

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: January 2, 2024

CASE: 2022-00654R

Citation: Traicheff v. York Condominium Corporation No. 43, 2024 ONCAT 1

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

Member: Stephen Roth, Member

The Applicant,

John Traicheff
Self-Represented

The Respondent,

York Condominium Corporation No. 43
Represented by Angie Tracey, Counsel

Hearing: Written Online Hearing – May 4, 2023 to December 11, 2023

REASONS FOR DECISION

A. INTRODUCTION

- [1] John Traicheff, the Applicant, is the owner of a unit in York Condominium Corporation No. 43 (the “Respondent” or “YCC43”). YCC43 has a number of record disputes before the Tribunal.
- [2] The Applicant delivered the prescribed Request for Records form to the Respondent on July 26, 2022, requesting the following records:
1. Corporate by-laws
 2. Periodic information certificates “(PIC)” from the past 12 months
 3. Board minutes from December 2021 to July 2022
 4. Unaudited financial statements and Arrears Report from December 2021 to July 2022
 5. YCC43’s current landscaping contract
 6. Linkwood Village Recreation Centre (“LVRC”) minutes from September 2021 to July 2022. (LVRC is a recreation facility shared by several condominiums including YCC43)
 7. May 18, 2022, AGM Vote results

8. Audio recording of the May 18, 2022 AGM
 9. Shibley Righton invoices from January 2022 to July 2022
 10. LVRC Budget from 2021 to 2022
- [3] YCC43 responded on August 22, 2022 with a Board's Response to Request for Records form and provided the corporation's by-laws and the May 18, 2022 AGM vote results.
- [4] During Stage 2 mediation, the Respondent provided the Landscaping Contract and the LVRC budget.
- [5] At the outset of the hearing, the Applicant took the position that YCC43 still had not provided the following records:
1. The PICs
 2. Several months of board minutes, and some that contained excessive redactions without an explanation of the reasons for redactions
 3. Several months of unaudited financial statements
 4. The Arrears Report
 5. The LVRC Minutes
 6. The AGM audio recording
- [6] At the outset of the hearing, except for the AGM audio recording, the Respondent agreed that the Applicant was entitled to all of the records requested subject to redactions in accordance with Section 55(4) of the Condominium Act, 1998 (the "Act"). YCC43 agreed to provide any outstanding records (except the audio recording) and waive any fees for redacting as a good faith gesture. YCC43 took the position that the recording was not a record of the corporation.
- [7] On May 9, 2023, during the hearing, the Respondent uploaded the following documents:
1. Board meeting minutes from December 2021 to March 2022
 2. PIC 2022
 3. LVRC minutes from September 2021 to July 2022
 4. Shibley Righton invoices from January to June 2022
 5. Unaudited Financial Statements from December 2021 to March 2022
 6. Statement of Redactions

- [8] In September 2023, during the hearing, the Respondent uploaded further LVRC minutes.
- [9] After the second round of cross-examination was completed, the Applicant raised the issue of the adequacy of records when I was clarifying what records the Applicant believed remained outstanding. Essentially, the Applicant stated that he forgot to raise it at the beginning of the hearing as an issue. I denied including this issue as a matter of fairness because of the late stage of the hearing and because it did not form part of the accepted issue agenda.

B. ISSUES

[10] The following are the issues to be decided by me:

1. Has the Applicant been provided with all of the records requested by him, to which he is entitled under the Act.
2. Whether the Respondent's redaction of specified records produced or to be produced is reasonable under the Act.
3. Is a penalty warranted against the Respondent in accordance with section 1.44(6) of the Act for failure to provide the requested records without a reasonable excuse?
4. Should costs be awarded?

C. ANALYSIS

[11] The Applicant submits that after the Respondent uploaded records in Stage 3, he had not yet been provided with three records:

- Third quarter 2021 PIC
- January 25, 2022, LVRC Minutes
- AGM recording dated May 18, 2022

Issue One: Has the Applicant been provided with all of the records?

The Third Quarter 2021 PIC

[12] The Respondent concedes that this is a record that the Applicant is entitled to; however, YCC43 submits that the original document was lost during the Respondent's transition from one condominium manager to another. In lieu of the

original, the Respondent uploaded a reconstructed version. This is reflected in the sworn testimony of Irfan Naeem, YCC43's condominium manager. I accept this testimony.

