CONDOMINIUM AUTHORITY TRIBUNAL

DATE: June 8, 2021
CASE: 2020-00334R
Citation: Steenkamp v. York Condominium Corporation No. 279, 2021 ONCAT 49

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

Member: Jennifer Webster, Member

The Applicant,
Otto Steenkamp
Self-Represented

The Respondent,
York Condominium Corporation No. 279
Represented by John De Vellis, Counsel

Hearing: Written Online Hearing – January 4, 2021 to May 19, 2021

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant, Otto Steenkamp, is a unit owner of the Respondent condominium corporation.

[2] He filed this application with the Condominium Authority Tribunal (the "Tribunal") in relation to a request for records that he submitted to the Respondent on September 10, 2020. He claims that he has not received all the records he requested and he asks the Tribunal to order the Respondent to provide the records. He also asks the Tribunal to assess a penalty to the Respondent for its refusal to provide certain records and seeks his costs in this matter.

[3] The Respondent submitted that it is not obligated to provide the records and it argued against a penalty and costs.

[4] For the reasons that follow, I find that the Applicant is not entitled to the records he has requested. In addition, his request for costs and a penalty is denied.

B. BACKGROUND

[5] The Applicant was a member of the Respondent's board of directors (the "Board")

for a number of years until his resignation in April 2020. He submitted a Request for Records to the Board on September 10, 2020, in which he requested the following records: the record of owners and mortgagees; the minutes of board meetings held within the last 12 months; and the voting results in relation to the election of two director positions at the Annual General Meeting held in September 2020.

[6] Catherine Grieg, the Respondent's property manager, sent the Board's Response to the Applicant's Request by email on October 8, 2020. She provided electronic versions of the requested records as attachments to the email and confirmed that no payment was required in relation to the non-core documents. In her email, the property manager also identified the dates of the Board meetings for which the Respondent had provided minutes. These dates were:

- September 25, 2019
- October 16, 2019
- November 27, 2019
- No December 2019 meeting
- January 22, 2020
- February 5, 2020
- February 19, 2020
- March 18, 2020
- April 22, 2020
- April 29, 2020
- May 6, 2020
- May 27, 2020
- No June 2020 meeting
- July 22, 2020
- August 26, 2020

[7] The Applicant brought this application to the Tribunal shortly after receiving the Board's Response. The Applicant claimed that there were Board meetings on September 6, 2019, October 30, 2019, December 4, 2019, and February 11, 2020, and that the minutes of these meetings should be provided to him. In the Stage 2 Summary and Order, the outstanding issue between the parties was defined as:

- Is the Applicant entitled to receive the requested minutes of Board meetings for the dates below, or can they not be released because one or more of the exemptions in section 55(4) of the *Condominium Act* apply?
    - September 6, 2019;
    - October 30, 2019;
    - December 4, 2019; and

- February 11, 2020.

[8] The Respondent disputed that there were Board meetings on those dates. It was the Respondent's position that there was no Board meeting on September 6, 2019 because there was no quorum at the meeting and no business was transacted. Although the Applicant prepared minutes about this "non-meeting" and sent these minutes to the Board, the Respondent stated that there were no minutes for the Respondent to provide to the Applicant.

[9] The Respondent submitted that the meetings on the other dates were not Board meetings, but instead were meetings of a disciplinary panel in accordance with its By-Law No. 13. According to the Respondent, although minutes of the disciplinary panel's deliberations were kept, such minutes were confidential because they related to deliberations about an alleged breach of the Board Members' Code of Ethics (the Code). The meetings on October 30, 2019 and December 4, 2019 related to disciplinary action taken by the Board against the Applicant, and the meeting on February 11, 2020 involved the consideration of an alleged breach of the Code by John Triantos, the Board's vice-president.

[10] The Respondent further claimed that it was not required to provide the records of the disciplinary panel meetings because the records related to actual or contemplated litigation. The Respondent stated that the Applicant advised the Board in November 2019 that he was considering legal action about the discipline imposed on him. In addition, in May 2020, the Respondent's counsel wrote to the Applicant about a letter he had sent to unit owners about the circumstances of his resignation from the Board. The Respondent advised the Applicant that it viewed the statements in his letter as defamatory and in breach of his fiduciary duties as a past director. In October 2020, the Respondent's counsel wrote letters to each of the Applicant and Mr. Triantos, again advising that the Respondent considered that their statements were defamatory.

