CONDOMINIUM AUTHORITY TRIBUNAL

DATE: December 21, 2021
CASE: 2021-00042R
Citation: Kim v. York Condominium Corporation No. 96, 2021 ONCAT 124

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

Member: Brian Cook, Member

The Applicant,
John Kim
Self-Represented

The Respondent,
York Condominium Corporation No. 96
Represented by Rachel Fielding and Carol Dirks, Counsel.

Hearing: Written Online Hearing – November 10, 2021 – November 23, 2021

REASONS FOR DECISION

A. INTRODUCTION

[1] John Kim is an owner of a unit in York Condominium Corporation No. 96 and is the Applicant in this case.

[2] The hearing was completed using the tribunal's on-line dispute resolution system. The Applicant provided written evidence and submissions. The Respondent's evidence includes an affidavit from Steven Van Dyck, the president of the corporation's board of directors.

[3] The Applicant makes the following allegations:

1. He has not received all of the records he has requested from the corporation.
2. Some of the records are inaccurate or inadequate.
3. Some financial transactions have not been properly documented.
4. A member of the board failed to disclose a conflict of interest.

5. The corporation breached confidentiality attached to the mediation process (Stage 2 in the Tribunal's process) that preceded this adjudication.

B. ISSUES & ANALYSIS

Records requests

[4] Subject to exceptions that do not apply here, section 55 of the *Condominium Act, 1998* ("the Act"), provides that an owner is entitled to examine or obtain copies of a condominium corporation's records. Section 55(1) requires that a condominium corporation keep "adequate records".

[5] The Applicant has made three separate requests for records. The Respondent admits that it did not respond to these requests in a perfect manner. They did not meet the time frames set out in the Act and failed to use the proper Response to Request form. However, the Respondent's evidence is that it did provide all the records requested that it has in its possession. The Respondent further says that it provided several additional documents which were not a part of Mr. Kim's initial requests, including documents from third parties.

[6] Most of the requested records were provided before this application was filed. Some of the remaining issues regarding records were resolved in Stage 2 of the Tribunal's process. In Stage 3, the Applicant submits that the Respondent still has not provided all the records he requested. The Applicant alleges that the corporation has not maintained adequate records as required by section 55(1). He says this is apparent from the fact that the corporation does not have some records. He alleges that some of the records he has received are inadequate or fraudulent.

Water meter project

[7] In early 2019, the building's water meter had to be replaced. This in turn required an upgrade to the water intake system. This was a major project with costs of over $600,000. Trace Consulting Group Ltd. (Trace), an engineering consulting firm, was retained to design the installation. The installation was done by Jermark Plumbing and Mechanical Services Ltd. (Jermark) in December 2020. The work was inspected and approved by City of Toronto inspectors.

[8] The Applicant requested documents related to the project. He received some but did not receive "drawings and contracts including the shop drawings". The Respondent asserts that it provided all the documents requested by the Applicant that exist and are in its possession. In addition, they contacted Trace and Jermark to obtain relevant documents that were not in its possession and provided these to the Applicant.

[9] The Applicant asserts that there are errors in some of the drawings he received related to the water meter project. He submits that at some time there should have

been an “Issued for Construction” (IFC) drawing that would have incorporated any changes in the plan prior to construction. He alleges that instead of this, drawings were improperly modified after the fact including the use of drawings from Trace that were changed to remove Trace and replace Jermark as the creator of the drawing. The Applicant has referred to the drawing that he was provided as a “Fake as Built” and alleges that there never was a final IFC drawing. In his submission, this means that the board failed to ensure that it had proper documentation.

[10] The Respondent submits that it provided the Applicant with the documents in its possession. It submits that it does not believe there are errors in the documents but if there are, it relied on the experts who were retained to plan and implement the project.