- [13] I cannot order the production of a document that does not exist. I am satisfied that the Respondent has uploaded a document that reflects the original.

The January 25, 2022, LVRC Minutes

- [14] The Respondent has two designated directors on the board of managers that manages a shared recreational facility with a number of other condominiums. The Respondent never took the position that these minutes were not records of the corporation. This is consistent with the finding in *El Naaj v. Peel Condominium Corporation No 35*, 2012 ONCAT 5:

There is nothing in the Act which excludes records related to shared facilities from the records an owner is entitled to access. I note that mutual use agreements are one of the records which s. 55 (1) of the Act requires a corporation to keep and are also listed as a core record in s. 1. (1) of O. Reg. 48/01. It is reasonable that records related to the management of the facilities governed by a mutual use agreement also form part of the records of the corporation.

- [15] The Respondent uploaded several versions of this document during the hearing. It submits it made best efforts to provide the Respondent with the LVRC meeting minutes dated January 25, 2023. YCC43 argues that the unapproved LVRC meeting minutes dated January 25, 2023 were uploaded on August 31, 2023. Subsequently, an amended "version two" of the minutes was uploaded on September 18, 2023 and then an amended "version three" of the minutes approved by the board of managers was uploaded on September 27, 2023.
- [16] The Applicant was not satisfied that any of the versions uploaded by YCC43 were the final approved minutes. His skepticism is understandable. As such, I asked the Respondent to provide a supplementary affirmed witness statement addressing this issue. After providing two extensions to provide the witness statement, Respondent's counsel advised me that she was not able to secure a statement but provided no explanation.
- [17] In submissions, the Respondent conceded that it should not have refused the records to the Applicant by referring him to obtain them himself through the LVRC manager. It was submitted by the Respondent that YCC43 should have obtained the records from the LVRC manager and then provided them to the Applicant. The Respondent's witness provided not evidence on when these minutes came into the

possession of YCC43. Given YCC43 has two directors on the board of managers, I find that YCC43 has access to the minutes. Given this failure to provide any evidence at all on this issue, I find on a balance of probability that the LVRC minutes were records of the corporation when requested. With respect to the January 25, 2022 minutes, given the Respondent's failure to provide testimony that it has produced the final approved board minutes, I find on a balance of probability that it has not. The Applicant is directed to make inquiries as to whether the latest uploaded version is the approved version. If it is, the Respondent shall provide a statement to the Applicant to that effect. If it is not, the approved minutes shall be provided.

The AGM recording dated May 18, 2022.

- [18] The Respondent takes the position that that the recording is not a record of the condominium corporation and is used solely as an aid to the minute taker for preparing the AGM minutes. It submits that it has not retained the recording. The Respondent did not refer me to any case law on this issue.
- [19] The Applicant has not explained in his testimony as to what purpose he is requesting the recording.
- [20] In *King v. York Region Condominium Corporation No. 692*, 2022 ONCAT 8 ("King"), the Tribunal concluded that the applicant's request for a recording was because of the perceived inaccuracy and completeness of draft minutes. The Applicant sought to use the recording to, in effect, rewrite the minutes. The Tribunal noted in *King* that previous Tribunal decisions have established that the Act does not impose a standard of perfection for minutes and that minutes are not required to be a verbatim account of a meeting. While *King* left the door open as to if and when a recording was a record of the corporation, the Tribunal concluded that the applicant's motivation to obtain the recording was personal to his own preferred wording reflected in the AGM minutes. This did not satisfy the basic requirement set out in Section 13.3(1) of Ontario Regulation 48/01 (O. Reg 48/01):
- (1) The right to examine or obtain a copy of a record under subsection 55 (3) of the Act does not apply unless,
 - (a) an owner, a purchaser or a mortgagee of a unit requests to examine or obtain the copy and the request is solely related to that person's interests as an owner, a purchaser or a mortgagee of a unit, as the case may be, having regard to the purposes of the Act;
- [21] In *Kent v. Carleton Condominium Corporation No. 268*, 2022 ONCAT 128, the Tribunal found that a recording of an owner-requisitioned meeting on Zoom was a

record of the corporation. However, like in *King*, the Tribunal concluded that the owner was not entitled to the recording because the Applicant did not meet the test that the request is “solely related to that person’s interest as an owner.” The Tribunal concluded that the purpose of the request was a focus on rewriting draft minutes to meet the applicant’s expectations. The Tribunal stated that “The Applicant may disagree with the contents of the minutes – however, the appropriate approach would be to wait for the minutes to be prepared and reviewed by all owners. If they are substantially inaccurate, the owners can discuss and vote upon the changes to be made.”

