

CONDOMINIUM AUTHORITY TRIBUNAL

AMENDED DECISION AND ORDER

ORIGINAL RELEASE DATE: June 7, 2018

AMENDED VERSION RELEASE DATE: May 24, 2019

CASE: 2017-00011R

Citation: Shaheed Mohamed v. York Condominium Corporation No. 414, 2018 ONCAT 3

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

Adjudicator: Michael Clifton

The Applicant

Shaheed Mohamed
Self-Represented

The Respondent

York Condominium Corporation No. 414
Slobodan Pavlovski, Agent

Hearing: April 3, 2018 to April 9, 2018, Written online hearing

AMENDED REASONS FOR DECISION

A. INTRODUCTION

- [1] The Applicant, Shaheed Mohamed, is a unit owner of the Respondent condominium corporation and identifies himself as president of a “Homeowners Committee” of unit owners, but his status in this Tribunal case is that of an individual owner.
- [2] The Respondent is represented by Mr. Pavlovski (the “Respondent’s agent”), the manager for the Respondent.
- [3] The Applicant brought this application relating to a request for records submitted to the Respondent in the proper form currently required under the Condominium Act, 1998 (the “Act”), and dated November 2, 2017, (the “Request for Records”), and in relation to other requests for records made in various forms previously and during these proceedings (the “Other Requests”).

- [4] The Applicant has agreed that the subject matter of these proceedings shall be restricted to the Request for Records and that no determination is required to be made with respect to any of the Other Requests.
- [5] The essential facts of this case as presented by each of the Users are as follows:
- a. The Applicant states that he submitted the Request for Records to the Respondent on November 3, 2017, and that he received no response to the Request for Records and therefore brought an application to the Tribunal.
 - b. The Respondent's agent states that the Respondent received the Request for Records on November 2, 2017, and that, on November 3, 2017, the Respondent prepared certain of the requested records for pick-up by the Applicant, and also prepared and delivered a written reply to the Request for Records (the "Respondent's Reply") that the Respondent's agent says was delivered to the Applicant by various means on or around November 3, 2017.

There was insufficient evidence to make a finding regarding many of the facts in disagreement between the parties. However, it is not necessary for the purposes of making this decision to deal with all of them.

- [6] The facts that are undisputed are that the Request for Records was submitted by the Applicant to the Respondent in the proper form on or about November 2 or 3, 2017, and that, up to the date of this hearing, the Respondent had not provided all of the records requested. As to whether the Respondent's Reply was actually prepared and delivered when and as stated by the Respondent's agent, I find the Applicant's submissions more credible for reasons that are explained later in this decision.
- [7] Three issues need to be determined in this case: First, is the Applicant entitled to all of the records requested, including the record of owners and mortgagees? Second, is the Respondent's demand for a fee for the requested records in compliance with the law? Third, as the Applicant has requested that the Respondent be held accountable for its conduct regarding the Request for Records and these proceedings, should an award of costs and/or a penalty be ordered in favour of the Applicant?
- [8] On the first issue, I conclude that the Applicant is entitled to all requested documents. On the second issue, I find that although the Respondent is entitled under the law to demand a fee, the actual fee demanded is not in compliance with the law. An analysis of what constitutes a more appropriate fee is set out in this

decision. On the third issue, I find that costs and a penalty in favour of the Applicant are appropriate in this case. Reasons for my decision follow.

- [9] In this decision “Act” refers to the Condominium Act, 1998, and “Regulations” means the regulations made under the Act.

B. ISSUES & ANALYSIS

Issue 1: Is the Applicant entitled to all of the records requested, including the record of owners and mortgagees?

- [10] As stated above, I find that the Applicant is entitled to all of the requested records.

- [11] The Request for Records requests electronic copies of the following core records of the Respondent (the “Requested Core Records”):

- a. Record of Owners and Mortgagees;
- b. Budget for the Respondent’s current fiscal year;
- c. The Respondent’s most recent approved financial statements;
- d. The Respondent’s most recent auditor’s report;
- e. The Respondent’s current plan for future funding of the reserve fund.

- [12] The Request for Records also requests electronic copies of the following non-core records of the Respondent (the “Requested Non-Core Records”):

- a. Minutes of the Respondent’s Board Meetings from November 2016 to November 2017;
- b. Official monthly financial statements from the bank, from November 2010 to October 31, 2017;
- c. All building contracts, from 2014 to 2017;
- d. Building insurance, from 2010 to 2017;
- e. “Landscaping, Snow removal, Garbage removal, Rogers cable”, 2010 to 2017; and
- f. “Consumer gas, En-care”, 2010 to 2017.