[11] I note that the Applicant’s allegation that information on the drawings provided were improperly changed may not be correct. An email dated June 21, 2021 from a representative of Trace to Mr. Van Dyck indicated:

> While it is true that in some cases (where it is required, or there [were] major changes due to site conditions) contractors will request CAD files and provide a formal as-built drawing (as Mr. Kim appears to be looking for), that was not the case for this project. In the case of minor or no changes to the original design, such as occurred on this project, contractors will typically remove Trace Consulting’s identifying information from our drawing (since we are not responsible for the content of the “as-built drawing), mark up any changes, add their business information, and transmit the result as the “as-built” drawing.

[12] This indicates that the fact that Jermark replaced information identifying Trace with its identification information reflects standard practice and is not evidence of fraud or an attempt to mislead.

[13] The Respondent notes that the water project was subject to oversight and approval by the City. The Respondent asserts that if it does not have all the records pertaining to the project, this is because it relied on the retained experts including engineers. The Respondent notes that the board members themselves are not experts and that they are entitled to rely on the experts that they retain.

[14] In his submissions, the Applicant notes that in its submissions of November 4, 2021, the Respondent advised that “large contracts such as the contract with the mechanical contractor who did the water meter train project are signed by both parties in a formal document – that contract is about 50 pages and includes a signature page for both parties to sign.” The Applicant says he has not received this document. It does not appear to be included in the records referred to by the Respondent as records it has provided. I agree with the Applicant that this contract is an important record that the corporation should have and, if it does not, it should obtain a copy from Jermark. I find that the Applicant is entitled to receive a copy of the contract relating to the water meter train project and direct the Respondent to

provide a copy to the Applicant. The Respondent may provide the document in the format that is most convenient (i.e., paper or electronic). If for some reason it is not possible for the Respondent to obtain the contract, it shall provide a detailed explanation to the Applicant.

[15] I accept the Respondent's evidence that it has provided all the other records requested that it has in its possession regarding the water meter project.

Contracts

[16] The Applicant's request for records of February 12, 2021, was for contracts or purchase orders relating to five repair or engineering projects. He states that he has not received them. He describes these records as follows:

- Contract or Purchase Order (PO # 81138) of GL Code 307150 related to external waterproofing done by Dryshield Water Solutions;
- Contract or Purchase Order (PO # 92648 & 96549) of GL Code 307230 related to brick work done by Straight Up Masonry Ltd. for Building 5B; and,
- Contract or Purchase Order (PO # 78834 & 81134) for Control # J-48071 of GL Code 307400 related to Breezeway repairs done by Pro-Solution.
- Contract or Purchase Order (PO# 82849) of GL Code 307054 related to replacement of retaining wall near 15A;
- Contract for Control # P-85312 & 99650 of GL Code 307140 related to engineering services done by Honeycomb Group Inc. and Brown & Beattie Ltd;

[17] The Respondent has provided documents pertaining to the projects identified by the Applicant (the Respondent's documents filed as exhibit 6A and 6B). The Respondent's evidence is that it has provided all the records in its possession concerning these projects. In his final submissions, the Applicant agrees that he has received some records related to the projects in question but has not received contracts or the purchase orders related to them. The Applicant submits that the fact that the Respondent does not have these shows that the Respondent is not keeping adequate records as required by section 55(1) of the Act. In his view, retaining signed copies of contracts or purchase orders for work done on the building is a basic requirement of maintaining adequate records.

[18] The question of what constitutes "adequate records" was discussed in *McKay v. Waterloo North Condominium Corp. No. 23,* 1992 CanLII 7501 (ON SC) which found that the records of the corporation must be adequate to permit the corporation to fulfill its duties and obligation to control manage and administer the corporation's property and assets.

[19] With respect to records relating to contracts entered into by the corporation or on its behalf, the critical information is what was done, when it was done, who did it, and how much it cost. This may be best contained in signed contracts, and section 55(1) 8 of the Act requires a corporation to maintain a copy of "all agreements entered into by or on behalf of the corporation."

