

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: March 28, 2019

CASE: 2018-00266R

Citation: Lenny Chiro v. Toronto Standard Condominium Corporation No. 1615, 2019 ONCAT 6

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

Adjudicator: Mary Ann Spencer, Member

The Applicant

Lenny Chiro

Self-represented

The Respondent

Toronto Standard Condominium Corporation No. 1615

Katharine McLarty, Agent

Hearing: Written electronic hearing January 1 to March 7, 2019

REASONS FOR DECISION

A. OVERVIEW

- [1] Lenny Chiro (the “Applicant”) is a unit owner of Toronto Standard Condominium Corporation No. 1615 (the “Respondent”). On May 7, 2018, he submitted a Request for Records seeking paper copies of the minutes of the Respondent’s board meetings “held within the last 12 months.”
- [2] On June 4, 2018, the Respondent’s property manager replied to the Request for Records by e-mail and sent electronic copies of the minutes of four board meetings held during the previous twelve-month period. During the Stage 2 proceeding in this matter, the Respondent provided the minutes of an additional five board meetings.
- [3] The Applicant alleges that the Respondent did not provide all of the requested records because it failed to comply with the requirements for the safekeeping and storage of records set out in the *Condominium Act, 1998* (the “Act”) and in Regulation 48/01 (“O. Reg. 48/01”). He further alleges that it did not comply with the requirement to respond to his Request for Records in the form specified by the

Minister. He requests an order from the Tribunal directing the Respondent to pay both a penalty for its non-compliance and his costs in this matter.

- [4] I find that the Respondent did fail to provide all of the requested records when it initially responded to the Applicant's Request for Records in June 2018 and that its response was not on the prescribed form. However, I also find that the Applicant's Request for Records has been fulfilled and, for the reasons set out below, I order no penalty or costs in this matter.

B. PRELIMINARY MATTERS

- [5] At the outset of this proceeding, the Applicant requested that the records at issue be expanded to include minutes of board meetings held from June 25, 2015 to May 7, 2018. He submitted that the Request for Records form was misleading in that pre-printed sections appeared to indicate he was only entitled to twelve months of minutes. He referred me to correspondence he sent to the Respondent's board of directors with his Request for Records which he submitted proved his intent was always to request the broader date range.
- [6] I denied the Applicant's request on the basis that it would not be fair to expand the issues to be adjudicated to include records which were not requested in a Request for Records to which the Respondent had the opportunity to respond. Further, the Applicant had the opportunity to request additional records using other parts of the Request for Records form. And, once he had received the Respondent's response and before he made application to this Tribunal, he had the opportunity to submit a further request to the Respondent.

C. BACKGROUND

- [7] The Applicant was a member of the Respondent's board of directors and its President from June 25, 2015 to April 25, 2018. The Respondent's Agent was elected to its board on April 25, 2018 and is the current President.
- [8] The Respondent retains a property management company but there is no full-time property manager located on site at the condominium. There is a small office at the Respondent's premises which is used to store records and which certain members of the board can access. GPM Property Management ("GPM") was the Respondent's property management company from April 1, 2016 to July 31, 2018.
- [9] On May 7, 2018, the Applicant submitted a Request for Records to the Respondent, ticking the boxes "minutes of meetings held within the last 12 months" and "Board's meeting" under the "Request for Core Records" section.

- [10] On June 4, 2018, property manager Nexhip Troci replied to the Applicant's Request for Records by e-mail and sent the minutes of board meetings held on June 8, August 17, and December 14, 2017 and March 8, 2018 and a board resolution dated April 19, 2018. During the Stage 2 proceeding in this matter, the Respondent provided additional minutes dated April 12, May 3, September 7 and November 23, 2017 and February 17, 2018.
- [11] The Applicant submits that the Respondent had all of the above-noted minutes in its possession on June 4, 2018 and should have provided them on that date. Further, he submitted that he did not receive the minutes of the June 28, 2017 meeting until they were disclosed during this Stage 3 proceeding. He also alleges that the Respondent has failed to produce the minutes of board meetings held sometime between May 30 and June 8, 2017 and on May 2, 2018. He submits that the Respondent should be penalized for its failure to provide the requested records and for its failure to respond to his Request for Records on the form as required by O. Reg. 48/01.
- [12] The Respondent submits that the records provided to the Applicant on June 4, 2018 were those it could locate. When it received the Applicant's Request for Records, it discovered that its hard copy minute book had not been updated subsequent to March 6, 2016 and was advised by GPM that it did not have electronic copies. To identify the records, the Respondent's Agent contacted the Respondent's auditor to determine which minutes had been reviewed as part of the audit of the 2017 fiscal year. GPM was then able to locate all but one set of those minutes. The Respondent later located additional records. It submits that it should not be penalized for what it alleges is the failure of its previous board to properly maintain its records.

