

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: October 6, 2022

CASE: 2022-00328R

Citation: Crabbe v. Toronto Standard Condominium Corporation No. 2150, 2022 ONCAT 105

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

Member: Mary Ann Spencer, Member

The Applicant,

Justin Crabbe

Self-Represented

The Respondent,

Toronto Standard Condominium Corporation No. 2150

Represented by Natalia Polis, Counsel

Hearing: Written Online Hearing – July 18, 2022 to September 28, 2022

REASONS FOR DECISION

A. INTRODUCTION

[1] Justin Crabbe (the “Applicant”) is the owner of a unit of Toronto Standard Condominium Corporation No. 2150 (“TSCC 2150”). In April 2022 he submitted three Requests for Records to TSCC 2150 in which he requested various records relating to water ingress into his unit. He contends that TSCC 2150 has failed to respond to one of the Requests and has not provided all of the records requested in the other two Requests. He asks the Tribunal to order the corporation to provide copies of all of the requested records. TSCC 2150’s position is that it has responded to all three Requests and has provided all of the records in its possession which Mr. Crabbe is entitled to receive. It asks the Tribunal to dismiss this application. Both parties request their costs in this matter.

[2] For the reasons set out below, I find that TSCC 2150 has not provided all of the records which the Applicant is entitled to receive. I order TSCC 2150 to provide the Applicant with copies of any e-mails or written correspondence it received from Trace Consulting during the period June 20, 2021, to April 12, 2022, which contain a report or opinion of a professional engineer. I also order it to provide copies of invoices it received from Trace Consulting and Detail Roofing during the same

period. The records are to be provided to the Applicant at no cost. Finally, I order TSCC 2150 to reimburse the Applicant \$200, the amount he paid in Tribunal fees.

B. BACKGROUND

- [3] Mr. Crabbe has been the owner of a penthouse unit at TSCC 2150 since 2018. On June 20, 2021, a hot water tank on the building's roof burst causing water ingress to his unit. The attending firefighters advised him to evacuate. Defects in the roof were subsequently determined to be the cause of the water ingress. To facilitate investigation and monitor temporary repairs, cabinetry in Mr. Crabbe's unit had to be dismantled in order to open walls. Damaged flooring was also removed. Mr. Crabbe alleges that TSCC 2150 did not take expedient or appropriate action to repair the roof with the result that his unit was uninhabitable until April 2022 when he himself took steps to restore it.
- [4] Three requests for records are at issue in this matter: one submitted by Mr. Crabbe to TSCC 2150 on April 12, 2022, and two submitted on April 14, 2022. All of the requests are for records relating to the investigation of the roof leak and/or its repair.
- [5] TSCC 2150 responded to the three requests on April 25, 2022. It indicated it would not provide the records requested in Mr. Crabbe's April 12, 2022, request but would provide records requested on April 14, 2022, upon receipt of the estimated fee. Mr. Crabbe paid the fee on May 17, 2022, and on May 26, 2022, TSCC 2150 e-mailed him copies of a number of records related to the roof repair including reports prepared by its consulting engineers and contractors.
- [6] Mr. Crabbe submitted his application to the Tribunal on May 17, 2022, in respect of the corporation's refusal to provide the records requested in his April 12, 2022, request. The Stage 2 Summary and Order prepared by the mediator in this matter indicates that a representative of TSCC 2150 initially joined the mediation but advised that someone else would be participating. However, no representative from TSCC 2150 participated further in the mediation. The Stage 2 Summary and Order also indicates that the issues to be addressed expanded to include TSCC 2150's alleged failure to provide all of the records requested in the two April 14, 2022, requests.

C. ISSUES & ANALYSIS

- [7] The issues to be addressed in this matter are:
1. Has TSCC 2150 provided all of the records which the Applicant is entitled to

receive?

2. Did the Respondent refuse to provide records without reasonable excuse and if so, should a penalty be assessed?
3. Should the Tribunal award costs in this matter?

