CONDOMINIUM AUTHORITY TRIBUNAL

DATE: June 25, 2021
CASE: 2020-00194R
Citation: Gagnon v. Carleton Condominium Corporation No. 331, 2021 ONCAT 56

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

Member: Jennifer Webster, Member

The Applicant,
Edith Gagnon
Self-Represented

The Respondent,
Carleton Condominium Corporation No. 331
Represented by Cathy Basso

Hearing: Written Online Hearing – January 7, 2021 to June 3, 2021

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant, Edith Gagnon, is the owner of a unit of the Respondent, Carleton Condominium Corporation No. 331. Ms. Gagnon was also a director of the Respondent, from November, 2019 to June, 2020.

[2] The Applicant brought this application in relation to four Requests for Records (the "Requests") that she submitted to the Respondent between May, 2019 and June, 2020, under section 55 of the Condominium Act, 1998 (the "Act"). She claims that the Respondent has failed to provide requested records to her and has failed to keep adequate records as required by the Act. In addition, she alleges that the Respondent has falsified its records related to the board meeting minutes of November 22, 2018. She also claims that the Respondent has proposed unreasonable fees for the production of certain non-core records. Finally, she requests an order from the Tribunal assessing a penalty in relation to the Respondent's refusal to provide records and her costs in this application.

[3] The Respondent claims that it provided a timely response to all of the Applicant's

Requests and delivered all core records to her. The Respondent further argues that it proposed reasonable fees for the delivery of the non-core records and that it concluded that the Applicant had abandoned her request when she did not respond about the proposed fees.

[4] The hearing was partially conducted as a bilingual hearing. Although the Applicant elected to participate in this hearing in English, she and I communicated in French, as needed, throughout the hearing. Many of my written communications to the parties were conducted in English and French at the same time. Her testimony and that of the Respondent's witnesses were provided in English. At the Applicant's request, the Tribunal translated a portion of the Respondent's cross-examination questions from English to French, and the French translation was uploaded to the CAT-ODR platform as an exhibit.

B. ISSUES

[5] The issues to be decided in this application are:

1. Did the Respondent refuse to provide the records requested by the Applicant without reasonable excuse?
2. Is the Respondent keeping adequate records in accordance with section 55(1) of the Act?
3. Did the Respondent request reasonable fees in relation to the records requested?
4. Should a penalty be assessed against the Respondent?
5. Should costs be awarded?

[6] On the first issue, I have found that the Respondent provided all records to the Applicant. On the second issue, I have found that the Respondent failed to keep adequate records by not correcting errors in its Periodic Information Certificate (PIC). On the third issue, I have found that the Respondent proposed an unreasonable fee and I have ordered the fee to be amended. I have awarded costs to the Applicant, but I have not assessed a penalty. The reasons for my decision follow.

C. EVIDENCE & ANALYSIS

[7] Evidence was provided in this hearing through documents and witness statements. The three witnesses were the Applicant, Ms. Basso, the Respondent's treasurer and representative, and Kathleen McMullen, the Respondent's former condominium manager. Ms. McMullen held the position of condominium manager

with the Respondent at all relevant times in relation to the Applicant's four Requests.

[8] The Applicant proposed Bernard Lagan and Dianne Soutif as two further witnesses. She intended to provide evidence, through their testimony, about the issues related to the Tribunal's decision in *Lagan v. Carleton Condominium Corporation No. 331*, 2020 ONCAT 30 ("*Lagan*"). I did not allow these witnesses on the basis that they did not have testimony relevant to the issues in this application.

Issue 1: Did the Respondent refuse to provide records to the Applicant?

Request for Records dated May 30, 2019 ("R1")

[9] The Applicant submitted R1 on May 30, 2019 to request the certificate of completion of the CAO (Condominium Authority of Ontario) Director Training Program for each member of the board. On June 5, 2019, Ms. McMullen sent the Respondent's Response to the Applicant to the email address provided. Ms. McMullen attached electronic records of the training certificates for four of the five board members.

[10] Ms. McMullen testified that, at the time she sent the Response, she did not have the training certificate for Ms. Basso. She further stated that she contacted Ms. Basso and received the training certificate from her later on June 5, 2019, but after she had sent the Response to the Applicant. She then emailed the certificate to the Applicant. Ms. McMullen later discovered on July 8, 2019, that the email with Ms. Basso's certificate had been placed in her archives folder, and it had not been sent to the Applicant. She testified that, when she realized that Ms. Basso's certificate had not been sent, she provided it to the Applicant as part of the Response to her second Request for Records.

[11] The Applicant confirmed that she had received the records requested in R1. She argued, however, that the Respondent had effectively refused to provide the training certificates because it delayed providing the record in relation to Ms. Basso's training. The Applicant further relied on the Respondent's delay in providing this record to show part of a pattern of delays and refusals in responding to requests, and she claimed that Ms. McMullen's explanation about an unsent email was not credible, given that the first email had been sent and received.

[12] It is the Respondent's position that it provided the records and that the cause of the delay was a technical issue with Ms. McMullen's email. Moreover, the Respondent argues that the delay was immaterial due to the length of the delay.