[20] In its submissions, the Respondent advises that for smaller contracts, the general procedure is that the terms are negotiated by the condominium management company. The contract terms are then sent to the board. If approved, a representative of the board signs off on the contract proposal and then it is emailed to the supplier as acceptance. This then constitutes a binding contract. Sometimes, this is explicitly noted in the contract with the words "By accepting this estimate you are confirming this to be a contract".

[21] The records related to the Dryshield contract contain this wording. Although there is not a copy showing that it was signed back by a board representative, there is a detailed contract and a notation that payment was made. I accept that these records are adequate with respect to the Dryshield contract.

[22] The Respondent has provided several documents related to the breezeway project done by Pro-Solution. I find that these records are adequate to establish what was done by the contractor and how much it cost.

[23] The retaining wall project was the project ultimately done by a contractor with whom one of the board members had a conflict of interest, discussed in more detail below. The Respondent has provided quite a number of records relating to this project that are sufficient to establish that the work was done, who did it, when it was done, and how much it cost. I find that these records are adequate.

[24] The records provided by the Respondent with respect to the engineering projects done by the engineering firms Brown & Beattie and Honeycomb, indicate that their involvement was to assess existing problems and to suggest solutions and contractors who would be capable of doing the work. What is not clear is the cost of the work done by the engineering firms that was billed to the corporation. The Applicant says he is seeking the "Contract for Control # P-85312 & 99650 of GL Code 307140". If the Respondent has contracts in respect of the engineering work done by Brown & Beattie and Honeycomb which relate to the refence codes in the Applicant's request, it shall provide them to the Applicant. If the Respondent does not have these contracts it shall provide a detailed explanation to the Applicant.

Financial records

[25] The Applicant requested "monthly financial statements". He appears to agree that he received the records he requested. However, in his opinion, there are discrepancies in the records, in particular, as between the balance sheet and the general ledger. The Respondent notes that its auditor reviewed the financial records and provided a statement on December 14, 2020 that indicated "there are

no material transactions that have not been properly recorded in the accounting records underlying the financial statements". The Applicant submits that the irregularities he identified have not been properly addressed and suggests that the board has an obligation to address them regardless of the auditor's opinion.

[26] This Tribunal does not have the jurisdiction to conduct an independent audit of financial records to determine if they are accurate. The Applicant has received the financial records that he requested.

Is a conflict of interest properly recorded in the minutes?

[27] The Applicant alleges that a conflict of interest involving one member of the board and a contractor sometimes retained by the corporation is not accurately recorded in the minutes, and that the minutes are therefore inadequate. He also alleges that minutes were altered on at least one occasion to cover up the loss of quorum that should have resulted when the director did not participate in a vote because of the conflict.

[28] Mr. Van Dyck's evidence is that the conflict was disclosed to the Board in writing at the time the director joined the Board and a copy of the director's email disclosing the conflict has been provided. Mr. Van Dyck's evidence is that the director did not participate in the discussion or vote regarding any contracts or potential contracts involving the contractor even though this was not always recorded in the minutes. I accept this evidence but note that it is prudent to always note the conflict in the minutes and the fact that the director did not participate in the discussion or vote even if the contracts are of small monetary value.

[29] The minutes referred to by the Applicant include discussions of contracts or possible contracts involving the contractor. They generally, but not always, indicate that the director recused herself from the vote and sometimes also indicate she recused herself from the discussion.

[30] The Respondent submits that section 40 does not apply to those discussions because of section 40(2) which provides:

> (2) Subsection (1) does not apply to a contract or transaction or a proposed contract or transaction unless both it and the director's interest in it are material.

[31] The Respondent's evidence is that Board approval for expenses of less than $2,000 is not required and that smaller contracts are usually dealt with by the condominium manager.

[32] Section 40(6) of the Act provides that except in certain circumstances not relevant to this case, the director with the conflict shall not be present during the discussion at a meeting, vote or be counted in the quorum on a vote with respect to a contract or transaction or a proposed contract or transaction.