D. ISSUES

- [13] There is no dispute that, in accordance with s. 55(3) of the Act, the Applicant is entitled to examine or obtain copies of the requested minutes of board meetings. The issues to be addressed relate to the manner and completeness of the Respondent's response to the Applicant's Request for Records:
1. Did the Respondent respond to the Applicant's Request for Records in accordance with the requirements set out in the Act and in O. Reg. 48/01?
 2. Did the Respondent provide all the requested records?
 3. Did the Respondent comply with the requirements to retain the requested records set out in O. Reg. 48/01?

4. If the Respondent did not comply with the Act and/or O. Reg. 48/01, should it be assessed a penalty?

E. EVIDENCE & ANALYSIS

- [14] The evidence comprised documents submitted by the Applicant and the Respondent, the written testimony of the Applicant and his one witness and the written testimony of the Respondent's Agent and six other witnesses for the Respondent.

Issue 1: Did the Respondent respond to the Applicant's Request for Records in accordance with the requirements set out in the Act and in O. Reg. 48/01?

- [15] The process that a person entitled to examine or obtain copies of records must follow is set out in s.13.3 of O. Reg. 48/01. The requirements for the corporation's response are set out in s.13.3(6):

When the corporation receives a request for records in accordance with this section, the board shall determine whether the corporation will allow the requester to examine or obtain a copy of the record that the requester has requested and shall respond to the requester within 30 days in English or French, using the form that the Minister responsible for the administration of subsection 55 (3) of the Act specifies.

- [16] The Ministry of Government and Consumer Services' form "Board's Response to Request for Records" requires a condominium corporation to provide reasons if it is not allowing the requester to examine the requested records or, if it is allowing the request, to provide information about how the requester may access the records and about any applicable costs.

- [17] The evidence is that GPM property manager Nexhip Troci replied to the Applicant's May 7, 2018 Request for Records on June 4, 2018. The Applicant requested paper copies of the minutes of Board meetings held within the last twelve months. Mr. Troci's e-mailed response forwarded a copy of the minutes of one board meeting and attached electronic copies of a further three meetings. The e-mail advised that a photocopying fee of \$.20 per page would apply if the Applicant still wished to receive paper copies.

- [18] Section 84 of the *Legislation Act, 2006* states:

Deviations from a form whose use is required under an Act do not invalidate the form if,

- (a) they do not affect the substance and are unlikely to mislead; and

(b) the form is organized in the same or substantially the same way as the form whose use is required.

- [19] While the Respondent did not reply to the Applicant using the form specified by the Minister, its response did include all of the information required by that form. Therefore, I find that the Respondent complied with the regulated requirements.

Issue 2: Did the Respondent provide all of the requested records?

