CONDOMINIUM AUTHORITY TRIBUNAL

DATE: November 11, 2021
CASE: 2021-00252R
Citation: McNulty v. Toronto Standard Condominium Corporation No. 1553, 2021 ONCAT 106

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

Member: Benjamin Drory, Member

The Applicant,
Lisa McNulty
Self-Represented

The Respondent,
Toronto Standard Condominium Corporation No. 1553
Represented by Justin Goldrich, Counsel

Hearing: Written Online Hearing – October 1 to 18, 2021

REASONS FOR DECISION

A. INTRODUCTION

[1] The Respondent, Toronto Standard Condominium Corporation No. 1553, enacted "Smoke-Free Rules", effective June 1, 2021, that prohibited smoking within its units and common elements, but would allow current occupants a 15-day period to apply for "grandfathered status" – which would grant them exemptions to continue smoking in their units until the cessation of their residencies.

[2] The Applicant, Lisa McNulty, is a unit owner of the Respondent. In a Request for Records dated June 16, 2021, she requested the following from the Respondent, for the period from June to July 2021:

> 1. The number of all owners grandfathered under the smoke-free rule, by floor and by reason: 1) to be grandfathered as a smoker 2) to be grandfathered to permit smoking or 3) to be grandfathered to smoke and permit smoking

[3] In its Board's Response to the Request for Records, the Respondent denied the Applicant's request, on the basis that:

> Owners do not have the right to access records that contain personal information about other units or owners.

[4] The sole issue presently within the Tribunal's jurisdiction is whether the Applicant is entitled to the information that she sought in her Request for Records. This decision does not speak to every submission the parties presented to me, and only addresses information relevant to the issue I had to decide. Both parties spoke to other points of contention – such as relating to the effects of second-hand smoke, the history of the Respondent's Smoke-Free Rules, and the appropriateness or necessity of "grandfathering" smokers, among others – none of which impact the decision.

[5] I advised the parties that this Tribunal has identified concerns with the use of the term "grandfathering" generally, as its origins are problematic, notwithstanding its long-standing social usage. The Tribunal believes that the term "grandfathering" is better understood as creating "legacy" provisions. However, the term "grandfathering" will still be used herein, as the parties used it, and the Respondent's Rules themselves refer to the term that way.

B. RESULT

[6] The Applicant is not entitled to the records requested, on the basis that this Tribunal will not order the creation of a record that does not presently exist. Both parties shall bear their own costs in this matter.

C. SUBMISSIONS & ANALYSIS

Issue 1: Is the Applicant seeking records relating to specific units or owners, or that could lead to the identification of such?

[7] The Applicant asserted that under s. 55(4)(c) of the *Condominium Act, 1998* (the "Act"), owners' rights to examine or obtain copies of records do not apply to "records relating to **specific** units or owners" – not "other" units or owners as the Respondent stated (emphasis in original). Sections 55(3) and (4)(c) of the *Act* read as follows:

> Examination of Records
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> (3) 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, except those records described in subsection (4).
>
> Exception

> (4) The right to examine or obtain copies of records under subsection (3) does not apply to,
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> …
>
> (c) subject to subsection (5), records relating to specific units or owners; …

[8] The Applicant asserted that "specific", in its ordinary meaning, is defined by the Merriam-Webster dictionary as "restricted to a particular individual, situation, relation, or effect." She added that O. Reg. 48/01 provided no further guidance on point, and stated that she didn't seek to access information about specific owners or their units, and therefore the s. 55(4)(c) exemption didn't apply.

[9] She stated that "personal information" is neither referenced nor defined in the Act, but it means recorded information about an identifiable individual, respecting which the Privacy Commissioner of Canada has formulated the following test:

> Information will be about an identifiable individual where there is a serious possibility that an individual could be identified through the use of that information, alone or in combination with other available information.

[10] The Applicant asserted that she requested aggregate data without reference to specific units or occupants, and disputed that providing the records could mean individuals permitted to smoke under the grandfathering exemption could be identified through observation. She stated that accessing aggregate records that don't reveal specific units or owners was as reasonable as accessing information about the corporation's financial affairs.