[11] Finally, the Respondent noted that s.13.3(1)(a) of Ontario Regulation 48/01 provides that the right to examine or obtain a record under subsection 55(3) of the *Condominium Act, 1998* ("the Act") does not apply unless "an owner, a purchaser or a mortgagee of a unit requests to examine or obtain the copy and the request is solely related to that person's interest as an owner, a purchaser or a mortgagee of a unit, as the case may be, having regard to the purposes of the Act." The Respondent claimed that the Applicant was aware that the records were confidential and that he was not entitled to the records pursuant to By-Law No.13. According to the Respondent, the Applicant was seeking the records for an improper purpose, namely to pursue his allegations against members of the Board.

C. ISSUES

[12] The issues to be decided by the Tribunal are as follows:

1. Are the disputed records (minutes of meetings held on September 6, 2019 October 30, 2019, December 4, 2019 and February 11, 2020) Board meeting minutes?

2. Is the Respondent entitled to refuse access to the records because its By-Law No. 13 provides that such records are confidential?

3. Is the Respondent entitled to refuse access to the records under section 55(4)(b) of the Act on the basis that they relate to actual or contemplated litigation?

4. Is the Applicant disentitled from access to the records because his request is not solely related to his interest as an owner, having regard to the purposes of the Act?

5. What fees, costs and penalties, if any, should apply?

D. ANALYSIS

ISSUE 1: ARE THE DISPUTED RECORDS BOARD MEETING MINUTES?

[13] The parties provided witness statements from persons who were members of the Respondent's Board at the relevant times. These witnesses were: the applicant, who held the office of treasurer until April 2020; John Triantos, the Board's former vice-president; Malcolm MacNeil, secretary; and Joshua Sera, the president. I will address the evidence and submissions about each of the meetings and the records in chronological order.

The meeting on September 6, 2019

[14] On September 4, 2019, the Applicant sent an email to all members of the Board and the Respondent's Operational Manager, Brenda Hooper-Rowland, in which he requested that a special Board meeting be held on September 6, 2019. He noted in his email that, if he could get a second director to support his proposal for a special meeting, the meeting could be held in accordance with By-Law 6, clause 7.04. He advised the Board members that the purpose of the meeting was "to discuss the disqualification of an unit owner that was taken without this action first being discussed during a Board Meeting or by a motion approved by the Board." Mr. Triantos confirmed that he seconded the request for the meeting by an email reply on September 4, 2019. The Applicant requested that the secretary and president call a meeting, based on his request and Mr. Triantos' support. Neither

the secretary nor the president agreed to call a meeting.

[15] The Applicant and Mr. Triantos had a meeting on September 6, 2019, starting at approximately 7:00 pm. No other members of the Board attended this meeting. The Applicant prepared minutes of the meeting in which he identified that it was a special meeting “duly called in terms of Bylaw 6 and the required notice period was provided”. He also noted that “the required quorum was not present for holding a Board meeting” and that the meeting was therefore adjourned. The Applicant sent these minutes to the Board members and Ms. Hooper-Rowland by email on September 6, 2019.

[16] All the witnesses confirmed that the Applicant’s minutes of the meeting on September 6, 2019 were never presented or approved at a subsequent Board meeting.

[17] The Applicant argued that the Board meeting on September 6, 2019 was called in accordance with the by-law and that minutes must be kept of all Board meetings. In his view, the minutes he prepared were Board meeting minutes that should have been produced to him in response to his Request for Records.

[18] I accept the Respondent’s argument that no Board meeting took place on September 6, 2019 because there was no quorum and, therefore, no business was conducted. There may have been an informal discussion between the Applicant and Mr. Triantos, but there was, in fact, no Board meeting and, therefore, no requirement of minutes. In addition, the minutes prepared by the Applicant of his discussion with Mr. Triantos are not transformed into records of the Respondent simply through his action of sending these minutes to the Board members.

[19] I conclude that there was no Board meeting on September 6, 2019 and that there are therefore no minutes of a Board meeting to be provided by the Respondent.