[13] I find that the Respondent did not refuse to provide the requested records to the Applicant. The Tribunal has recognized that a delay in providing a record may be, in effect, a refusal. Section 13.3 of Ontario Regulation 48/01 (the "Regulation") requires a condominium to respond to a request for records within 30 days and the Respondent provided 4 out of the 5 records within six days of her request. Although Ms. McMullen stated that she also sent the fifth record on June 5, 2019, it was not actually sent from her email program and she ultimately provided the record on July 8, 2019, which was 39 days after the Respondent had received R1. I agree that Ms. McMullen should have been more attentive to her email account to ensure that the second email had been sent. Nonetheless, I accept that Ms. McMullen attempted to provide the record on June 5, 2019 and corrected the error on July 8, 2019 when she became aware that the email had not been sent. Given this explanation and the short length of delay, I do not find that the Respondent refused to provide the record.

Request for Records dated June 19, 2019 ("R2")

[14] On June 19, 2019, the Applicant submitted R2 to the Respondent to request the following core records:

- the condominium corporation declaration;
- the by-laws;
- the corporate rules;
- the periodic information certificates for the past 12 months;
- the budget for the current fiscal year;
- the most recent approved financial statements;
- the most recent auditor's report;
- the current plan for the future funding of the reserve fund;
- the mutual use agreements;
- the minutes of meetings held within the last 12 months; and
- any additional records specified in a by-law of the corporation.

[15] Ms. McMullen provided a response to R2 on July 8, 2019. She testified that she sent two emails to the Applicant with the board's response and the records. She explained that she sent two emails because the file size of the attachments was too large to send in one email.

[16] The Respondent submitted Ms. McMullen's two emails. The first email shows a date of July 8, 2019 and a time of 12:03 p.m. In this email, Ms. McMullen wrote to the Applicant as follows: "Per your request for records from today, June 19, 2019. As some of these files are larger files I will send them in a few emails. Please

advise should you have difficulty opening the documents". Despite Ms. McMullen's use of the word "today" in her email, I find that the evidence shows that the email was sent on July 8, 2019. There were six attachments to this email, which were the board's Response, the director training certificate for Ms. Basso, the Respondent's rules and regulations, By-Laws 1 to 3, 5, and 7 to 14, the Respondent's declaration and amendment, and a document identified as "all other core records.

[17] The second email from Ms. McMullen to the Applicant shows a time of 4:46 p.m. on July 8, 2019. There were 11 attachments to this email. Ms. McMullen provided the following information to the Applicant in the second email:

> Per your request for records from today, June 19, 2019. See attached the second batch with the core records requested. I have attached the Reserve Fund Study, Approved Audit, General Ledger from May 1, 2018 to May 31, 2019, and the board meeting minutes from June 2018 to June 2019. Please advise should you have difficulty opening the documents and I will make arrangements to deliver in a different method. If you wish to discuss any of these records or concerns, please do not hesitate. If you prefer, we can schedule a meeting to go through any concerns.

[18] The Applicant testified that she did not receive two emails from Ms. McMullen on July 8, 2019 in response to R2. She confirmed that she received the first email with attachments, but she stated she did not receive the second email. The Applicant sent an email to Ms. McMullen on September 3, 2019 as a reply to the first email of July 8th. She stated in the email that the response to her request was "past due" and that she had only received one email in response.

[19] Ms. McMullen stated that she responded to the Applicant by email on September 4, 2019 and provided the remaining core records as attachments to the email. She also stated that she did not receive a message in her email program that either the second message on July 8th or the September 4th message had failed to deliver.

[20] The Applicant testified that she did not receive the email dated September 4, 2019. She challenged Ms. McMullen's statement that she had sent the second email on July 8th and the email on September 4th. She argued that Ms. McMullen was fabricating the email records in order to claim that records has been provided that had not been. In addition, the Applicant noted that, based on the time of the September 4th email, Ms. McMullen would have been attending a board meeting and she would not have been able to send an email. Ms. McMullen clarified in cross-examination that she was able to send emails during board meetings and that she would do so frequently.

[21] Ms. Basso stated that the board had understood that all core records had been provided in response to R2 based on reports from Ms. McMullen. She became aware that the Applicant had not received some of the core records at Stage 2 of the Tribunal process and uploaded the set of records that had been attached to Ms. McMullen's second email of July 8th.

[22] The Applicant acknowledged that she had received the second set of core records at Stage 2. She argued, however, that the Respondent's failure to provide the records until Stage 2 was an effective refusal to provide the records to which she was entitled.

[23] There was a lengthy delay between the Respondent's receipt of R2 and the delivery of the second set of core records. The Applicant sent R2 to the Respondent on June 19, 2019, and she received the second set of core records in October, 2020 at Stage 2 of the Tribunal's process. The Respondent argued that there was no refusal to provide the records and instead characterized the delay as related to issues with the Applicant receiving emails. The Respondent stated that, as soon as it became aware in Stage 2 that the Applicant had not received the records, it provided them through the Tribunal's platform.

[24] The Applicant challenged the reliability of the Respondent's claims that the emails had been sent with the attachments of the second set of core records. The Applicant asserted that Ms. McMullen's statements that she had sent the records were not credible because Ms. McMullen has a record of poor performance of her duties and the Applicant had never received the emails.

