CONDOMINIUM AUTHORITY TRIBUNAL

DATE: April 8, 2022
CASE: 2022-00021R
Citation: Jasper Developments Corp. v. York Condominium Corporation No. 82, 2022 ONCAT 32

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

Member: Mary Ann Spencer, Member

The Applicant,
Jasper Developments Corp.
Represented by Victor Yee, Counsel

The Respondent,
York Condominium Corporation No. 82
Represented by Derrick Fulton, Counsel

Hearing: Written Online Hearing – February 14, 2022 to April 1, 2022

REASONS FOR DECISION

A. INTRODUCTION

[1] Jasper Developments Corp. (the "Applicant") alleges that York Condominium Corporation No. 82 (the "Respondent) has failed to provide all the records requested in its October 13, 2021 Request for Records which it is entitled to receive. It also alleges that the fees charged by the Respondent for the records that were provided were unreasonable and requests the Tribunal order reimbursement of a portion of those fees. It further alleges that the Respondent is not keeping adequate records as required by section 55 (1) of the *Condominium Act, 1998* (the "Act"). The Applicant requests the Tribunal assess a penalty of $5,000 for the Respondent's refusal to provide records without reasonable excuse and an award of damages of $5,000 incurred as a result of the alleged failure to keep adequate records. The Applicant also requests its costs in this matter.

[2] The Respondent's position is that it did not refuse to provide the records which the Applicant was entitled to receive and no penalty should be assessed; it provided all the records which were in its possession after making all reasonable efforts to locate them. The Respondent asserts that the Applicant's request for damages

was improperly made. It also asserts that the fees it charged for the records it provided were reasonable. It also requests its costs in this matter.

[3] For the reasons set out below, I find the Respondent has failed to keep adequate records as required by section 55 (1) of the Act. I also find the Respondent's failure to provide all the records requested in the Applicant's October 13, 2021 request is a refusal to provide records without reasonable excuse and I order it to pay a penalty of $1,500 to the Applicant. I also order the Respondent to reimburse the Applicant $367.50 of the fees it paid for the delivery of copies of records. Further, I order the Respondent to provide the Applicant with a copy of its bank statements for the month of September 2021. Finally, I order the Respondent to pay the Applicant $200 in costs in respect of Tribunal fees. I award no other compensation or costs in this matter.

B. BACKGROUND

[4] York Condominium Corporation No. 82 is a 321-unit residential condominium. The Applicant corporation is the owner of three units. Witness Lina Kazakova is a director of the Applicant.

[5] This is the second case between these parties to come before the Tribunal. The previous case dealt with the Applicant's September 3, 2021 request for core records. Both parties advised me that there is a third Request for Records extant. There is also a history of litigation between these parties with respect to a requisition for an owners' meeting submitted by the Applicant. The case before me is about the Applicant's October 13, 2021 request for non-core records and the issues relating to that request are the only ones I address in this decision.

[6] The Applicant's legal counsel, as authorized agent of the Applicant, requested 16 sets of non-core records in the October 13, 2021 Request for Records on behalf of the Applicant as owner of one of its three units. With the exception of the request for a list of owners in arrears, the Respondent's Board Response to Request for Records form indicated it was prepared to provide the records for a total estimated fee of $770, which the Applicant paid on November 16, 2021.

[7] Bert Berger, the Respondent's witness, is responsible for condominium management services at the Respondent. Currently, he is with L & H Property Management Services, which took over management of the condominium in January 2022. When the Applicant's Request for Records was received, Mr. Berger was employed by City Towers Management which had entered into a contract for the management of the Respondent in May 2021. Mr. Berger responded to the Applicant's counsel in a series of e-mails to which he attached

the records he could locate. None of the e-mails indicated the actual cost of delivering the records.

C. ISSUES & ANALYSIS

[8] The issues to be decided in this matter are:

1. Is the Applicant entitled to examine or obtain a copy of the requested list of owners in arrears?
2. Is the Applicant entitled to examine or obtain a copy of certain specific records which it alleges should have been included among those the Respondent did provide?
3. Is the Respondent keeping adequate records?
4. Is the Applicant entitled to any reimbursement of fees it paid the Respondent to complete the October 13, 2021 Request for Records?
5. Should the Tribunal order a penalty and/or compensation for damages?
6. Should the Tribunal award costs?

