

Corrected Decision

This decision was amended to remove quotations around December 31, 2021 in paragraph 7 as outlined in the motion order dated April 8th, 2022.

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: March 11, 2022

CASE: 2021-00132R

Citation: Harder v. Metropolitan Toronto Condominium Corporation No. 905, 2022 ONCAT 18

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

Member: Noeline Paul, Member

The Applicant,

Lucas Harder
Self-Represented

The Respondent,

Metropolitan Toronto Condominium Corporation No. 905
Represented by Greg Marley, Counsel

Hearing: Written Online Hearing – August 3, 2021 to January 27, 2022

REASONS FOR DECISION

A. INTRODUCTION

[1] This Application was brought to the Condominium Authority Tribunal (“CAT”) under the *Condominium Act, 1998* (“Act”). The Applicant is a unit owner of the Respondent (“MTCC 905”), which is a residential condominium. He submitted two requests, dated February 17, 2021 and February 24, 2021, to obtain records. Some of the requested records were delivered to the Applicant by the Respondent prior to the start of the CAT Stage 3 hearing. The Applicant requests that he be provided with all outstanding records and that the CAT order costs and a penalty.

A. ISSUES

[2] The issues to be decided in this Application are as follows:

1. Are the items sought by the Applicant in fact records that he is entitled to access?
2. Did the Respondent provide the Applicant with all of the requested records to which he was entitled?
3. Did the Respondent reply to the Applicant's records requests using the mandatory government forms and, if not, should the Respondent bear any consequence for such failure?
4. Should any costs and/or penalty be awarded?

B. DECISION

- [3] For the reasons below, I find that the Applicant is entitled to the records requested and that some of these records require a fee for production. Further, I find that the Respondent has provided the Applicant with all of the records requested but the Respondent did not use the prescribed form to respond to the Applicant's records requests initially. I have decided not to award costs and that a penalty is not warranted in the circumstances of this case.
- [4] I have ordered that the Applicant be provided with additional documents and/or records in order to promote greater transparency and rectify the Respondent's lack of compliance with Ontario Regulation 48/01 (the "Regulation").

C. BACKGROUND

- [5] The Applicant submitted two requests to obtain several core and non-core records from the Respondent. These requests were completed on the prescribed government form and dated February 17, 2021 ("Request #1") and February 24, 2021 ("Request #2").
- [6] In Request #1, the Applicant requested electronic copies of the most recent approved financial statements and minutes of board meetings held between December 1, 2020, and February 28, 2021.
- [7] In Request #2, the Applicant requested minutes of board meetings and monthly financial records. In terms of the date range, the Applicant indicated December 31, 2020 for the meeting minutes, and, for the monthly financial records, he indicated a date range of October 1, 2020, to February 1, 2021. The monthly financial records appear under the section of the request form for "non-core records".
- [8] The hearing into this Application was conducted online through the CAT's online

platform. At the outset of the hearing, the parties agreed that the issues to be decided by me are those set out above. The parties were advised that the evidence and submissions should be focused on these discrete issues.

- [9] In his closing submissions, counsel for the Respondent argued that Request #2 was only served by email, and therefore was not properly served. There was ample opportunity to raise this issue at the outset of the hearing process when preliminary matters and issues were discussed. I have determined that this issue is outside the scope that was agreed upon and, in the context of the facts before me, it is a very minor issue in any event. Therefore, I will not address it further in fairness to the Applicant. Additionally, the hearing and adjudicative process would be unduly delayed if I were to consider this issue at this point.

D. ANALYSIS

- [10] While the issues noted above were clearly set out and discussed at the beginning of the hearing, both parties strayed in their focus at different points in the hearing. The issues have drifted from those that were originally identified and, for clarity, I have set out the original issues in the headings below, but I have also incorporated the other issues that were raised as subsets. I have addressed the other issues because these are the ones that are determinative of this case. Further, while I have reviewed all of the submissions, only those that are relevant to this decision are included here.

Issue 1: Are the items sought by the Applicant in fact records that he is entitled to access?

