CONDOMINIUM AUTHORITY TRIBUNAL

DATE: July 16, 2021
CASE: 2021-00019R
Citation: Bogue v. Carleton Condominium Corporation No. 228, 2021 ONCAT 67

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

Member: Patricia McQuaid, Vice-Chair

The Applicant,
Margaret Ann Bogue
Self-Represented

The Respondent,
Carleton Condominium Corporation No. 228
Represented by Peter Lessard, Agent

Hearing: Written Online Hearing – April 3, 2021 to June 18, 2021

REASONS FOR DECISION

A. OVERVIEW

[1] The Applicant, Margaret Ann Bogue, is an owner of a unit in Carleton Condominium Corporation No. 228 (the Respondent or CCC288). She submitted a Request for Records to the Respondent on November 13, 2020, seeking the following, as described by her:

1. Any and all group emails sent to all owners with email by CMG [1] as agents for CCC288, mentioning MaxCondo and/or MaxCondo Club.

2. Any and all records of authorization(s) granted by CCC288, and/or CMG as its agent, to MaxCondo and or MaxCondo Club for access to, and use of, the email addresses of any and/or all owners.

3. Any and all group emails sent to owners who have signed the Ontario Ministry of Government and Consumer Services form 11370E (2017/10), by CMG as agents for CCC288, mentioning MaxCondo and/or MaxCondo Club.

[1] CMG is CMG Condominium Management Group, the condominium manager for CCC288

4. Any and all group emails sent to owners who not have signed the Ontario Ministry of Government and Consumer Services form 11370E (2017/10), by CMG as agents for CCC288, mentioning MaxCondo and/or MaxCondo Club.

5. Copy of the October 2020 notice - mailed in paper to all owners who have not signed the Ontario Ministry of Government and Consumer Services form 11370E (2017/10) - advising of eavestrough cleaning scheduled for November 2nd through 4th.

[2] The Respondent provided an email response on December 7, 2020 through its condominium manager, Nikki Monette (of CMG Condominium Management Group). They did not respond on the prescribed form. In the email, the Respondent stated that they could not provide a list of emails that were sent in different group categories or a list of owners that authorized CMG to receive email communication because this was "personal information relating to unit owners and not information we can share". The Respondent did provide the notice delivered to owners in response to the fifth record requested. In addition, a 'communications log' relating to the Applicant which lists all emails that were sent out to owners was provided. Regarding the authorization (the second record requested), the Respondent stated that they were making inquiries to obtain that document.

[3] On December 11, 2020, the Applicant responded to Ms. Monette, by email, clarifying that she was not seeking the distribution list or lists of owners' names and their email addresses; rather, she was requesting copies of "any and all 'group' messages that were sent to owners who have signed the Agreement to Receive Notices Electronically and those who have not".

[4] The Applicant's concern, in large measure, as disclosed through her evidence, is how the board and CMG were applying the Respondent's communication policies, and whether their stated policies comply with the provisions of the *Condominium Act, 1998* (the "Act"). She queried why she was receiving notices by email and others by post. As she stated, her request is as much about how the various documents were delivered as they are about the content of the documents.

[5] It became apparent through the hearing that it is the Respondent's communications policy that is the crux of the dispute between the parties. However, as I explained to them, adherence to that policy is not a matter that the Tribunal has the authority to determine. Further, disputes about whether a log entry is an email communication -- an argument that arose during closing submissions -- appears to be less about the 'records' of the condominium corporation which allow an owner to be apprised of the business transactions and management of the corporation assets, and more about a dispute about how the corporation communicates to owners.

B. RESULT

[6] For the reasons set out below, I find that the Applicant has been provided with the records responsive to her request. I find that a penalty under s. 1.44(1)6 of the Act is not warranted. However, I order the Respondent to pay the Applicant $200 in costs.