Issue No. 1: **Is the Applicant entitled to examine or obtain a copy of the requested list of owners in arrears?**

[9] The Applicant requested a "List of Arrears, setting out which units of the Corporation are in arrears of common expenses, for how long, and for how much" for the period October 13, 2020 to October 13, 2021. Mr. Berger testified that the Respondent did not provide the record because it contains personal information that is confidential under the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") and the Act.

[10] Ms. Kazakova testified that the arrears list is needed to determine who is entitled to vote at an owners' meeting. Section 49 (1) of the Act states that "an owner is not entitled to vote at a meeting if any contributions payable in respect of the owner's unit have been in arrears for 30 days or more at the time of the meeting."

[11] As context, while the previous hearing involving these parties was before the Tribunal, there was a concurrent dispute before the Superior Court of Justice with respect to the Respondent's failure to call a meeting of owners after it had received a requisition from the Applicant. In its decision, the Court noted that section 46 (5) of the Act provides a statutory remedy allowing owners to call a meeting when a corporation fails to.

[12] Ms. Kazakova testified that the owners' meeting has yet to be called. Mr. Berger testified that the Respondent would provide the list to the chair of the meeting

when it was scheduled. He noted that a list of owners in arrears reflects a point in time, can change daily, and therefore would need to be current at the date of the meeting.

[13] I find that the Applicant is not entitled to receive a copy of the list of owners in arrears. Section 55 (4) (c) of the Act states that the right of an owner to examine or obtain copies of records does not apply to records relating to specific units or owners. The information the Applicant requests clearly relates to specific units and owners. I also note that unless the Respondent is engaged in commercial activities, PIPEDA does not apply; section 4 (1) (a) of PIPEDA states that it only applies to organizations in respect of personal information that "the organization collects, uses or discloses in the course of commercial activities."

[14] In his closing submissions, Counsel for the Applicant did not argue that the Applicant was entitled to receive the list of owners in arrears; rather, he requested the Tribunal order the Respondent to provide the list to the chairperson or the company which might host a virtual owners' meeting when the date of that meeting was set. I will not make this order. The subject record will not exist until it is created as of the date of a meeting that has yet to be called. Section 55 (3) of the Act and section 13.3 (1) of Ontario Regulation 48/01 ("O/Reg 48/01") establish the entitlement of owners to examine or obtain copies of records if the request is solely related to their interest as an owner. Ms. Kazakova testified that she does not trust the Respondent's management. Counsel for the Applicant is requesting that I order a record be provided at an unknown future date to an unknown third party to ensure the Respondent's compliance with section 49 (1) of the Act. This purpose extends beyond the purpose of an owner's request for records.

Issues No. 2 and 3: Is the Applicant entitled to examine or obtain a copy of certain specific records which it alleges should have been included among those the Respondent did provide; and, is the Respondent keeping adequate records?

[15] I am addressing Issues No. 2 and 3 together in this decision. The question of the Applicant's entitlement to additional specific records which it alleges should have been provided is related to the question of the adequacy of the records being kept by the Respondent.

[16] In addition to the list of owners in arrears, the Applicant requested 15 sets of non-core records. Mr. Berger's testimony was that the Respondent provided all the records responsive to the Applicant's request that could be located. He testified that the Respondent's records were missing when City Towers Management was retained as its condominium management provider in May 2021. He found empty folders in the office file cabinets and a number of what he described as "old

boxes." He testified that all efforts were made to obtain the missing records; this included searching e-mails and electronic files and contacting both SPS Management, the firm which managed the Respondent from February to April 2021, and Nadlan-Harris which managed it from December 2018 to February 2021. Demand letters were also sent. Mr. Berger indicated that his efforts with the previous management firms were unsuccessful. I also note that the e-mails Mr. Berger sent with the records which were provided indicate that in some cases he contacted the Respondent's suppliers to obtain copies of agreements that he could not locate.