The meeting on October 30, 2019

[20] At the Board meeting on September 25, 2019, Joshua Sera introduced a motion to initiate disciplinary action against the Applicant. The Board agreed to defer the issue to its next scheduled meeting on October 16, 2019 at which time the Applicant was to provide a response to the allegations.

[21] The Applicant presented his response to the allegations at the Board meeting on October 16, 2019. I note that the Respondent provided the minutes of the Board meetings held on September 25 and October 16, 2019 in its Response to the

Applicant's Request for Records, and that these minutes were redacted to remove the information related to the allegations and the disciplinary process.

[22] The Board scheduled a meeting for October 30, 2019 to consider the allegations. The Applicant did not attend the October 30th meeting because its sole purpose was to discuss the allegations that he had breached the Code. Mr. Triantos, Mr. Sera, and Mr. MacNeil confirmed in their witness statements that each of them attended the meeting on October 30th, and that the discussions were about the discipline of the Applicant in accordance with By-Law No.13.

[23] Ms. Hooper-Rowland sent an email to the Applicant after the meeting on October 30th with the following message:

> I have been asked by the board to convey the results of tonight's (October 30, 2019) In-Camera Disciplinary Review.
>
> Please see the specific motion below which was passed by an unanimous 4 director decision.
>
> > Motion (JS, acting as Chair) to amend main motion to reframe review of OS as an additional reprimand, and also provide the board, including OS, with written Guidelines about future conduct for clarification. Seconded by GS.
> >
> > Six addition Guidelines were discussed and finalized as follows:
> >
> > > * producing outside lawyer's opinions is inappropriate and jeopardizes the liability protection of the board;
> > >
> > > * directors should not interfere with ongoing negotiations between our lawyer and residents in dispute, such as examples only discussing the matter with the resident; harassing management; or advocating for the disputing party. All such questions belong in a board environment.
> > >
> > > * directors can request information from management and these will be processed when time is available; cannot direct management, should go through the president outside the board environment.
> > >
> > > * directors not to accuse management of lying or acting in bad faith; management should be treated with courtesy and respect.
> > >
> > > * directors not to compel the board to investigate itself as an agenda item (would be immediately treated as an ethical violation).
> > >
> > > * any director meeting with a (complaining) owner should declare

> that specific meeting at the next scheduled board meeting; and also produce a valid reason for the meeting which the board considers acceptable (otherwise an immediate ethical violation).

[24] Mr. MacNeil and Mr. Sera testified that the meeting on October 30th was not a Board meeting. Each witness stated that the meeting was an ethics or disciplinary panel review under By-Law No. 13. This by-law was enacted in April 2019 and addressed board governance and ethics. Mr. MacNeil testified that notes were taken during the meeting but that those notes were sealed and confidential, as required by By-Law No. 13.

[25] Mr. Triantos testified that he understood that the meeting on October 30th was a Board meeting where a motion was passed to discipline the Applicant and new guidelines were approved by the Board. All witnesses confirmed that no minutes of the October 30th meeting were provided or approved at a subsequent Board meeting.

[26] Articles 1.5 and 1.6 of By-Law No. 13 set out the process for the Board to respond in circumstances where a Board member is a party to litigation and /or subject to allegations of a breach of the Board Members' Code. Article 1.5 (a) reads as follows:

> 1.5 Litigation, Mediation and / or Arbitration and / or Board Members' Code of Ethics
>
> Where the director or a member of the director's household or family is a party to litigation, mediation, and / or arbitration involving the Corporation or is the subject of allegations regarding breach of the Code Members' Code of Ethics:
>
> (a) The director shall not be present for any portion of the meeting where the litigation, mediation and / or arbitration is discussed and shall not participate in any decision with respect thereto; …

[27] According to Article 1.5(b), a first alleged breach of the Code shall be discussed with the Board member and a second alleged breach shall become an agenda item at a Board meeting. The persons alleging a breach are required to outline their position at the Board meeting and then the Board member will have an opportunity to respond. Article 1.5(b) then explains the next steps as follows:

> After these presentations, the Board member, alleged to be in breach, shall not be present for any portion of a meeting where the breach is discussed by the remaining Board members and shall not participate in any decision with respect thereto. The remaining Board members shall vote on whether the Board member is in breach of the Board Members' Code of Ethics and whether he / she should

> be reprimanded or whether he / she should be asked to tender his / her resignation. If the majority of the Board at the meeting determines that the Board member has breached the Board Members' Code of Ethics and he / she should no longer qualify for membership on the Board, the Board member should be advised immediately. If the Board member fails to tender his / her resignation within three (3) business days of receiving notice of the Board's decision, he / she will, despite paragraph 7.03(5) of By-Law No. 6, be deemed to have resigned.

[28] I find that Article 1.5(b) describes a Board meeting where Board members are discussing an alleged breach of the Code and determining the appropriate penalty through a vote. Although the meeting may be characterized by the Board as an "in-camera" meeting, this is not a distinction made in either By-law No. 13 or the Condominium Act, 1998 nor is it meaningful. The use of the words "in-camera" does not cause it to be anything other than a Board meeting for which minutes are to be kept as records of the corporation that an owner may request. The business of the Board was conducted at the meeting on October 30th, with the result that a Board motion was passed to reprimand the Applicant and guidelines for Board conduct were finalized. I accept that the minutes of October 30, 2019 are minutes of a Board meeting.

The meeting on December 4, 2019

[29] On November 28, 2019, the Respondent's counsel on the discipline issue sent an email to the Applicant to invite him to a meeting at their office in order to assist and facilitate a mutually acceptable resolution to the issues involving his discipline as a Board member. A meeting was held at the lawyer's office on December 4, 2019 for the purpose of without prejudice discussions. The Applicant and Mr. Sera participated in the discussions which were facilitated by the Respondent's counsel, and they reached a tentative settlement about the Board's discipline of the Applicant.

[30] Mr. Triantos, Mr. Sera, Mr. MacNeil, and the Applicant attended a meeting on December 4, 2019, after the meeting at the lawyer's office. The December 4th meeting was also attended by another Board member and a Board Advisor.

[31] The Respondent provided the minutes of the December 4th meeting for the purposes of Stage 3 of this application to support its contention that the meeting was confidential and that the Applicant agreed to its confidentiality. The minutes are labelled as "In Camera Board of Directors Meeting" and "Private & Confidential." The purpose of the meeting as outlined in the minutes was to address the Applicant's request for a clean slate and exoneration of the disciplinary action that had been taken against him. At this meeting, the Applicant

and Mr. Sera presented the details of the agreement that had been reached between them during the earlier meeting at the lawyer's office. The minutes of the meeting state that "Board Guidelines" were introduced that were an amended version of the guidelines from the October 30th meeting. A motion to accept the Guidelines was passed by the Board. In addition, the Board passed a motion to withdraw the discipline against the Applicant based on certain terms, including that "all public board meeting minutes relating to this motion on this disciplinary action will be redacted when providing such minutes as a core document."

[32] The December 4th minutes were signed by Mr. Sera and Mr. MacNeil in their offices as president and secretary, respectively. Under their signatures, the minutes include a note that states "these minutes are sealed and are not for distributed to the public" [*sic*].

[33] The minutes of the December 4th meeting were never presented to the Board for approval at subsequent meetings. Mr. MacNeil and Mr. Sera stated that the notes of the meeting were not presented to the Board because the meeting was part of the disciplinary review and the notes were sealed in accordance with Article 1.6 of By-law No. 13 and the agreement of the Board members. The Applicant did not see these minutes until the Respondent provided them in Stage 3.

[34] Mr. Sera explained in his testimony that the minutes provided by the Respondent were incorrectly labelled as In Camera Board of Directors Meeting and should have been labelled as a disciplinary review. In my view, this distinction does not change the nature of the meeting, and I accept that the Board held a meeting on December 4th and that it transacted condominium business in that meeting by passing a motion related to the Board Guidelines and a motion about the disciplinary action taken against the Applicant. The minutes of this meeting are Board meeting minutes.

The meeting on February 11, 2020

[35] At the Board meeting on January 22, 2020, Mr. MacNeil brought a motion to initiate a complaint against Mr. Triantos for violation of the Code. A meeting was scheduled for February 11, 2020 at which time Mr. Triantos was to provide his response to the complaint.

