

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: July 19, 2018

CASE: 2018-00041R

Citation: Janet Cangiano v. Metropolitan Toronto Condominium Corporation No. 962, 2018 ONCAT 7

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

Adjudicator: Mary Ann Spencer, Member

The Applicant
Janet Cangiano

Shawn Pulver, Counsel

The Respondent
Metropolitan Toronto Condominium Corporation No. 962

Michael Pascu, Counsel

Hearing: May 6 to July 9, 2018. Written electronic hearing with telephone conference on June 19, 2018.

REASONS FOR DECISION

A. OVERVIEW

- [1] Janet Cangiano (the “Applicant”) is a unit owner of Metropolitan Toronto Condominium Corporation No. 962 (the “Respondent”). Shortly after the Respondent’s November 16, 2017 Annual General Meeting (the “AGM”), she submitted a Records Request for electronic delivery of “legible and unaltered” copies of the proxy forms submitted at that meeting.
- [2] The Respondent refused to provide unaltered copies of the proxy forms submitted at the AGM on the basis that, in accordance with section 55(4)(d) of the Condominium Act, 1998 (the “Act”) and section 13.11(2)4 of Ontario Regulation 48/01 (“O. Reg. 48/01”), an owner’s right to examine records excludes the personal information of owners the proxy forms contain. For the fee of \$27.60, the Respondent is prepared to provide the Applicant with copies of the proxy forms redacted for the personal information.
- [3] The Applicant requests an Order from the Tribunal directing the Respondent to provide her with un-redacted copies of the proxy forms.
- [4] I find that the Applicant is not entitled to receive un-redacted copies of the proxy forms. Sections 55(4)(d) of the Act and 13.11(2)4 of O. Reg. 48/01 specifically

exclude personal information of owners on proxy forms from the records an owner is entitled to examine.

B. PRELIMINARY MATTERS

- [5] This hearing was conducted using the Tribunal's online dispute resolution system and the names of witnesses the Users intended to call were disclosed on the system. Witness testimony was heard by teleconference on June 19, 2018. At the outset of the teleconference, Counsel for the Applicant advised that he would not be calling witness M.M., one of the two witnesses whose names he had disclosed.

C. ISSUE

- [6] The issue to be addressed is whether the Applicant is entitled to receive un-redacted copies of the 38 proxy forms submitted at the Respondent's November 16, 2017 AGM.

D. EVIDENCE

- [7] The Applicant testified on her own behalf. She has resided in the Respondent's condominium building since 1996 and served as a member of its Board of Directors between approximately 1999 and 2007. Marijana Djordjevic, the Respondent's condominium administrator since 2016, testified on behalf of the Respondent. Ms Djordjevic's responsibilities include preparing responses to requests for records. A summary of their evidence follows.
- [8] The Applicant testified that she requested copies of the proxy forms submitted at the Respondent's November 16, 2017 AGM because she wishes to audit the election of directors "with full transparency." She is concerned that an "extremely high number of proxies" were submitted at the AGM. Her experience is that 10 to 15 proxy forms were submitted in previous years; almost 40 were submitted in 2017. She is requesting un-redacted copies of the forms because redaction of the owners' names would not allow her to determine that the owners themselves submitted the forms.
- [9] One of the Applicant's concerns is that proxies for the AGM were being solicited by the Respondent's building superintendent. She testified that she spoke to the superintendent on May 12, 2018 and he informed her he had secured 8 proxy forms. Several other owners have told her that they found it unusual that the superintendent was soliciting proxies. Asked if any of the owners with whom she spoke confirmed that they did give a proxy form to the superintendent, she indicated that one of the two concerned individuals she discussed this with confirmed that they did not.