[8] Much of the evidence in this proceeding related to TSCC 2150's investigation and repair of the roof leak rather than to the Requests for Records. Many of Mr. Crabbe's cross-examination questions were requests for information or explanation of the decisions of TSCC 2150's board of directors. Many of TSCC 2150's questions were about the habitability of Mr. Crabbe's unit. However, whether TSCC 2150 took appropriate action to address the roof leak or whether Mr. Crabbe's unit was habitable before he himself took remedial action are not issues within the jurisdiction of this Tribunal. Therefore, this decision will only address the issues and evidence related to Mr. Crabbe's three Requests for Records.

[9] Mr. Crabbe testified on his own behalf and Gary Kraja, TSCC 2150's condominium manager, testified on behalf of the corporation.

Issue No. 1: Has TSCC 2150 provided all of the records which the Applicant is entitled to receive?

[10] The right of an owner to examine or obtain copies of a condominium corporation's records is set out in Section 55 (3) of the *Condominium Act, 1998* (the "Act"):

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).

The exceptions in s. 55 (4) of the Act include records related to employees, to actual or contemplated litigation, and to specific units or owners.

The April 12, 2022, Request for Records (the "E-Mail Request")

[11] Mr. Crabbe's April 12, 2022 Request for Records requests the following records with a date range of January 2018 to April 12, 2022:

Email(s) and written correspondence between TSCC2150 and Trace Consulting (building contractors and engineers); and

Email(s) and written correspondence between TSCC2150 and Leading Edge

Consulting (building contractors and engineers)

In his closing submission, Mr. Crabbe asked the Tribunal to order the provision of copies of all communications relating to the roof leak between the corporation's board of directors and Maple Ridge Community Management Ltd., its condominium management provider. Because this request was not included in any Request for Records, TSCC 2150 has not had the opportunity to respond to it and I will not consider it.

- [12] On April 25, 2022, Mr. Kraja responded to the E-Mail Request and attached a Board Response to Request for Records form for each of the two requested sets of records. Both response forms stated TSCC 2150 would not provide the records for the following reason:

Communication between 3rd party professionals is carried out by management and the board on behalf of TSCC 2150. Updates to all communication and proceedings have been provided as per e-mail requests. The 2nd request is invalid as management has not had any communication with Leading Edge.

I note that Mr. Kraja testified that Leading Edge is a subcontractor retained by Trace Consulting, an engineering consultant, and that there has been no correspondence between it and TSCC 2150. I accept this testimony. Therefore, I need to consider only the request for e-mails and written correspondence between TSCC 2150 and Trace Consulting.

- [13] Mr. Crabbe stated he is seeking the emails and written correspondence between Trace Consulting and TSCC 2150 in order to understand the state of the repairs to the roof. He submits that TSCC 2150 should be open and transparent given the substantial inconvenience he has experienced as a result of the roof leak and should provide the requested correspondence.
- [14] Counsel for TSCC 2150 submits that Mr. Crabbe is not entitled to receive copies of the requested e-mails and written correspondence because these do not form part of the records of the corporation; they are not included among the records which s. 55 (1) of the Act requires a corporation to keep. I note that this submission is significantly different from the responses previously provided to Mr. Crabbe. In an e-mail dated April 11, 2022, Mr. Kraja advised Mr. Crabbe that the e-mails were confidential although he noted that the board could choose to release them upon receipt of a Request for Records. And, as set out above in paragraph 12, the reason included on the Board Response to Record forms sent to Mr. Crabbe on April 25, 2022, although unclear, appears to state that the refusal was because TSCC 2150 had already kept him apprised of the status of repairs.

[15] In *McKay v. Waterloo North Condominium Corp. No. 23*, 1992 CanLII 7501 (ON SC) (“McKay”), a case which addressed the entitlement of owners to access corporation records, Cavarzan J. set out the principle that the affairs of a condominium corporation are an “open book”:

The Act embodies a legislative scheme of individual rights and mutual obligations whereby condominium units are separately owned and the common elements of the condominium complex are co-operatively owned, managed and financed. In the interest of administrative efficiency an elected board of directors is authorized to make decisions on behalf of the collectively organized as a condominium corporation, on condition that the affairs and dealings of the corporation and its board of directors are an open book to the members of the corporation, the unit owners.

However, the “open book” principle does not mean that an owner is entitled to receive copies of all documents in a corporation’s possession.