[33] The Applicant alleges that the board altered minutes or entered misleading information to cover up a loss of quorum. At the August 20, 2020 meeting of the Board, there was a discussion about a driveway repair. The minutes indicate that the board decided to ask the contractor and another contractor for an estimate. The minutes record that the director did not participate in the discussion. At the September 8, 2020 meeting, the minutes indicate that a bid of $175 from the contractor was “previously accepted by the board”.

[34] The Applicant alleges that the decision to award the contract was actually made at the September 8, 2020 meeting. If the conflict had been recorded at that meeting, quorum would have been lost since under section 40(6) a conflicted director cannot be included in quorum.

[35] While I accept that the board minutes about this item are not completely transparent, I do not accept that the minutes were altered or deliberately misleading. As noted, approval of the Board for the expenditure was not required and the amount involved was small and not “material” for the purpose of section 40. I have no basis for finding that the minutes are inadequate

[36] One contract involving the contractor did involve a larger amount of money. This concerned the repair of a garden wall. There were email exchanges between the contractor and the president of the board about this and they indicate that bids from several contractors were considered. The contract for over $10,000 was awarded to the contractor with whom the director had a conflict. Mr. Van Dyck’s evidence is that the director did not participate in these discussions and this is supported by the email chain. I was not provided with the minutes of any meeting where a decision was made about the contract, but I accept Mr. Van Dyck’s evidence that the director did not participate in the discussion or vote.

Alleged breach of confidentiality

[37] In the time that this application was in the Tribunal’s Stage 2 (mediation) process, the Respondent communicated about the case to the owners. The Applicant asserts that this was in violation of the Tribunal’s rules. Rule 5.1 reads as follows:

> 5.1 All messages, settlement offers, and documents that are shared in Stage 1 - Negotiation or Stage 2 - Mediation are private and confidential. Messages, settlement offers, or documents that were provided in these stages cannot be made public or used in Stage 3 - Tribunal Decision, unless the Users agree and the CAT allows it.

[38] In June 2021, the board sent a lengthy communication to the owners about the application. It did not identify the name of the Applicant but indicated he was an owner. The communication advises the owners that a special levy will likely be necessary because of the costs associated with the application and the Applicant’s requests for multiple records. The communication identifies 42 records requested by the Applicant (some of which involved a number of separate documents) and expresses the frustration of the board in trying to respond to these requests. It

provides a detailed explanation of the water meter project (discussed earlier in this decision) and the basis for the board's belief that it acted with all due diligence around that project. The communication noted that the owner had alleged that some of the records had been altered or were fake documents and that a complaint about the condominium manager had been registered with the Condominium Management Regulatory Authority of Ontario and stated that these circumstances led the board to obtain legal assistance. The communication indicates that substantial legal costs had been incurred and advises the owners that they will be responsible for the costs. It states: "this should outrage the other 115 owners as much as it has outraged your Board."

[39] In discussing the records requested by the owner, the communication indicates:

> Most of the documents have been provided, one has been mutually agreed as non-existent, and there are others which are still subject to outstanding requests either because they don't exist, or because neither the Board nor the management company can understand them.

[40] In July 2021, the board sent a second communication to the owners to advise that the case had progressed to Stage 3 and that further costs were anticipated.

[41] In addition to Rule 5, the Tribunal has a User Guide about confidentiality. It provides an overview of the confidentiality requirements that apply to everyone who participates in a CAT case and is intended to help Users understand what information must be kept private and confidential and what can be shared, both during a CAT case and after it concludes.