- [11] As noted above, the Applicant has requested several core and non-core records and a central issue in this case is whether these requested records are records that the Applicant is entitled to access.

1. Is the Applicant Entitled to Receive an Index of Corporate Documents?

- [12] The Applicant has argued that the Respondent should have provided an index listing out the records that he was to receive as indicated in section 13.3 of the Regulation. He also stated that he did not receive the prescribed form from the Respondent in response to his records requests.
- [13] Section 13.3(7) of the Regulation states that a condominium board's response shall set out an index of the records that the requestor has requested and provides a list of what should be included in this index, such as a description of the record

requested, whether or not it is a core record, and a statement regarding whether the requestor is allowed to examine or obtain a copy of the record.

- [14] In his closing submissions, counsel for the Respondent indicated that the Respondent is required to provide a list of the documents requested and this list includes the reason for any refusals or redactions of the documents. However, counsel does not completely agree that this list should be precisely an index as the Applicant describes. The Respondent acknowledges that it did not provide this list. He submits that this failure was, at best, a technical violation and not intended to deceive.
- [15] With respect to the Respondent's compliance with completing the mandatory prescribed forms to respond to records requests, I have addressed this issue later in this decision.
- [16] In terms of the index that the Applicant seeks, I note that had the Respondent completed the required documentation properly, the Applicant likely would not be requesting this index. Further, the prescribed form to respond to records requests contains an index, when completed properly. Notwithstanding that, I recognize that the Applicant is also motivated to receive this index because he has a suspicion that the Respondent has not disclosed all meetings of the board. I have addressed this concern below, insofar as it relates to the scope of issues that I am deciding in this case. For the purposes of transparency and providing the Applicant with clear information that he should have been given earlier, I am ordering the Respondent to provide the Applicant with a list that itemizes the documents provided to the Applicant in response to Request #1 and Request #2 and sets out all of the board meeting dates for the period from February 25, 2020 to February 24, 2021. For clarity, I am not distinguishing between formal and informal board meetings. This direction pertains to any meeting of the board where business was conducted and decisions made by the board. The list should contain all meeting dates.
- [17] As a further note, while the Applicant and Respondent appear to disagree regarding whether the Applicant should have been provided an index, it is clear that there was procedural error on the part of the Respondent in failing to provide the accompanying statements to a response to the records request. The Applicant should not need to request these statements as if they are a record of the corporation. The Respondent's error is rectified by providing the statements.
- [18] In terms of entitlement to an index as argued by the Applicant, this document is not an existing record of the Respondent. I have ordered the list described above in order to rectify the Respondent's lack of compliance with the Regulation and the Applicant has clarity moving forward.

2. Is the Applicant Entitled to Monthly Financial Documents as Core Records?

- [19] The Applicant has also argued that draft financial documents which are produced for the board's monthly meetings should be considered core records and, therefore, should be accessible without a fee. More specifically, the Applicant seeks access to regular statements that are created from information held electronically in the Respondent's database or account and reflect the Respondent's financial transactions over the course of the month. The Applicant takes the position that he is entitled to access these documents as core documents, regardless of whether these monthly statements are printed and viewed by the Respondent's board. In arguing that these documents should be considered core records, he relies on section 55 of the Act and the Respondent's by-law No. 6.
- [20] The Respondent takes the position that draft and monthly financial statements are not core documents. The Respondent submits that, in keeping with the CAT decision in *Mellon v. Halton Condominium Corporation No. 70*¹, audited financial statements should be disclosed as core records but monthly or interim (unaudited) financial statements do not fall under this same category. With respect to by-law No. 6, the Respondent submits that this by-law simply states that financial records form a record of the corporation, but it does not designate any of the documents to be core documents.
- [21] Based on a plain reading of by-law No. 6, which was signed in December 2015, the by-law does not specifically itemize or further describe which documents are financial records. Article 3.1 of by-law No. 6 states that the corporation shall keep and maintain a number of documents, including the financial records of the corporation. This by-law further directs that, in the case of the financial records, they should be retained for a period of at least six years. The by-law does not specifically list draft financial documents.
- [22] I note that the phrasing of by-law No. 6 is best viewed as broad and inclusive, such that it would capture all financial records that exist but it would not mandate the creation of any particular record. It is a direction to keep all financial records for the retention period. Further, the by-law predates the current version of the Act, so the by-law could not have been intended to define "core" documents for the purposes of the current legislative regime.

