

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: September 22, 2020

CASE: 2020-00061R

Citation: He v. Waterloo Standard Condominium Corporation No. 541, 2020 ONCAT 34

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

Member: Marc Bhalla, Member

The Applicant,

Xiao Peng He

Self-Represented

The Respondent,

Waterloo Standard Condominium Corporation No. 541

Represented by Justin Black, Counsel

Hearing: August 12, 2020 to September 11, 2020, written online hearing

REASONS FOR DECISION

A. INTRODUCTION

- [1] The Applicant is a unit owner of the Respondent. On March 11, 2020, the Applicant submitted a Request for Records form to the Respondent requesting non-core records. The records requested were not listed in the form. They were set out in a series of documents attached to the form and referenced in the form as “minutes related to issues”.
- [2] The Respondent replied to the Applicant’s Request for Records on March 24, 2020. Along with the Response to Request for Records form, the Respondent’s lawyer and condominium manager wrote letters to the Applicant on the same day. These communications explained that the Respondent offered redacted minutes and other records. The Respondent provided a cost estimate of \$380 for the production of the records. The Applicant wants un-redacted minutes and refuses to pay the cost estimate.
- [3] The Applicant’s request related to a series of incidents involving the parties:
 - a. an allegation that the Applicant’s mother soiled the Respondent’s common element sauna with dead skin and hair; and

- b. allegations that the Applicant and/or their tenants violated the Respondent's rules.

[4] Many of the issues raised by the Applicant fall beyond the jurisdiction of this Tribunal. They include, but are not limited to, application of the Respondent's Declaration's indemnity provision, the registration of a Condominium Lien, an allegation of oppression and the de-activation of the Applicant's key fobs.

[5] In addition to the requested records, the Applicant sought: (i) re-activation of their key fobs, (ii) the dismissal of legal letters and reversal of related chargebacks, (iii) a letter explaining actions and addressing allegations of missing minutes, (iv) the Respondent refraining from threatening further legal action and (v) to meet with the Respondent. Most of the relief sought by the Applicant is beyond the jurisdiction of this Tribunal. The jurisdiction relates to records under Section 55 of the *Condominium Act, 1998* (the "Act"). In this decision, I will address issues that fall within the Tribunal's jurisdiction.

[6] From the parties' submissions, the Applicant sought:

Sauna Records

- a. Meeting minutes and photographs related to allegations of the Applicant's mother soiling the sauna with dead skin and hair; and
- b. Minutes related to construction carried out in the Respondent's sauna around February to May 2019, with "supported pictures, contracts, bills and so on to provide construction has been done properly";

FOB De-Activation Records

- c. Video footage related to allegations of the Applicant and/or their tenants violating the Respondent's rules; and
- d. Minutes and policies of the Respondent surrounding the de-activation of the Applicant's key fobs;

Manager Qualification Confirmation

- e. Evidence of the qualification of a previous condominium manager of the Respondent; and

Owners' List

- f. A list of all unit owners which includes names, unit numbers and email addresses for service, and contact information.

- [7] The Respondent's lawyer provided the Applicant with a link to the website of the Condominium Management Regulatory Authority of Ontario which offered the licensing status of the Respondent's former condominium manager. The status was also listed in the body of the email. I commend this gesture of informing condominium owners. This addressed the Applicant's request.
- [8] The Applicant's Request for Records form does not request a Record of Owners and Mortgagees. Evidence before me indicates that the Applicant previously requested and received this record. I need not consider this issue.
- [9] After reviewing the evidence and submissions before me, I find that the Respondent is entitled to redact records because of contemplated litigation and is entitled to charge a fee for the examination and production of non-core records. I do not find the fee proposed by the Respondent to be reasonable in this case. No penalties or costs are awarded.

B. ISSUES & ANALYSIS

[10] Based on the evidence before me, I identified three issues to be decided:

1. Is the Respondent entitled to redact records?
2. Is the Respondent entitled to charge a fee for the examination or production of records?
3. Is a penalty appropriate?

1: Is the Respondent entitled to redact records?

- [11] The parties dispute the format of the records requested by the Applicant. The Applicant has requested un-redacted minutes of board meetings that speak to decisions made by the Respondent to take actions related to the alleged soiling of the sauna by the Applicant's mother with dead skin and hair and the alleged violation of the Respondent's rules by the Applicant and/or their tenants. The Respondent has offered redacted minutes, citing contemplated litigation in denying the Applicant's request for un-redacted minutes.
- [12] Section 55 (4) (b) of the Act allows a condominium corporation to refuse to provide records relating to actual or contemplated litigation. The Respondent relied on this section when it offered redacted minutes to the Applicant. The tone and nature of communications between the parties suggest a reasonable likelihood of litigation. The Applicant threatened to sue the Respondent. The Applicant suggested they would bring claims against the Respondent or its condominium manager. The Applicant reserved their right to take further action. In *Patricia Gendreau v Toronto*

Standard Condominium Corporation No. 1438, 2020 ONCAT 18, this Tribunal found that prior conduct of a party was not enough to contemplate litigation. The distinction in this case is that the Applicant's conduct related to the issues at hand. Litigation was not contemplated due to prior actions of the Applicant. Litigation was contemplated directly in relation to the underlying subject matter of this case. Litigation has been contemplated. The Respondent is entitled to redact minutes related to the contemplated litigation. I appreciate that the Applicant does not want redacted minutes, this decision confirms what the Applicant is entitled to.