C. ISSUES AND ANALYSIS

[7] The issues to be decided are as follows:

1. Has the Applicant been provided with the requested records?
2. Did the Respondent refuse to provide any of the requested records, and if so, is a penalty warranted and in what amount?
3. Is the Applicant entitled to costs?

ISSUE 1: Has the Applicant been provided with the records?

[8] At the outset of this hearing, the Applicant confirmed receipt of the fifth listed document in her Records Request. At the conclusion of the evidence, the Applicant stated that she was satisfied that no records exist relating to the third and fourth records requested. This leaves records number 1 and 2. In this case, entitlement to records was not in dispute. The issue is more specifically described as whether what has been provided to the Applicant is responsive to her request.

[9] As noted above, on December 7, 2020, the Respondent provided a "communications log". This was an email communications log which documented all emails (20 in total) that the Applicant received in the period requested- January 1 to October 31, 2020. It included a September 4, 2020 email addressed to "owners" which was notification by CMG that owners would be receiving an invitation from Max Condo Club which was the new online platform CMG would be using to communicate with owners and residents. As the Applicant highlighted in her evidence, it was not clear from the December 7 email that the communications log was intended to be the response to the first requested record. In his evidence, Mr. Lessard, the Respondent's president, confirmed that it was.

[10] In her closing submissions, the Applicant initially stated that while she does not believe the log is an adequate answer to her request because only one of the entries is relevant to the request, the September 4 email, she accepts the Respondent's position that the September 4 email from CMG to owners on the subject of Max Condo is the sole answer to her request and that there are no other emails to be disclosed. However, in her reply submissions, she stated that the log

provided was not an email communication and therefore this request remains unanswered.

[11] To pursue this argument risks elevating form over substance, which is of little benefit to any party. Based on the parties' evidence and submissions, I find that the Respondent did provide the requested record.

[12] Regarding the second listed record, the authorization granted by the Respondent to Max Condo, the Applicant submits that the Respondent did not address this request in an adequate or timely manner. She states that it was only during these proceedings that the Respondent put forward the position that the Applicant had access to a contract between it and the condominium management company, and that this document was the answer to this particular request. Further, she received this document in the context of a different records request, on May 4, 2021. She asserts that it is not responsive to her request in that it is a contract dated in 2018 for condominium management services and makes no mention of Max Condo or Max Condo Club, as per her request.

[13] The Respondent states that the contract though dated in 2018 is renewed automatically, as per its terms, and further, that by the terms of the contract, CMG is authorized to use a web service company for the board and owners, without a company being specifically identified.

[14] The Applicant takes issue with the interpretation of the contract term cited by the Respondent; specifically, while it does refer to providing a web page for the use of the board and owners, the Max Condo service is a communications tool, and it is not creating or maintaining a website for the board. Whether or not the Applicant's interpretation is correct is not for the Tribunal to decide in the context of this records dispute. The Respondent may be giving a liberal interpretation to the particular clause of this contract and the Applicant as an owner may disagree with the board on this point. However, interpreting the meaning or scope of a contract clause is not within my jurisdiction. I accept that the Respondent's evidence that this is the only authorization in place. By providing the contract to the Applicant, albeit late, I find that the Respondent has answered this request. It may lack the specificity that the Applicant is seeking, but there is no other record.

[15] I note that the Applicant believes that the documents provided in response to these two requested records are not an adequate response and therefore these requests remain unanswered. What has been provided may not be the answers she is seeking, but this is a records dispute and the evidence supports the conclusion that what records there are have been provided.

Issue 2: Should the Respondent be required to pay a penalty under s.1.44 (6) of the Act for failure to provide the Applicant with the requested records without reasonable excuse, and if so, in what amount?

[16] Section 1.44(1)6 of the Act provides that the Tribunal may order a penalty to be paid if it finds that the corporation has, without reasonable excuse, refused to permit a person to examine or obtain records.