¹ 2019 ONCAT 2.

- [23] The Respondent asks for guidance and a ruling in this case about the status of draft financial records so that it can properly deal with anticipated future requests for records. The Respondent states that, as per the CAT decision in *Ronald Smith v. Metropolitan Toronto Condominium Corporation No. 773*², a document that is accepted and reflected in the minutes of a Board meeting becomes a record of the corporation and should be produced. By extension, the Respondent takes the position that a document which has not been accepted and adopted by the board is not a record of the corporation and the Respondent would like confirmation of this position in a ruling from the CAT.
- [24] It is clear that the respective positions of the Applicant and Respondent fall on different sides of a spectrum of what should be considered a record. On the one side, the Applicant takes a very broad view of financial records and statements, to the point where his position encompasses what more properly falls into the category of working documents. On the other side, the Respondent seems to be moving to a point where financial documents may be reviewed by the board at its meetings but are not being approved, apparently so that they are not considered records of the corporation.
- [25] The matters of board governance do not fall within the jurisdiction of the CAT. However, to the extent that the Respondent's board adopts a practice whereby financial drafts are not approved so that they do not form a record of the corporation and cannot be accessed, I must highlight that this practice is not consistent with the management of a harmonious condominium community and will invariably foster a climate of distrust between the management structure, including the board, and the members that it is entrusted to serve. There should be transparency for members with an ownership interest in the condominium community and this transparency should be timely. By the board adopting such a practice, it merely creates roadblocks for these members to access information that should be accessible and frustrates the intent of the 'open-book principle'.³
- [26] While the term "draft" has been used in reference to financial documents in this case, I note that draft financial statements have not been defined in the Act or Regulation. The term as used here is, in effect, a distinction without a difference. Instead, the questions of significance are (1) whether a financial statement or document is a record; (2) if so, whether it is a core record; and (3) whether the requestor is entitled to access the record.

² 2019 ONCAT 24.

³ See *Abou El Naaj v. Peel Standard Condominium Corporation No. 935*, 2021 ONCAT 5.

[27] I find that draft monthly financial documents, which are produced for the purposes of review by the board and relied upon in its ongoing governance duties, are records of the corporation but they are not core records. While the referencing of these drafts in the board minutes is an issue that deals more with the adequacy of minutes and is beyond the scope of this Application, I find that, in the circumstances of this case, it is untenable to hold a position that these draft financial documents are not records. The board clearly needs to rely on some draft financial documents for the purposes of ongoing and good governance. Documents also must be provided to auditors for review. It is unclear how a practice where financial drafts are not approved by the board and are not considered records would function on a long-term, productive basis. I further note that there is a distinction between work products, information, and interim financial statements. Documents, such as interim financial statements, become part of the accounting records of the corporation and are needed for the reference of the board, its treasurer and other individuals for accounting and auditing purposes. These documents are records of the corporation and are accessible under the Act. In contrast, work products are not in this same category.

[28] For the purposes of deciding this issue, I find that the Applicant is not entitled to draft financial records that are reviewed in monthly board meetings as core records but he is able to access these records as non-core records.

3. Is the Applicant Entitled to Monthly Financial Documents Without a Fee?

[29] As indicated above, I have found that these draft monthly financial documents are non-core records. As such, the Respondent may charge for fees associated with the production of these records further to a records request. For clarity, the Applicant is not entitled to these documents without paying a reasonable fee.