- [13] With the request for un-redacted minutes relating to the de-activation of the Applicant's key fobs, there is no dispute that the Applicant's key fobs were de-activated. There was dispute about whether any records related to the de-activation exist. I find that if they exist, the Respondent is entitled to redact them in light of the contemplated litigation.
- [14] The Applicant submits that the photographs offered by the Respondent related to the allegations of the Applicant's mother soiling the sauna with dead skin and hair did not include information about when they were taken. The Applicant requests the photographs in exchangeable image file format (Exif), offering metadata. The Applicant sought this to confirm the time and date the photographs were taken.
- [15] The Respondent stated that "[t]here are no plans to redact any portion of the photo or camera footage". Thus, there is no dispute before me about the Applicant's entitlement to Exif metadata of photographs previously provided by the Respondent. The Respondent is not seeking to redact any available Exif metadata.

2: Is the Respondent entitled to charge a fee for the examination or production of records?

- [16] Sections 13.3 (8) and 13.3 (9) of Ontario Regulation 48/01 establish when a condominium corporation can charge a fee for the examination or production of records. A condominium can charge a fee if the requested record is a non-core record of the condominium. A condominium can also charge a fee when it determines that it is required to redact a non-core record. However, the fee charged must be reasonable and represent actual costs of the condominium.
- [17] What I must decide is if the Respondent is entitled to charge a fee and, if so, whether the fee requested is reasonable. As the Respondent is entitled to charge a fee for non-core records and for redaction under Sections 13.3 (8) and 13.3 (9) of Ontario Regulation 48/01, the question becomes if the \$380 cost estimate is reasonable.

- [18] The Respondent submits that it requested a reasonable fee for preparing the records in the circumstances. The Respondent claims \$95 per hour is “within the standard hourly rate charged by the condominium industry and is an hourly rate similar to previous CAT decisions”. The \$95 hourly rate is presented as an actual cost to be incurred for additional work performed by condominium management, beyond ordinary duties to the Respondent. Such work primarily pertains to reviewing video footage related to the alleged violations of the Respondent’s rules by the Applicant and/or their tenants. The cost estimate also included the preparation of minutes related to construction carried out in the Respondent’s sauna around February to May 2019, with “supported pictures, contracts, bills and so on to provide construction has been done properly” and providing photographs in relation to allegations of the Applicant’s mother soiling the sauna with dead skin and hair.
- [19] The Tribunal has considered the amount that is reasonable for a condominium to charge for records. The amount has varied based on the nature of the work to be carried out. In *Shaheed Mohamed v York Condominium Corporation No. 414*, 2018 ONCAT 3, a proposed hourly labour rate of \$63 was reduced to \$31.50 for “the basic clerical functions of locating, unstapling, copying, re-stapling and re-filing records”. In *Robert Remillard v Frontenac Condominium Corporation No. 18*, 2018 ONCAT 1, a \$130 hourly rate was deemed reasonable based upon the estimated cost of involving an articling student in redacting invoices as a result of the alleged litigious nature of an applicant. In *Emerald PG Holdings Ltd. v Metro Toronto Condominium Corporation No. 2519*, 2019 ONCAT 5 (“Emerald”), an hourly fee of \$60 was accepted as a reasonable fee to be charged by a condominium manager to provide non-core records. In *Chai v Toronto Standard Condominium Corporation No. 2431*, 2019 ONCAT 45 (“Chai”), a \$60 hourly rate was again accepted as a reasonable fee for a condominium manager’s involvement in preparing records. The \$95 hourly rate claimed appears high in comparison to hourly rates of condominium managers involved in preparing and producing records previously accepted by this Tribunal.
- [20] An hourly rate alone does not provide a full equation. I must also consider that the amount of time required to carry out a task impacts the total fee. My concern is if the proposed fee is reasonable for the nature of the work, not if an hourly rate amount is generally appropriate. This is in respect to this particular case and the unique set of facts before me. A variety of circumstances and markets within the province impact what is reasonable, together with the capability of the particular manager and the nature of the work to be carried out. The Respondent pointed to past Tribunal decisions to support a \$95 hourly rate for a condominium manager’s preparation of records. I have not found any prior decisions that support this, nor has the Respondent offered any. Emerald and Chai instead consider a \$60 hourly

rate reasonable for a condominium manager's involvement in preparing records. In weighing the submissions before me, I do not find a \$95 hourly rate reasonable. I find a \$60 hourly rate reasonable and apply it to this case. The total cost that the Respondent can claim from the Applicant is not the \$380 proposed but instead \$240, based on a \$60 hourly rate applied to the four-hour time estimate offered for the non-core records.