[16] While s. 55 (3) of the Act clearly sets out the entitlement of an owner to receive copies of a corporation’s records, a corporation is not required to keep every document it produces or receives as a record. In previous decisions, the Tribunal has affirmed that not every document in a corporation’s possession is a record. In *Ronald Smith v Metropolitan Toronto Condominium Corporation No. 773*, 2019 ONCAT 24, the Tribunal’s decision was that management reports presented to a board of directors only became records of the corporation “to the extent that they are accepted by the Board and reflected in the minutes of a Board meeting.” In *Kai Sin Yeung v Metropolitan Toronto Condominium Corporation No. 1136*, 2019 ONCAT 11, a decision to which Counsel for TSCC 2150 referred me, the Tribunal determined that e-mails between board members relating to approval of a gas contract were not records of the corporation.

[17] Section 55 (1) of the Act and section 13.1 (1) of Ontario Regulation 48/01 (“O. Reg. 48/01”) set out the records a corporation is required to keep. As Counsel for TSCC 2150 submitted, s. 55 (1) of the Act does not require corporations to keep correspondence as records. However, the records prescribed in s.13.1 (1) of O. Reg. 48/01 include the following:

9. All reports and opinions of an architect, engineer, or other person whose profession lends credibility to the report or opinion, that the corporation receives and that relate to physical features of the property or of any real or personal property that the corporation owns or that is the subject of an agreement mentioned in section 113 or subsection 154 (5) of the Act entered into by or on behalf of the corporation.

It stands to reason that if the “reports or opinions” are contained in an e-mail or written correspondence then the corporation is required to keep that e-mail or written correspondence as a corporate record. This requirement would apply to any such e-mails or correspondence sent by an engineer from Trace Consulting. Therefore, I will order TSCC 2150 to provide copies of any e-mails or written correspondence it received from a Trace Consulting engineer which contains a report or opinion relating to the roof leak and/or its repair or, if there are no such records, to provide a written confirmation that they do not exist.

[18] Mr. Crabbe requested records with a date range of January 2018 to April 12, 2022, the date of his Request for Records. However, I accept Mr. Kraja’s testimony that TSCC 2150 had no correspondence with Trace Consulting before June 20, 2021. I note that my order does not require the corporation to provide copies of all of its correspondence with Trace Consulting to Mr. Crabbe and he may in fact receive no documents. However, I recognize that my order will require the exercise of some judgment on the part of TSCC 2150 to determine what comprises a report or opinion and I urge it to bear the “open book” principle in mind when it reviews the documents.

The April 14, 2022, Requests for Records (the “Roof Leak Request” and the “Special Assessment Request”)

[19] I am addressing Mr. Crabbe’s two April 14, 2022, Requests for Records together because Mr. Kraja’s testimony is that because he considered the requests to be for the same documents, he responded to both on one Board Response to Request for Records form.

[20] The Roof Leak Request was for three sets of records:

Copies of invoices, work orders, contractor reports, firefighters reports, reports of findings, including any related images and supplementary reports related to the building leak on June 20th 2021, and all subsequent water leaks/seepage thereafter. Date range: June 20, 2021 to April 14 2022.

Building security reports and routine patrols that contain reporting of any accumulated water, leaking, running water, standing water in, around, or adjacent to the mechanical rooms, 34th floor, on or adjacent to the roof areas of the building. Date range: January 1, 2018 to April 14 2022.

Notices/records of entries into [the Applicant’s unit] inclusive of dates and times by management, restoration companies, contractors and agents acting on behalf of the Corporation. Date range: June 20, 2021 to April 14, 2022.

The Special Assessment Request, with a date range of January 1, 2018 to April 14, 2022, was for:

All records and contractor reports and estimates etc. that detail and explain the roof envelope issues including what's required to be fixed to an amount of \$750,000 as of the indicated line item on the assessment.

