

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: August 30, 2021

CASE: 2021-00057R

Citation: Robinson v. Durham Condominium Corporation No. 139, 2021 ONCAT 81

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

Member: Anne Gottlieb, Member

The Applicant,

Carroll Robinson

Self-Represented

The Respondent,

Durham Condominium Corporation No.139

Represented by Counsel Patrick Nelson and Luis Hernandez

Hearing: Written Online Hearing – April 29, 2021 to August 1, 2021

REASONS FOR DECISION

A. INTRODUCTION

- [1] The Applicant Mr. Robinson owns a unit at Durham Condominium Corporation No. 139 (the “Respondent”). On December 20, 2020, he made a Request for Records asking for a record of owners and mortgagees and minutes of board of director meetings (the “board minutes”) for the past 12 months. A Board Response to Request for Records (the “Board Response”) was provided, giving access to a list of the owners and mortgagees and the board minutes, except for the December 2020 board minutes, which had not yet been approved.
- [2] The board minutes contained references to ‘in camera’ meetings and minutes which were not identified in the Board Response and were not forwarded. In an email dated Jan 23, 2021, the Applicant asked about the completeness of the board minutes provided to him. On January 25, 2021, a response email was sent from the condominium manager Laura McCarney stating that those were the board minutes “to the best of my knowledge”. She stated that the December board minutes had been approved and would be sent by email and that he should let her know “if something is missing”. The Applicant brought this matter before the Tribunal.

- [3] During Stage 2 - Mediation in this Tribunal process, (“Stage 2”) the Applicant received an additional ten sets of redacted minutes which the Respondent called ‘in camera’ minutes. The Applicant submits that there was a refusal to provide records.
- [4] I find that the Respondent did not declare in the Board Response that it was not delivering parts of its board minutes to the Applicant. In communication to the Applicant regarding the board minutes requested, the Respondent did not identify anything as eligible for an exemption pursuant to the *Condominium Act, 1998* (“the Act”) or disclose anything as part of separate ‘in camera’ minutes. The Respondent intentionally did not deliver the entirety of the board minutes requested and did not identify to the Applicant any purported or permitted reason for exempting portions of the board minutes that it initially provided. I find that this constitutes a refusal to provide the records without a reasonable excuse. I award a penalty of \$1000 to the Applicant. I also award \$200 for the filing fees spent to bring this matter to the Tribunal.
- [5] The Applicant also takes issue with the redactions made and the lack of an accompanying statement explaining the reasons for each redaction. It is a requirement that each redaction have an accompanying written explanation. Here, there was a general statement made at the top of each set of ‘in camera’ minutes referencing grounds for excluding the information pursuant to the *Condominium Act, 1998*. For reasons outlined below, I have determined that only two sets of ‘in camera’ minutes require a separate written explanation for each redaction. The Respondent is directed to review the redactions and provide a written explanation stating the applicable exemption for each redaction from the September 24, 2020, and the December 10, 2020 ‘in camera’ minutes.
- [6] The Applicant further submits that some decisions are absent from the board minutes and claims that this constitutes a failure to provide the records requested. I find that the requested records were provided to him and that there was no failure to provide records.
- [7] The Respondent has asked that its legal fees be awarded, on a substantial indemnity basis due to exceptional circumstances in this case. I find that there were no exceptional circumstances to warrant an award of legal fees.

B. ISSUES & ANALYSIS

- [8] The issues before this Tribunal relate to board minutes from Jan 2, 2020, to December 20, 2020. They relate to the ‘in camera’ minutes provided during Stage 2, and the redaction of the ‘in camera’ minutes. The Applicant also raises matters

about the possible business of the corporation that may not have been documented in the minutes of the board. I have considered all the evidence and submissions and will not refer to everything that was presented before me. I will only address the evidence most relevant to the issues to be decided.

Issue #1. Did the Respondent refuse to provide records, without a reasonable excuse?