- [10] The Applicant testified that her concern is not with the ballots cast at the 2017 AGM but with the proxy forms. There were scrutineers at the AGM. She is not certain but believes the Respondent's management keeps a directory or registry of owners' signatures. She does not know if this registry was used to verify owners' signatures on the proxy forms. Asked if she could not go door to door and ask unit owners if they submitted proxies, she indicated that this would not be practical as it might prove difficult to speak to everyone and a significant amount of time has passed since the election. She wants un-redacted copies of the proxy forms in order to verify both the grantor information and that the forms were completed correctly.
- [11] Marijana Djordjevic testified that she submitted the Applicant's Request for Records form to the Respondent's Board of Directors. However, she does not know how the Board made its decision to redact the proxy forms because the Respondent's property manager, Bob Alexander, dealt with the Board. She testified that a legal opinion indicating the corporation had the right to redact the forms was obtained and she was copied on a January 22, 2018 e-mail in which Mr. Alexander forwarded a summary of the opinion to the Applicant.
- [12] Ms Djordjevic confirmed that the Respondent has a 2017 AGM registration form which indicates which owners attended the meeting in person and which owners submitted proxy forms. Asked by Counsel for the Applicant if the Respondent would be prepared to release a copy of this document to the Applicant, Ms Djordjevic stated that because there has been no request for this record, there has been no discussion and she would have to follow the process of sending the request to the Respondent's Board of Directors.

E. SUBMISSIONS

- [13] Counsel for the Applicant submitted that a narrow interpretation of the legislative provisions does not permit a proper audit of election results and cannot be what the legislative drafters intended; there must be practical ways for elections to be properly audited. He further submitted that a proxy form cannot be assumed to be confidential or private because owners are waiving their right to privacy by appointing a third party to attend an AGM on their behalf. The Applicant has valid reasons for requesting un-redacted proxy forms in order to audit the Respondent's 2017 AGM election; the significant increase in the number of forms submitted in 2017 compared to previous years and the fact that the superintendent solicited proxy forms are "highly suspicious" circumstances. Potential proxy fraud is an issue of serious concern to condominium owners across the province.
- [14] Counsel for the Respondent submitted that the Tribunal does not have the jurisdiction to over-rule or ignore the legislative provisions which restrict the right of owners to full disclosure of personal information on proxy forms. Owners who

submit proxies are not entitled to less privacy than owners who attend a meeting and vote in person. And, even if the Tribunal did have jurisdiction, there are no grounds for providing the full records the Applicant requests. The election scrutineers had the opportunity to review the proxy forms. There is no evidence that the solicitation of proxy forms by the superintendent was improper. The Tribunal should dismiss the Applicant's application.

F. ANALYSIS

[15] Section 55(1) of the Act requires a condominium corporation to keep adequate records and sets out a list of those records, which includes "all instruments appointing a proxy or ballots for a meeting of owners that are submitted at the meeting."

[16] The right of an owner to examine or obtain copies of the corporation's records is set out in Section 55(3) of the Act:

55(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).

[17] Section 55(4) of the Act sets out exclusions to an owner's right to examine or obtain copies of records:

(4) The right to examine or obtain copies of records under subsection (3) does not apply to,

(d) any prescribed records.

[18] The records prescribed for purposes of s. 55(4) of the Act are listed in s.13.11(2) of O. Reg. 48/01:

(2) The following are prescribed records for the purpose of clause 55(4)(d) of the Act:

4. Any portion of a ballot or proxy form that identifies specific units in a corporation or owners in a corporation, unless a by-law of the corporation provides otherwise.

[19] The provisions of the Act and O. Reg. 48/01 set out above are very clear. An owner is not entitled to receive the information contained on proxy forms which identifies specific units or owners unless a by-law of the corporation permits this. There is no evidence before me that the Respondent has such a by-law. Therefore, I find that the Applicant is not entitled to receive un-redacted copies of the proxy forms submitted at the Respondent's November 16, 2017 AGM. The

proxy forms must be redacted for information which identifies specific units or owners of the Respondent corporation.

