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Other areas of practice include estate administration and disputes, property law disputes and employment law issues.

Protecting the Corporation's Records

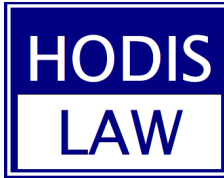
It's common to focus on protecting people and property when developing a disaster plan. However, one crucial but often overlooked element of a disaster plan is the protection of a corporation's records. Take a moment and try to calculate how many documents a condominium corporation or its property management firm creates every day, month and year. Those numbers are likely in the hundreds, if not thousands.

So, why is a disaster plan needed to protect records from fire, loss, theft, or acts of nature?

First and foremost, condominium corporations have a statutory obligation to maintain certain types of records. In Ontario, Section 55 of the *Condominium Act, 1998* mandates that a corporation keep the following records:

- The financial records of the corporation;
- A minute book containing the minutes of owners' meetings and the minutes of board meetings;
- A copy of the declaration, bylaws and rules;
- All lists, items, records and other documents mentioned in subsections 43 (4) and (5), i.e. items delivered by the declarant at the turn over;
- The report described in subsection 44 (8) that the corporation receives from the person who conducts a performance audit;
- The records required under subsection 47 (2) i.e. notices to owners and 83 (3) i.e. notices of leases;
- A record of all reserve fund studies and all plans to increase the reserve fund under subsection 94 (8);
- A copy of all agreements entered into by or on behalf of the corporation;
- The report that the corporation receives from an inspector in accordance with subsection 130 (5); and
- All other records as may be prescribed or specified in the bylaws of the corporation.

Under the *Condominium Act, 1998* Regulations, a condominium corporation is also required to keep issued status certificates for 10 years. Per privacy legislation, such as the *Personal Information Protection and Electronic Documents Act* and the common law, condominium corporations and property management firms have obligations to protect the personal information they collect. The Ontario Court of Appeal recently recognized a new tort of invasion of privacy in *Jones v. Tsige*. As a result, condominium corporations, board members and property management companies can be sued for damages if they don't take steps to secure records which hold personal information.



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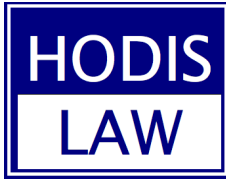
In addition, a board should check its corporation's bylaws and declaration for further requirements when developing its disaster plan for records. However, boards shouldn't restrict their definitions of records to those listed in the legislation and the corporation's governing documents. Boards should expand the definition to include such items as newsletters, photographs, emails, letters, website pages, quotes, supporting documentation for financial statements, etc. Although there may not be a statutory obligation to keep these records, they may provide a valuable source of information in the future.

The requirement to keep records implicitly includes the requirement to take steps to protect those records from destruction or theft. I always advocate for condominium directors and property managers to "document, document, document." However, there is no value in documenting in the absence of a plan to preserve those documents for future use. For various reasons, at some point or another, a board may have to produce those records for inspection. Beyond the statutory obligation to maintain records, there are also practical reasons for doing so. Some of them include:

- A corporation may need them to bring or defend a court action, tribunal proceeding or administrative proceeding such as a Canada Revenue Agency audit. The existence of records may make a case and their non-existence may break it;
- People do not have good memories. Documents create a contemporaneous record which one can refer back to;
- The history of a corporation is usually told by the records, as people don't remain in the condominium forever;
- Condominium corporations are usually run by volunteers who come and go as board members are elected and resign; property management companies are hired and fired. The records create a continuity of information that can and should be passed on.

Each condominium will have different types of records and ways of creating them. Regardless of this, there are some common issues that should be considered when developing a disaster plan for documents:

It's important to remember that these records belong to the condominium corporation – not to third parties, such as individual board members or the property management company. The first rule in developing a disaster plan for records is to ensure that they're maintained under the control of the condominium corporation at all times. The condominium corporation, through the board of directors, should be able to access the records without having to obtain permission from a third party. The condominium corporation may want to provide access to records to certain third parties, such as property managers, board members, employees, or professional advisors, but this access should not jeopardize the original or copy that the condominium corporation maintains.



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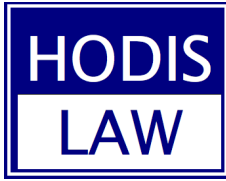
A well-developed plan will satisfy corporations that if a property manager or board member leaves, the records of the corporation are intact and accessible. One way to accomplish this is to digitize the records. This easily allows a “master” to be kept by the corporation and only copies shared with third parties. It also makes the storage and retrieval of these records more efficient. Some records should be kept in their original form as well as a digital copy, such as contracts or releases with original signatures; however, many records which are already copies can be kept in a digital format such as a PDF file.

There have been instances where disgruntled board members or property management companies have taken a corporation’s records with them when they’ve been terminated. Although a condominium corporation has the right to bring a court action to return such records and can sue for damages that may be incurred if records are not returned, this is an option of last resort. It doesn’t guarantee that the records will be returned or that damages awarded will be paid.

Lastly, it’s never a good idea to rely on one set of records. It’s better to have at least two, if not more, copies (backups) of records stored in different locations. This way, if fire or Mother Nature damages or destroys one location, a corporation’s records are safely stored in another location.

Ten questions to consider when developing a disaster plan for corporation records:

1. What records will be kept (including in addition to statutorily mandated records)?
2. How long will records be kept? There will be statutory minimum periods of time that records must be kept; however, that doesn’t mean that a corporation should only keep them for the minimum time periods.
3. How many copies of the records will be kept?
4. What format will the records be kept in? Paper, digital or both?
5. If records are going to be stored digitally: What software programs will be used? Will digital records be retrievable when the software programs are updated? What backup systems are in place?
6. Where will the records be stored? (On-site, remotely or with a third-party provider? In a filing cabinet, a safe, a hard drive or in the cloud?)
7. Who will have the ability to access the records, and have those people signed a confidentiality agreement?
8. Who is responsible for maintaining the records, and should this job be the responsibility of only one person?
9. How are the records going to be organized for easy retrieval?
10. Will the corporation’s insurance policy cover the replacement or costs to recreate the records if lost, stolen or destroyed?



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Although the corporation's records may not be the first thing that comes to mind when one considers disaster planning, given both the statutory obligation and practical reasons to keep secure records, no disaster plan is complete without a policy and system for record retention.



Sonja Hodis is a litigation lawyer based in Barrie that practices condominium law in Ontario. She advises condominium boards and owners on their rights and responsibilities under the *Condominium Act, 1998* and other legislation that affects condominiums. She represents her clients at all levels of court, various Tribunals and in mediation/arbitration proceedings. Sonja can be reached at (705) 737-4403, sonja@hodislaw.com or you can visit her website at www.hodislaw.com.

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