

### **Corrected Decision**

This decision was amended on August 26, 2022 to include minor additions in accordance with Rule 46 of the CAT's Rules of Practice.

### **CONDOMINIUM AUTHORITY TRIBUNAL**

**DATE:** August 17, 2022

**CASE:** 2022-00382R

**Citation:** Morassut v. Middlesex Standard Condominium Corporation No. 922, 2022 ONCAT 87

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

**Member:** Mary Ann Spencer, Member

**The Applicant,**  
Edward Morassut  
Self-Represented

**The Respondent,**  
Middlesex Standard Condominium Corporation No. 922  
Represented by DJ DeJesus, Agent

**Hearing:** Written Online Hearing – July 14, 2022 to August 4, 2022

### **REASONS FOR DECISION**

#### **A. INTRODUCTION**

- [1] Edward Morassut (the "Applicant") alleges that Middlesex Standard Condominium Corporation No. 922 (the "Respondent") has refused to provide the records requested in his May 30, 2022 Request for Records without reasonable excuse. His position is that he is entitled to receive the requested records and he asks the Tribunal to order they be provided to him. He also requests that the Tribunal order the Respondent to pay a penalty and his costs in this matter.
- [2] The Respondent's position is that the records requested by the Applicant are not in its possession and therefore it did not unreasonably refuse to provide them. The Respondent made no request for costs.
- [3] For the reasons set out below, I find that the documents requested by the Applicant are not records of the Respondent and therefore I dismiss the

application without penalty or costs.

## **B. BACKGROUND**

[4] Edward Morassut is the registered owner of a unit of Middlesex Standard Condominium Corporation No. 922. On May 30, 2022, he submitted a Request for Records in which he requested electronic copies of the following records with a date range “to May, 2022”:

1. LDS Well Data Collection Report
2. Edison Humidity Probes Report
3. LDS Weeping Tile Scoping Report
4. Any other reports or opinions from Edison (or any subcontractors) related to any Tricar PATS repairs

[5] On June 6, 2022, in its Board Response to the Request for Records, the Respondent indicated that, in accordance with section 55 of the *Condominium Act, 1998* (the “Act”), it would not provide copies of the requested records. The Applicant submitted his application to the Tribunal the same day he received the Board Response.

## **C. ISSUES & ANALYSIS**

[6] The issues to be addressed in this matter are:

1. Is the Applicant entitled to receive copies of the requested records?
2. Did the Respondent refuse to provide the records without reasonable excuse and if so, should the Tribunal assess a penalty?
3. Should the Tribunal award costs?

### **Issue No. 1: Is the Applicant entitled to receive copies of the requested records?**

[7] An owner’s entitlement to examine or receive copies of records of a corporation is set out in section 55 (3) of the *Condominium Act, 1998* (the “Act”) which states:

The corporation shall permit an owner, a purchaser or a mortgagee of a unit or an agent of one of them duly authorized in writing, to examine or obtain copies of the records of the corporation in accordance with the regulations, except those records described in subsection (4).

Section 55 (4) states that an owner’s right to examine or obtain copies of records does not apply to employee records, to records relating to litigation or insurance investigations, or to records relating to specific units and owners.

- [8] Section 55 (1) of the Act states that a corporation “shall keep adequate records” and sets out a list of the records it must keep. That list includes any records prescribed by regulation. One of the records prescribed in section 13.1(1) of Ontario Regulation 48/01 (O.Reg 48/01) is “All reports and opinions of an architect, engineer, or other person whose profession lends credibility to the report or opinion, that the corporation receives and that relate to physical features of the property...”. The records requested by the Applicant are engineering reports. On this basis, it would appear, as he submitted, that the Applicant is entitled to receive the records he requested, and that the corporation was incorrect in refusing to provide them. However, the evidence in this hearing indicates that the issue is not as straightforward as the Applicant submits; the question that must be addressed is whether the documents the Applicant asserts the corporation possesses are in fact records of the corporation.
- [9] DJ DeJesus is a member of the Respondent’s board of directors. Mr. DeJesus testified that the condominium is three years old and is in the process of addressing approximately 600 deficiencies that were identified in the performance audit. I note that the Condominium Authority of Ontario’s Registry indicates that the Respondent was registered on September 10, 2019 and that section 44 (1) of the Act requires a corporation to retain either a professional engineer or architect to conduct a performance audit no earlier than six months and no later than 10 months after the date of registration. The purpose of the performance audit is to identify deficiencies in the common elements. The performance audit must be submitted to the corporation’s board and to Tarion, the corporation providing warranty coverage under the *Ontario New Home Warranties Plan Act*.
- [10] Mr. DeJesus testified that the Respondent’s board retained engineering firm Edison Engineers to “identify and follow through” with the builder to ensure the owners are “getting the absolute full benefit” of the Tarion warranty as they work to correct the deficiencies. He indicated that two significant issues, the humidity level in the building and leaks in the parking garage, are being addressed. In this regard, Edison recommended the corporation undertake investigative work which includes well data collection, humidity probing and weeping tile scoping. Mr. DeJesus testified that Edison retained LDS Consultants, specialists in geotechnical engineering, to collect the data. He further testified that LDS will report its findings to Edison which will analyze the results and present its report and recommendations to the Respondent’s board. Similarly, with regard to the Applicant’s fourth request, that is for reports or opinions from Edison with respect to other repairs, Mr. De Jesus testified that “all updates and conclusions will come from Edison...”. He confirmed that the Respondent’s board has yet to receive or review the report(s) from Edison.