[21] The Applicant's Request for Records form indicates that all of the requested records were non-core records. However, some of the minutes requested are core records under Section 1 (1) of *Ontario Regulation 48/01*. I find that that the minutes for meetings which took place "within the 12-month period before the corporation receives a request for records" are core records.

[22] The distinction between core and non-core records impact whether the Respondent can charge a fee. Section 13.3 (8) 4 of *Ontario Regulation 48/01* confirms that a condominium corporation "*shall not charge a fee*" if core records are delivered in electronic form, which is the format that the Applicant requested them. Section 13.3 (8) 6 i confirms that a fee cannot apply to the provision of a core record in paper form if the requestor asks for records electronically. Therefore, no fee shall be charged for the production of the redacted board minutes that are core records.

3: Is a penalty appropriate?

[23] The Applicant stated that a penalty should apply as the Respondent could not meet the Applicant's criteria to evidence wrongdoing. This extended beyond the records requested by the Applicant to actions taken by the Respondent that gave rise to the Applicant's interest in records. To determine if a penalty is warranted, I consider if the Respondent refused to provide records to the Applicant without a reasonable excuse. The Respondent has not refused to provide any non-core records that the Applicant is entitled to.

[24] As noted, the Applicant did not identify their request as also for core records. This goes beyond simply neglecting to tick a box. The way that the Applicant presented their records request complicated matters. Instead of listing the records in the prescribed form, the Applicant attached four documents totaling 52 pages to the form. These attachments contained many documents relating to the issues between the parties. While the Request for Records form indicated that the Applicant requested meeting minutes, the documents attached to the form suggested that much more than minutes were sought. While the Applicant stated "[m]y case is pretty simple", they did not present the case simply. The focus of submissions and evidence went well beyond requesting records. The Applicant

used vague, general language to describe what records they wanted and cross-referenced multiple documents in explaining this.

- [25] The Respondent submitted that if it failed to provide any documents no penalty should apply. The Respondent supports this with a claim it addressed the Applicant's request honestly and in good faith. Records requested by the Applicant that qualify as core records should have been provided. Yet, the Applicant makes no claim that the Respondent refused to provide core records without a reasonable excuse.
- [26] It is one thing when a party innocently makes an error in a prescribed form and it is otherwise clear what records they are requesting. The way that the Applicant chose to set out the records requested, by-passing the prescribed form in favour of their own manner of presentation, was not necessary. It would have been simpler if each record requested was clearly listed in the prescribed form and the form was used as intended. While the Applicant is entitled to core records, the Applicant's request for core records was not clear. The Applicant presented their request as for only non-core records. At no point did the Applicant suggest that a core record was requested or refused, despite having requested core records from the Respondent before. No penalty is appropriate in this circumstance.

C. ORDER

[27] The Tribunal orders that:

1. Within 30 days, the Respondent shall provide the Applicant with redacted minutes of board meetings within the 12-month period before the Respondent received the Applicant's Request for Records of March 11, 2020 that relate to:
 - a. allegations that the Applicant's mother soiled the Respondent's sauna with dead skin and hair;
 - b. allegations that the Applicant and/or their tenants violated the Respondent's rules; and
 - c. construction carried out in the Respondent's sauna around February to May 2019, with "supported pictures, contracts, bills and so on to provide construction has been done properly".

The Respondent can redact these records in respect of contemplated litigation with the Applicant consistent with Section 55 (4) of the Act.

2. Within 30 days of the Applicant providing the Respondent with \$240, the Respondent is to provide the Applicant with:
 - a. Photographs that the Respondent has to support allegations that the Applicant's mother soiled the Respondent's sauna with dead skin and hair;
 - b. Video footage related to allegations that the Applicant and/or their tenants violated the Respondent's rules; and
 - c. Minutes related to construction carried out in the Respondent's sauna around February to May 2019, with "supported pictures, contracts, bills and so on to provide construction has been done properly". The Respondent can redact these minutes in respect of contemplated litigation with the Applicant consistent with Section 55 (4) of the Act.
3. Each party shall bear their own costs in relation to this proceeding and no penalty is awarded.

Marc Bhalla
Member, Condominium Authority Tribunal

Released On: September 22, 2020