[42] The User Guide explains the purpose of confidentiality in mediation:

> The purpose of Stage 1 – Negotiation and Stage 2 - Mediation is for the Users to explore opportunities to resolve the issues in dispute collaboratively. That often involves an open discussion of the issues in dispute and may also include the exchange of documents or other materials.
>
> By making these stages confidential, Users are encouraged to work towards a resolution without worrying that their messages, documents and settlement offers will be used against them during Stage 3 – Tribunal Decision.
>
> If a case moves to Stage 3 – Tribunal Decision, the role of the CAT Member is to give each party an opportunity to make their case and then to make a final and binding decision based on the facts and law. That decision must only be based on what happened during the Stage 3 hearing, and cannot consider what the parties said or did in Stages 1 and 2.
>
> By making Stage 1 and 2 confidential, the CAT can better ensure the fairness of the Stage 3 hearing process.

[43] The User Guide notes that not all information about a CAT case in mediation is confidential. Users can disclose general information about what the case is about, including an overview of the issues in dispute. However, "All messages, settlement offers, and documents that are shared in Stage 1 - Negotiation or Stage 2 - Mediation of a CAT case are private and confidential."

[44] I find that the communications to the owners by the board did not violate the Respondent's confidentiality obligations. The communications did not disclose messages, settlement offers or documents that had been filed during Stage 1 or 2. An applicant's request for records is not in itself subject to confidentiality unless the request arises as part of a settlement discussion. In this case, the records listed in the communication were not records the Applicant requested as part of a settlement offer.

[45] As noted, the communication does refer to things that occurred during settlement discussions and in particular refers to a record that "has been mutually agreed as non-existent." That reference comes close to a violation of confidentiality because it appears to be referring to something that was agreed to during Stage 2. However, this does not appear to have been an agreement related to a settlement offer and I find that it does not constitute a violation of confidentiality. Even if it did, there is no evidence before me that the Applicant's rights in respect of this case or the Stage 3 process have been prejudiced or compromised.

[46] It is, however, easy to see why the Applicant was upset by the communication. It is also easy to see how such communications could escalate the conflict. However, the tribunal's jurisdiction in respect of this issue is limited to whether there was a breach of confidentiality and does not include the question of whether the communication was otherwise appropriate or if it infringed other rights. I find there was not a breach of confidentiality.

Penalty and costs

[47] I find that there is no basis for a penalty in this case. I accept that the volume of requests and the fact that some of the requests were not clear explains the delay in providing the requested records. I have found that with the exception of records related to some contracts, the Respondent provided the requested records. Apart from this, I have found that the Applicant's allegations about the conduct of the Respondent are unfounded or concern matters that this Tribunal does not have the authority to deal with.

[48] The Applicant seeks his Tribunal filing fees. Rule 45.2 of the Tribunal's Rules of Practice provides that those fees are generally reimbursed by the Respondent if the Applicant is successful. The Applicant has been partially successful and I find that it is appropriate for the Respondent to reimburse the Applicant for those fees.

[49] The Respondent submitted that it is entitled to legal costs because of the Applicant's behaviour in pursuing issues. The Applicant's behaviour in the course

of this hearing has not been a cause for concern. Rule 46 of the Tribunal's Rules of Practice provides that legal costs will be awarded only in exceptional situations. I find that there are no exceptional circumstances in this case that would justify an award for legal costs.

C. ORDER

[50] The Tribunal orders as follows;

1. Within 60 days of the date of this order, the Respondent shall provide a copy of the contract with Jermark relating to the water meter/train project. The Respondent may provide the document in the manner that is most convenient (e.g. paper or electronic). If for some reason it is not possible for the Respondent to obtain the contract, it shall provide a detailed explanation to the Applicant.

2. If the Respondent has contracts in respect of the engineering work done by Brown & Beattie and Honeycomb which relate to the refence codes in the Applicant's request, it shall provide them to the Applicant. If the Respondent does not have these contracts it shall provide a detailed explanation to the Applicant.

3. Within 60 days of the date of this order, the Respondent shall pay the Applicant costs of $200 for his Tribunal filing fees.

Brian Cook
Member, Condominium Authority Tribunal

Released on: December 21, 2021