

## CONDOMINIUM AUTHORITY TRIBUNAL

**DATE:** August 13, 2024

**CASE:** 2023-00600R

**Citation:** Khan v. Peel Condominium Corporation No. 409, 2024 ONCAT 126

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

**Member:** Elisha Turney Foss, Member

**The Applicant,**

Sharaf Khan

Represented by Seema Ahmad, Agent

**The Respondent,**

Peel Condominium Corporation No. 409

Represented Angad Singh, Counsel

**Hearing:** Written Online Hearing – February 14, 2024 to July 17, 2024

### **REASONS FOR DECISION**

#### **A. INTRODUCTION**

- [1] The Applicant is a unit owner in the Respondent, Peel Condominium Corporation No. 409 (“PCC 409”). The Applicant alleges that PCC 409 failed to provide him with all the records he is entitled to receive in relation to his March 19, 2023, and July 30, 2023 Requests for Records.
- [2] The Applicant also seeks an order requiring that PCC 409 reimburse him the cost for filing this application.
- [3] For the reasons that follow, I find that the Applicant has received the records to which he is entitled. I further find that PCC 409’s records are adequate pursuant to subsection 55 (1) of the *Condominium Act, 1998* (the “Act”). I order that this application be dismissed with no costs awarded to either party.
- [4] The parties submitted evidence and made lengthy submissions. In some cases, the evidence and submissions related to issues outside of the matters at issue in this case. In making my decision, I relied on the evidence relevant to the issues in dispute. Additionally, while I have read all the submissions provided in this case, I

refer only to those necessary to determine the questions in front of me.

## **B. ISSUES & ANALYSIS**

**Issue No. 1: Has the Respondent provided the Applicant with all the requested records that he is entitled to receive pursuant to his requests for records?**

Did the Applicant receive the records he requested in his March 19, 2023 Request for Records?

[5] In his March 19, 2023 request for records, the Applicant requested the following:

1. Last Reserve Fund Study
2. “Correspondence between PCC 409 and the legal consultant referred to above which shows the information given to the legal consultant about the current lobby and includes a statement by the legal consultant(s) that section 97 of the Condo Act does not apply to the lobby renovation.”

[6] The evidence before me demonstrates that PCC 409 provided the Applicant with the last reserve fund study. In their Board’s response, the board stated that the Applicant could not examine or obtain a copy of the correspondence between PCC 409 and the legal consultants because of provisions in section 55 of the Act. It was noted that PCC 409 did not provide a subsection at that time.

[7] The Applicant does not dispute that he received the latest reserve fund study. However, he did dispute whether section 55 of the Act supports the denial of access to the correspondence between PCC 409 and the legal consultants regarding the lobby renovation.

[8] At hearing, PCC 409 clarified that they were relying upon paragraph 55 (4) (b) of the Act in denying access to the record. Paragraph 55 (4) (b) of the Act states:

(4) The right to examine or obtain copies of records under subsection (3) does not apply to,

(b) records relating to actual or contemplated litigation, as determined by the regulations, or insurance investigations involving the corporation.

- [9] PCC 409 submitted that records contemplated under paragraph 55 (4) (b) of the Act include those that are legal opinions provided by the corporation's lawyer. PCC 409 referred to the case of *Reva Landau v. Metropolitan Toronto Condominium Corporation No. 757*, 2020 ONCAT 19 ("Landau").
- [10] In Landau, the requested record in dispute was a legal opinion letter(s) written by the corporation's lawyer relating to the authority of the condominium corporation to add costs to the common expenses of individual unit owners for violation of its rules.

- [11] In Landau, the Tribunal stated:

Solicitor-client privilege protects communications between a solicitor and his or her client. The privilege exists to protect these communications on the theory that a client is entitled to consult a lawyer in confidence and without fear of any disclosure made by the client or any advice given by the lawyer becoming public. Courts have held that the solicitor-client privilege is fundamental to our notions of justice. ...<sup>1</sup>

- [12] Subsection 55 (4) of the Act does not exclude the application of solicitor-client privilege. Indeed, in Ontario Divisional Court's decision *Fisher v. Metropolitan Toronto Condominium Corp. No. 596*, 2004 CarswellOnt 6242, it was found that subsection 55 (4) of the Act does not exclude the general application of solicitor-client privilege.<sup>2</sup>

- [13] Further, in Landau, the Tribunal also considered when the records relate to litigation as stated in paragraph 55 (4) (b) of the Act. The Tribunal concluded that the logical time for MTCC 757 to have claimed the exemption was when they responded to Ms. Landau's request for records. The Adjudicator further states in p. 31:

... It appears from the plain wording of the Act that the exemption may be claimed at some point after the record's preparation; the qualification is that the record relates to litigation, not that it is prepared for that purpose.<sup>3</sup>

