

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: December 13, 2021

CASE: 2021-00070R

Citation: Zamfir v. York Condominium Corporation No. 238, 2021 ONCAT 118

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

Member: Nicole Aylwin, Member

The Applicant,

Lucian Zamfir

Self-Represented

The Respondent,

York Condominium Corporation No. 238

Represented by Christopher Poland, Agent

Hearing: Written Online Hearing – August 13, 2021 to November 23, 2021

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant, Mr. Lucian Zamfir, is the owner of a residential unit of the Respondent, York Condominium Corporation No. 238 (“YCC 238”). Mr. Zamfir requested two sets of records from YCC 238 on November 19, 2020, using the mandated Request for Records form. The records Mr. Zamfir requested are:

1. Board meeting minutes from January 2018 – December 2020, including “in-camera” or “confidential” minutes with respect to Mr. Zamfir’s own unit.
2. The unaudited financial statements of YCC 238 from January 2019 – January 2020.

[2] Mr. Zamfir submits that he received no acknowledgement of the request from YCC 238, nor did he receive the records requested. As a result, Mr. Zamfir filed an application with this Tribunal asking the Tribunal to provide him with the requested records and to impose a penalty on YCC 238 for failing to provide the records without a reasonable excuse. He has also asked to be awarded costs related to pursuing this matter.

[3] The Respondent, YCC 238, acknowledges they received the request but cannot verify that a response was ever sent to Mr. Zamfir as the condominium manager responsible for the property at that time is no longer employed at the management company.¹ YCC 238 submits that they do not know why a response was not sent. Nonetheless, it is YCC 238's position that Mr. Zamfir is entitled to the minutes requested, including "in-camera" or "confidential" minutes that refer to Mr. Zamfir's own unit, however they do not agree that Mr. Zamfir is entitled to view minutes that refer to legal matters or opinions, even if they do relate to Mr. Zamfir or his unit. YCC 238 submits that they are entitled to keep these parts of the minutes confidential and would like to redact these sections of the minutes.

[4] I note that while Mr. Zamfir has requested "in camera" minutes, the term "in camera" is not a term used in the *Condominium Act, 1998* (the "Act"). Rather, in the context of condominiums in Ontario, any reference to "in camera" minutes should be interpreted as a reference to a record of those parts of a board meeting that may take place on a confidential basis and/or that may require redaction.

[5] I also note that during this hearing, Mr. Zamfir withdrew his claim for the unaudited financial statements as these had subsequently been posted to a community website and were no longer at issue.

[6] Thus, the issues to be decided in this case are:

1. Is Mr. Zamfir entitled to receive copies of board meeting minutes for the period of January 2018 – December 2020? If so, should the minutes that refer to Mr. Zamfir or his unit, including any discussions of legal matters or opinions that relate to him or his unit, be provided without redaction?
2. Is YCC 238 entitled to charge a fee for the labour associated with the production of the board meeting minutes? If so, what is a reasonable fee?
3. Is YCC 238 required to pay a penalty under s. 1.44(1)6 of the Act for refusing to provide the records without a reasonable excuse? If so, in what amount?
4. Should costs be awarded to either party?

[7] In deciding these issues, I have reviewed all the submissions and evidence provided to me by the parties, but only refer to those that which are relevant and

¹ In their submissions, YCC 238 refers to the person(s) responsible the management of the property as a 'property manager'. However, throughout this decision I use the term condominium manager as the persons responsible for managing a condominium property must be a licenced and the title of condominium manager is the appropriate title for this role.

necessary to making my decision.

B. ISSUES & ANALYSIS

Issue 1: Is Mr. Zamfir entitled to copies of board meeting minutes for the period of January 2018 – December 2020? If so, should the minutes that refer to Mr. Zamfir or his unit, including any discussion of legal matters or opinions that relate to him or his unit be provided without redaction?

[8] Both parties agree that Mr. Zamfir is entitled to examine or obtain copies of the minutes requested under s. 55(3) of the Act. The parties disagree on the scope of redactions, if any, that YCC 238 may apply to these minutes.