- [20] There is no dispute that the Respondent did not provide all of the requested records in its June 4, 2018 response to the Applicant's request. The Applicant disputes that his request has now been fulfilled.
- [21] The Applicant testified that he did not receive a copy of the minutes of the June 28, 2017 board meeting until these were disclosed by the Respondent during this Stage 3 proceeding. He also testified that he has not received minutes "for a critical meeting that was conducted between May 30th and June 8th, as was reported in an e-mail dated September 22, 2017." Further, in his closing submission, he indicated that he should have received the minutes of a May 2, 2018 board meeting.
- [22] With respect to the minutes of the June 28, 2017 meeting, the evidence is that this record was not sent as part of the Respondent's June 4, 2018 response nor is it listed in the Tribunal's "Stage 2 Summary and Order" as one provided to the Applicant. The evidence also indicates that these minutes were included in those e-mailed by board Secretary Snezana Tanic to GPM on August 13, 2017 in response to a request for all minutes dating from "May 2016 to present." The June 28, 2017 minutes were included in the Respondent's document "Minutes April 2017 – April 2018" which was disclosed during this proceeding. No explanation was put forward as to why this record was not previously provided to the Applicant. However, given the evidence of the efforts made by the Respondent to locate and provide records to the Applicant, I conclude that the Respondent did not intend to withhold this specific record.
- [23] There is no evidence that a board meeting took place between May 30 and June 8, 2017. The September 22, 2017 e-mail to which the Applicant refers is one in which Ms Tanic wrote to fellow board member Dragan Nedeljkovic "we met at Rabba prior to June 8th" to discuss a particular issue. I have reviewed the June 8, 2017 minutes; they include the item "Approval of minutes from last meeting" but there is no notation of the date of that last meeting. There are no minutes for a meeting between May 30 and June 8, 2017 included among those e-mailed by Ms Tanic to

GPM. And, Mr. Nedeljkovic testified that the meeting in question took place on a different date.

- [24] The Stage 2 Summary and Order in this matter lists minutes dated October 12, 2017 as an issue to be addressed in this proceeding. The evidence is that the auditor reviewed these minutes but they cannot be located. However, in his closing submission, the Applicant indicated he was no longer pursuing obtaining a copy of this record.
- [25] I find that the Applicant's May 7, 2018 request has now been fulfilled. The minutes of the June 28, 2017 meeting have been provided and there is no evidence that a meeting was held between May 30 and June 8, 2017. The Applicant submitted that he no longer wished to pursue obtaining a copy of the October 12, 2017 minutes. Finally, the May 2, 2018 minutes fall outside of the date range requested by the Applicant. The evidence is that these minutes were approved on May 29, 2018. Therefore, they did not form part of the records of the Respondent until well after the Applicant submitted his Request for Records.

Issue 3: Did the Respondent comply with the requirements to retain the requested records as required by O. Reg. 48/01?

- [26] Section 55(1) of the Act requires a condominium corporation to keep adequate records and sets out a list of those records, which includes, at paragraph 2, "a minute book containing the minutes of owners' meetings and the minutes of board meetings." Section 55(2.1) of the Act states that records may be kept in electronic or paper form in accordance with any prescribed requirements. Section 13.1(2)2 of O. Reg. 48/01 requires that the minutes be retained at all times.
- [27] Section 13.2 of O. Reg. 48/01 sets out the detailed requirements for the retention of both paper and electronic records. In the case of electronic records, the records must be maintained on a system that is password protected and "automatically backs up files and allows the recovery of backed-up files or otherwise provides reasonable protection against loss of, damage to and inaccessibility of information."
- [28] The Applicant and the Respondent do not dispute that the Respondent failed to properly retain its records. The evidence is that the Respondent was unable to identify and locate all of the relevant board minutes when it received the Applicant's Request for Records. What is at issue is whether the Respondent should be assessed any penalty for its failure to provide all of the records in its initial response to the Applicant.

Issue 4: If the Respondent did not comply with the Act and/or Regulation 48/01, should it be assessed a penalty?

- [29] The Applicant testified that until he became President, the Respondent's minute book containing a hard copy of all board meeting minutes was maintained by the Respondent's property management company at its head office. When the Applicant was elected, he requested the minute book be returned to the Respondent for safekeeping in the office on its premises.
- [30] In an e-mail dated July 30, 2017, Mr. Nedeljkovic advised the Applicant that he would be organizing and sorting documents in the office. The Applicant testified that effective that date, Mr. Nedeljkovic "took on the responsibility for the safekeeping and maintenance of the condominium records." While the Applicant submitted that Mr. Nedeljkovic had volunteered to file hard copy minutes, I note that the e-mail is not that specific.
- [31] The Applicant began to make inquiries about the status of the minute book shortly before his tenure as a board member ended on April 25, 2018. On April 18, 2018 he e-mailed Ms Tanic and Mr. Nedeljkovic and asked them to return the minute book if either of them had it. On April 19, 2018, he e-mailed them minutes dated March 8, 2018 and asked they be added to the minute book "when and if" they found it. He alleges that Mr. Nedeljkovic had "deliberately removed" the minute book from the office.
- [32] In the exhibit "Appendix 20", the Applicant wrote that his intention in making his records request was "to ensure the minute book was accurate" and "that the minutes fairly and completely represent the business transactions that were conducted during my tenure as a board member". However, notwithstanding these statements, and, in apparent contradiction of his request that the March 8, 2018 minutes be filed in the minute book, the Applicant testified that the Respondent's official minutes were the electronic versions:

We transitioned over to an electronic method of taking and storing board of directors meeting minutes on a secure computer that was password protected and had the capability to be easily accessed by Ms. Tanic when required. As such the hard copies of the previous minutes that were kept in the minute book, were being maintained in the office for safekeeping in the event that they had to be accessed for business purposes.

... both Ms. Tanic and myself considered the electronic version of minutes that were housed on a secure computer to be the official board of directors minutes from the time I became president of the board.

- [33] Ms Tanic also testified that Mr. Nedeljkovic had offered to sort the hard copy records in the office, including the minutes, and she forwarded electronic copies of “the minutes he needed” to him. Mr. Nedeljkovic testified that “since July 2017, I had been trying to get all of the minutes into the minute book and signed. Ms Tanic had them all on her computer at this point as she was the board’s appointed secretary.” He indicated that he did eventually receive electronic copies of the minutes from Ms Tanic but “I have never got approved and signed MOM’s only draft copies.” I note that none of the minutes provided to the Applicant by the Respondent are signed.
- [34] It is unclear from the testimony of the witnesses whether the board’s policy was to keep its official minutes electronically, as Mr. Chiro testified, or in hard copy as Mr. Nedeljkovic believed. What is clear is that the individual members of the board did not have any common understanding. In practice, the result was that the hard copy minute book was not up to date and GPM could not locate electronic copies when the Respondent received the Applicant’s May 7, 2018 Request for Records.
- [35] I do not doubt that the testimony of both the Applicant and Mr. Nedeljkovic has been somewhat tailored to place responsibility on each other for the Respondent’s inability to initially locate the records. However, the responsibility to manage the affairs of the corporation and the requirement to comply with the Act and regulations rests with the entire board of directors.
- [36] Section 37 of the Act requires that every director and every officer of a corporation “exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances”. The evidence is that the Applicant’s concern about record keeping began only shortly before his tenure as a director ended. Mr. Nedeljkovic testified his concern dated to July, 2017. Board member Patricia Warsh testified that “there was no review/discussion of minutes at the meetings; nor were the minutes signed”. However, there is no evidence before me to indicate that recording and filing the minutes was a significant enough concern for any of the board members to request an issue be placed on the agenda of a board meeting or to seek advice or assistance, for example, from the Respondent’s counsel.
- [37] The Applicant also testified that GPM was not required to keep copies of the board meeting minutes:

It should be further noted that when I was president of the board the arrangement that we had with GPM Property Management did not require them to maintain or safe keep either the hard copy or electronic version of the corporation's directors meeting minute books.

[38] Ms Tanic's testimony is that she recorded the board meeting minutes, kept them in an electronic file on her personal computer and forwarded them to GPM. However, it is not clear whether these were sent on any regular basis. The evidence is that she sent minutes of fifteen meetings to GPM on February 23, 2017. On August 13, 2017, in response to a request from GPM, she forwarded minutes for fourteen meetings, some of which were duplicates of those she had sent in February.

[39] Auditor Susan Serjeant of Rapkin Wein LLP wrote that she reviewed the minutes at GPM's head office when she conducted her audit of the Respondent's 2017 fiscal year. It is reasonable to expect that either the board or GPM would have referred Ms Serjeant to Ms Tanic's electronic records if those were intended to be the Respondent's official records.