[30] With respect to the amount of the fee charged by the Respondent to the Applicant for accessing documents, the Respondent states that the Applicant was charged \$30 per hour in order to access the requested documents. The Respondent's position is that this amount reflects the estimated time involved in compiling the requested drafts. The Respondent now asks for an order from the CAT clarifying whether a fee of \$30 per hour is reasonable and payable by the requestor, or the Applicant in this case.

[31] The Applicant has indicated throughout the hearing process that he does not agree with the Respondent's calculation of \$30 per hour for access to records.

[32] The charge for access to records is addressed in section 13.3(8) of the Regulation. This section indicates that the Respondent may charge a reasonable estimate for

the production of non-core records and this amount reflects actual labour and delivery costs.

- [33] Having reviewed the evidence provided in this case, I find that the Applicant has not established that the amount charged by the Respondent is outside of what is a reasonable estimate. In terms of access to the records, I find that the Respondent's estimates to access monthly financial documents are reasonable.

Issue 2: Did the Respondent provide the Applicant with all of the requested records to which he was entitled?

- [34] The Applicant has requested a number of records in Request #1 and Request #2. I have addressed these records below.

1. Were All the Board Meeting Minutes Provided?

- [35] The Applicant requested minutes of board meetings in both of his requests. In Request #1, the Applicant indicated that he was requesting minutes for meetings within the timeframe of December 1, 2020 until February 28, 2021. In Request #2, the Applicant specifically noted the date of December 31, 2020.

- [36] In his closing submissions, the Applicant argued that his records requests should be understood more broadly. He stated that Request #2 was intended to clarify Request #1 and that he was requesting minutes from all board meetings within the 12 months up to December 31, 2020. The Applicant specifically noted that he has not received the minutes for the board meeting of May 12, 2020. He further asserted that there are additional minutes from board meetings that have not been disclosed.

- [37] A focal point of the Applicant's case has been a letter sent by the Respondent to the witness, Dr. Davies (who is another unit owner), on February 4, 2001. The Applicant has argued that a meeting of the board must have occurred in order to authorize this action and, in particular, the Applicant has narrowed the timeframe of this suspected board meeting to some time between January 31, 2021 to February 4, 2021. In his closing submissions, the Applicant also noted that the board issued letters during the period from the end of January to the beginning of February 2021, again suggesting the existence of additional undisclosed board meetings to authorize this action.

- [38] There has been some confusion around a board meeting held in November 2019 and this appears to relate to a meeting that was re-scheduled to another date within the same month. The Applicant insists that multiple board meetings must

have occurred, while the evidence of the witness Ms. Robin (who is the Administrative Assistant to the Respondent's property manager) is that only one meeting occurred and minutes from that meeting were posted for all unit owners to review. I note that any meeting that occurred within this month is outside of the timeframe relevant to this Application. There was also reference to a contract executed in February 2019. Again, this timeframe is outside of this Application's scope.

- [39] The Respondent has consistently maintained that it has provided all the meeting minutes that fall within the relevant requested period to the Applicant and that there are no missing or other minutes. Counsel for the Respondent does not agree with the broadened timeframe suggest by the Applicant in his closing submissions for Request #2.
- [40] With respect to the number of meetings held by the Respondent's board, the Respondent's evidence is that its board meets formally approximately once per month to conduct business and may also meet outside of these meetings for the purpose of dealing with urgent matters. The Respondent's position is that actions decided upon at informal meetings are ratified at subsequent formal board meetings and documented in the board minutes, as was asserted to be the case with the letter to Dr. Davies. In terms of the reference to informal board meetings, the Respondent's witness, Ms. Robin, testified that she had not received any record of meetings between January 28, 2021 and February 8, 2021 and she speculated that if any meetings occurred they were not formal meetings of the board.
- [41] There has been some discussion about informal and formal meetings of the board in this case. The evidence of the Respondent is that informal meetings of the board do occur. I note that the Act makes no distinction between so-called formal and informal meetings. Further, the Act imposes an obligation to keep minutes of meetings and requires that every board meeting be minuted, as this is one aspect of keeping adequate records.
- [42] While the Respondent has characterized some meetings as being informal, it seems that what the Respondent is actually describing are informal communications between board members occurring between the times that meetings are held, sometimes resulting in decisions that are acted upon. The Respondent further states that where decisions are made between meetings, then the board ensures they are ratified at the next meeting and recorded in that meeting's minutes. Whether or not this is appropriate condominium governance is outside the scope of this case and the CAT's current jurisdiction to assess;

however, I can and do find that the practice as it relates to the keeping of minutes is acceptable and satisfies the requirement for adequacy of the corporation's records.