[9] While recognizing that s. 55(4)(c) of the Act, does restrict the right of owners to examine or obtain records when those records relate to specific units or owners, it is Mr. Zamfir's position, that s. 55(5) (a) and (b) of the Act, provide an exception to this rule and allow him to examine or obtain records that are about him and his unit and thus no redactions should be made to parts of the minutes that refer to him or his unit.

[10] The two relevant parts of the Act are as follows:

Section 55(4) reads:

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

(a) records relating to employees of the corporation, except for contracts of employment between any of the employees and the corporation;

(b) records relating to actual or contemplated litigation, as determined by the regulations, or insurance investigations involving the corporation;

(c) subject to subsection (5), records relating to specific units or owners; or

(d) any prescribed records. 1998, c. 19, s. 55 (4); 2015, c. 28, Sched. 1, s. 51 (5-7).

[11] Section 55(5) reads:

(5) Clause (4) (c) does not prevent,

(a) an owner, a purchaser or a mortgagee of a unit or an agent of one of them duly authorized in writing from examining or obtaining copies of records under subsection (3) if the records relate to the unit of the owner, the unit being purchased or the unit that is subject to the mortgage, as the case may be;

(b) an owner of a unit or an agent of the owner duly authorized in writing from examining or obtaining copies of records under subsection (3) if the records relate to the owner; or

(c) an owner, a purchaser or a mortgagee of a unit or an agent of one of them duly authorized in writing from examining or obtaining copies of the record that section 46.1 requires the corporation to maintain. 2015, c. 28, Sched. 1, s. 51 (8).

- [12] YCC 238, agrees, in part, with Mr. Zamfir. While they agree that he is entitled to examine or obtain copies of the minutes requested and that s. 55(5)(a) and (b) entitles him to view parts of the minutes that relate to him or his unit, it is their position that s. 55(5) does not extend to discussions on legal matters or legal opinions that may be contained in the minutes, even if these relate to Mr. Zamfir or his unit. Rather, they argue that these parts of the minutes are protected by solicitor-client privilege and should be redacted.
- [13] Given the position of the parties and that the proposed redactions and their relationship to solicitor-client privilege and s.55(4)(b) was likely to determine questions related to the right to redact discussions in the minutes that refer to legal matters and/or legal opinions about Mr. Zamfir and his unit, at my request, both parties were asked to provide submissions specifically on these points in order to clarify their positions.
- [14] In setting out his position, Mr. Zamfir acknowledged that board minutes may be subject to solicitor-client privilege, however he argued that the discussion of legal matters between board members where the discussion or opinion was not provided by the solicitor, or where counsel is not present, is not subject to solicitor-client privilege. Here Mr. Zamfir referred me to *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, 2004 SCC 31 (“Pritchard”) which has limited relevance in this case given the vastly different context and circumstances, but is helpful for setting out the criteria for solicitor-client privilege, which according to Pritchard is: “(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties”. Mr. Zamfir argues that based on these criteria the onus is on YCC 238 to show that solicitor-client privilege applies to the minutes and that only direct communications between the solicitor and the client would be protected or subject to redaction.
- [15] I agree with Mr. Zamfir that solicitor-client privilege is narrow in its scope and protects communications between a solicitor and their client. This privilege exists to protect these communications on the theory that a client is entitled to consult a

lawyer in confidence and without fear of any disclosure made by the client or any advice given by the lawyer becoming public. Therefore, in this case, any direct communication between the lawyer and the board (representing, in this case the client) would be protected from disclosure under solicitor client privilege.