- [13] The Respondent's agent specifically stated that all of the records requested in the Request for Records can be produced, except for the Respondent's record of owners and mortgagees.
- [14] The Respondent submitted to the Tribunal that, "According to Condominium Act, 1998, S.O. c. 19, 55(4)(c), we cannot fulfill Mr. Mohamed's request for records of owners and mortgages. All other request [sic] we are able to fulfill, upon receiving payment for the first set of documents which has been prepared for him."
- [15] Subsection 55(4)(c) of the Act provides that a condominium unit owner is not entitled to examine or obtain copies of condominium records that relate to specific units or owners, subject to the provisions of subsection 55(5). That section of the Act states that the prohibition against examining or obtaining copies of records relating to specific units or owners does not apply in certain cases. One of those cases, that is described in subsection 55(5)(c), is a request to examine or obtain a copy of the record that section 46.1 of the Act requires the corporation to maintain. That record is the record of owners and mortgagees that is referred to in the Request for Records.
- [16] As such, the Applicant is entitled to receive the Respondent's record of owners and mortgagees as requested, as well as all of the other Requested Core Records and Requested Non-Core Records.
- [17] Such records are to be provided to the Applicant following the delivery of this decision as set out in my Order.

Issue 2: Is the Respondent's demand for a fee in compliance with the law?

- [18] This issue arises because the Respondent notes, in both its Reply and its submissions to this Tribunal, that it has already prepared copies of financial records requested by the Applicant (the "financial records") and demands payment of a fee for these records before they will be given to the Applicant. In his submissions, the Respondent's agent also stated that the Respondent will not provide the Applicant with any other requested records until that fee is paid. The Respondent also intends to charge a fee for providing other requested records, though the Respondent's agent stated he could not estimate such fee at the time of the hearing.
- [19] For the purpose of analyzing this issue, I am putting aside the question of whether or not the Respondent's Reply was in fact ever delivered to the Applicant, which the Applicant states never happened. In any event, the Applicant argues that he should not be required to pay any fee for the labour involved in preparing the

requested records, that the requested records should not be withheld pending the Applicant's payment of such fees, and that the fee set out in the Respondent's Reply and submissions to this Tribunal is not in compliance with the legislation.

[20] I find that the Respondent is entitled to charge a fee for the labour involved in preparing the requested records, and that the fee is to be paid prior to delivery of the records, but that the fee charged by the Respondent does not comply with applicable legislation.

[21] The Respondent's Reply describes the fee as follows: "The fee for preparing the requested [sic] is \$252.00 for labour plus HST, for copy [sic] 42.75 plus HST sub-totalling \$294.75 plus HST. The HST is \$38.31 and the Grand Total is \$333.06 CND which includes labour and photocopies."

[22] The Respondent's agent advised the Tribunal that additional fees will be charged on the same basis as other records requested in the Request for Records.

[23] The Respondent's agent also submits that all such fees are payable by the Applicant directly to the Respondent's agent, rather than to the Respondent.

[24] To provide a complete answer to this issue, this Tribunal must consider the following questions:

- a. Is the Respondent entitled to charge a fee related to providing copies of the financial records?
- b. Is the fee charged in compliance with the legislation, and, if not, what is an appropriate fee under the legislation?
- c. Is the Respondent entitled to withhold records from the Applicant until such fee is paid?
- d. To whom is the fee to be paid?
- e. What fee should the Respondent charge for copies of other records requested in the Request for Records?

Issue 2.a. – Is the Respondent entitled to charge a fee related to providing copies of the financial records?

[25] Although the Respondent's Reply was stated to have been made and delivered to the Applicant on or about November 3, 2017, it references section 55(6) of the Act as it read prior to November 1, 2017, as justification for the demand for payment of

a fee for the financial records. This was obviously not a correct legal reference at the time the Respondent's Reply was said to have been made.

