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But I'm a director! But I'm an owner! CAT decisions on record access exemptions

Tony Bui and An Nguyen

For the first two years of its operation, the Condominium Authority Tribunal (“CAT”) only dealt with disputes relating to records requests. In about one hundred decisions you would think the CAT covered virtually every part of records requests under the Condo Act – after all, the records request provisions in the Condo Act and regulations are relatively straightforward and require little interpretation. Or so we thought...we continue to get interesting records-related decisions from the CAT.

Owner's access and the litigation exemption

In [*Rahman v. PSCC 779, 2023 ONCAT 46*](#), we see the return of two familiar foes. Together, both sides have been through many CAT decisions (a staggering and unmatched 11 to-date), unsuccessful appeals and concurrent proceedings in Superior Court. These disputes run the gamut from rule enforcement to harassment and of course, records. The latest decision in this saga raises an interesting question considering the intense litigation history between the two parties: in what circumstances can a condo rely on “actual or contemplated litigation” to deny an owner's request for records?

The owner requested incident reports prepared about him – the condo denied the request under s. 55(4)(d) of the Condo Act because the reports related to “actual or contemplated litigation”. The condo pointed to ongoing CAT applications and an arbitration involving the owner. The CAT looked at the substance/issues of the other matters and ultimately held that the incident reports the owner requested were properly exempt.

In coming to that conclusion, the CAT elaborated on the litigation exemption:

- **The mere existence of actual or contemplated litigation does not automatically disqualify owners from accessing all records:** an owner can be in a legal proceeding against their condo but this does not mean the owner forfeits their right to request *any* condominium records.
- **The exemption is only justified if the requested records *relate to* “actual or contemplated” litigation:** Owners can still request records if they are a party to litigation with their condo. However, the litigation exemption hinges on the record itself – it looks at “what the record is” and “whether the records pertains to actual or contemplated litigation” and less on “who is requesting the record/are they a party to litigation”.

In *Rahman*, the arbitration proceedings between the parties concerned Mr. Rahman's conduct. Similarly, the incident reports detailed the very behaviour at issue in the arbitration. Understandably, Mr. Rahman was not entitled to those incident reports.

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- **If the exemption is being claimed over “contemplated litigation” then the condo must be contemplating litigation over the requested record at the time of the request:** Though the CAT did not elaborate on this principle, it is still a practical consideration. If condos could refuse a records request at any point on the basis of litigation that was not considered/did not exist at the time of the request, this would subvert the timely disclosure of condominium records and the “open book” spirit of the Act.

If the litigation exemption applies, does this mean owners can never receive those exempt records as long as the litigation (or possibility of it) exists? The litigation exemption only applies if the records are requested under the Condo Act – the exemption is not a blanket prohibition and does not go beyond the records request scheme of the Act. It cannot absolve a party from its general obligation to disclose or produce relevant documents under the *Rules of Civil Procedure* (subject to upheld claims of privilege) or orders for disclosure from a judge or adjudicator. A condo can maintain its arguments for the litigation exemption in those situations but whether the exemption stands must still be determined.

Director’s access to records

The Board of Directors of a condo is privy to all sorts of information and records about the condo and its owners in order to manage and administer the assets and common elements on behalf of a community. But how much information is an *individual* director allowed to access and in what circumstances? This is a question we’ve been asked by condo managers and boards with rogue directors acting without board quorum.

In [*Sharma v. TSCC 2510*](#), an individual director filed an application with the CAT when the condo refused his request for expansive condo records relating to specific unit owners. The director argued that he is entitled to the records about other unit owners because he is a director and needed that info to fulfill his duties under section 37 of the Condo Act.

The CAT dismissed the application because the applicant sought records to fulfill director’s duties, and the tribunal does not have jurisdiction to hear the application on that basis:

- Section 55 of the Condo Act outlines which records must be kept by a condominium corporation and those that unit owners are entitled to access.
- Section 13.3 of Regulation 48/01 sets out who can request access to a condo’s records and for what purpose. The right to examine or obtain a copy of a record applies to an owner, purchaser or mortgagee of a unit and the request is solely related to that person’s interest as a owner.
- The Condo Act and Regulation 179/17 provides that the CAT’s jurisdiction on records is limited to owners seeking access to records solely related to their interest as a unit owner, and not as a director to fulfill duties under section 37 of the Act.

Individual directors can’t use the CAT’s dispute resolution process to gain access to records that unit owners would not have access to and circumvent the Condo Act by claiming that records are required to fulfill director’s duties. Just because a person is a director does not give them special rights to examine records specifically excluded under the Condo Act, without the authority of a quorum of the board.

Property managers faced with a records request by a single director that relates to other owners or sensitive information should advise that director to bring the request at the board meeting and get quorum to approve the production of the requested record to the entire board. One director cannot bind the board or transact business. If the document is legitimately required for board business, the request should be supported by the board.