[40] The evidence persuades me that the record keeping practices of GPM contributed to the Respondent's inability to fully respond to the Applicant's Request for Records. As noted above, notwithstanding the Applicant's testimony that GPM was not required to keep the minutes in any form, GPM requested minutes on more than one occasion. In her June 6, 2018 reply to GPM's request, Ms Tanic wrote "This is really disturbing to be asked multiple times for documents I have provided multiple times." However, the board's requirement to manage the affairs of the corporation includes overseeing the property management company it retains. Ultimately, it is the Respondent which is responsible for record keeping.

[41] The Applicant requests that the Respondent be assessed a penalty for its failure to safeguard the Respondent's records. The Act limits the ability of the Tribunal to assess penalties to specific circumstances. The Tribunal may order a penalty to be paid if it finds that the corporation has, without reasonable excuse, refused to permit a person to examine or obtain records:

1.44 (1) Subject to subsection (4), in a proceeding before the Tribunal, the Tribunal may make any of the following orders:

...

6. An order directing a corporation that is a party to a proceeding with respect to a dispute under subsection 55 (3) to pay a penalty that the Tribunal considers appropriate to the person entitled to examine or obtain copies under that subsection if the Tribunal considers that the corporation has without reasonable excuse refused to permit the person to examine or obtain copies under that subsection.

[42] The Respondent's Agent outlined the steps the Respondent took to identify the records when it received the Applicant's May 7, 2018 Request for Records. She

testified that after discovering that the hard copy minute book had not been updated subsequent to March 6, 2016, she asked GPM for electronic copies of the minutes but was advised none could be located on GPM's server. She then contacted the Respondent's auditor, Susan Serjeant. On May 10, 2018, Ms Serjeant provided a list of the minutes she reviewed when she conducted the audit of the Respondent's 2017 fiscal year. After receiving the list from the auditor, GPM was able to locate all of the listed minutes except those for October 12, 2017 and it then responded to the Applicant on the Respondent's behalf.

[43] The Respondent's June 4, 2018 response to the Applicant's request attached the minutes of four board meetings. Although it was later found that these records were not fully responsive to the Applicant's request, the evidence is that the Respondent's intent was to provide the records and that it had made all reasonable efforts to identify them. Therefore, I find that the Respondent did not refuse to permit the Applicant to examine or obtain copies of the records he requested on May 7, 2018 and I assess no penalty.

[44] One of the purposes in assessing a penalty is that it acts as a deterrent to similar future action. Although I assess no penalty in this case, it is worth noting that the Respondent has taken action to obtain its missing records and to regularize its record keeping. On June 6, 2018, the Respondent's counsel sent letters to both the Applicant and Ms Tanic requesting immediate return of any records or assets of the corporation in their possession. The Respondent's Agent testified that the Respondent retained a new property management company effective August 1, 2018. Finally, I note that the Applicant made a further Request for Records in September, 2018. The Respondent replied using the form specified by the Minister and provided all of the requested records.

F. COSTS

[45] Rule 30.1 of the Tribunal's Rules of Practice (effective November 1, 2017) states that the Tribunal may order a User to pay any reasonable expenses related to the use of the Tribunal. The Applicant requests that he be "awarded my costs to apply to the Tribunal plus an allowance for my time spent."

[46] I award no costs in this matter. I acknowledge that the Applicant did not obtain all of the records he was entitled to receive until he made application to the Tribunal. However, the Applicant's Request for Records was made only twelve days after the composition of the Respondent's board changed on April 25, 2018. This fact persuades me that the Respondent's initial inability to produce all of the requested records was the direct result of the record keeping practices of the board which was in place before that date. The Applicant was a member of that board and the

President of the corporation. It would be inappropriate and unfair to assess costs against the Respondent as a result of practices of the board when the Applicant himself was a member.

G. CONCLUSION

[47] I have found that the Respondent did not refuse to provide the records requested by the Applicant in his May 7, 2018 Request for Records and therefore I assess no penalty in this matter. The Request for Records has been fulfilled. I award no costs in this matter because I find that the Respondent's initial inability to fully respond to the Applicant's request was the result of the record keeping practices of the board of directors of which the Applicant was a member.

[48] Accordingly, I issue no order and this matter is now concluded.

Mary Ann Spencer
Member, Condominium Authority Tribunal

Released on: March 28, 2019