[25] There was a delay in providing the second set of records to the Applicant due to Ms. McMullen's lack of attention to her emails. As of July 8th, she was aware that there were technical issues with her email because she had already discovered that her June 5th email with Ms. Basso's training certificate had not been sent to the Applicant. Ms. McMullen had a responsibility to be more diligent with respect to her emails in response to Records Requests given that she knew an earlier email had not been sent. It is not sufficient for her to state that she did not receive a message that delivery had failed because she had not received such a message with respect to the unsent June 5th email. The Respondent's board delegated the responsibility of responding to Records Requests to Ms. McMullen, and she failed to ensure that a response was provided in a timely way.

[26] I also accept that the board needed to exercise more oversight of Ms. McMullen. There was a special owners meeting held on June 19, 2019. All board members attended this meeting, and one of the topics at this meeting related to owners' concerns about a lack of responsiveness from Ms. McMullen. The board members

were aware that owners were not receiving communications from the condominium manager, and the board should have taken the necessary steps to ensure that the core records were provided to the Applicant.

[27] At the same time, I find that the Applicant's actions contributed to the delay in receiving the second set of core records. She did receive the first email from Ms. McMullen on July 8th with a series of attached records and the information that the records would be sent in a few emails due to the file size. The Applicant was also one of the owners who expressed concerns about Ms. McMullen's performance at the special owners meeting on June 19, 2019. Nonetheless, the Applicant did not follow-up about the other core records until September 3, 2019. She also did not follow-up with either the board or Ms. McMullen after her email on September 3, 2019. The board and Ms. McMullen believed that the Applicant had received the September 4th email and the attached core records. Also, the Applicant had advised Ms. McMullen in May 2019 that she did not regularly monitor her email because it was the address that she used for junk email. The Applicant became a member of the board in November 2019, and there is no evidence that she ever identified to the board or Ms. McMullen during her term on the board that the second set of core records had still not been received.

[28] Although the Tribunal has found that a delay in responding to a request for records may, in some circumstances equate to a refusal (see Mariam Verjee v. York Condominium Corporation No. 43, 2019 ONCAT 37), in the circumstances of this case, I do not find that the Respondent refused to provide the requested records. There was no intention to refuse or to delay the records. Rather, the condominium manager and the Applicant were not attentive in their use of email communication and each of them failed to adequately monitor their email use to ensure the delivery of the records

[29] The Applicant also argued that, in addition to the delay in providing the core records in response to R2, the Respondent had refused to provide her with other particular records. She stated that the Respondent had failed to provide:

- The minutes of the board meeting of November 22, 2018;
- the correct By-Laws;
- the minutes of the owners meeting on June 19, 2019;
- the expense ledger for May 2018 to May 2019;
- the current plan for the funding of the reserve fund; and

- an Information Certificate Update (ICU)

[30] For the reasons that follow, I do not find that the Respondent refused to provide any of the particular records identified by the Applicant.

Minutes of November 22, 2018 Board meeting

[31] The Respondent uploaded the minutes of the Board meeting held on November 22, 2018, as part of the second set of core records at Stage 2. The Applicant stated that she had received a copy of the November 22nd minutes from another owner prior to Stage 2 and that the version provided by the Respondent was a different document. She claimed that the Respondent had falsified the minutes for its own advantage and particularly for the advantage of Ms. Basso.

[32] During Stage 3, Ms. Basso agreed that the minutes uploaded at Stage 2 were incorrect and she explained that Ms. McMullen had provided her with the second set of core records, which included this incorrect version of the minutes. She had relied on the records supplied by Ms. McMullen when she uploaded the records at Stage 2. She provided the November 22nd minutes that had been approved by the board during the hearing.

[33] The difference between the two versions of the minutes is that the incorrect version includes a motion about board member reappointment. The motion is recorded as having been moved by Dianne Soutif and seconded by Carine Grant. According to the motion in this version of the minutes, “Cathy Basso and Mike Adams were reappointed to the Board following their completion of the CAO Certification.”

[34] Ms. Basso testified that the board was not aware of this version of the minutes and that the board had approved the version she provided at Stage 3 which did not include this motion. She recalled that she and Mr. Adams had been reappointed to the board but was not aware that this motion had been omitted from the board’s minutes.

[35] Ms. McMullen explained that the incorrect version of the minutes was her annotated version and not the official approved version. She added the motion about the reappointment of Ms. Basso and Mr. Adams because she noted that the minute taker had failed to include it. Ms. Basso stated that the board did not direct or authorize Ms. McMullen to make this change to the November 22nd minutes.

[36] The Applicant disputed that the minutes were annotated. She argued that the Respondent intentionally provided a falsified version of the November 22nd

minutes and that this action amounted to a refusal to provide records.

[37] The Applicant further submitted that the Respondent had a responsibility to closely scrutinize the documents provided by Ms. McMullen on the basis that the Tribunal had already found her to have engaged in document tampering in a previous application, Lagan. I find that the Applicant has misrepresented the Tribunal's conclusions in the Lagan decision. The Tribunal addressed Mr. Lagan's allegations of document falsification by Ms. McMullen at paragraph 27 of its decision as follows:

> I note that the Applicant characterized Ms. McMullen's annotated version of the minutes as "falsified" and cross-examined Ms. McMullen on some of the differences between it and the paper document Ms. Soutif had delivered. In his closing statement, he submitted "every deletion or alteration is favourable to the individual doing the editing. And this is an individual that has already been shown to be more than capable of taking documents and altering them in order to deceive." I find these allegations to be unfounded. Given that Ms. McMullen was aware that the Applicant has already received a paper copy of the minutes and the fact that she rectified her error by uploading a correct electronic version to the CAT-ODR system, I accept her explanation that she simply made a mistake when she e-mailed the Applicant a document intended for her own use. Any edits or annotations she might have made for own purposes are not relevant to the case before me.