[11] The Respondent asserted that the Applicant requested the "reasons" owners might have been granted exemption to the Smoke-Free Rules – which could have included individuals exempt because of medical need or accommodation. It stated that it concluded the Applicant was seeking information that was personal in nature, and accordingly refused to provide any "reasons", on the basis that such information was specific to each unit, and therefore exempt from disclosure.

[12] The Respondent submitted that a breakdown of legacied smokers by floor could create the possibility that individuals could be identified through its use, or in combination with other available information. It submitted that its agreements with legacied smokers ought to be carefully safeguarded, and kept in the strictest of confidence.

[13] The Applicant stated that it was highly improbable aggregated data about grandfathering by floor would allow the identification of individual occupants and

their status.

[14] Owners are presumed to have rights to examine copies of a condominium corporation's records, pursuant to s. 55 of the Act, unless the condominium corporation can establish an exception against that right, such as under s. 55(4)(c).

[15] I disagree with the Respondent's assertion that the Applicant sought records related to specific unit owners. What the Applicant sought was, effectively, an *aggregation of data* that the corporation has information about. I do not accept that information about the number of legacied smokers per floor would necessarily lead to the identification of whether any particular individual is legacied or not. There is only mere possibility. The Respondent's argument is too speculative, and simply unsupported by the Act's wording. I conclude, based on my reading of the Act, that s. 55(4)(c) requires a specific unit or owner to be identified on its face, or leave no other possible conclusion. I find that nothing in the Act's wording requires imputing a speculative quality to the s. 55(4)(c) exception – i.e., that it could apply in circumstances where information merely "might" be capable of leading to the identification of a specific owner or individual.

[16] Regarding the Respondent's submission that the Applicant also sought "reasons", I note that nothing in the Respondent's Smoke-Free Rules actually sought reasons for granting exemptions in the first place – the Rules merely required occupants to provide signed notification, within 15 days of the Rules' coming into effect, of their desire to be exempt from the smoking prohibition. The Smoke-Free Rules did not require the Respondent to collect "reasons" for granting exemptions.

Issue 2: Should the Tribunal order the Respondent to create a record that doesn't presently exist?

[17] In its submissions, the Respondent provided an argument not previously advanced in its Board's Response to Request for Records – that is, that the Applicant hadn't requested an existing record it was required to maintain pursuant to s. 55(1) of the Act or s. 13.1(1)7 of Ontario Regulation 48/01 (the "Regulation"). It submitted that this Tribunal doesn't have jurisdiction to order the creation and/or production of a record that it isn't required to maintain and which doesn't currently exist. The Respondent acknowledged that it could hypothetically create the record, but it wasn't a prescribed record it had to maintain. It submitted that the Tribunal's jurisdiction is limited to granting access to those records outlined in s. 55(1) of the Act and s. 13.1(1) of the Regulation, and it isn't empowered to order production or creation of records falling outside those sections.

[18] The Applicant replied that the Respondent had records of grandfathered occupants, and as such they were existing non-core records, which wouldn't constitute the creation of a new record falling outside the Act or Regulation.

[19] She asserted that the Respondent was now advancing a new reason to deny access to the records she sought, but its original Response to Request for Records could not be changed now retroactively. She relied on *Landau v. Metropolitan Toronto Condominium Corporation No. 757* (2020 ONCAT 19):

> [23] … Given my finding that solicitor-client privilege applies in this case, it is not necessary for me to decide this point. However, for the sake of completeness, I have considered the issue. I conclude that the subsection 55(4)(b) exemption does not apply in this case because MTCC757 claimed it retroactively rather than at the appropriate time.
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> …
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> [33] In this case, I conclude that the logical time for MTCC757 to have claimed the exemption was when it responded to Ms. Landau, around August 20, 2019. It is important to note that Ms. Landau's records request and MTCC757's response are formal documents on forms prescribed by the Regulation. Under the Regulation, MTCC757 was given 30 days to prepare its response. MTCC757 had ample opportunity to consider the grounds for its refusal. Therefore, the failure to claim the subsection 55(4)(b) exemption cannot be dismissed as a mere oversight. When MTCC757 did claim the exemption in September, two events had intervened. First, the 30-day period for it to respond to Ms. Landau's request had expired. Second, it was faced with the explicit possibility of a records application to the Tribunal. MTCC757 may not claim the benefits of hindsight in these circumstances. MTCC757 did not claim the subsection 55(4)(b) exemption at the time of its response to Ms. Landau's record request. I conclude that it would be inconsistent with the records requests provisions of the Act to permit it to claim the exemption retroactively. Therefore, the exemption would not apply in this case.