[26] The current legislation supports a demand for a fee, as follows:

- a. Subsection 55(3) of the Act states that, "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."
- b. Subsection 55(3.1)(c) of the Act authorizes the Regulations to "specify fees that a corporation may charge for payment by a person who makes a request to the corporation to examine or obtain copies of records under that subsection, where the fees are for costs relating to the examination or copying of the requested records."
- c. Subsection 13.3(7) of O. Reg. 48/01 allows (but does not require) a condominium corporation to set a fee for an owner to examine or obtain copies of records.
- d. Subsections 13.3(8) and 13.3(9) of O. Reg. 48/01 set out the conditions and factors to be considered by a condominium corporation when setting such fee.

[27] The Applicant argues that where subsection 55(3.1)(c) references fees "relating to ... copying," it means only the photocopying costs and not the labour associated with preparing such copies. This view is not consistent with paragraph 1 of subsection 13.3(8) of the Regulation, which states that the fee is intended "to reimburse the corporation for the actual labour and delivery costs that the corporation incurs ... for delivering a copy of the record".

[28] The effect of these provisions of the Act and the Regulation is that the Respondent is entitled to charge, and the Applicant can be required to pay, a fee for the labour involved in providing copies of records to the Applicant.

Issue 2.b. – Is the fee charged in compliance with the legislation, and, if not, what is an appropriate fee under the legislation?

[29] There are two bases for fees under the legislation: labour and photocopying.

[30] The complete conditions and factors to be considered by a condominium corporation when setting a fee for examination or copies of records are set out in subsections 13.3(8) and 13.3(9) of O. Reg. 48/01 as follows:

13.3(8) The fee payable for the request shall be calculated in accordance with the manner set out in the board's response, subject to the following conditions:

1. 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 labour costs that the corporation incurs during the examination.
2. The fee shall be reasonable.
3. The board shall establish a charge of no more than 20 cents per page for printing or photocopying.
4. If the request is to examine or obtain a copy of a core record, the corporation shall not charge any fee for the request if it delivers the copy to the requester in electronic form.
5. If the request is to examine a copy of a core record, the corporation shall not charge any fee for the request if it makes a copy of the record available for examination in paper form, other than a fee for the actual labour costs that the corporation incurs during the examination and the printing and photocopying charges established under paragraph 3.
6. If the request is to obtain a copy of a core record, the corporation shall not charge,
 - i. any fee for the request if it delivers the copy to the requester in paper form and if the request for records provides that the requester wishes to obtain the copy in electronic form, or
 - ii. any fee for the request, other than the printing and photocopying charges established under paragraph 3, if it delivers the copy to the requester in paper form and if the request for records does not provide that the requester wishes to obtain the copy in electronic form. O. Reg. 180/17, s. 17 (1).

13.3(9) Subject to subsection (8), the fee payable for the request may vary depending on the following factors:

1. Whether the record requested is a core record.
2. Whether the corporation keeps the record requested in electronic or paper form.

3. Whether the request is to examine a copy of the record requested or to obtain a copy of it.

4. Whether the corporation is required to redact the record requested to remove any part that it has determined that it will not allow the requester to examine or of which it will not allow the requester to obtain a copy.

5. The time that the board estimates spending on responding to the request.
O. Reg. 180/17, s. 17 (1).

[31] The Respondent's agent stated that the fee charged in the Respondent's Reply was determined based on the following factors:

Fees and labour:

Hourly Labour Rate: \$63 per hour - 4 hours - Files had to be searched from March 2010 to October 2017, staples removed in order to photocopy items, files were gathered again and re-stapled and put back in the appropriate monthly and yearly folders.

The total pages copied : 159 pages - \$ 0.26 per page

[32] I find that this fee is not in compliance with the conditions and factors set out in the Regulation for the following reasons.

[33] First, the \$63 per hour rate, plus HST, does not appear to be reasonable and is therefore contrary to paragraph 2 of subsection 13.3(8). The Respondent's agent was asked more than once whether this rate was based on his condominium management contract with the Respondent. The Respondent's agent first answered that such fee represents "our company's rate based on industry average". This claim was not supported by any evidence. The Respondent's agent later stated that the fee was in fact determined by having "collaborated" with the Respondent's legal counsel, and that the Respondent set a fee that was different than what was recommended by its legal counsel. It appears unlikely that the rate of \$63 per hour represents either the real rate of pay of the Respondent's agent for its "actual labour and delivery costs" or the industry average for the kind of work in question. There is no basis upon which I can conclude that the stated rate is reasonable or otherwise in compliance with the legislation.