- [21] Mr. Kraja's April 25, 2022, e-mail to Mr. Crabbe enclosed a Board Response to Request for Records which set out the requested records as "All records and reports that relate to the roof envelope issue" and indicated the corporation would provide these in electronic format upon receipt of the estimated fee of \$25. On May 17, 2022, Mr. Crabbe notified Mr. Kraja that he had paid the requested fee. In a responding e-mail dated May 26, 2022, Mr. Kraja acknowledged receipt of the fee and attached 12 records which included inspection reports and tender documents related to the investigation and repair of the roof leak.
- [22] Mr. Crabbe's position is that TSCC 2150 failed to provide all of the records he requested in the Roof Leak Request and failed to respond at all to the Special Assessment Request. Mr. Kraja's testimony is that he replied to both requests on one form because, "As I understood that the Applicant's requests pertained exclusively to the leak issue, I believed the all-encompassing response was sufficient."
- [23] Notwithstanding Counsel for TSCC 2150's submission that "it was only logical" that TSCC 2150 responded to both of Mr. Crabbe's April 14, 2022, requests on one form because both requests related to the roof leak, the requests are not identical. While both requests do ask for contractor reports, which I acknowledge TSCC 2150 provided, the Roof Leak request also asks for security reports and notices of suite entry.
- [24] TSCC 2150's Board Response to Request for Records was not in compliance with the requirements set out in section 13 of O. Reg. 48/01. Section 13.3 (7) requires the corporation's response to contain a description of each record requested and, if the corporation is providing a non-core record, the estimated fee the corporation will charge for its provision. If the corporation is refusing to provide the record, it is required to set out an explanation of the reason for its refusal. Not only did TSCC 2150 fail to address each of the items requested in the Roof Leak Request, it is by no means evident that its Response was to both the Roof Leak and Special Assessment Requests. Further, when TSCC 2150 e-mailed the records to Mr. Crabbe on May 26, 2022, it did not provide the accompanying statements required

by s. 13.3 (8) of O. Reg. 48/01. Specifically, it did not indicate its actual cost of producing the records and did not provide any reason as to why the requested security reports and notices of entry were not provided. Therefore, it is understandable that Mr. Crabbe questions that TSCC 2150 has provided him with all of the records which he is entitled to receive.

[25] However, notwithstanding that its response was not in the correct form, I find that TSCC 2150 did not fail to provide the records requested in the Special Assessment Request. The evidence is that in November 2021, TSCC 2150 levied a special assessment of \$1,800,000, of which \$750,000 was for roof repairs. Mr. Crabbe requested the records which would account for that \$750,000. Mr. Kraja testified that the records TSCC 2150 e-mailed to Mr. Crabbe on May 26, 2022, were all the records the corporation possessed which were responsive to both the Leak Repair and Special Assessment Requests. I note that those records included the tender documents and contract award for the roof repairs. While Mr. Crabbe expressed his concern that the amount of the awarded contract is significantly less than \$750,000, I accept Mr. Kraja's testimony and am satisfied that the corporation has provided the records responsive to his request. Therefore, I find the request has been fulfilled.

[26] For Mr. Crabbe's information, a corporation is required to provide records or a reason for refusing to provide records in response to a Request for Records. TSCC 2150 was only required to provide the records relevant to the special assessment; it was not required to provide an explanation of its amount. However, after Mr. Kraja testified that the records he sent on May 26, 2022, were in response to both the Special Assessment and Leak Repair Requests, I asked him to clarify which records were sent in response to each of those requests. He responded in part as follows:

As per the roof envelope issue, Justin was explained in greater detail that such request is invalid as such amount as explained in the general special assessment letter sent out to all resident was estimated amounts based on preliminary evaluations. This was discussed at a monthly board meeting and captured in the minutes where Trace was part of such meeting. Such minutes were provided to Justin for referencing.

Mr. Kraja also testified that the board determined the \$750,000 amount after it estimated engineering and consulting fees, permit costs, and a contingency allowance in consultation with Trace Consulting. While he may not be satisfied with the corporation's explanation, Mr. Crabbe has received it.

[27] With respect to the Roof Leak Request for "copies of invoices, work orders,

contractor reports, firefighters reports, reports of findings, including any related images and supplementary reports related to the building leak,” Mr. Crabbe testified that he believed that TSCC 2150 should possess the firefighters’ reports. Mr. Kraja testified that the corporation does not have any records of firefighters’ reports. I have no reason to doubt Mr. Kraja’s testimony. The Tribunal cannot order a corporation to produce a report from an outside party which is not in its possession. Therefore, I make no order respecting this record.