[38] Similarly, Ms. McMullen has provided what she described as an annotated version of the November 22nd minutes to Ms. Basso as the Board meeting minutes. I do not accept that these are annotated minutes but rather minutes that Ms. McMullen corrected at some time after the minutes were approved because she realized the motion had been omitted. It is clear on the evidence that the board did not authorize her to make this change and that she did not bring the change to the attention of the board.

[39] The error in providing an incorrect version was corrected by Ms. Basso, who confirmed that these were not the November 22nd minutes that had been approved by the board. Ms. Basso has provided the approved minutes. I find that the Respondent did not refuse to provide the board meeting minutes of November 22, 2018. Further, although the Respondent was careless in not reviewing the record provided by Ms. McMullen for accuracy, I do not conclude that the Respondent intentionally provided a falsified record to the Applicant.

The Respondent's By-Law

[40] The Applicant argued that the Respondent had failed to provide her with the current by-laws in response to R2. Her concern is that By-law No. 1 was provided

to her but that she later received confirmation that it had been repealed. She stated that By-law Nos. 4 and 6 had not been provided because they had been repealed and that the delivery of By-law No. 1, even though it was also repealed, was misleading.

[41] I do not agree that the Respondent has failed to provide its by-laws. The Applicant received By-law Nos. 1 to 3, 5, and 7 to 14 by email on July 8th. The fact that the Respondent provided more, rather than less, than what the Applicant requested by including the repealed By-law No. 1, is not a refusal to provide the requested records.

The minutes of the owners meeting of June 19, 2019

[42] The Applicant claimed that the Respondent failed to provide her with minutes of the owners meeting held on June 19, 2019 in its Response to R2. She stated that, because her Request was made on June 19th, these minutes were part of the category of requested documents of minutes of meetings held within the last 12 months. She acknowledged that she received a paper copy of draft minutes in October 2019, but she claimed that she had requested the minutes in electronic form in R2 and that the Respondent had failed to provide an electronic version. She also confirmed that minutes of the owners meeting were included in the owners' package for the 2020 Annual General Meeting, and that she had received these minutes with the package.

[43] The Applicant argued that the Respondent's actions amounted to an effective refusal because the minutes were provided to her outside the 30-day time frame and not electronically, as she had requested.

[44] The Respondent has not refused to provide June 19th minutes to the Applicant. As of 30 days from the date she filed R2, there were no minutes in relation to this meeting. In October 2019, when draft minutes of the meeting had been prepared, a paper copy was hand-delivered to her. The issue of whether the failure to provide these draft minutes in electronic version was a refusal by the Respondent to provide records was addressed by the Tribunal in Lagan, as follows:

> [26] With respect to the minutes of the June 19, 2019 owners' meeting, I find that there was no refusal by the Respondent to provide records. The Act states that the corporation records may be kept in paper or in electronic form. While the Applicant requested and may have preferred an electronic version, he received a paper copy of the draft meeting minutes on October 15, 2019, within the 30 day time frame for response to records requests set out in section 13 of Ontario Regulation 48/01. However, draft minutes of meetings do not form part of a corporation's records. Because the owners' meeting minutes had not yet been approved by the owners, it

was not a corporation record and the Respondent was not required to provide any copy to the Applicant.

[45] I see no reason to depart from the Tribunal's decision in Lagan. There has been no refusal to provide minutes of the June 19th meeting because, at the time of the Applicant's request, no such minutes existed. The Respondent did not have an obligation to provide a record, in electronic format or otherwise, that did not exist. The Respondent later provided draft minutes in October 2019 and finalized minutes for owners' approval in November 2020. The Applicant has received the minutes of the June 19th meeting.

Expense Ledger for May 2018 to May 2019

[46] The Applicant claimed that the expense ledger referenced in Ms. McMullen's second email of July 8th was not provided by the Respondent among the records it uploaded to the CAT-ODR system in Stage 2. Ms. Basso explained that the expense ledger information was included in the financial reports she provided in Stage 2. She noted that Ms. McMullen provided the ledger as a single file using accounting software and Ms. Basso provided the documents from the board's approved financial statements. The evidence does not show that the Respondent has refused to provide any financial documents to which the Applicant was entitled.

Current Plan for Future Funding of the Reserve Fund

[47] The Applicant argued that the Respondent was required to create a plan for future funding of the reserve fund and that such a plan had not been delivered to her.

[48] The Respondent provided the reserve fund study report dated March 20, 2019 as part of the second set of core records. Ms. Basso explained that the Respondent did not have a separate plan for future funding of the reserve fund and that, therefore, there was no additional record to provide to the Applicant.

[49] I do not have the authority to order a condominium corporation to produce a record that was never created, and I cannot find that there has been a refusal to provide a record that does not exist.