[34] Second, the photocopying charge of \$0.26 per page is in excess of the maximum charge of \$0.20 per page that is set out in paragraph 3 of subsection 13.3(8) of the Regulation. In addition, the Regulation states no fee for photocopying shall be charged when a core record is requested and is able to be delivered in electronic form, or where the record was requested in electronic form but is delivered in

paper form. At least some of the records for which the Respondent has sought to charge photocopying fees are core records, in so far as the Respondent's Reply indicates that the 2017, or most recent, financial records of the Respondent are included. Paragraph 4 under the definition of "core record" in subsection 1(1) of O. Reg. 48/01 includes the "most recent financial statements that the board has approved under subsection 66(3) of the Act".

[35] As I have concluded that the Respondent is entitled to a fee, but that the fee charged by the Respondent is not in compliance with the legislation, I have reasoned as follows to determine what would be an appropriate fee.

[36] In regard to the cost of photocopying, I find that no fees should be charged in this case for the following reasons:

- a. The Applicant asked that all the requested records – whether core or non-core records – be provided in electronic format. The Respondent's agent has stated that all the requested records can be provided in that format. As noted, in these circumstances no fee is to be charged for copying core records that are requested to be delivered in electronic format. Regarding non-core records, although the Regulations do not prohibit a charge for photocopying them, they state that one of the considerations in setting a fee should be whether the documents are kept in paper or electronic form. The Regulations also require that the fee be reasonable. I find it would not be reasonable to charge a photocopying fee for providing electronic copies of the non-core records, since this does not require the production of photocopies.
- b. Since the Respondent has already made paper copies of the financial records, it is appropriate to question whether a fee should be charged for those that are non-core records. The Respondent's agent provided inconsistent explanations as to why such copies were made. He first stated this was done because the Applicant had stated he had no computer and could not receive records electronically; later, he stated that the Applicant had refused records electronically because he has no email. The Applicant denies both explanations. I note that the Request for Records includes an email address for the Applicant. During the hearing, the Applicant also offered both the use of a USB flash drive and a Dropbox account for delivery of the records electronically. In comparison to the Respondent's inconsistent statements, I find the Applicant's assertions both consistent and credible. It does not appear that there was any genuine necessity for the financial records to be photocopied rather than prepared for electronic delivery to the

Applicant. It would not be reasonable to charge a fee for any of those photocopies.

- [37] Regarding the fees charged for labour, the Respondent's agent provided no consistent or credible evidence of the actual cost to the Respondent of the labour involved in preparing the requested records. Further, neither User provided evidence of an industry average or other standard hourly rate or any other basis for determining a reasonable rate of pay for the labour in question, despite being asked to do so. As a result, it falls to this Tribunal to decide upon a rate that is reasonable for the purpose of making an order in this case. Following the factors set out in the Regulations, I have considered both the kind of work to be done and the time required to do it.
- [38] The work described by the Respondent's agent consists of the basic clerical functions of locating, unstapling, copying, re-stapling and re-filing records that the Respondent or Respondent's agent retains in its filing system, which the Respondent's agent indicates are readily available subject only to such labour. The Respondent did not indicate that any substantive work requiring specialized knowledge, such as redaction, was required. I have considered that the current minimum wage in Ontario is \$14 per hour, as of January 1, 2018, and prior to this date was only \$11.60 during the period that the work in question was performed. While I am not prepared to accept the Respondent's agent's submission of a rate as high as \$63 per hour as reasonable for the work described, I also have no basis on which to reduce the rate charged to the level of the minimum wage. In the absence of any specific evidence from the Users on this issue, I am prepared to use an hourly rate that is equal to approximately double the current minimum wage, plus H.S.T. (as this might be charged if the person performing the work is a contractor rather than employee, for example), as a basis for calculating what is likely the maximum, reasonable rate of pay for the basic, unspecialized clerical work described by the Respondent's agent. \$31.50 per hour is the rate that will be applied in this case. This is slightly less than one-half of the rate used in the Respondent's Reply. I recognize that a different rate might be deemed to be reasonable in other cases based on evidence that Users in such cases might submit.
- [39] The Respondent's agent states that copying the financial records took four hours. The Applicant claimed that less time should have been incurred if the Respondent had prepared the documents in electronic, rather than paper, format as requested. However, the work of searching for, scanning and refiling records, which the Respondent's agent described as the process needed for providing electronic copies of the requested records, does not necessarily require less time than

producing paper copies of the same records. I find that four hours is a reasonable amount of time for preparing either paper or electronic copies of the financial records. However, since the financial records include the financial records for 2017, which are core records, the time used for the purpose of calculating the fee must be adjusted to eliminate the time required for providing that year's records. I assume it takes about the same amount of time to photocopy one year's financial records as another's. Therefore, the time is adjusted by subtracting one-eighth of the overall time, or half-an-hour. Based on the rate of \$31.50 per hour, the fee for the labour involved in copying the non-core financial records would be \$110.25. The Respondent should not be required to re-do the work to prepare these documents for electronic delivery but should simply provide the paper copies to the Applicant upon receiving payment of \$110.25.