[17] In his closing statement, Counsel for the Applicant wrote "it is evident that the Respondent is attempting to shift the scope of the dispute to focus solely on the Request for Records itself, and not on the obvious fact … that the Respondent has not been keeping "adequate" records as required under Section 55 (1) of the Act." Section 55 (1) of the Act states that a corporation "shall keep adequate records" and sets out a list of the records which must be kept. The word "adequate" is not defined. However, guidance is provided by the decision in In *McKay v. Waterloo North Condominium Corp. No. 23,* 1992 CanLII 7501 (ON SC):

> The Act obliges the corporation to keep adequate records. One is impelled to ask – adequate for what? An examination of the Act provides some answers. The objects of the corporation are to manage the property and any assets of the corporation (s. 12 (1)). It has a duty to control, manage and administer the common elements and the assets of the corporation (s. 12 (2)). It has a duty to effect compliance by the owners with the Act, the declaration, the by-laws and the rules (s. 12 (3)). Each owner enjoys the correlative right to the performance of any duty of the corporation specified by the Act, the declaration, the by-laws and the rules. The records of the corporation must be adequate, therefore, to permit it to fulfil its duties and obligations.

While Mr. Berger's testimony about the overall state of the Respondent's records indicates a significant deficiency in its overall record-keeping practices, my findings about the adequacy of its records are limited to the specific records requested in the Applicant's October 13, 2021 request on which I heard evidence.

[18] I note that many of the Applicant's requests were for records spanning lengthy date ranges. Therefore, the applicable records retention requirements must be considered in determining if the Respondent is keeping adequate records. The requirement to keep adequate records has always been part of the Act (and was included in the Act's predecessor *Condominium Act*) and section 55 (1) has always set out a list of the records which the corporation "shall keep". The minimum records retention periods currently set out in section 55 (2) of the Act and in section 13.1 (2) of "O. Reg. 48/01" became law on November 1, 2017. Before

that date, the only retention periods specified were for financial records and status certificates.

[19] The records requested by the Applicant are addressed individually below. Where the requested records are similar, I have grouped the requests together.

Financial Records, Board Meeting Minutes, and any Agreements entered into by the Corporation, regarding the "boiler loan" financing from Morrison Financial referenced in October 19th 2020 Auditor's Report at Note #5;

Financial Records, Board Meeting Minutes, and any Agreements entered into by the Corporation, regarding the "water debt loan" financing from Morrison Financial referenced in October 19th 2020 Auditor's Report at Note #4;

[20] The requested date range for the loan-related records was January 1, 2000 to October 13, 2021. The evidence is that the only records the Respondent provided were copies of a continuation agreement dated July 10, 2017, and a loan renewal agreement dated May 21, 2017, which Mr. Berger testified were all he could find. I accept Mr. Berger's testimony. Therefore, the only issue to be addressed is the adequacy of the subject records.

[21] Notwithstanding that the request was for financial records, board meeting minutes and agreements, Ms. Kazakova's testimony was focused on board meeting minutes and her belief that given the significant amount of the loans, the Respondent should have minutes of meetings where they were addressed.

[22] Section 55 (1) of the Act lists "a minute book containing the minutes of owners' meetings and the minutes of board meetings" as one of the records a corporation "shall keep." Section 13.1 (2) 2 of O. Reg. 48/01 specifies this record shall be kept "at all times". As set out above in paragraph 16, while this section of the regulation was not effective until November 1, 2017, the minutes of board meetings have always been among the records listed in section 55 (1).

[23] The loan renewal agreement, for a total of approximately 4.9 million dollars, was signed in 2017. Section 32 (1) of the Act states "the board of a corporation shall not transact any business of the corporation except at a meeting of directors at which a quorum of the board is present." While it is possible that the board did not meet to approve the loan renewal, I find this highly improbable given the significant liability the loan represents. However, there is no evidence to support that such a meeting took place. I also note that the dates the agreements were signed precede November 1, 2017 when the retention requirements set out in O. Reg 48/01 came into effect. Therefore, notwithstanding the evidence about the overall

state of the Respondent's records, I cannot find that the corporation has failed to keep adequate records with respect to the requested minutes of board meetings relating to the loan agreements.