- [20] Counsel for the Applicant submitted that owners who grant proxies are not entitled to the same privacy considerations as those who attend meetings in person and vote by ballot. Section 13.11(2) of O. Reg. 48/01 sets out four exclusions to an owner's right to review records. I note that sections 13.11(3), (4) and (5) of O. Reg. 48/01 set out exceptions to the exclusions for all of the records listed in s. 13.11(2) other than the ballot or proxy form. That there is no exception to the exclusion of the release of identifying information on ballots or proxy forms is a clear indication that the legislative intent was to protect the privacy of unit owners.
- [21] Counsel for the Applicant further submitted that a narrow reading of the legislation does not permit a proper audit of election results and cannot be what the legislative drafters intended. The sections of the Act and O. Reg. 48/01 set out above are very specific and I find no scope for a broader reading. I acknowledge that there is no specific provision in the legislation with respect to the audit of election results. However, this is an issue to be addressed by the Legislature.
- [22] I acknowledge that the Applicant testified that she is not challenging the results of the ballots cast at the 2017 AGM. Rather, she wishes to obtain un-redacted copies of the proxy forms both to verify grantor information and to verify that the forms were completed correctly. There are avenues other than obtaining un-redacted copies of the proxies available to her. Notwithstanding her dismissal of going door to door as impractical, this option remains open to her. If she has the support of a sufficient number of owners, she can request that a meeting of owners be convened to address concerns about potential election irregularities. Finally, as raised during her Counsel's cross-examination of Ms Djordjevic, the AGM sign-in registry might provide the Applicant with the information she is seeking. I am not ordering the Respondent to release this document. No request for this record has been submitted to the Respondent and the Respondent has not had the opportunity to consider its release. I do note, however, that the right to examine or obtain a copy of this record may be subject to the exclusions set out in s. 55(4) of the Act.

G. DECISION

- [23] Based on the exemption set out in s. 55(4)(d) of the Act and s.13(11)(2)4 of O. Reg. 48/01, I find that the Applicant is not entitled to examine or obtain un-redacted copies of the proxy forms submitted at the Respondent's 2017 AGM.
- [24] As set out in the Respondent's response to the Applicant's Request for Records, the Respondent is prepared to provide copies of the proxy forms to the Applicant redacted for owners' personal information upon payment of the fee of \$27.60. The amount of the fee was not at issue during this hearing. While an Order of the

Tribunal is not strictly necessary, for clarity, the Tribunal will order the release of the redacted records.

H. COSTS

- [25] The Respondent requests that the Tribunal award it costs of \$3,001.85 representing the legal fees it incurred in this matter.
- [26] Rule 30.1 of the Tribunal's Rules of Practice (effective November 1, 2017) states that the Tribunal may order a User to pay any reasonable expenses related to the use of the Tribunal. However, Rule 31.1 states "The Tribunal will not order one User to pay to another User any fees charged by that User's lawyer or paralegal, unless there are exceptional reasons to do this."
- [27] Counsel for the Respondent submitted that the Applicant knew or ought to have known that she was not entitled to receive un-redacted copies of proxy forms in accordance with s. 55(4)(d) of the Act; she filed an "unmeritorious" application causing the Respondent to needlessly incur costs.
- [28] The Tribunal's online dispute resolution system was developed to help people resolve disputes conveniently, quickly and affordably. I note that the Applicant was self-represented when she filed her application with the Tribunal and was not represented by counsel until Stage 3 in this matter. I have no reason to conclude that the application before me was either frivolous or not filed in good faith; the Applicant submitted reasoned arguments asking the Tribunal to apply a broad reading of the legislation. That the application was unsuccessful does not in itself comprise an exceptional reason to award costs. Therefore, I order no costs in this matter.

ORDER

Pursuant to the authority set out in section 1.44(1) of the Act, the Tribunal orders that:

1. Metropolitan Toronto Condominium Corporation No. 962 provide to Janet Cangiano electronic copies of the proxy forms submitted at its November 16, 2017 Annual General meeting (the "records") redacted for information that identifies specific units or owners of the corporation.
2. The fee, payable by Ms Cangiano in advance, for the preparation and production of the records shall not exceed \$27.60.
3. Metropolitan Toronto Condominium Corporation No. 962 shall provide the records to Ms Cangiano within 30 days of its receipt of the fee.

Mary Ann Spencer
Member, Condominium Authority Tribunal

RELEASED ON July 19, 2018