2.c. – Is the Respondent entitled to withhold records from the Applicant until such fee is paid?

[40] The Applicant questioned whether it is appropriate for the Respondent to withhold the records until the Applicant has paid the fee. The Regulation makes it clear that a condominium corporation is not required to provide access to copies or permit examination of records until the fee required in accordance with the Regulations is paid. Therefore, the Respondent is permitted to withhold delivery of the records until the fee, as ordered, is paid.

2.d. – To whom is the fee to be paid?

[41] The Respondent's agent stated in his submissions that the fee was being charged by him, or his company, and not by the Respondent, explaining, "We are not charging it to the condominium, instead to the individual asking for these documents. This is according to the Condominium Act, as we have the right to charge reasonable fees." This is not correct. The Act and the Regulations only authorize the condominium corporation to charge and receive a fee for the provision of records, and not any other party.

[42] Therefore, fees that the Applicant is required to pay in accordance with this decision are to be paid to the Respondent directly and not the Respondent's agent (or any other third party). This does not, of course, preclude the Respondent from paying that or any other amount to the Respondent's agent (or any other third party) for its work under the contractual arrangement between them.

2.e. – What fee should the Respondent charge for copies of other records requested in the Request for Records?

- [43] As explained above, no fees for photocopying should be charged in this case since all records are to be provided electronically. The only fees that may be charged would be related to labour. Also, the rate of \$31.50 (inclusive of HST) for labour determined above shall apply in regard to the labour required to provide the remaining records requested in the Request for Records, other than the financial records.
- [44] The Respondent's agent was asked to estimate the time for preparing such records, but refused to do so, stating, "We would not know the time needed to search, photocopy all the other documents requested until we start the process. As this is not an everyday task or request nor it is a standard everyday part of our work." However, as noted above, a reasonable estimate of costs is a requirement the Regulations; therefore, it is not appropriate for the Respondent or its agent to refuse to make such an estimate. Since the Respondent did not do so, and in order to render a complete decision regarding the Request for Records, the Tribunal shall determine the cost.
- [45] Since no fees for either labour or photocopying are to be charged for providing electronic copies of the Requested Core Records, and having determined that no fee for photocopying should be charged in this case at all, the only fee to be charged is in respect of the labour involved in providing copies of the Requested Non-Core Records.
- [46] Taking into consideration the Respondent's statement of the time taken to produce paper photocopies of the financial records, the Respondent's agent's description of the kind of work that needs to be done to provide electronic copies (i.e., searching, scanning and replacing the filed records), and also given that much of this work might be minimized if any of the documents are already in electronic format, I conclude that twelve hours is a reasonable estimate of the time required to prepare all of the other Requested Non-Core Records. At the rate of \$31.50 per hour, the resulting fee for such work would be \$378.00. The records shall be provided by the Respondent within thirty (30) days of the date on which the Applicant pays this amount to it.

Issue 3: Should an award of costs or a penalty be made in favour of the Applicant because of non-compliance or other conduct of the Respondent relating to the Request for Records and these proceedings?

- [47] The Applicant asks that this Tribunal hold the Respondent accountable for its non-compliance with the Act and for its failure to conduct itself appropriately in relation to Tribunal proceedings. Under subsection 1.44(1) of the Act, the Tribunal can make an award of damages, costs or a penalty against a party to a proceeding. It

is the decision of this Tribunal that there are grounds for both an award of costs and a penalty in this case.

[48] The relevant sections of the Act relating to the imposition of a penalty are as follows:

- a. Paragraph 6 of subsection 1.44(1) of the Act states that the Tribunal can make “[a]n 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”; and
- b. subsection 1.44(3) provides that “An order for a penalty made under paragraph 6 of subsection (1) shall be in an amount of not more than the lesser of \$5,000 and the prescribed amount, if any.” There is no alternative prescribed amount. Therefore, the Tribunal has authority to award a penalty of up to \$5,000 in the circumstances described above.