Information Certificate Update

[50] The Applicant identified that the Respondent did not provide an Information Certificate Update (ICU) as part of the second set of core records in response to R2. She argued that an ICU was required because Ms. Basso and Mr. Adams were disqualified as directors on July 23, 2018 when they had failed to complete

their mandatory CAO director training within six months of their election.

[51] The Respondent acknowledged that an ICU was not issued within 30 days of July 23, 2018 to notify owners that two directors had not completed their training and had ceased to be directors. In addition, the Respondent noted that it had directed Ms. McMullen to prepare an ICU in September 2018 to correct clerical errors in the Periodic Information Certificate (PIC), and that Ms. McMullen has not prepared the ICU.

[52] As with the plan for funding the reserve fund, I cannot order the Respondent to produce a record that does not exist, nor can I find that there is a refusal to provide the ICU when it was never created.

Request for Records dated December 12, 2019 ("R3")

[53] The Applicant provided R3 to Ms. McMullen on December 12, 2019. In this request, the Applicant was seeking the following records in relation to water leaks at her unit:

- Any and all documents related to foundation water leaks including correspondence from all contractors, fees / invoices or cost, photos from July 25, 2018 to the present;
- Any and all documents related to bedroom roof water leak, including what was done and communication from contractor saying it has been resolved and how from July 25, 2018 to the present; and
- Any and all correspondence about the garage leak from February 2019 to the present.

[54] The Applicant requested that all records be provided to her electronically.

[55] The Applicant was a member of the Respondent's board at the time she submitted R3. On January 13, 2020, she advised the board that she had not received a response to her request. Ms. McMullen provided the board's Response to R3 by email to the Applicant on January 13, 2020. She wrote in the email: "here is the response to your request for records. Please advise if you wish to proceed with the request. We will need your signed form returned." The Applicant responded to Ms. McMullen on January 14, 2020 that she was not able to open the attached Response. Although Ms. McMullen resent the Response form on January 15, 2020, the Applicant was still not able to open the form.

[56] Ms. McMullen provided a paper copy of the Response to the Applicant in her mail box on January 16, 2020. The Applicant confirmed that she received the

Response on January 16th.

[57] The Respondent's Response to R3 indicated that the records were non-core records and provided an estimate of the fee for providing access to the records. The total estimated fee was $200.00, and the Respondent outlined that the fee was the sum of $100.00 for four hours of labour at $25.00 per hour and a $100.00 delivery fee. The Respondent confirmed that the records would be delivered in electronic form once payment of the fee had been received.

[58] On February 17, 2020, the Applicant wrote to Ms. McMullen about the Response to R3. She asked "to know what the 500 pages includes" in order to decide about her request. She sent a second email to Ms. McMullen on February 24, 2020 to ask about the 500 pages and followed up again with an email on March 11, 2020. The Applicant testified that she was seeking clarification of the estimated fees and that she did not receive a response to any of these three emails.

[59] It is not clear from the evidence how the Applicant became aware that the Respondent believed that there were 500 pages related to R3 given that the Respondent did not specify a number of pages in its Response. Ms. Basso testified that she had overheard the Applicant and Ms. McMullen discussing R3 at the February 2020 Board meeting, but she stated that she was not clear about the content of their conversation. Ms. McMullen also testified that she discussed R3 with the Applicant at the board meeting on January 16, 2020. The Applicant denied having a conversation with Ms. McMullen about R3 or the Response to her Request.

[60] I do not accept that the Applicant never discussed the calculation of the fees for the records requested in R3 because, at some time between receiving the response on January 16th and her email to Ms. McMullen on February 17th, she learned that the Respondent had estimated that there were 500 pages of records related to her request. The Applicant offered no explanation as to how she became aware that the records involved 500 pages, only that she did not understand why there were so many pages and she sought clarification. Whether a discussion occurred with Ms. McMullen at a board meeting or at some other time, it is clear that the Applicant had some discussion with her about the fees prior to the first email on February 17th.

[61] There is no evidence, however, of any response from Ms. McMullen to the emails from the Applicant requesting clarification of the fee.

[62] The Respondent provided some records in response to R3 through the CAT-ODR platform at Stage 2. The Applicant claimed that the response was incomplete, and

that the Respondent had refused to provide the records without reasonable excuse because it never clarified the fees.

[63] The Respondent submitted that it considered that the Applicant had abandoned her request in R3 because she never paid the fee. The board believed that Ms. McMullen had explained the fee to the Applicant and that she had decided not to pay the fee.

[64] In these circumstances, I do not find that the Respondent refused to provide the records requested in R3. The Respondent proposed a fee to the Applicant, which she did not pay. The Applicant explained that she did not pay the fee because she was seeking clarification from Ms. McMullen, and that such clarification was never received. Again, I note that the Applicant was a board member at the time and she could have identified the issues to the board and to Ms. McMullen in order to resolve the issue of the fee and the delivery of the records.

[65] The Respondent was not refusing to provide the records; rather, it was waiting for the Applicant to pay the fee and return the signed response with her payment.