[43] In any event, there is insufficient evidence before me to confirm that the board necessarily did hold any meetings other than the ones represented by the minutes provided to the Applicant. Therefore, I find that the Applicant has not clearly established the existence of board meetings other than those disclosed by the Respondent. The arguments by the Applicant in this area are speculative at best and the evidence does not clearly support a finding of additional meetings of the board. There may very well be governance issues that the Respondent's management and board structure need to address but this is beyond the scope of this Application and, to some extent, also the jurisdiction of the CAT.

[44] The Applicant has broadened the timeframe of the request for board meeting minutes under Request #2. I am not satisfied that the Respondent should have been aware of the Applicant's intention at the time that the request was submitted in February 2021. It is not clear that the Applicant was requesting minutes from meetings from February 2020 until December 31, 2020, which would be the meetings falling within the 12 months prior to the request. Nonetheless, there has been significant confusion and communication problems between the Applicant and Respondent and for the purposes of transparency of information, I am ordering the production of minutes from the May 12, 2020 board meeting, with proper redaction of confidential information, in keeping with the Act. If minutes do not exist, then the Respondent should provide an attestation to this effect, as noted in the Order below.

2. Was the Applicant Provided with the Most Recent Approved Financial Statements?

[45] The Applicant requested the most recent approved financial statements in Request #1. He did this by checking the appropriate box under the section for core records in the request form.

[46] The Applicant's evidence is that Ms. Robin advised him by email that the most recent financial statements were already provided in the Annual General Meeting package that was sent to him digitally and mailed to his unit. This email was included in the documentary evidence in this case. The most recent financial statements referenced here are the most recent audited financial statements.

[47] The evidence is that this record has ultimately been provided to the Applicant. As such, I find that the Applicant has been provided with the most recent approved

financial statements as captured in his Request #1.

3. Was the Applicant Provided Monthly Financial Documents?

[48] As indicated earlier in this decision, the Applicant and Respondent have differing views on what can be accessed as records and whether these documents can be accessed without fees.

[49] The Respondent takes the position that all monthly draft financial statements for the relevant timeframe of the records requests have been provided to the Applicant. In Respondent counsel's closing submissions, the Respondent admits that these documents were produced late. The Respondent further submits that, while it took the position that these documents could be accessed for a fee, the Respondent provided the documents upon legal advice to do so and has done so free of charge as an act of good faith.

[50] I have previously addressed the Applicant's arguments as they relate to access of monthly financial information and documents. Based on the information before me, I find that the Applicant has been provided with the monthly financial documents that he requested.

Issue 3: Did the Respondent reply to the Applicant's records requests using the mandatory government forms and, if not, should the Respondent bear any consequence for such failure?

[51] In responding to the Applicant's records requests, the Respondent did not complete the prescribed Response to a Request for Records form initially. Instead, the Respondent, through Ms. Robin, sent an email on February 18, 2021 in response to the record requests. The official responses, on two separate prescribed forms, were sent much later and are dated April 19, 2021 and June 8, 2021. The latter response sets out a charge of \$9.90 to access certain documents and this amount is calculated at a rate of \$30 per hour.

[52] The evidence in this case is that the Respondent delayed in providing the prescribed form in response to the records requests. The Respondent has not given an adequate explanation for the failure to provide responses in a timely manner, using the prescribed forms. While this is a technical violation of the Respondent's obligations under the Act and Regulation, the Respondent has rectified this error by providing the forms. I find that this issue is resolved and the Respondent's error does not give rise to any consequence in the circumstances of this case.