[49] The two questions for me to consider are whether the Respondent refused to provide the requested records to the Applicant, and, if so, whether there was a reasonable excuse for such refusal.

[50] The Applicant states that in the months between the date of the Request for Records and the date by which the Respondent joined the Tribunal proceedings, the Respondent made no attempt whatsoever to provide the Applicant with any of the requested records. The Respondent’s agent submitted an unsigned copy of the Respondent’s Reply as part of its evidence in this case, but did not furnish any credible evidence that it was actually made when the Respondent’s agent said it was or that a reasonable attempt was made to deliver it to the Applicant. The Applicant denies the Respondent’s Reply was ever delivered to or received by him. Although the Applicant could not provide material evidence to demonstrate a negative, he provided some explanations and evidence in support of his position that the Respondent’s submissions regarding this matter should not be believed.

[51] I have been mindful of the fact that throughout the hearing the Respondent’s agent made some contradictory statements of fact and generally failed to provide credible evidence to support almost all of the Respondent’s claims. On the other hand, the Applicant’s factual submissions were generally consistent and supported by credible evidence. Overall, the Applicant’s factual submissions and evidence were more believable than those of the Respondent. I conclude that it is more

likely that the Respondent's Reply was not actually made at the time the Respondent's agent said that it was, and that, even if it was, no actual or reasonable effort was made to deliver the same to the Applicant.

- [52] Even if the Respondent's Reply was made and the Respondent had made a reasonable attempt to deliver it, it was effectively not a valid reply to the Request for Records as contemplated under the legislation. First, it dealt with only a very minimal portion of the records listed in the Request for Records. The evidence of both Users is that no reply was given about, and no effort was made to provide, any other of the requested records to the Applicant. Second, it was substantially not in compliance with the Regulations for several reasons, including that it was not in the required form, was not delivered as required by the Regulations, and did not contain almost any of the required information, such as an index and description of the requested records, a statement as to whether or not each one is a core record, and an estimate of the fee to be paid for copies. While such non-compliance might have seemed to be accidental or due to a lack of sophistication on the part of the Respondent, the Respondent's agent stated, "We did seek legal counsel regarding this request and was [sic] advised by our lawyer on how to respond and proceed." Despite this, the Respondent failed to comply with almost every applicable provision of the Act and Regulations.
- [53] The facts and submissions of the Users lead me to conclude that the Respondent either wilfully disregarded or chose to remain wilfully blind to the legal requirements in relation to the Request for Records, resulting in an effective, if not expressed, refusal to provide the Applicant with access to the requested records. In addition, as already noted in this decision, the Respondent's agent did expressly state that the Respondent refused to provide the Applicant with access to the record of owners and mortgagees that the Respondent should keep under section 46.1 of the Act, despite the clear statement in legislation permitting such access.
- [54] I conclude that the Respondent refused to provide the Applicant with access to the requested records. Furthermore, there is no evidence before me of any reasonable excuse for the refusal. I find that a penalty is warranted.
- [55] Under the previous legislation the standard penalty for a corporation that without reasonable excuse did not provide records was \$500, regardless of whether there was a refusal or simply a failure to do so. The penalty the Tribunal is authorized to impose applies only in the case of a refusal to provide records. This seems consistent with prior court decisions not to enforce payment of this penalty amount if the condominium corporation had made a reasonable effort to provide access to the requested records or if the requesting person's own conduct had interfered

with obtaining such access. The change in the legislated penalty from a fixed amount of \$500, applicable equally to all cases, to a range of up to \$5,000, suggests the legislature intends that the penalty imposed by this Tribunal should proportionately reflect the nature or severity of the refusal.

[56] While there is no specific or clear direction in the legislation as to the purpose intended for the penalty that may be imposed, this Tribunal is committed to operating in a way that focuses on its users, resolves disputes in a way that is fair and convenient, and promotes healthy condominium communities. The penalty should at least be imposed by the Tribunal for reasons that represent those commitments.