“In Camera” Minutes

- [9] There is no reference in the *Condominium Act, 1998* to ‘in camera’ minutes. I use the term here, as it was used by the Respondent to denote ten sets of redacted records that were provided in Stage 2. I agree with the submission made by the Applicant that “such a label is not recognized in the Act and certainly does not clothe these minutes with a veil of invisibility to owners.” Section 55(3) of the Act sets out the right of owners to examine or obtain records, which include minutes of meetings of the board of directors. There are also exceptions to the right to examine or obtain these records set out in section 55(4) of the Act.
- [10] The Respondent did not identify that ‘in camera’ minutes existed in the Board Response. There was no mention of ‘in camera’ minutes in the correspondence to the Applicant. There was no reference to excluding parts of board minutes for any permitted exempted grounds in the Board Response or correspondence. The condominium manager stated in her testimony that the board minutes provided clear references to matters discussed ‘in camera’ and that the existence of ‘in camera’ minutes was not hidden. I find that the existence of the ‘in camera’ minutes was not disclosed outright and that not all the board minutes clearly identified when ‘in camera’ minutes were being kept for a particular board meeting.
- [11] The Respondent states that the Applicant was “not clear in his request”. I find that he was very clear. After he was provided with the records, he wrote an email asking about the entirety of board minutes. When he received a “to the best of my knowledge” response from management, he followed up again by email and addressed the board to ask for confirmation that the records “are the totality of all the records” requested. I agree with the Applicant’s submission that owners should not have to file a case with the Tribunal to receive a copy of board minutes. Board minutes should be provided and if appropriate to exempt parts of the record, then this should be identified and stated outright.
- [12] The Respondent did not indicate that the board minutes sent to the Applicant were not complete. I find that the Respondent failed to identify to the Applicant that it kept a set of ‘in camera’ minutes for purported exempted portions of the board

minutes. The Respondent did not outrightly disclose that it was not providing complete board minutes and did not provide any reasons or any explanation for not providing all the board minutes to the Applicant. This constitutes a refusal to provide records without a reasonable excuse. These 'in camera' minutes were eventually provided to the Applicant during Stage 2, in redacted form.

Issue# 2. Were the 'in camera' minutes redacted in accordance with the Act?

Lack of an Accompanying Written Statement

[13] Subsection 13.8 (1)(b) of Ontario Regulation 48/01 (the "Regulation") requires that each copy of a record provided by a condominium in response to a request for records that is redacted, shall include a statement explaining the reason for each redaction and the statutory exclusion being relied upon:

13.8 (1) Each copy of a record that the corporation makes available for examination or delivers under any of sections 13.4 to 13.7 shall be accompanied by,

...

(b) if the board has determined that the corporation will redact the record to remove any part that the board has determined that the corporation will not allow the requester to examine or of which it will not allow the requester to obtain a copy, a written statement of the board's reason for its determination and an indication on which provision of section 55 of the Act or this Regulation the board bases its reason:

[14] A separate accompanying written statement with an explanation for each of the redactions of the 'in camera' minutes was not provided to the Applicant. The Respondent did include a general statement at the top of each set of the 'in camera' minutes provided to the Applicant in Stage 2. It reads:

This section of the minutes does not form a part of the minutes which are available for owners' review under section 55(4) (a-c) of the Condominium Act, as it relates to a specific unit or owners, to employees of the Corporation, or to an actual or contemplated litigation or an insurance investigation.

[15] The Respondent states that it "maintains a category of minutes labelled 'in-camera'...{for} matters that deal with individual units, that refer to legal discussions or advice received from the Corporation's lawyers, employee matters, matters that relate to actual or contemplated litigation or other matters in respect of which an exemption would be available under s. 55(4) of the Condominium Act, 1998." The s. 55(4) exemptions states:

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

to,

- (a) records relating to employees of the corporation, except for contracts of employment between any of the employees and the corporation;
- (b) records relating to actual or contemplated litigation, as determined by the regulations, or insurance investigations involving the corporation;
- (c) subject to subsection (5), records relating to specific units or owners; or
- (d) any prescribed records. 1998, c. 19, s. 55 (4); 2015, c. 28, Sched. 1, s. 51 (5-7).

[16] At no point in the hearing did the Applicant ask for clarification about specific redactions. I have reviewed the ten sets of 'in camera' minutes. They are redacted with a black line. I find that eight sets of the 'in camera' minutes are minimally redacted. For example, the word 'unit' appears and the number beside it is blacked out and it is clear on the face of the record that these redactions were made to protect the privacy of unit owners. The other redactions are similarly self evident. The correct practice would be to provide a statement explaining each individual redaction. Nonetheless, these redactions are obvious. It is readily apparent that they are permitted exemptions pursuant to s. 55 (4) of the Act, indicated by the statement at the top of each set of 'in camera' minutes. The Applicant would not be entitled to the information.