- [22] YCC43 had one witness, Irfan Naeem, the Respondent’s condominium manager employed by Ace Condominium Management Inc. Mr. Naeem’s original testimony was not helpful. Essentially, he testified that although he was aware of the Applicant’s records request of July 26, 2022, he was not involved in responding to this request because he was on leave. He stated that his colleague, Shikar Tilak, responded to it in his absence. Mr. Naeem testified that “I cannot speak to the actions taken by Mr. Tilak and cannot ask him as he is no longer an employee of Ace Condominium Management.”
- [23] While I am sympathetic that the transition to new manager may have created some difficulty in obtaining relevant witness testimony, the Respondent’s evidence is wholly inadequate on establishing who made the recording, for what purpose, whether it was destroyed, who destroyed it and when it was destroyed.
- [24] The Board’s Response to Request for Records form simply states that “audio recordings are not a record of the corporation. They are used only for preparing minutes.” The response did not indicate that the recording did not exist. I find on a balance of probability that the recording was a record of the corporation, adopting the reasoning in *Kent*. I find that it existed at the time the Applicant requested it.
- [25] While the Applicant’s testimony is devoid of an explanation for his motivation for his request, in his Request for Records form he affirms that his request for records is solely related to his interests as an owner. The Respondent neither disputed this in the hearing nor asked the Applicant any questions related to this issue. As such, I find on a balance of probability that the Applicant has satisfied this requirement. The Respondent states in final submissions that the recording has not been retained; however no testimony was provided on this issue. I direct the Respondent to make inquiries as to whether the recording exists. If it does exist, it shall be provided to the Applicant. If it does not exist, the Respondent shall provide a statement to the Applicant to that effect.

Issue Two: Were the redactions appropriate?

- [26] YCC43 has an obligation to redact documents in accordance with s. 55(4) of the Act. In addition, s. 13.8(1)b of O. Reg 48/01 requires YCC43 to provide a statement of redactions with the Board's Response. A statement of redactions was uploaded during the hearing. Mr. Naem testified that the redactions have been done in accordance with s.55(4).
- [27] The Applicant submits that the redactions of the minutes exceeded what is required by 55(4).
- [28] The Applicant's submissions confirm his frustration with the perceived failure of YCC43 to respond to records requests in a timely and fulsome manner. Furthermore, he complains that the board provides insufficient oversight to its condominium managers who have been delegated the responsibility of responding to records requests. As evidence of this systemic issue, he refers to twenty other CAT cases filed against YCC43. The Applicant submitted that YCC43 has distributed inconsistent and excessive redactions in the minutes. He refers to Mr. Naeem's testimony when the witness stated that "subsequent redactions on restricted meeting minutes were necessary due to the many CAT cases being filed against YCC43 as the previously made redactions were contested by various owners."
- [29] The Applicant argues that that the condominium needs to be more diligent when redacting minutes as owners should not have to contest them.
- [30] YCC43's approach to responding to records requests appears haphazard and uninformed as to its legal obligations. The board is required to oversee its condominium manager. Ultimately, as an agent of the corporation, any failure on behalf of a condominium manager is not an excuse for the condominium itself. The Applicant's concern about how YCC43 is responding to records request is well-founded. While I have insufficient persuasive evidence that the documents provided to the Applicant are improperly redacted, I find that YCC43 generally lacks a thorough understanding of its statutory obligations.
- [31] Pursuant to section 1.44(1)7 of the Act, I order the current members of the board of directors to complete or retake Module 8 of the Condominium Authority of Ontario's Foundational Director Training program – "Corporate Records" within 30 days of this Order. A notification of the completion and reference to the Tribunal's order shall be posted in a visible and public place within YCC43 within 60 days of the Order. In addition, the board shall provide a statement to the Applicant attesting to its completion within 60 days of this order.

Issue Three: Is a Penalty Warranted?