[36] The Applicant attended the meeting on February 11th by teleconference and heard the response provided by Mr. Triantos. The Applicant left the meeting at the conclusion of the response because Mr. Sera asked him to declare a conflict of interest. Although he disagreed with the view that he had a conflict, he nonetheless recused himself and did not participate in the discussions about the

allegations.

[37] The Applicant stated that he never received a copy of the minutes of the meeting on February 11, 2020 despite being a Board member at the time and having attended part of the meeting. Both Mr. Sera and Mr. MacNeil testified that the meeting on February 11, 2020 was a disciplinary review under By-Law No. 13 and that the notes were confidential and not Board meeting minutes.

[38] Mr. Triantos stated that he received a letter from Mr. Sera on behalf of the Board on February 12, 2020 advising him that the Board had passed a motion at the February 11th meeting stating that he had breached By-Law No. 13. He did not receive copies of the minutes of this meeting.

[39] Similar to the meetings held on October 30 and December 4, 2019, I find that the meeting held by the Board for the purpose of a disciplinary review under By-Law No. 13 was a Board meeting and that the notes of the meeting are Board meeting minutes.

ISSUE 2: IS THE RESPONDENT ENTITLED TO REFUSE ACCESS TO THE RECORDS BECAUSE ITS BY-LAW NO. 13 PROVIDES THAT SUCH RECORDS ARE CONFIDENTIAL?

[40] The Respondent claimed that, even if the disputed records were Board meeting minutes, it could properly refuse the Applicant's request for the records because the records are confidential and sealed in accordance with By-Law No. 13. Mr. MacNeil explained that a separate and sealed minute book is kept for these minutes, and that Board members have agreed that they are confidential. Article 1.6 of By-Law No. 13 states:

> Separate minutes shall be kept for the portion of the meeting where the issue of litigation, mediation, arbitration and / or breach of the Board Members' Code of Ethics are discussed. These minutes shall not be available to those persons set out in Article 1.5(a).

The persons identified in Article 1.5(a) are a "director or a member of the director's household or family" who is a party to litigation, mediation, and / or arbitration involving the Corporation, or "is the subject of allegations regarding breach of the Board Members' Code of Ethics."

[41] The Respondent argued that the exemptions in section 55(4) of the Act are not exhaustive and that a particular record could be refused for a reason not specifically listed in the exemptions. In support of this position, the Respondent relied on the Tribunal's decision in *Landau v. MTCC 757*, 2020 ONCAT19, in

which the Tribunal found that solicitor-client privilege could justify a condominium's refusal to provide particular records.

[42] According to the Respondent, when the Board is considering allegations under By-Law No. 13, it is acting as a non-statutory disciplinary panel and it should be permitted to protect the confidentiality of its deliberations. The Respondent argued that the Board should be free to openly discuss the allegations without concern for the public disclosure of the details. The Respondent further submitted that, if these minutes were not kept confidential, there would be a chilling effect on the discussions as well as a potential breach of privacy for the affected Board member. The Respondent urged the Tribunal to recognize that condominium boards should have a reasonable discretion to maintain confidentiality over certain documents in order to protect privacy and protect against legal liability.

[43] As I have found that the Board was conducting business at these meetings by passing motions and establishing guidelines, I am not persuaded that the Board should be permitted to keep the minutes of these meetings confidential unless an exemption in section 55(4) of the Act applies. The Board's by-law and its decision to seal the records are not sufficient on their own to justify a refusal to provide the record. The Board's interest in maintaining the confidentiality of its discipline process does not outweigh the owners' interest in open access to records about the management and governance of the condominium corporation.

[44] I would also note that the Respondent redacted the Board meeting minutes it provided to the Applicant in response to his Request in order to remove details related to the disciplinary allegations, among other redactions. There is no evidence here to show that the Respondent could not have produced redacted versions of the disputed records to remove particularly sensitive and confidential information while still providing the portion of the minutes in which the motions and guidelines were passed.

[45] I therefore find that the Respondent is not entitled to refuse access to the Board meeting minutes on the basis that By-Law No. 13 provides that they are confidential.