[17] The remaining two sets of 'in camera' minutes are redacted, but the reasons for the redactions are not obvious. The Respondent is directed to review the sets of 'in camera' minutes for September 24, 2020, and December 10, 2020, and provide the Applicant with a statement explaining the section of the Act that it relies upon, in making each individual redaction.

Issue #3. Does the absence of certain decisions in the Board minutes constitute a failure to provide records?

Board Minutes

[18] The Applicant claims that decisions affecting the condominium corporation are not reflected in the board minutes and that this is a failure to provide records. He did not provide testimony but cited examples in his opening statement, where he also referred to incidents that happened prior to the timeline that is the subject of the present case. These point to discontent over purported governance issues that are beyond the scope of this application. Mr. MacMillan, a former member of the board of directors gave testimony that also refers largely to governance matters and issues that are not properly before me to decide.

[19] In response to the examples cited, the Respondent indicated that one such decision was made earlier than the timeframe captured by the board minutes. I find this explanation plausible. The Respondent also stated that certain decisions did not require multiple separate board resolutions and that some day-to-day operational decisions did not require any board resolution. I was referred to sections of a by-law of the condominium corporation to illustrate this point. I find this explanation satisfactory. I have read the board minutes in their totality, including the redacted 'in camera' minutes provided in Stage 2, such as they are. Based on the evidence submitted, I find there was not a failure to provide the records to the Applicant.

Issue # 4. Should any penalty be awarded?

Penalty

[20] Section 1.44(6) of the Act provides that the Tribunal may order a penalty if it finds that the condominium corporation has, without reasonable excuse, refused to permit a person to examine or obtain records. The Applicant did not receive all the records requested within the timeline prescribed in the Act. The 'in camera' minutes were part of the Board minutes within the last year which was the subject of the Request. The Respondent did not identify or claim any exemption for them before this case commenced. Although these records were provided at Stage 2, I have found that the Respondent initially refused to provide records without a reasonable excuse.

[21] Both parties referred me to caselaw, which I have reviewed and considered. *Mills-Minster v. York Condominium Corporation No. 279*,ⁱ was cited by the Respondent and *Mehta v. Peel Condominium Corporation 389*,ⁱⁱ was cited by the Applicant. These cases are sufficiently different on their own facts from the present case before me and provide me with little guidance.

[22] The Applicant cited *Terrence Arrowsmith v Peel Condominium Corporation No 94*,ⁱⁱⁱ and referred me to the following quote:

I note that generally penalties operate to do two things. First, they operate to sanction conduct that is considered undesirable. Second, they communicate to the class of interested people and organizations that such conduct is unacceptable.

[23] In the case before me the Respondent did respond within the proper timeframe and did provide parts of the requested records. However, the Respondent intentionally did not deliver the entirety of the board minutes requested and knowingly did not identify or state to the Applicant that it was exempting parts of

the board minutes. Prior to this case coming before the Tribunal, the Respondent did not acknowledge that it had not disclosed or provided portions of the board minutes for any purported reason. I award a penalty to serve as a reminder, that if there is something contained in board minutes which a condominium corporation decides should be exempt, pursuant to an acceptable category outlined in the Act, it must be identified and disclosed outright to the party requesting to see the records. On this basis I order the Respondent to pay a penalty of \$1000.

Issue # 5. Should there be an award of legal fees and Tribunal filing fees?

Legal Fees

[24] The Respondent asked to have its legal costs awarded and claims that there are exceptional circumstances for the Tribunal to make an award on a substantial indemnity basis, in the amount of \$10,386.85. Detailed legal accounts have been submitted. The Applicant was given an opportunity to respond to the submission on costs. Rule 46(1) of the Tribunal's Rules of Practice states:

46.1 The CAT will not order a User to pay to another User any fees charged by that User's lawyer or paralegal, unless there are exceptional reasons to do so.