[28] Mr. Crabbe did not indicate any other records were missing from the request for “invoices, work orders...building leak.” However, I note that TSCC 2150 provided him with copies of reports produced by both Trace Consulting and Detail Roofing but provided no invoices from these firms. While Mr. Kraja testified that the corporation provided Mr. Crabbe with all the records it possessed, I find it unlikely that it would not have received invoices from these firms given their reports date back to 2021. Section 55 (1) of the Act requires a corporation to maintain financial records. Notwithstanding that Mr. Crabbe did not raise this as an issue, I will order TSCC 2150 to provide either copies of the invoices from Trace Consulting and Detail Roofing which it received between June 20, 2021, and April 14, 2022, or a written confirmation that these records do not exist.

[29] Mr. Crabbe did raise the fact that TSCC 2150 did not respond to his requests for security reports relating to water ingress in the building and for notices of entry to his suite. Mr. Kraja testified that these records do not exist. With respect to security reports, he stated that security staff do log incidents, but he found none that reported water ingress. With respect to notices of entry, he stated that TSCC 2150 does not keep copies of these, which he explained were the notices left in residents’ units after entry by condominium staff or other authorized personnel. In his cross-examination responses, Mr. Kraja provided answers to Mr. Crabbe’s questions about the process the corporation follows to notify residents about entry as well as a list of the firms that have entered Mr. Crabbe’s unit. He stated “The resident was advised via e-mail of such suite-entries for the reasoning to review the effectiveness of the temporary repairs alongside if any further water penetration had occurred. Additionally, the resident was advised of the entire process via telephone communication...” I accept Mr. Kraja’s evidence that there are no security reports relating to water ingress and that the notices of entry do not exist. I also note that there is no legislated requirement to keep the notices of entry. Therefore, I make no order relating to these records.

Issue No. 2: Did the Respondent refuse to provide records without reasonable excuse and if so, should a penalty be assessed?

- [30] Section 1.44 (1) 6 of the Act provides that 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. The maximum penalty payable is \$5,000.
- [31] In this case, for the reasons set out below, I find that the Respondent did not refuse to provide records without reasonable excuse and therefore I award no penalty.
- [32] While TSCC 2150 did refuse to provide copies of its e-mail and written correspondence with its engineering consultants to Mr. Crabbe, and I am ordering it to provide some of that correspondence, I find that it had reasonable grounds for that refusal. E-mail and written correspondence are not among the records that s. 55 (1) of the Act expressly requires a corporation to keep. While I have found that these must be kept if they contain a report or opinion of a professional engineer, it is not unreasonable that TSCC 2150 would not have considered that the requirement to keep a report or opinion set out in s. 13.1 (1) of O. Reg. 48/01 applied to correspondence as well as to stand-alone reports.
- [33] However, I do note that the reasons for refusal to provide the requested e-mails and written correspondence TSCC 2150 sent to Mr. Crabbe could and should have been more clearly articulated. Similarly, the Board Response to Request for Records sent in response to the two April 14, 2022, Requests for Records was unclear that it was in fact responding to both the Roof Leak and the Special Assessment Requests. Combining the responses to these requests was not in compliance with the requirements set out in s. 13 of O. Reg. 48/01. However, there is no provision in the Act for the Tribunal to assess a penalty for that failure to comply.
- [34] Further, while I have ordered the provision of contractor invoices, I do not find that TSCC 2150 refused to provide these. Rather, I find they were simply overlooked. The evidence is that the corporation provided numerous documents to Mr. Crabbe in its combined response to the Roof Leak and Special Assessment Requests. Its response, while not in the proper format, was sent promptly upon receipt of the estimated fee. Given what has clearly been an ongoing issue between the parties about the habitability of Mr. Crabbe's unit, I do not find it unreasonable that TSCC 2150 focused on providing the consultant reports and tender documents that related to the investigation of the roof leak and its repair.
- [35] Finally, while it failed to provide any response to Mr. Crabbe's request for security reports and notices of suite entries, I cannot find that there was an unreasonable refusal to provide these records. Mr. Kraja's testimony was that he found no

security reports responsive to the request. Additionally, there is no legislated requirement to retain copies of suite entry reports which Mr. Kraja explained are the documents the corporation leaves in a suite after it has entered, which the corporation does not keep. In her closing submissions, Counsel for the Respondent noted that Mr. Crabbe should have advised Mr. Kraja that the records he received were incomplete. While some of the issues might have been resolved had he done so, it is incumbent on the corporation to respond to all of a Request for Records.