Monthly Financial Statements provided by the Condominium Manager to the Board; and

Corporation's monthly banking statements issued by the holder of Corporation's monies under s. 115 (3) of Condominium Act

[24] Both of the above records were requested for the period of October 1, 2020, to October 13, 2021.

[25] Ms. Kazakova testified that the Respondent did not provide financial statements for the months of January, March, and April 2021 and that only one of the bank statements included cheque images. She also noted that the financial statements produced by City Towers Management were significantly shorter than those produced by Nadlan-Harris; she asserted that the City Towers Management records are inadequate because they do not say which specific services were paid. Further, some information in the records was redacted.

[26] Mr. Berger testified that he provided the financial statements which could be located and that he redacted information which identified the units in arrears. I note that Mr. Berger should have provided an explanation for the redaction; section 13.8 (1) (b) of O. Reg 48/01 requires that redacted records be accompanied by a written statement setting out which provision of the legislation a corporation relies on for the redaction.

[27] I do not find the statements produced by City Towers Management to be inadequate in themselves. That the statements produced by different management companies are not the same is reasonable given each company may use proprietary financial software. I note that the lengthier documents produced by Nadlan-Harris include copies of the General Ledger, which, while a financial record, would not necessarily be reproduced as part of a financial statement provided to the board.

[28] With respect to the monthly bank statements, only the statement for February 2021 appears to be complete in the records Mr. Berger attached to his December 16, 2021 e-mail to the Applicant's Counsel. In the e-mail, Mr. Berger indicates he responded to the request for both the financial and bank statements and that the bank statements form part of the financial statements. While this may explain why the statements are not complete, the Applicant did not request the bank statements provided to the board. The Applicant is entitled to receive a complete copy of these records, redacted as required to comply with section 55 (4) of the

Act. I note that the Respondent entered complete bank statements for the months of April to August, 2021, as evidence in this hearing. I accept that the records pre-dating Mr. Berger's tenure may well not be available in their entirety. However, I will order the Respondent to provide the Applicant with a copy of the complete bank statement for the month of September 2021.

[29] Section 55 (1) 1 of the Act requires the corporation to keep financial records. Section 55 (2) 1 sets out that the retention period for financial records is "at least six years from the end of the last fiscal period to which they relate or such longer period that is prescribed." Based on the evidence that the Respondent could not produce the financial statements for the months of January, March, and April 2021, I find it is not keeping adequate financial records.

Agreement between the Corporation and its current condominium management services provider

Any Agreements entered into by the corporation for cleaning, janitorial or maintenance services; plumbing services; security and/or concierge services; superintendent and/or building operator services; website or web portal development or online services for residents; pest control/remediation services

Any Agreement(s) or contracts of employment entered into by the Corporation for Superintendent and/or building operator

[30] All the above agreements were requested for the date range of January 1, 2000 to October 13, 2021, notwithstanding that the request for the management agreement was for the agreement with the "current" condominium management provider.

[31] The evidence is that the Respondent provided the condominium management services contract with City Towers Management executed in May 2021; cleaning and maintenance services contracts with Smart Maintenance Services Inc. dated April 1, 2021, with Select Maintenance Services Ontario Inc. covering the period September 1, 2020 to August 31, 2021, and a February 28, 2019 letter terminating the services of former provider Affinity Integrated Facility Solution; an agreement with Justice Services Ltd. dated November 1, 2020, for security services; and, a quote for pest control services dated August 6, 2021.

[32] With respect to the management services agreements, Mr. Berger testified that there was no contract with previous management company SPS Management which had been retained on a trial basis. He also stated that there should have been a contract with Nadlan-Harris, that he requested it from them, and they

refused to provide it.

[33] With respect to cleaning services, Mr. Berger testified that the Respondent provided the records which could be found and noted that while the letter terminating the services of Affinity Integrity Facility Solution was provided, no contract with that firm could be located. He also testified that the Respondent has no agreements for plumbing or pest control services but retains these on an as-needed basis. He stated that the Respondent has no superintendent but has a "handyman" on call, testifying that the superintendent's suite was sold some time ago. Finally, he stated that the Respondent's website had been developed by a friend of a board member at minimum cost and there was no signed agreement.