[25] The Respondent states that the conduct exhibited deserves an award of costs, regardless of the outcome of this application on the merits. I was referred to the case of *Mara Bosso v Metro Toronto Condominium Corporation 965*^{iv} and the case of *Kamyshan v York Condominium Corporation No 465*^v. In each of these cases this Tribunal considered what might be required to find exceptional circumstances to warrant an award of legal costs. In *Mara Bosso* the Tribunal stated it would "need evidence that the Applicant had been grossly unreasonable or had taken a position that unduly complicated this Application, or had acted in bad faith or with malice, or took some other step beyond being unsuccessful and unreasonable."

[26] During the hearing, the Applicant added a postscript to the list of his questions for cross examination that included thinly veiled threats directed at the Respondent's witness. This is a breach of decorum and not appropriate behaviour, and the Applicant was reprimanded. In his closing remarks the Applicant included unsubstantiated allegations disparaging a lawyer hired by the Respondent and criticizing this Tribunal for permitting legal representation. The content was not germane to the matters to be determined in this application, and the Applicant indicated he knowingly included it anyway.

[27] I do not condone the Applicant's actions described above. However, I am hard

pressed to characterize the circumstances of this case as exceptional. I do not find that the Applicant unduly complicated this case with obstructive behaviour. I am also not persuaded by the Respondent's argument that I can separate the cost award from the outcome on the merits of this application. I have found that there was a basis for the Applicant to bring this matter to the Tribunal. The Respondent chose to be represented by counsel and should expect legal costs to be associated with the representation. The Respondent did not point to any additional or specific amount of time that it expended due to the Applicant's behaviour during this hearing. The Applicant had cause to appear before this Tribunal. He was well prepared and did not delay or obstruct the hearing.

[28] I have weighed the arguments and conclude that the Respondent would have incurred legal fees to appear before this Tribunal in any event. I do not find that there were exceptional circumstances in this case to warrant an award of legal costs.

Tribunal Filing Fees

[29] Costs are at the discretion of the Tribunal under subparagraph 1.44(1) 4 of the Act and under Rule 32 the Tribunal's Rules of Practice. The Applicant asked for \$200 for the Tribunal fees that he paid to bring this matter forward. He did not receive part of the records that he requested until Stage 2 and other matters were determined in the Stage 3 hearing of this application. I award \$200 to him for the fees he paid to file this matter with the Tribunal.

C. OTHER

[30] In his closing submission the Applicant asked the Tribunal to make an order under s.1.43 of the Act for the inspection by Tribunal staff of the unredacted 'in-camera' minutes. There are no grounds or authority upon which to make such an order.

[31] The Applicant also asked for an order that the "Respondent promulgate the Tribunal's decision... to each individual unit owner." It is not necessary for me to make such an order. Cases brought before the Tribunal are published and available, free of charge, to anyone who wishes to read them. They can be accessed anytime through the Condominium Authority of Ontario website and the Canadian Legal Information Institute website.

D. ORDER

[32] The Tribunal Orders that:

1. Within 30 days of the date of this decision, the Respondent through its condominium manager or through its legal counsel shall provide the Applicant with a statement explaining the redactions made and specifying the subsections of s. 55(4) of the Act that it relies upon for each of the redactions contained in the following sets of 'in camera' minutes:
 - a. September 24, 2020
 - b. December 10, 2020
2. Within 30 days of the date of this decision, the Respondent shall pay a penalty of \$1000 to the Applicant.
3. Within 30 days of the date of this decision, the Respondent shall pay the cost of filing fees of \$200 to the Applicant.
4. To ensure that the Applicant does not have to pay any portion of the penalty and cost awards associated with this Order he shall be given a credit toward the balance of any common expenses that may be attributable to his unit, if any, in the amount equivalent to his proportionate share of the penalty and filing fee awarded.

Anne Gottlieb
Member, Condominium Authority Tribunal

Released on: August 30, 2021

ⁱ *Mills-Minster v. York Condominium Corporation No. 279*, 2020 ONCAT 4

ⁱⁱ *Mehta v. Peel Condominium Corporation 389*, 2020 ONCAT 9

ⁱⁱⁱ *Terrence Arrowsmith v Peel Condominium Corporation No 94*, 2018 ONCAT 10

^{iv} *Mara Bosso v MTCC 965*, 2018 ONCAT 6

^v *Kamyshan v York Condominium Corporation No 465*, 2020 ONCAT 46