Request for Records dated June 4, 2020 ("R4")

[66] The Applicant stated that she sent R4 to Ms. McMullen by fax on June 5, 2020, although the actual form is dated June 4, 2020. She identified the requested records in two pages attached to the Request. The records were divided into the two categories of "update on" and "follow up on". In each category, the Applicant listed nineteen bullet points related to issues with her unit. These bullet points included, for example, "status on uneven driveway and pathways leading toward the house, as well as hole under front balcony with mice getting there" and "damages made by contractors inside the house when fixing foundation leak (walls)." The Applicant concluded the bulleted list with the following bullet: "To name a few. Please refer to your list and include any requests made even if not included in this request since they are follow up, and as well as status from previous CAO requests unfulfilled for months."

[67] Ms. McMullen sent an email to the Applicant on July 27, 2020 to ask for a time extension for a Response to R4 because she had just received the request. She explained in her testimony that she had been working remotely due to the COVID-19 public health restrictions and that she had not been aware of R4 until some time after the fax was received.

[68] Ms. Basso provided the board's response to R4 on August 7, 2020. She apologized for the delay in responding and explained that the delay had been

caused by the pandemic and the fact that Ms. McMullen was working from home. On the Response, the Respondent indicated that the Applicant could not examine or obtain a copy of the records because the list attached to R4 did not identify specific records or documents. Ms. Basso also advised the Applicant in her August 7th email that "if there are specific documents that you would like to review please fill out a new request itemizing the specific documents and please send by email or at least notify us by email or phone that it was faxed."

[69] The Applicant challenged the Respondent's explanation for its late Response and submitted that there was no reasonable excuse for not providing a response within the 30-day time frame prescribed by the Regulation. She also argued that the Respondent had refused her request for records.

[70] The Respondent submitted that R4 was not a request for records but merely a list of concerns and questions. It did not provide any records in response because there were no records requested.

[71] Section 55(1) of the Act requires a condominium corporation to keep adequate records and lists certain records that are included in this requirement. Section 13.1 of the Regulation prescribes the records of a condominium corporation for the purpose of paragraph 11 of section 55(1) of the Act. Each record enumerated in the Act and the Regulation is a reference to a particular document created, received or maintained by the corporation. In R4, the Applicant was not requesting records. She was requesting answers to specific questions about the status of repairs done to her unit.

[72] I find that the Respondent provided an appropriate response to R4 when it advised the Applicant that she had not identified specific records or documents and suggested that she submit another request with specific requests. The Respondent did not refuse to provide records in response to R4 because no records had been requested. In addition, I accept the Respondent's explanation for the delay as a reasonable excuse given that Ms. McMullen was working remotely due to public health restrictions.

Issue 2 – Is the Respondent keeping adequate records in accordance with s.55(1) of the Act?

[73] Section 55(1) of the Act requires a condominium corporation to keep adequate records.

[74] Although the Act does not include a definition of "adequate", the decision in McKay v. Waterloo North Condominium Corp. No. 23, 1992 CanLII 7501 (ON SC)

provides some guidance as to what constitutes adequate records:

> 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.

[75] The standard of adequacy requires accurate records but does not require perfection (see *Yeung v. Metropolitan Toronto Condominium Corporation No. 1136*, 2020 ONCAT 33).

[76] The Applicant's arguments about the Respondent's inadequate record keeping were as follows:

- the Respondent provided by-laws to her, which included By-Law No. 1 and this by-law has been repealed;
- the failure to create a plan for the future funding of the reserve study is a failure for the board to fulfil mandatory duties and, therefore, an example of inadequate records;
- the failure to complete an ICU after the disqualification of Ms. Basso and Mr. Adams is a failure to comply with the requirements of the Act, and therefore, an example of inadequate records;
- the PICs provided by the Respondent are inaccurate because they contain incorrect information about board members; and
- the Respondent has deliberately falsified the board minutes of November 22, 2018 in an effort to mislead the owners about the status of Board members.

[77] The Respondent made an error in providing By-Law No. 1 to the Applicant because this by-law had been repealed. The issue related to this by-law does not raise a concern about adequacy. The records are adequate but a mistake was made in providing a repealed by-law. This mistake was corrected by the Respondent and it confirmed to the Applicant that this by-law had been repealed.

[78] The Respondent's plan for the future funding of the reserve fund is the plan provided to it by the engineering firm. The Applicant argued that a separate plan was required and the board's failure to develop a plan was a failure to keep adequate records. I do not find that the Respondent's decision to adopt the plan developed by the engineering firm, and to forego creating a separate document from the one provided by the firm, renders the plan an inadequate record.

[79] The three remaining issues raised by the Applicant in relation to the adequacy of records are inter-related.

[80] Throughout her evidence and cross-examination of the Respondent's witnesses, the Applicant challenged the Respondent's process for managing the disqualification of Ms. Basso and Mr. Adams for failure to complete their mandatory CAO director training. She identified that Ms. Basso and Mr. Adams were disqualified in July, 2018 and that the Respondent failed to provide an ICU to the owners. The Applicant argued that the PICs were inadequate because they contained errors, but particularly that the PICs continued to identify these two individuals as board members when they had been disqualified. In addition, she claimed that the board unlawfully permitted these two members to continue to serve despite their disqualification. According to the Applicant, the Respondent falsified the November 22, 2018 board meeting minutes in order to cover up its decision to allow Mr. Adams and Ms. Basso to act despite their disqualification.