ISSUE 3: IS THE RESPONDENT ENTITLED TO REFUSE ACCESS TO THE RECORDS UNDER SECTION 55(4)(b) OF THE ACT?

[46] Section 55(4)(b) of the Act allows a condominium to refuse to provide records relating to actual or contemplated litigation. The scope of "actual or contemplated litigation" is broader than solicitor-client privilege and litigation privilege (see *Bossio v. MTCC*, 2018 ONCAT 6).

[47] The Applicant made a statement to other Board members on November 27, 2019 that he was considering legal action against the Board regarding his disciplinary sanction. The Applicant and Mr. Sera then met at the offices of the Respondent's lawyers on December 4th in order to negotiate a settlement that would avoid any legal action, and the terms of the settlement were incorporated into the Board's motions and guidelines that were passed later on December 4, 2019.

[48] Despite the agreement between the Applicant and the Board about his discipline in December 2019, there has been ongoing animosity between them. This animosity extended to Mr. Triantos after allegations of his breach of the Code were brought forward by Mr. MacNeil in January 2020. On May 25, 2020, the Respondent's counsel wrote to the Applicant about a letter that he had circulated to unit owners. The Applicant's letter contained statements that board members had engaged in many improprieties including making "false allegations against their fellow Board members which resulted in disciplinary action." In his letter, Respondent's counsel stated that the Board believed that the Applicant was engaging in defamation and a breach of his fiduciary duties through the circulation of the letter, and further advised that "the Corporation will not hesitate to take any action against you regarding any defamatory statements you make about the board." The Applicant then retained counsel, who responded to the Respondent by letter dated July 29, 2020.

[49] The dispute between the parties continued after the Applicant made his Request for Records on September 10, 2020. Mr. Sera issued a letter to the owners on October 15, 2020, and both the Applicant and Mr. Triantos produced letters in response that they distributed to unit owners. In the Applicant's responsive letter, he explained that the Respondent had accused him of defamation, and he stated that he had not apologized for his statements because an apology was not necessary. He wrote that he wanted the affairs of the condominium corporation to be an open book and that he would waive the confidentiality in relation to his disciplinary matters. Mr. Triantos also wrote a letter to unit owners. He identified in his letter that he had retained a condominium lawyer and that, although he believed he had a strong legal case in relation to the disciplinary action taken against him, he had to consider the legal expenses involved for himself and for the condominium corporation prior to taking legal action.

[50] Based on the evidence, I find that there is contemplated litigation in relation to the disciplinary action taken against the Applicant and Mr. Triantos and that the Board meeting minutes of October 30, 2019, December 4, 2019 and February 11, 2020 are records related to contemplated litigation. I find that the Respondent is justified in refusing the records requested under section 55(4)(b) of the Act.

ISSUE 4: IS THE APPLICANT DISENTITLED FROM ACCESS TO THE RECORDS BECAUSE HIS REQUEST IS NOT SOLELY RELATED TO HIS INTEREST AS AN OWNER, HAVING REGARD TO THE PURPOSES OF THE ACT?

[51] Given my decision that the Respondent is entitled to refuse the records on the basis that they relate to actual or contemplated litigation, it is not necessary to determine whether the Applicant is requesting the records for a purpose not solely related to his interest as an owner.

ISSUE 5: WHAT FEES, COSTS AND PENALTIES, IF ANY, SHOULD APPLY?

[52] The Applicant sought his costs of the application and a penalty of $500 assessed against the Respondent for its refusal to provide the disputed records. I have determined that the Respondent was justified in refusing the records and I find no basis on which to order costs or a penalty in these circumstances.

E. CONCLUSION

[53] The Respondent was justified in refusing to provide the disputed records to the Applicant. I have found that there were no records in relation to a meeting on September 6, 2019 and that the minutes of the meetings held on October 30, 2019, December 4, 2019 and February 11, 2020 were Board meeting minutes. I have also found that the Applicant's right to examine these records is restricted by section 55(4) of the Act because the records are related to actual or contemplated litigation.

[54] There is no order for costs and no penalty awarded.

Jennifer Webster
Member, Condominium Authority Tribunal

Released on: June 8, 2021