[34] Ms. Kazakova's testimony with respect to the deficiency of the records was that no termination letter was provided with respect to the early termination of the cleaning and maintenance contract with Select Maintenance Services Inc.; and no work orders or invoices were provided in lieu of contracts for plumbing, website development and pest control services. Further, with respect to the request for security agreements, she noted that the Respondent had issued cheques to City Solutions Systems but she received no invoices. Mr. Berger testified that he interpreted the Applicant's request to be for contracts for guard services and City Solutions Systems was providing repairs to cameras on an as-needed basis.

[35] In cross-examination, Ms. Kazakova agreed that the Applicant did not request work orders and invoices in its Request for Records. However, she stated that she believed the Respondent should have been "transparent" and provided these in lieu of contracts. Mr. Berger testified that had cheques, invoices and work orders been requested, he would not have provided copies of these but would have allowed the Applicant to examine them in the office. He advised that these records "could" be available but noted that some are currently with the Respondent's auditor.

[36] Counsel for the Applicant submitted that if the Respondent "does not have a record of a written agreement or contract with a particular service provider, then YCC 82 ought to have produced the invoices, work orders, and other documentation which demonstrates the non-written agreement between YCC 82 and the service provider." He referred me to the Tribunal's decision in *Russell v. York Condominium Corporation No. 50,* 2021 ONCAT 103 (CanLII), which, at paragraph 16, states that if "work orders are an integral part of the agreement or are the principal record of the agreement, then it may be necessary to retain them." The applicant in *Russell* had requested "contracts, work orders, purchase orders and similar" in their Request for Records and the respondent had not

provided the work orders because they had not retained them.

[37] The Applicant in the case before me did not request copies of termination letters, invoices, and work orders in its requests for the various agreements entered into by the Respondent and I reject Counsel for the Applicant's submission that the Respondent should have provided them. Notwithstanding his arguments about the legal definition of a contract, a plain reading of the Request for Records supports the Respondent's interpretation of the request, and I will not order the provision of the records set out above in paragraph 34. If the Applicant wishes to obtain copies of these records, a further Request for Records setting out the specific type of records requested should be submitted.

[38] With respect to the adequacy of the Respondent's records of agreements, section 55 (1) 8 of the Act requires a corporation to keep copies of all agreements it has entered into. Section 55 (1) 11 requires a corporation to keep other records as prescribed. As set out in section 13.1 (1) 16 of O. Reg. 48/01, one of the prescribed records is "a copy of all agreements mentioned in paragraph 8 of subsection 55 (1) of the Act that have expired". Section 13.1 (2) of O. Reg 48/01 requires expired agreements be kept for 7 years from the date of expiry.

[39] The evidence is that the Respondent does not have a copy of the Nadlan-Harris management contract or the contract with Affinity Integrated Facility Solution and therefore I find it is not keeping adequate records of its condominium management and cleaning and maintenance services agreements. I cannot make the same finding with respect to the other requested service areas. While the Respondent provided a security services contract dated in 2020, there is no evidence before me of previous agreements, notwithstanding that I find it improbable that there were no such agreements. With respect to plumbing, web design and pest control, there is no evidence of either current or past agreements and I accept Mr. Berger's testimony that these services are provided on an as-needed basis. Finally, with respect to the requested agreement or employment contract for a superintendent, it is unknown when the corporation ceased to have a superintendent and therefore whether a contract, if in fact there was one, should still be being retained by the Respondent.

<u>All Reserve Fund Studies from May 19, 1972 to October 13, 2021</u>

[40] The evidence is that the Respondent provided Reserve fund studies dated January 2007, September 2012, and June 2019 in response to the Applicant's request. Mr. Berger testified that the Act requires a corporation to conduct a reserve fund study every three years and there is no requirement to keep older

studies because each new study replaces the previous one. He also testified that it was not until 1984 that the legislation required corporations to conduct reserve fund studies.