Issue No. 3: Should the Tribunal award costs in this matter?

[36] The authority of the Tribunal to make orders is set out in section 1.44 of the Act. Section 1.44 (2) of the Act states that an order for costs “shall be determined...in accordance with the rules of the Tribunal.” The cost-related rules of the Tribunal’s Rules of Practice relevant to this case are:

48.1 If a Case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final Decision, the unsuccessful Party will be required to pay the successful Party’s CAT fees unless the CAT member decides otherwise.

48.2 The CAT generally will not order one Party to reimburse another Party for legal fees or disbursements (“costs”) incurred in the course of the proceeding. However, where appropriate, the CAT may order a Party to pay to another Party all or part of their costs, including costs that were directly related to a Party’s behaviour that was unreasonable, undertaken for an improper purpose, or that caused a delay or additional expense.

[37] Mr. Crabbe requested reimbursement of the \$200 fees he paid to the Tribunal and other costs which he did not specify. TSCC 2150 requested \$9,756.57 in legal fees and submitted that Mr. Crabbe had made his application to the Tribunal for an improper purpose.

[38] The Tribunal’s Practice Direction: Approach to Ordering Costs, issued January 1, 2022, provides guidance regarding the awarding of costs. Among the factors to be considered are whether a party or representative’s conduct was unreasonable, for an improper purpose, or causes a delay or expense; whether the case was filed in bad faith or for an improper purpose; the conduct of all parties and representatives; the potential impact an order for costs would have on the parties; and, whether the parties attempted to resolve the issue in dispute before the CAT case was filed.

[39] Mr. Crabbe was successful in this matter and in accordance with rule 48.1 of the

Rules of Practice I will order TSCC 2150 to pay him \$200, the amount of the fees he paid to the Tribunal.

[40] I award no costs to TSCC 2150. I do not find that Mr. Crabbe's application was for an improper purpose. While it was clear from his submissions that he is frustrated by the length of time it has taken to investigate the roof leak and finalize repairs and that he has questions about the decisions TSCC 2150 has made, it was also clear that his expectation was that the records he requested would provide the information he sought. And, as I noted above in paragraph 14, the reasons TSCC 2150 gave to Mr. Crabbe for its refusal to provide the records in his E-Mail Request were unclear and it is understandable that he submitted an application to the Tribunal.

[41] I also do not find that Mr. Crabbe's conduct during this proceeding was unreasonable or that it caused delay or additional expense. While there was some delay due to his request for a summons and his subsequent withdrawal of that request, I do not find that was unreasonable given he represented himself and is not a legal professional. I also note both parties in this matter asked a number of cross-examination questions that did not directly relate to the records issues before me that made the cross-examination extensive.

[42] It is unfortunate that TSCC 2150 did not participate in the mediation in this matter. That would have provided it with the opportunity to explain its position and may have resulted in the resolution of these issues without the need to hold a hearing with its associated expense.

D. ORDER

[43] The Tribunal Orders that:

1. Within 30 days of the date of this decision, TSCC 2150 shall, at no cost to the Applicant, either provide copies of the records listed below or a written confirmation that the records do not exist:
 - a. The e-mails or written correspondence it received from Trace Consulting between June 20, 2021, and April 12, 2022, which contain a report or opinion of a professional engineer; and
 - b. The invoices it received from Trace Consulting and Detail Roofing between June 20, 2021, and April 14, 2022.
2. Within 30 days of the date of this decision, TSCC 2150 shall pay \$200 to the Applicant in respect of the fees he paid to the Tribunal.

Mary Ann Spencer
Member, Condominium Authority Tribunal

Released on: October 6, 2022