[17] The Applicant states, with respect to a penalty, she is looking for any amount that the Tribunal feels is warranted given the delays and the failure of the board to provide a response in the prescribed form with the required statements. There is no dispute – the Respondent did not complete the prescribed form. The question is whether that failure is tantamount to a refusal to provide the record(s) without reasonable excuse. I find that it is not.

[18] The Respondent submits that the mandatory form was not provided with its December 7, 2020 email to the Applicant because there was at the time one document request outstanding (the second requested record) which was "being worked on by senior management". That may have been the case, but it ought not to have precluded what was required: responding to the request on the prescribed form. Yet, on these facts, I do not find that is not a refusal: records that did exist were provided in December 2020. The December 7th email and subsequent communications with the Applicant, as well as its submissions at the hearing suggest a lack of understanding of the corporation's basic obligations under the Act, specifically under s.55 and s.13 of Regulation 48/01. It is the board and condominium manager's responsibility to know these, but that deficiency does not fall within s. 1.44(1)6 in this instance. Had there been a lack of responsiveness by email or otherwise, my decision may have been different.

[19] Regarding the delay in responding, as the Applicant points out, the contract which she continues to believe is not an adequate response to the record of authorization request, was not provided until approximately six months after the request was made. And there was a lack of clarity as to whether the log was the complete response to the first request and whether there were any documents responsive to the third and fourth records requested. Balanced against this there may have been some confusion as to what in fact was being requested though the Applicant did provide more specifics to the Respondent following the December 7 email.

[20] An example of the confusion and the Respondent's lack of understanding was the statement in their December 7 email that they could not provide a list of emails that were sent in different group categories or a list of owners that authorized CMG to receive email communications as that was personal information. This could, in

some circumstances, be viewed as a refusal, but I find that it was in fact a response arising from a lack of understanding of the nature of the request. As noted previously, the Applicant responded by email on December 11th that she was not seeking any distribution lists or lists of owners' names and their email addresses; she was requesting copies of any and all 'group' messages that were sent to owners who have signed the "Agreement to Receive Notices Electronically" and those who have not.

[21] This confusion and delay may have been mitigated if, ironically in the context of this dispute, the parties had communicated more directly with each other. Delay, may in some circumstances, constitute a refusal, but not here. There is nothing in the evidence to suggest an intentional delay or an attempt to deter the Applicant from accessing the records. The delay may reflect some inefficiencies in management and as noted, a lack of appreciation of its obligations under the Act, but not a refusal to provide the records.

[22] In coming to this conclusion, I am not condoning this lack of compliance with the prescriptions in the Act. In this instance, it does not warrant a penalty, but hopefully the case will serve as a caution to the Respondent to be fully adherent to its obligations under s. 55 of the Act going forward.

ISSUE 3: Is the Applicant entitled to costs?

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

[24] While I have not found that there are more records that need to be provided to the Applicant, it was not until this hearing that she received any explanation about the records (other than the fifth record requested) that would indicate that the responses were sufficient. For that reason, a cost award of $200 being the fees paid to the Tribunal, is appropriate.

D. CONCLUSION

[25] I find that the Applicant's requests have been satisfied, though the responses were not in accordance with the Act. I note though that this case, as stated by the Applicant in her evidence, was essentially part of an ongoing dispute about the Respondent's communication policy and how it is implemented. This case was

framed as a records dispute, and was accepted by the Tribunal as such, but in fact what was in front of the Tribunal was a request for information. The Applicant may well have valid questions and concerns about the distribution list for notices to owners and specifically which list she was placed on, why she is receiving certain emails by mail and others by post and the role of the Max Condo system. At this time, the Tribunal does not have the jurisdiction that allows it to assess the communication policies of a condominium corporation. These are issues more efficiently and effectively dealt with by an owner and board dealing directly with each other rather than through the Tribunal.

E. ORDER

[26] The Tribunal Orders that:

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

Patricia McQuaid
Vice-Chair, Condominium Authority Tribunal

Released on: July 16, 2021