[41] Mr. Berger is not correct. Corporations were not required to conduct reserve fund studies until the Act came into effect on May 1, 2001. Section 55 (1) of the 2001 version of the Act listed reserve fund studies as one of the adequate records that a corporation "shall keep". Effective from November 1, 2017, section 13.1 (2) 2. of O. Reg 48/01 requires that reserve fund studies must be retained "at all times". The dates of the studies the Respondent provided do not correspond to the legislated requirement to ensure reserve fund studies are conducted no later than three years apart from one another, commencing from the first study which ought to have been completed by no later than May 2004 (three years after the requirement for reserve fund studies came into effect). Whether this reflects a failure to comply with that requirement or a failure to keep records is not clear. However, based on the fact that the Respondent provided the 2019 study, it appears it is complying with the current retention requirements. Therefore, I find it is keeping adequate records of its reserve fund studies.

Monthly utility invoices for water for the period August 1, 2020 to October 13, 2021

[42] The evidence is that the Respondent provided invoices dating from January 2021 to November 2021 in response to the Applicant's request. Mr. Berger testified that when City Towers Management took over management of the Respondent in May 2021, there were no invoices on record but the Respondent was receiving reports of arrears from the City of Toronto. He stated City Towers did not even know the account numbers. He called the City of Toronto and was told he was not authorized to access the account. He has subsequently received copies of the invoices for 2021 but testified he was denied earlier ones.

[43] The water invoices are financial records which section 55 (1) of the Act requires the Respondent to keep and section 55 (2) 1 requires be retained for a minimum of six years following the end of the fiscal period to which they apply. Therefore, I find that the Respondent is not keeping adequate records with respect to its water invoices.

Issue No. 4 Is the Applicant entitled to any reimbursement of fees it paid the Respondent to complete the October 13, 2021 Request for Records?

[44] The Respondent is entitled to charge a fee for the delivery of non-core records. Section 13.3 (8) (1) of O. Reg. 48/01 requires a corporation to include an estimate

of the fee for each record on the Board Response to Request for Records form. The regulation sets out the manner in which the fee is to be calculated:

> The fee shall be a reasonable estimate of the amount required to reimburse the corporation for the actual labour and delivery costs that the corporation incurs for making the record requested available for examination or for delivering a copy of the record, which costs shall include the printing and photocopying charges established under paragraph 3 and the actual costs that the corporation incurs during the examination.

Section 13.3 (8) (2) states "the fee shall be reasonable."

[45] Section 13.8 (1) of O. Reg. 48/01 requires that each copy of a record provided by a corporation be accompanied by a statement which must include the actual cost the corporation incurred to deliver it. If the actual cost is less than the amount estimated, the corporation is required to refund the difference. In this case, the Respondent included an estimated fee for each set of records on the Board Response to Request for Records form but failed to provide the actual cost it incurred when it delivered them. I note that the fees charged were for only for labour at $35 an hour.

[46] Counsel for the Applicant submits that the Applicant should be reimbursed for a portion of the fees it paid because they do not reflect the number of records produced and the Respondent over-charged the Applicant for the time it spent searching for records which it could not readily locate due to its poor record-keeping practices. He referred me to the Tribunal's decision in *Missal v. York Condominium Corporation No. 504*, 2022 ONCAT 2. At paragraph 16, the Tribunal wrote:

> Condominiums have a duty to maintain records. While there may be occasions where, because of poor record keeping practices, it would be unreasonable to transfer some "search" costs to an owner, I do not find so in this matter. There is nothing objectionable with keeping the ledger records at a third-party storage facility, especially as the records sought are between five and seven years old and may be voluminous. Retrieving those records is incidental to the actual labour and delivery costs contemplated by the legislation.

Counsel for the Respondent submits that "the evidence of Mr. Berger establishes that YCC 82 was required to make searches for records as requested by the Applicant. YCC 82 provided what records were found. Further, the amount of time and the costs involved exceeded what was charged to the Applicant."

[47] I do not doubt Mr. Berger's testimony that a significant amount of time was spent

searching for records. However, unlike *Missal*, this is not a case where the Respondent estimated a fee based on identifiable costs associated with retrieving and preparing the requested records. A corporation with good record keeping practices would have an index to its records. In this case, the corporation was required to undertake a search. A requester should not be charged for the time a corporation spends to determine if it has the records it is required to keep. Further, the fact that Mr. Berger and others may have spent more time than the sum of the hours the Respondent estimated for the individual requests is immaterial; the Respondent was required to provide its actual cost of producing each set of records.