Issue 4: Should any costs and/or penalties be awarded?

[53] The Applicant has requested that he be awarded the costs of his application and a penalty in the amount of \$5,000 on the basis of the Respondent's conduct in this case, noting a number of delays that he attributes to the Respondent and what he views as misleading actions.

1. Costs

[54] The CAT may grant an award to an applicant for costs where the applicant has been successful in an application and in the appropriate circumstances, as set out in Rule 48 of the CAT *Rules of Practice*. The awarding of costs is discretionary.

[55] In the CAT's *Practice Direction: Approach to Ordering Costs*, issued January 1, 2022, the CAT sets out some factors that may be considered by an adjudicator in deciding whether to award costs. As listed in section 3 of this document, the CAT may look at the conduct of the parties, including the party requesting costs, when deciding this issue.

[56] In considering whether to award costs to the Applicant in this case, I have considered the behaviour of both parties during the hearing process. This process was, at times, unduly delayed by directions not being followed and repeated reminders being issued to ensure that the matter could move forward in a timely manner. While I recognize that the Respondent could have been more diligent in following directions, I note that the Applicant's behaviour was often problematic. The Applicant also failed to follow directions which resulted in delays in the hearing process on multiple occasions. Notably, the Applicant failed to follow directions related to closing submissions twice, resulting in delays, and despite being issued repeated, clear instructions. In light of the Applicant's repeated difficult behaviour, I am exercising my discretion to not award costs in this case.

2. Penalty

[57] Section 1.44(1)6 of the Act permits the CAT to impose a penalty when appropriate in cases where the condominium corporation has, without reasonable excuse, refused to permit a person to examine or obtain records.

[58] With respect to whether a penalty is appropriate in this case, I am not satisfied that there has been a clear refusal to provide records on the part of the Respondent. The Applicant has been able to access the records requested, notwithstanding the dispute over whether monthly financial drafts should be accessed without charge, the amount of the charge, and the timeframe that the records requests were

intended to capture. Some documents have been provided late but they were ultimately provided. As such, I find that an award of a penalty is not warranted in these circumstances.

E. CONCLUSION

[59] Based on the evidence provided in this case, I conclude that the Applicant is entitled to the records requested but not all of them are considered core records that can be accessed without paying fees. Further, I have determined that the Respondent provided the Applicant with the records that fall within the relevant timeframe. While the Respondent did not use the prescribed form to initially respond to the Applicant's records requests, I have determined that the Respondent's error does not give rise to any consequence in the circumstances of this case. Finally, I conclude that costs and a penalty are not warranted.

[60] I have ordered the documents below for the purpose of promoting greater transparency and rectifying the Respondent's lack of compliance with the Regulation.

ORDER

[61] The Tribunal orders that:

1. The Respondent must, within 30 days of this Decision, provide the Applicant with documents as follows:
 - a. A list that conforms to section 13.3(7) of the Regulation in response to the Applicant's Request for Records of February 17, 2021 and February 24, 2021; and
 - b. A list that sets out all of the Board meeting dates for the period from February 25, 2020 to February 24, 2021.
2. The Respondent must provide minutes from the May 12, 2020 Board meeting, with proper redaction in keeping with applicable law, within 60 days of this Decision. If minutes do not exist, then the Respondent must provide an attestation of this fact, in electronic format, within 30 days of this Decision.
3. If there are any outstanding financial records that fall under the Applicant's Request for Records of February 17, 2021 and February 24, 2021, the Applicant is entitled to access these records but the Respondent must first provide an estimate of the fees to be charged for these non-core records and the Applicant can then confirm that he would like to access these records. The Respondent must provide this estimate within 30 days of this Decision.

The Respondent must provide the records within 30 days of the Applicant's payment of the applicable fees. The fees must be later adjusted if the estimate is inaccurate, as provided by the Regulation.

4. No penalty or costs are awarded.

Noeline Paul
Member, Condominium Authority Tribunal

Released on: March 11, 2022