- [14] Landau is similar to this case as the requested records may not have been prepared for litigation but may relate to litigation. The opinion provided was created to provide justification for PCC 409 to proceed and provide legal justification in the

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<sup>1</sup> p. 10 of *Reva Landau v. Metropolitan Toronto Condominium Corporation No. 757*, 2020 ONCAT 19

<sup>2</sup> *Fisher v. Metropolitan Toronto Condominium Corp. No. 596*, 2004 CarswellOnt 6242, [2004] O.J. No. 5758

<sup>3</sup> *Ibid* p. 11.

case that they are challenged. The request for records for communications between the legal consultants and PCC 409 would cause PCC 409 to contemplate these documents' use in litigation regarding the decision surrounding the lobby renovation. However, regardless of whether litigation was contemplated for these records, the common law principle of solicitor-client privilege would apply.

[15] Therefore, I find that the Applicant is not entitled to the correspondence between PCC 409 and the legal consultants due to the general application of the common law principle of solicitor-client privilege.

Did the Applicant receive the records he requested in his July 30, 2023 Request for Records?

[16] In his July 30, 2023 Request for Records, the Applicant requested the following:

1. Correspondence between PCC 409 and the legal consultant which shows the information given to the legal consultant about the old and new lobby.
2. Correspondence between PCC 409 and the legal consultant which includes "statement by the Legal Consultant that section 97 of the Condo Act [Condominium Act] apply to the lobby renovation."

[17] The evidence before me shows that PCC 409 provided the Applicant with a Board's response to the request for records with an email attachment explaining the refusal. PCC 409 refused access to the records pursuant to paragraph 55 (4) (b) of the Act.

[18] The Applicant disputes the use of paragraph 55 (4) (b) of the Act in the denial of the requested records.

[19] Similarly to the reasoning provided for the denial of the correspondence from the March request for records, PCC 409 maintained that the correspondence between PCC 409 and the legal consultants is exempt pursuant to paragraph 55 (4) (b) of the Act.

[20] As discussed above, the Landau case does confirm the common law principle of solicitor-client privilege.

[21] Within the July 30<sup>th</sup> request for records, the Applicant explained that the reason for requesting these records was to determine whether there was possible contravention of the Act. Thus, it would be reasonable to conclude that PCC 409 would contemplate that these records could be used in litigation if the Applicant believed that contravention has occurred, thereby protected from disclosure

pursuant to paragraph 55 (4) (b) of the Act.

- [22] Therefore, I accept that paragraph 55 (4) (b) of the Act exempts the correspondence between PCC 409 and its counsel which shows the information given to the legal consultant about the old and new lobby.
- [23] With regard to correspondence containing a statement by the legal consultants referencing section 97 of the Act, PCC 409 clarified at the hearing that there were no responsive records; however, if there were records that were responsive, they would be exempt pursuant to paragraph 55 (4) (b) of the Act.
- [24] PCC 409 provided affidavits from Brian Horlick and Bharat Kapoor, who were lawyers at Horlick Levitt Di Lella, the firm that served as legal counsel for PCC 409 during the lobby renovation project.
- [25] Brian Horlick confirmed that there were no records of the opinion being given in writing.
- [26] While I question why this explanation was not given to the Applicant at the time of the Board's Response to the Request for Records, I do accept the evidence provided by the witness.
- [27] Given the above, I find that there are no records related to this request.

## **Issue No. 2: Penalty and Costs**

- [28] Under paragraph 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 [subsection 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."
- [29] The Applicant has been provided with the requested records to which he was entitled. Therefore, there has been no refusal to provide a record without a reasonable excuse and no basis for a penalty.
- [30] The Applicant has requested that PCC 409 reimburse him the cost (\$200) of the filing of this application.
- [31] Rule 48.1 of the Tribunal's Rules of Practice states:

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.

[32] The Applicant was not successful in this matter. As such, I decline to make an order requiring PCC 409 to reimburse him the cost of filing this application.

[33] PCC 409 has requested an order for costs requiring the Applicant to reimburse for the legal fees incurred to respond to this application. PCC 409 further submits that the Applicant provided a frivolous application as the requested records are exempt under the Act.

[34] Rule 48.2 of the Tribunal's Rules of Practice provides that:

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 behavior that was unreasonable, undertaken for an improper purpose, or that caused a delay or additional expense.

[35] I do not find that the Applicant made this application in bad faith or for frivolous reasons. It appears that the Applicant truly believed that he had a valid request for records that he did not think that PCC 409 fulfilled. Additionally, PCC 409 did not provide the fulsome section reference in the March request, nor did it fully explain the basis for the denial related to the July request, all of which caused some confusion for the Applicant. For these reasons, I do not find that an order for costs against the Applicant is appropriate.

**C. ORDER**

[36] The Tribunal Orders that:

1. The application is dismissed without costs.

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Elisha Turney Foss  
Member, Condominium Authority Tribunal

Released on: August 13, 2024