[48] I have reviewed the fees charged for each of the requests the Applicant made and find that in some cases the fee is disproportionate to the number of records provided. The regulation is clear that fees are for the delivery of copies; however, in some instances, the Respondent charged a fee but delivered no records. Therefore, I have determined that the Applicant should be reimbursed for a portion of the fees it paid. I am ordering the reimbursement of a total of $367.50 as set out in the following chart.

Records Requested and Fee Paid	Records Received	To be Reimbursed
Financial records, agreements, minutes of meetings related to (1) boiler loan ($70) and (2) water debt loan ($70)	Copies of loan renewal and loan extension agreement.	I find that $140 representing four hours labour is disproportionately high for the delivery of only two documents and that one hour is more reasonable. Therefore, $105 is to be reimbursed.
Management agreements ($35); security agreements ($35); Pest control agreements ($35)	Copy of one document only for each service.	I find that one hour's time is not reasonable for the delivery of only 1 document and that the Applicant should be reimbursed for half of the fees it paid for each agreement. The Applicant paid a total of $105. Therefore, $52.50 is to be reimbursed.
Plumbing agreement ($35); superintendent's contract ($70); website development agreement ($35)	No records provided.	Because no records were delivered, the total $140 paid in respect of these requests is to be reimbursed.

Reserve Fund Studies ($140)	Three studies.	The Applicant argued that because the studies provided were the same as those submitted in a recent matter between these parties at the Superior Court of Justice, the estimated 4 hours time for their delivery was excessive. However, the studies are lengthy and I find two hours time is reasonable. Therefore, $70 is to be reimbursed.

Issue No. 5: Should the Tribunal order a penalty and/or compensation for damages?

[49] In his closing submission, Counsel for the Applicant requested the Tribunal order the maximum penalty of $5000 under section 1.44 (1) 6 of the Act, which provides that the Tribunal may order a penalty be paid if it finds that a corporation has, without reasonable excuse, refused to permit a person to examine or obtain copies of records. In his reply to the Respondent's closing submission, he also requested the Tribunal order an award of damages of $5000 under section 1.44 (1) 3 of the Act which provides for the payment of compensation for damages incurred by a party as the result of an act of non-compliance. I note that I gave Counsel for the Respondent the opportunity to respond to this additional request.

[50] Counsel for the Respondent submits that no penalty should be assessed because the Respondent did not refuse to provide records but delivered all the records it could locate which were in its control. He further submitted that the Respondent also provided the Applicant with information about "who would have records not provided" and suggested that the corporation was allowed to make such a referral to others, for example, to the previous condominium management companies. Counsel has misinterpreted the regulation. Section 13.12 (2) (8) of O. Reg 48/01 to which he referred applies only to requests made by a condominium management provider or condominium manager. With respect to the Applicant's request for damages, Counsel for the Respondent submits that it was improperly made in a Reply.

[51] This is the second case between these parties to come before the Tribunal. The Tribunal's decision in *Jasper Developments Corp. v. York Condominium Corporation No. 82,* 2022 ONCAT 4 (CanLII), which addressed the Applicant's September 2021 request for core records, was that the Respondent's inability to produce the requested records was, in effect, a refusal to provide records. The

Tribunal noted that it is the corporation, and not its condominium management provider, which is responsible for the maintenance of its records. The Tribunal assessed a penalty of $2500.

[52] The Respondent's inability to produce some of the non-core records requested in the Applicant's October 13, 2021 Request for Records is for the same reasons that it was unable to produce some of the core records in the previous case. At paragraph 55 in *Jasper*, the Tribunal wrote:

> That a condominium management provider did not turn over records does not abrogate a corporation's responsibility to both create and maintain records in accordance with its obligations under the Act. The Respondent should have taken steps to ensure the records were both created, which is unclear in the case of both the PIC's and the minutes of board meetings, and that the records were properly turned over during the transitions between management companies.