[11] The Applicant is requesting copies of the LDS reports on the results of the well data collection, humidity probes and weeping tile scoping. The Applicant clearly has technical knowledge. He provided me with an explanation of the purpose of each of the three specific investigations and an overview of the type of data being collected. He indicated that the reports would not be difficult to interpret. I note this was in response to a comment of the Respondent's representative that disseminating the results of the LDS reports before receipt of the Edison engineering report could lead to speculation. The Applicant submitted:

The owners need to gain access to these reports so they can read the results for themselves, and as I described earlier, there is no ambiguity in the actual data being collected and the data is easy enough to interpret. I consider all these services similar in that they are proving a hypothesis either through data collection or by an action (e.g., scoping the weepers with a camera) and owners are entitled to review the data for themselves.

[12] The Applicant testified that some of the data has been collected over a period of two years. I note, however, that Mr. DeJesus testified that there has been delay in receipt of reports because Edison has advised the board that other repairs being undertaken should take priority over the humidity and parking level leaking. The Applicant also testified that he is aware that "various versions of the well data collection reports, graphs and emails have already been circulated to the Board for review. I can vouch for this as I was cc'd on various emails when I was assisting the previous Board President with documenting defects." The Applicant entered into evidence copies of text messages sent on May 19, 2022 to a board member in which he asked if LDS had published the weeping tile scoping report. The response was "yes they did and Edison is reviewing it before the Board gets it." On cross-examination, Mr. DeJesus testified that some reports of LDS' findings do exist and that two board members have seen them. In response to my question about the existence of the reports he stated "yes the Records (LDS reports) do exist however in the hands of Edison Engineering and the board has not been briefed on the findings of these reports. The Board have NOT reviewed the reports."

[13] The Applicant appears to understand that the Respondent has directly retained LDS and therefore controls its reports:

When a report is produced by an Engineer (e.g., LDS), then that report stands alone. It has been confirmed that the LDS Weeping Tile Scoping work has been completed and that a report has been published. If the Board is choosing to pass this report through to another Engineer (Edison) seeking additional advice and recommendations then that is their prerogative, but I am still

entitled to read the LDS Weeping Tile Scoping report as published and draw my own conclusions.

Notwithstanding the Applicant's belief, Mr. DeJesus' affirmed testimony is that LDS is a subcontractor of Edison Engineers. I accept his evidence that the LDS data collection reports are being reviewed by Edison which will then provide a report to the board with its recommendations.

- [14] Not every document provided to a corporation must be kept as a record of the corporation. While the records at issue were different, the Tribunal's decision in *Ronald Smith v Metropolitan Toronto Condominium Corporation No. 773, 2019 ONCAT 24*, was that management reports presented to a board of directors only became records of the corporation "to the extent that they are accepted by the Board and reflected in the minutes of a Board meeting." While the evidence is that some individual members of the Respondent's board have had access to the LDS reports, even if the board itself has been provided with some reports of the findings of LDS, as the Applicant asserts, there is no evidence before me to indicate that it has formally reviewed and accepted these reports. LDS is not making recommendations to the board; rather, its findings will be analyzed by Edison and may be incorporated into the Edison report(s) provided to the board.
- [15] The evidence is that the Respondent is awaiting Edison Engineers' report(s) with its analysis of the results of LDS' investigation and its recommendations for further action. Therefore, I find that the reports requested by the Applicant in his May 30, 2022 Request for Records are not records of the corporation and the Applicant is not entitled to receive copies of them. When the Respondent receives and accepts Edison Engineers' report(s), they would become records the corporation is required to keep under section 55 (1) of the Act and the Applicant would be entitled to examine or receive a copy of those records.

**Issue No. 2: Did the Respondent refuse to provide the records without reasonable excuse and if so, should the Tribunal assess a penalty?**

- [16] I have found that the records requested by the Applicant are not records of the corporation. Therefore, the Respondent was not required to provide them and there is no basis for penalty.
- [17] I note that the reason for refusal set out in the Board Response to Records provided to the Applicant is vague. For each record, the Respondent wrote "Reviewing section 55 of the Condominium Act, this report is not covered by the documentation for owners." This explanation lacked reference to the specific

provision of section 55 of the Act which should have been included. While it is unknown whether the Applicant would have accepted a more detailed explanation for the refusal, the Respondent would be well advised to provide a full explanation in future responses to Requests for Records.

[18] I also note that in a message posted before the submission of affirmed testimony in this matter, Mr. DeJesus wrote “Sharing Reports with individual owners may lead to unnecessary speculation.” It was unclear if Mr. DeJesus was stating this was a reason the corporation refused the Applicant’s Request for Records. Mr. DeJesus testified that the Respondent sought legal advice and consulted with the engineers before it replied to the Applicant. A corporation can choose to provide documents to a requester even if they are under no legal obligation to provide them; it may well be that the Respondent consulted Edison and considered releasing the LDS reports but chose not to for the reason Mr. DeJesus stated. As set out above in paragraph 11, his comment was not well received by the Applicant. Again, the Respondent would be well advised to be detailed and precise with the explanations it provides to owners.

### **Issue No. 3: Should the Tribunal award costs?**

[19] The Applicant requested costs of \$200, representing the fees he paid to the Tribunal. The Respondent made no cost request. Rule 48.1 of the Tribunal’s Rules of Practice states that the unsuccessful party will be required to pay the successful party’s fees unless the member decides otherwise. The Applicant was unsuccessful in this matter and therefore is not entitled to payment of his fees.

### **ORDER**

[20] The Tribunal Orders that:

1. Edward Morassut’s application is dismissed without costs.

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Mary Ann Spencer  
Member, Condominium Authority Tribunal

Released on: August 17, 2022