[57] Weighing such factors, it is my view that the penalty imposed in this case should be substantial enough to act as a reminder to the Respondent to apply more care and diligence, and especially to be more mindful of its legal obligations, when responding to unit owners' requests for records. The former fixed penalty of \$500 seems insufficient for this purpose, while the maximum penalty of \$5,000 would be excessive. There is no reason to believe that the Respondent's conduct in this case represents the most egregious or improper conduct in respect of which such a substantial penalty should be awarded under the Act. Therefore, the penalty that the Respondent shall pay to the Applicant under paragraph 6 of subsection 1.44(1) of the Act is set at \$1,000.

[58] Subsection 1.44(1) of the Act permits the Tribunal to make "[a]n order directing a party to the proceeding to pay the costs of another party to the proceeding." Under section 1.44(2) of the Act, an order for costs shall be made "in accordance with the rules of the Tribunal". The Tribunal's Rules of Practice provide that a costs award may be made where a User's costs or expenses are "directly related to a User's behaviour during the Tribunal process that was unreasonable or for an improper purpose, or that caused an unreasonable delay."

[59] The Respondent either failed or refused to participate in the Tribunal's online dispute resolution process until some days after the Applicant commenced Stage 3 – Tribunal Decision. Although I cannot say that the disputes between these Users would have been resolved if the Respondent had participated at the first instance, it is obvious that the opportunity to do so was lost by its lack of participation. Further, where Users are unable to resolve their dispute by Stage 2, the Tribunal Member or mediator conducting that stage will prepare a summary and directions for the Member conducting Stage 3, which serve to identify and narrow issues and provide other information which can help ensure Stage 3 is conducted in an efficient and expeditious manner. These opportunities were also lost by the

Respondent's late participation. The Respondent's agent offered no reasonable explanation for its late participation.

[60] I find that the lack of early and active participation by the Respondent justifies an award of costs to the Applicant under paragraph 4 of subsection 1.44(1) of the Act in the amount of the application fee for Stage 3 – Tribunal Decision.

C. ORDER

[61] The Tribunal orders that:

1. The Respondent shall:
 - a. immediately and in any event no later than one business day after payment of \$110.25 by the Applicant to the Respondent, deliver to the Applicant the financial records that the Respondent states it has already copied and prepared for pick-up by the Applicant;
 - b. within seven (7) days of the date of issuance of this order, deliver to the Applicant in electronic format (either uploaded to the Applicant's Dropbox account or on a flash drive, at the Applicant's direction) and at no cost to the Applicant, all the Requested Core Records, **being namely:**
 - i. **Record of Owners and Mortgagees;**
 - ii. **Budget for the Respondent's current fiscal year;**
 - iii. **The Respondent's most recent approved financial statements;**
 - iv. **The Respondent's most recent auditor's report;**
 - v. **The Respondent's current plan for future funding of the reserve fund;**

(other than any of the foregoing that are amongst the financial records that the Respondent states it has already copied and prepared for pick-up by the Applicant and that are delivered in accordance with paragraph 1.a of this order) where the terms "current" and "most recent" refer to the records that fit those descriptions at the time that the Applicant's request for records was made, being November 3, 2017;

- c. within thirty (30) days of the date of which the Applicant pays \$378.00 to the Respondent, deliver to the Applicant in electronic format (either uploaded to the Applicant's Dropbox account or on a flash drive, at the Applicant's direction) all of the Requested Non-Core Records, **being namely:**
- i. **Minutes of the Respondent's Board Meetings from November 2016 to November 2017;**
 - ii. **Official monthly financial statements from the bank, from November 2010 to October 31, 2017;**
 - iii. **All building contracts, from 2014 to 2017;**
 - iv. **Building insurance, from 2010 to 2017;**
 - v. **"Landscaping, Snow removal, Garbage removal, Rogers cable", 2010 to 2017; and**
 - vi. **"Consumer gas, En-care", 2010 to 2017.**
- (other than any of the foregoing that are amongst the financial records that the Respondent states it has already copied and prepared for pick-up by the Applicant and that are delivered in accordance with paragraph 1.a of this order); and**
- d. within thirty (30) days of the date of issuance of this order:
- i. pay to the Applicant costs pursuant to paragraph 4 of subsection 1.44(1) of the Condominium Act, 1998, in the amount of \$125.00; and
 - ii. pay to the Applicant a penalty pursuant to paragraph 6 of subsection 1.44(1) of the Condominium Act, 1998, in the amount of \$1,000.00.

Michael Clifton
Member, Condominium Authority Tribunal

ORIGINAL RELEASED ON: June 7, 2018
AMENDED VERSION RELEASED ON: May 24, 2019