- [32] Pursuant to s. 1.44 (1)6 of the Act, the Tribunal may make an order directing a condominium corporation “to pay a penalty that the Tribunal considers appropriate to the person entitled to examine or obtain copies under s.55 (3) if the Tribunal considers that the corporation has without reasonable excuse refused to permit the person to examine or obtain copies under that subsection.”
- [33] To order a penalty under this section, I must find that the Respondent refused to provide records and did so without a reasonable excuse.
- [34] The Respondent acknowledges that it initially denied the entirety of the arrears report from December 2021 to July 2022 on the basis that that it contained confidential information about unit owners. However, the Respondent acknowledged its error by providing the report during Stage 3 with redactions in accordance with s. 55(4)c of the Act. While it corrected its error in this hearing, it did not have a reasonable excuse to initially refuse the record. As such, I find that it refused to provide the record without reasonable excuse.
- [35] The Respondent acknowledges that it did not initially provide the LVRC meeting minutes with the explanation that it did not have control and possession of these records. However, it did not provide testimony on this issue. Instead of providing the document, it directed the Applicant to request them directly from the LVRC manager. In its submissions, the Respondent concedes that YCC43 should have obtained the records from the LVRC manager and then provided them to the Applicant. I have already concluded that these were records of the corporation. These records were uploaded by the Respondent during the hearing. Again, while YCC43 rectified its error in this hearing, I find on a balance of probability that it did not have reasonable excuse to initially refuse the records.
- [36] With respect to the lost third quarter PIC, the Respondent argued it did not intentionally withhold the document. It referred me to *Mehta v. Peel Condominium Corporation 389*, 2020 ONCAT 9, where the Tribunal accepted that it was a reasonable excuse to not provide a record which was lost due to an error by a previous management company. I accept that this record was likely lost by the time that the Applicant made his request, and this is a reasonable excuse.
- [37] I have already found that the January 25, 2022, LVRC minutes have not been provided. The Respondent was given ample opportunity to provide testimony that it had provided the approved minutes during the hearing. No explanation was given why this testimony was not provided. On this basis, I conclude that the document was refused without a reasonable excuse.
- [38] Similarly, I find that the AGM recording was refused without a reasonable excuse. I

found that the recording was a record that existed at the time of its request. The Respondent provided no testimony about when the recording was destroyed or why it is not available.

[39] I have determined that a penalty is warranted. I order a penalty of \$1,000.00. The Respondent's lack of understanding of its statutory responsibilities is concerning.

D. COSTS

[40] The Tribunal's Rule 48.1 provides:

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.

[41] Mr. Traicheff has been substantially successful in his application. As such, I order reimbursement of his CAT filing fees totaling \$200.00.

[42] Neither party requested costs. Mr. Traicheff was not represented by counsel. He has not incurred legal costs. Also, I find that none of the parties' behaviour during the course of the hearing was unreasonable, undertaken for an improper purpose, and did not cause any delay or additional expense. I award no costs.

E. ORDER

[43] The Tribunal Orders that:

1. The Applicant shall make inquiries as to whether the latest uploaded version of the January 25, 2022 LVRC minutes is the final approved version. If it is, the Respondent shall provide a written statement to that effect to the Applicant within 30 days of this order. If it is not, the final approved minutes shall be provided to the Applicant within 30 days of the order.
2. The Applicant shall make inquiries as to whether the May 18, 2022 AGM recording exists. If it does not, the Respondent shall provide a written statement to that effect to the Applicant within 30 days of this order. If it exists, it shall be provided to the Applicant within 30 days of the order.
3. Pursuant to section 1.44(1)7 of the Act, the current members of the board of directors shall within 30 days of the date of this order complete Module 8 of the Condominium Authority of Ontario's Foundational Director Training program – "Corporate Records." A notification of the completion and reference to the Tribunal's Order shall be posted in a visible and public place within the

condominium within 60 days of the order. The board shall provide a statement to the Applicant attesting to its completion within 60 days of this order.

4. The Respondent shall pay to the Applicant a penalty under section 1.44(1) 6 of the Act in the amount of \$1,000 within 30 days of this Order.
5. Pursuant to Rule 48.1, the Respondent shall pay the Applicant \$200.00 for CAT filing fees within 30 days from the date of this order.
6. To ensure that the Applicant does not have to pay any portion of the penalty, the Applicant shall also be given a credit towards the common expenses attributable to the applicant's unit(s) in the amount equivalent to the Applicant's proportionate share of the penalty and costs awarded.

Stephen Roth
Member, Condominium Authority Tribunal

Released on: January 2, 2024