[81] Ms. McMullen and Ms. Basso testified that technical issues with the CAO's website had prevented the directors from completing the mandatory training prior to November 2018. They also confirmed that Ms. Basso and Mr. Adams completed the training in early November, 2018 and were re-appointed to the board after completing the training.

[82] Neither McMullen nor the board understood that an ICU was required within 30 days of the disqualification of Ms. Basso and Mr. Adams, and therefore, no ICU was prepared. In 2019, the board sought legal advice about the ICU and learned that it was required in relation to the disqualification. The board directed Ms. McMullen to prepare an ICU based on this legal advice. Ms. McMullen did not, however, issue the ICU due to what she characterized as an oversight due to her volume of work related to issues arising from a tornado that happened in June, 2019.

[83] Ms. Basso also provided evidence of an email thread in September 2018 through which board members directed Ms. McMullen to correct the errors in the PIC. Ms. McMullen did not correct these errors, and the board did not follow-up to ensure that this was done.

[84] The Respondent's failure to issue an ICU and to correct the PICs are both attributable to the condominium manager. The board has delegated these responsibilities to the condominium manager, but the board is still responsible under the Act for ensuring that the ICU and the PIC are issued. I find that the failure to correct the PICs in relation to the board member disqualification is a failure to keep adequate records. The failure to issue the ICU is an apparent failure to comply with the requirement under the Act to do so, but I do not find this to be an issue necessarily relating to the duty to keep adequate records under s.55(1) of the Act.

[85] Finally, the Applicant claimed that Ms. McMullen and the board had engaged in a deliberate alteration of the November 22, 2018 minutes. The Applicant did not argue that the existence of two version of the minutes meant that the Respondent was not keeping adequate records. She instead argued that the approved minutes were correct, and that Ms. Basso and Mr. Adams had never been re-appointed to the Board. In her view, they had continued to serve despite their disqualification and this called into question every act and decision of the board from the date of their disqualification forward. She argued that Ms. McMullen had tampered with the approved minutes to mislead the owners and that the Tribunal should order penalties and other remedies in response to her alteration of the approved minutes.

[86] Ms. Basso and Ms. McMullen testified that a motion was passed at the meeting on November 22, 2018 to re-appoint Ms. Basso and Mr. Adams as board members because they had completed the training. The board's approved minutes do not include this item. Ms. Basso and Mr. Adams continued to serve as board members after the November 22nd Board meeting, and Ms. Basso was re-elected to the Board at the 2019 AGM and continues to serve on the board. The Applicant submitted that the evidence did not show that the two board members were re-appointed. Nonetheless, the Respondent has provided the Applicant with the approved minutes of the November, 2018 board meeting and I have no basis for a finding that the minutes in question are evidence of inadequate record keeping by the Respondent.

[87] I wish to be clear, however, that no inference is to be taken from this conclusion in regard to the status of Ms. Basso or Mr. Adams as directors of the Respondent, or as to the allegations the Applicant has made against Ms. McMullen. Such matters are outside of the jurisdiction of this Tribunal either to determine or to remedy.

Issue 3 – Did the Respondent request reasonable fees in relation to R3?

[88] The Respondent requested a fee of $100 for four hours of labour and a delivery

fee of $100 in relation to the records requested in R3. The Applicant submitted that this fee was not reasonable, particularly given that she had sought clarification of the fee and Ms. McMullen did not respond to her. She requested that the Tribunal order the Respondent to provide the records to her at no cost on the basis that the fee was unreasonable and the Respondent had failed to respond to her requests for clarification of the fees. She also claimed that the records should be provided at no cost to her as part of the penalty that should be assessed against the Respondent in the context of all the issues with records she has raised in this matter.

[89] The Respondent maintained that the proposed fee was reasonable because the Applicant's request was for any and all documents over a period of 16 months related to three different water leaks and repairs. The Respondent argued that it would have taken Ms. McMullen a considerable amount of time to retrieve, organize, possibly redact, and email the records to the Applicant.

[90] Section 13.3(8) of the Regulation sets out the conditions and factors related to the setting of fees for the examination or delivery of copies of records. In particular section 13. (8) 1 and 2 provide as follows:

> 13.3(8) The fee payable for the request shall be calculated in accordance with the manner set out in the board's response, subject to the following conditions:
>
> > 1. The fee shall be a reasonable estimate of the amount required to reimburse the corporation for the actual labour and delivery costs that the corporation incurs for making the record requested available for examination or for delivering a copy of the record, which costs shall include the printing and photocopying charges established under paragraph 3 and the actual labour costs that the corporation incurs during the examination.
> >
> > 2. The fee shall be reasonable.

[91] The question, then, is whether the fee proposed by the Respondent is reasonable in the circumstances. I accept that it was reasonable for the Respondent to charge a fee for Ms. McMullen's labour to retrieve and organize the records for delivery to the Applicant. I also find that four hours of time is a reasonable estimate given the potential volume of records to be reviewed. The Respondent did not, however, provide any rationale for its proposed delivery fee of $100 and I do not accept that this is a reasonable fee for the delivery of electronic records.

[92] I would require the Applicant to make payment of the labour fee of $100 to the Respondent for delivery of the records requested in R3. The Respondent should deliver the records to the Applicant in electronic form within thirty (30) days of the

date on which she pays this amount. Although I am mindful that the Applicant believes that the proposed fees are excessive, I find that, based on the hourly rate and the volume of the records, a labour fee of $100 is reasonable.