[20] The term "record" is not specifically defined in the legislation – instead, s. 55(1) of the Act only sets out a series of things that are definitively records. Records that are "prescribed" are listed in s. 13.1(1) of the Regulation, and "core records" are defined in s. 1(1) of the Regulation. "Non-core records" are simply records that aren't core records.

[21] Based on the Applicant's submission, what she is in fact seeking is *information* – a document which would aggregate data from other sources, and which the corporation would have to create in order to satisfy her request. This is not a record of the corporation as contemplated by s. 55(1) of the Act, nor does s. 55(3)

entitle owners to demand information from a condominium corporation.

[22] There may be situations where it would be appropriate for this Tribunal to order a condominium corporation to create a record that doesn't presently exist. However, I do not accept that this is such a situation – it would require the Respondent to create a record that is solely an invention of the Applicant, and which it isn't otherwise required to have.

[23] I acknowledge that the Respondent only advanced this argument for the first time during this hearing. However, I find that the *Landau* decision must be read in the context of its particular facts. While I agree with the general aspiration that condominium corporations should state their complete reasons for denying a records request in the prescribed Board's Response to Request for Records, it is also crucial (and in my mind, moreso) to allow all of a party's relevant arguments to be advanced in a Tribunal hearing. Therefore, I have considered this reason that the Respondent has put forward for its denial of the Applicant's request.

[24] I don't believe that the Respondent's argument would have even made sense at the time of its Response to Request for Records – that is, prior to the Applicant having escalated the matter to a Tribunal hearing. Accordingly, this reason could not have possibly formed part of the Respondent's initial reasons for refusing the request, and cannot factor into whether its refusal was reasonable.

Issue 3: Does the Applicant's Request for Records relate to actual or contemplated litigation?

[25] The Respondent submitted a further argument, also advanced for the first time in this hearing, that the Applicant should not be entitled to the records on the basis of s. 55(4)(b) of the Act (i.e., exemption against records related to actual or contemplated litigation). It stated that the Applicant had, throughout the proceeding, expressed extreme dissatisfaction with its enactment of the Smoke-Free Rules and challenged the Board's lawful authority to incorporate a legacied exemption. It submitted that the Applicant might use the records to initiate proceedings against the Respondent, challenging the reasonableness of the legacied exemption and/or to quantify damages.

[26] The Applicant acknowledged that she has expressed concerns about the Smoke-Free Rules, but never about the legality of its enactment itself. She denied that her concerns about smoke migration could be reasonably extrapolated to mean she was contemplating litigation.

[27] While this issue is moot given my decision on the second issue, I simply note that

the evidence does not support the Respondent's argument that the Applicant's Request for Records was made in contemplation of litigation. Had this reason for refusal been given when the Respondent responded to the request for records, I find that it would have been predominantly speculative in nature, and an unreasonable basis for refusal.

Issue 4: Is the award of costs and/or a penalty appropriate in this case?

[28] Regarding an award of a penalty, s. 1.44(1)6 states that a penalty may be awarded when a corporation refused to permit an applicant to examine or obtain copies of records without reasonable excuse. As I have determined that the Respondent had valid reason to deny the Applicant's request, a penalty is inappropriate in these circumstances.

[29] Pursuant to Rule 45.2 of the Tribunal's Rules of Practice, a successful party is generally awarded their costs of bringing the application to the Tribunal. The Applicant was unsuccessful in this matter, and accordingly I make no award of costs in her favour. However, in spite of being unsuccessful, her application was not unreasonable – especially given the Respondent's initial response to her request, which I have found to have been insufficient. It is appropriate that each party bear their own costs of this proceeding.

D. ORDER

[30] The Tribunal orders that the Applicant's application be dismissed.

Benjamin Drory
Member, Condominium Authority Tribunal

Released on: November 11, 2021