[53] In the current case, the Respondent did not overtly refuse to provide any records other than the list of owners in arrears and I have found that refusal was in accordance with the Act. However, the Respondent could not provide all of the requested records which Section 55 (1) of the Act requires it to keep and I have found that it failed to keep adequate financial records and records of its agreements, specifically its condominium management and cleaning and maintenance services agreements. While I acknowledge Mr. Berger's testimony about the state of records he found when City Towers Management took over management of the corporation in May 2021, that a previous management company may not have properly maintained records is not a reasonable excuse for failing to produce the financial records and the records of agreements which Mr. Berger acknowledged it should have. I find this failure to be a refusal to provide records.

[54] One of the purposes of a penalty is to act as an incentive to deter future similar action. The Respondent has already been assessed a penalty with respect to the Applicant's September 2021 core records request. The Applicant submitted the non-core records request in October 2021, only approximately one month after its request for core records. A penalty is paid by all owners of a corporation. It would not be reasonable to penalize the corporation's owners again for the same reasons, that is, the failure of its board to ensure its records were properly maintained, without taking the previous penalty into consideration. However, the wider extent of the missing records which this case has revealed warrants an incremental penalty. In these circumstances, I assess a penalty of $1500 to be reasonable.

[55] There is no provision in the Act to assess a penalty for failure to keep adequate records. Counsel for the Applicant requested an award of compensation for damages under section 1.44 (1) 3 of the Act. There is no evidence that the Applicant incurred any damages as a result of the Respondent's failure to keep adequate records. None was presented by Ms. Kazakova in her testimony and no supporting arguments were made by Counsel for the Applicant. Therefore, I dismiss this request.

Issue No. 6: Should the Tribunal award costs?

[56] The Applicant requested costs of $200 representing its Tribunal fees. Both the Applicant and Respondent requested costs be awarded in respect of their legal fees.

[57] The relevant rules of the Tribunal's Rules of Practice state:

> 48.1 If a Case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final Decision, the unsuccessful Party will be required to pay the successful Party's CAT fees unless the CAT member decides otherwise.
>
> 48.2 The CAT generally will not order one Party to reimburse another Party for legal fees or disbursements ("costs") incurred in the course of the proceeding. However, where appropriate, the CAT may order a Party to pay to another Party all or part of their costs, including costs that were directly related to a Party's behaviour that was unreasonable, undertaken for an improper purpose, or that caused a delay or additional expense.

[58] The Applicant was successful in this matter and in accordance with Rule 48.1, I award costs of $200 in respect of the fees it paid to the Tribunal. I award no costs to either party for legal fees. Neither counsel presented any compelling reason for such an award. Counsel for the Respondent argued the Respondent was forced to retain counsel because one of the issues was a request for a list of owners in arrears. Moreover, the Respondent was unsuccessful in this matter. Counsel for the Applicant referred to the Tribunal's "Practice Direction: Approach to Ordering Costs" and submitted that the Respondent took "unreasonable positions not in compliance with the law." While I have pointed out areas where the Respondent has misread or misunderstood the legislation, the Tribunal's Practice Direction refers to unreasonable conduct of the parties. I do not find the Respondent's conduct was unreasonable.

D. ORDER

[59] The Tribunal Orders that:

1. Under section 1.44 (1) 1 of the Act, within thirty (30) days of the date of this decision, at no additional cost, the Respondent shall provide the Applicant with copies of the complete banking statements for the month of September 2021, redacted as required in accordance with section 55 (4) of the Act.

2. Under section 1.44 (1) 4 of the Act, within thirty (30) days of the date of this decision, the Respondent shall pay costs of $200 to the Applicant.

3. Under section 1.44 (1) 6 of the Act, within thirty (30) days of the date of this decision, the Respondent shall pay a penalty of $1500 to the Applicant.

4. Under section 1.44 (1) 7 of the Act, within thirty (30) days of the date of this decision, the Respondent shall reimburse the Applicant $367.50 of the fees it paid to obtain copies of the records requested in its October 13, 2021 Request for Records.

5. To ensure the Applicant does not pay any portion of the costs or penalty awards, the Applicant shall be given a credit towards the common expenses attributable to his unit in the amount equivalent to it unit's proportionate share of the above costs and penalty.

Mary Ann Spencer
Member, Condominium Authority Tribunal

Released on: April 8, 2022