Issue 4 – should a penalty be assessed against the Respondent?

[93] Section 1.44(6) of the Act provides that the Tribunal may order a penalty to be paid if it finds that the condominium corporation has, without reasonable excuse, refused to permit a person to examine or obtain records.

[94] The Applicant argued that that the Respondent's delay in providing records to her was a refusal without reasonable excuse. She also argued that the Respondent has refused to provide the records she had requested in R3 and R4.

[95] The Respondent submitted that it had never refused to provide records and that any delays were caused by its lack of oversight of the condominium manager. It was the Respondent's position that any errors committed by Ms. McMullen were inadvertent and not intended to prevent the Applicant from accessing the records. Moreover, the Respondent argued that the Applicant had the opportunity to resolve these matters directly with the board, particularly during her term from November 2019 to June 2020, and she failed to address the issues with the board.

[96] I have found that the Applicant did not receive all of the records requested in R2 within the time frames prescribed in the Regulation. These were core records, and the Respondent did ultimately provide these records at Stage 2 of this application. The Applicant submitted that, despite being provided some records at Stage 2, the Respondent continued its refusal because it did not provide the ICU, the minutes of the owner's meeting of June 19, 2019, the plan for the funding of the reserve fund, and part of the financial records. Based on my review of the evidence, I have concluded that the Respondent has provided all the records requested in R2, with the exception of records that did not exist.

[97] The Respondent provided a reasonable excuse for not providing the records requested in R3 and R4. The Respondent requested a fee for the records in R3, and the Applicant did not pay the fee. The Respondent accurately identified to the Applicant that the list provided in R4 was not a list of records and it suggested that she provide another request with specified records. The Applicant did not submit another request.

[98] Ms. McMullen, the condominium manager, was responsible for responding to the Applicant's requests. The Respondent characterized the delay in responding as being caused by her errors and the board's lack of oversight of her performance.

The evidence has shown that Ms. McMullen was not diligent in her response and did not take the necessary steps to ensure that the board's response and the requested records were received by the Applicant. Neither did the board fulfill its responsibilities under the Act to respond to the Applicant's request. The board relied on the condominium manager without exercising due diligence to ensure that the records were provided.

[99] I agree with the Applicant's argument that, regardless of who was responsible for the delays and the failure to provide records, it was ultimately the board's responsibility to oversee the condominium manager and to ensure that its obligations were fulfilled. The Respondent was late in providing core records to the Applicant, but the Applicant's conduct contributed to the delay. Ms. McMullen advised in her first email of July 8th that the core records would be sent in batches. The Applicant did not advise Ms. McMullen or the board that she had not received the other batches until September 3rd, almost two months after the initial email response. She stated that she did not receive the September 4th email from Ms. McMullen in response to her follow-up request. She did not, however, take any further steps to inquire about the core records. I accept that the board and Ms. McMullen did not know that the Applicant had not received either the second July 8th or the September 4th email.

[100] I do not find that the Respondent's delay in providing records amounts to a refusal to provide records without reasonable excuse, and I, therefore, do not have the authority pursuant to s. 1.44(1) 6 of the Act to assess a penalty

[101] The Applicant requested that the Tribunal order additional remedies related to the allegations that Ms. McMullen had falsified the November 22nd board minutes. These additional remedies are outside the Tribunal's jurisdiction, and I will not make any of the other orders requested by the Applicant.

Issue 5 – should costs be awarded?

[102] Rule 45.2 of the Tribunal's Rules of Practice provides that, the unsuccessful User will be required to pay the successful User's CAT fees when the CAT Member makes a final decision, unless the member decides otherwise.

[103] The Applicant requested her costs in relation to the Tribunal's filing fees. The Applicant did not receive some of the core records she requested until Stage 2, and I have reduced the fees requested by the Applicant for the Records requested in R3. For these reasons, I award costs of $200, the total of the filing fees that the Applicant paid to the Tribunal.

D. CONCLUSION

[104] I find that the Respondent has not refused to provide records to the Applicant in relation to R1 and R2.

[105] I also find that the Respondent proposed an unreasonable fee for the delivery of the records requested in R3, and I order that the delivery fee of $100 be removed from the fees proposed for these records. The Respondent has provided a reasonable excuse for not providing records in response to R4, and I make no orders in relation to R4. I order the Respondent to pay costs of $200 to the Applicant.

E. ORDER

[106] For the reasons set out above, the Tribunal orders that:

1. The Respondent shall, within thirty (30) days of the date on which the Applicant pays $100.00 to the Respondent in fees for labour, deliver to the Applicant, in electronic format, the following non-core records requested in R3

    a. Any and all documents related to foundation water leaks at the Applicant's unit including correspondence from all contractors, fees/ invoices or cost, photos from July 25, 2018 to December 12, 2019;

    b. Any and all documents related to bedroom roof water leak, including what was done and communication from contractor(s) saying it has been resolved and how from July 25, 2018 to December 12, 2019; and

    c. Any and all correspondence about the garage leak from February 2019 to December 12, 2019.

2. The Respondent shall, within thirty (30) days of the date of this decision, pay costs of $200 to the Applicant.

Jennifer Webster
Member, Condominium Authority Tribunal

Released on: June 25, 2021