 1, 2018 to February 28, 2019. The Respondent was initially not clear what this referred to. After clarification, the Respondent provided a number of

contracts.

[65] The Applicant provided a list of various contracts she had requested. She had received most of the requested contracts but identified some concerns about five of them:

### i. Carrier commercial contract

[66] The contract refers to a Schedule B, but Schedule B was not attached to the contract the Applicant received. The Respondent undertook to review the contract and determine if there is a Schedule B and send a copy to the Applicant if one exists.

### ii. INTO contract

[67] The Applicant notes that the contract she was provided appears to have expired in 2018. Mr. McLarty advised that this is a recurring contact with an auto renewal provision. Note H of the contract confirms this. The contract appears to have commenced in 2013. There is a version with a 2015 date and another with a 2018 date. The Applicant indicated that her concern is really that the intention to continue to renew the contract from year to year should be reflected in the minutes of the board. While this may be correct, the issue is not about the provision of the contract as the Applicant received the contract.

### iii. ICC contract

[68] This is the contract between the management company and the corporation. The Applicant noted that she was not provided with the contracts for 2018 and 2019. The Respondent advised that the contracts with ICC are typically renewed for periods of either three years or five years.

[69] The management contracts uploaded by the Respondent include a contract with a term of March 1, 2014 to February 31, 2017 (sic). It is a comprehensive contract. There is a renewal contract for the period January 1, 2020 to February 28, 2023. It has some adjustments with regard to the term and fees but otherwise adopts the original contract. What therefore appears to be missing is the renewal contract for the term from March 2017 to January 1, 2020. Ms. Petraco testified that she recalled signing a contract for this period. The request for records in this case is with respect to the period from March 1, 2018 to February 28, 2019.

[70] The Respondent is directed to provide the Applicant with a copy of any renewal management contracts that include the period March 2018 to March 2019.

### iv. Minotaur contract

[71] Minotaur provides stormwater monitoring. The Applicant submits that the contract is deficient because it does not indicate the term of the contract. The copy of the contract the Respondent provided is a Purchase Order. It indicates that the corporation has purchased three annual inspections (one inspection per year). The term of the contract is therefore three years. There is a date of April 26, 2018 so the Purchase Order is still in effect. I find that the Respondent has provided the requested contract.

### v. Odyssey contract

[72] Odyssey provides housekeeping services. Ms. Petraco testified that the corporation has used this service since 2013. She said the contract is tied to the fiscal year which is March to February and that a renewal contract is signed each year.

[73] The contract provided was signed by a representative of the corporation on January 28, 2020. The Respondent shall provide copies of any contract with Odyssey made in respect of the period from March 1, 2018 to February 28, 2019.

## E. PENALTY

[74] Under section 1.44(1) of the Act, a penalty may be considered when the Tribunal considers that the corporation has without reasonable excuse refused to permit the Applicant access to records that the Applicant was entitled to access.

[75] The Applicant submits that a penalty is appropriate in this case because the Board is not properly overseeing the operation of the condominium.

[76] Mr. McLarty submits that no penalty is in order. He submits that the Respondent responded to the Applicant's numerous requests for records in a timely and reasonable way when it understood what records were being requested. Other requests were difficult to understand, even up to the point of the hearing. As the nature of the request became clearer, the Respondent provided records if they existed.

[77] The Applicant has requested a great many documents, including all possible core records listed on the Request Form and a significant number of non-core records. I agree with the Respondent that it made reasonable efforts to provide the requested records in a timely way. I also agree that some of the requests were not clear. The Respondent sought clarification and provided records once it understood what the Applicant was requesting. Even up to the hearing, some of

the requests were still not clear. As discussed in this decision, some of the requests were not actually a request for records but rather a request for an explanation about information in records. In some instances, the actual request was not clarified until the hearing before me. I note that core and non-core records were provided at no cost to the applicant. The Applicant's concern about how the condominium is being managed is not a basis for a penalty. I conclude that there is no basis for a penalty.

## F. COSTS

[78] Rule 45 and 46 of the Tribunal's Rules provide that the Tribunal may order costs, including "costs that were directly related to a User's behaviour during the Case that was unreasonable, for an improper purpose, or that caused an unreasonable delay." The Rules provide that the Tribunal will not generally require the payment of a party's legal fees.

[79] Rule 45.2 provides that if a case proceeds to adjudication, and 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. This does not include legal fees.

[80] The results in this case are mixed. For the most part, I have found that the Respondent provided the records in dispute although I have ordered the Respondent to review certain records to clarify if there are additional records, but this follows a more detailed understanding of the request at the hearing. I have made a finding on the law regarding access to records relating to litigation, but the approach taken by the Respondent was consistent with previous decisions of the Tribunal.

[81] The Applicant submits that she is entitled to costs. She calculates that this process has cost her about $5,000 in time spent. I am satisfied that an order for costs as against the Respondent is not appropriate with respect to the Applicant's personal time in pursuing this case. It is clear that the Applicant has spent a lot of time on this case. However, much of that was caused by her pursuit of arguments that were not directly about the Request.

[82] To get to this stage, the Applicant was obliged to pay fees to the Tribunal. An order requiring the Respondent to reimburse those fees when the Applicant has been at least partially successful is usually made and I find it is appropriate in this case. The Tribunal filing fees to get to a Stage 3, hearing and decision are $200 I find it reasonable for the Respondent to reimburse this amount to the Applicant.

[83] Mr. McLarty submits that the Applicant's conduct has resulted in excess costs to the Respondent. Mr. McLarty submits that the Applicant has prolonged and complicated the matter and brought improper issues, including the challenge to the Respondent's counsel and witness.

[84] I agree with the Respondent that the Applicant's behaviour in this case has sometimes been problematic. She delayed the process when she suddenly advised that she would not be available for over a month. At the hearing, she vociferously argued the preliminary issues noted in this decision, continuing to argue about them after she was asked to stop. She had to be cautioned that her behaviour was bordering on vexatious. However, I note that the Applicant was self-represented, and she did change her behaviour after she was cautioned. While I appreciate that the Applicant presented challenges to the Respondent and counsel, I am not satisfied that there is a basis for costs as against the Applicant.

## G. SUMMARY OF UNDERTAKINGS

[85] During the hearing, the Respondent made undertakings:

1. To provide the Statement of Adjustments regarding the purchase of parking units.

2. To allow the Applicant to review the Reserve Fund Study on written request.

3. To review the Carrier contract to determine if there is a Schedule B and provide a copy if there is one and to inform the Applicant in writing If there is not a Schedule B.

## H. ORDER

[86] Within 30 days of the date of this decision, the Respondent shall:

1. Review the records relating to the ICC contract and the Odyssey contract to determine if there are any records regarding renewal of these contracts for the period March 2018 to March 2019. If these additional records do not exist, the Respondent shall inform the Applicant in writing. If they do exist, the Respondent shall provide a copy to the Applicant.

2. Review the records related to litigation and determine if the records relate to solicitor-client communications or if there is another basis for why the records should not be disclosed. If there is no such reason, the Respondent shall disclose the records. The Respondent shall provide a written explanation to the Applicant if any of the records are not disclosed.

3. Pay the Applicant's Tribunal filing fees in the amount of $200.

Brian Cook
Member, Condominium Authority Tribunal

Released on: January 29, 2021