- [16] However, according to YCC 238 the claiming of solicitor-client privilege does not impact the application of s. 55(4)(b) of the Act, which is broader in scope than that of the common law concept of privilege. According to YCC 238 an owner's right of examination does not extend to "*records relating to actual or contemplated litigation ... involving the corporation*". Such records are exempt from examination as per s. 55(4)(b) of the Act.
- [17] To support their position, YCC 238 refers to the Tribunal decision, *Mara Bossio v. Metro Toronto Condominium Corporation 965*. In Bossio, the Applicant was seeking a report of the condominium board's president and a series of board meeting minutes. The Respondent refused to provide these minutes on the basis that they were protected by s. 55(4)(b) of the Act, which provides an exception from disclosure for records that deal with "actual or contemplated litigation". The Tribunal ultimately found that the Applicant was not entitled to the records because the Applicant was considering litigation.
- [18] YCC 238 submits that during the time-period for which Mr. Zamfir is requesting the minutes, YCC 238 was contemplating litigation against Mr. Zamfir, and that they had made this intent known to him by sending him a draft Notice of Application which had been prepared by YCC 238's legal counsel. YCC 238 submits that they were "reasonably expecting to proceed with the Notice of Application in Superior Court", thus s. 55(4)(b) entitles them to redact any discussion of legal matters in the minutes that relate to the contemplated litigation. Mr. Zamfir maintains that the draft Notice of Application was an intimidation tactic by the board and does not indicate any real intent to litigate.
- [19] Subsection 55(4)(b) does provide a broader exception to the right of examination than solicitor-client privilege. It extends the exception to records "relating" to actual or contemplated litigation. To be exempt from examination under s. 55(4)(b) records need not contain direct communications between counsel and client, they need only contain information that relates to actual or contemplated litigation.
- [20] I accept that YCC 238 was contemplating litigation against Mr. Zamfir during the time-period in which the minutes are requested, and that the minutes may contain reference to discussions between board members that relate directly to actual or contemplated litigation against Mr. Zamfir. I find that any such references may be redacted pursuant to s. 55(4)(b).

- [21] Mr. Zamfir makes one further argument for why YCC 238 should not be allowed to claim an exception based on s.55(4)(b). It is Mr. Zamfir's position that because YCC 238 did not originally claim an exception based on s. 55(4)(b), that they cannot claim it retroactively. Here he referred me to *Reva Landau v. Metropolitan Condominium Corporation No. 754* ("Landau") to support his argument. Mr. Zamfir argues that in Landau the Tribunal decided that the Respondent, having already provided the Applicant with a different reason for their refusal, could not subsequently change their mind and claim s.55(4)(b) retroactively.
- [22] Mr. Zamfir argues that this case is 'identical' to Landau in this respect. I disagree. In Landau, the condominium provided a response to Ms. Landau's request for records. The response was on the proper response form and was provided within the mandated timeframe. In this official response the condominium did not cite s. 55(4)(b) as the reason for the refusal of records, it cited only solicitor-client privilege. It was only once Ms. Landau indicated she was considering filing a case against the condominium at the Tribunal that the Respondent changed their mind and cited s.55(4)(b). They argued that s. 55(4)(b) then applied precisely because Ms. Landau was considering the Tribunal process.
- [23] The facts of this case are different from Landau. In this case, YCC 238 did not provide a reason to Mr. Zamfir for refusing to provide the records and then change the reason for their refusal. No response from YCC 238 was ever forthcoming, a fact that YCC 238 appears to indirectly blame on condominium managers who are no longer employed by the management company. While, as I discuss below, it is not acceptable simply not to respond to a request, and such a failure may have implications regarding penalties, the facts in this case do not support the position that YCC 238 is now retroactively claiming s.55(4)(b) as response to the current hearing. Rather, it appears that YCC 238 simply failed to meet their responsibilities when they did not reply. YCC 238 was contemplating litigation during the period in which Mr. Zamfir requested the minutes. Thus, in this case, if I were to decide that the board's failure to respond to Mr. Zamfir's request for records meant that YCC 238 could not now claim an exception based on s. 55(4)(b) as part of their arguments in this proceeding, it would mean that they may be forced to provide communications or information about actual or contemplated litigation that the Act otherwise protects from disclosure. I am not prepared to do that in this case.
- [24] Consequently, for all the reasons stated above I find that, while Mr. Zamfir is entitled to the minutes requested and parts of the minutes that may refer to him or his unit, he is not entitled to any parts of the minutes that contain discussions about him or his unit that relate to actual or contemplated litigation under s.55(4)(b), including any discussions related to legal advice or opinions provided in

relation to actual or contemplated litigation. YCC 238 may redact any such references but will be required to provide Mr. Zamfir with the appropriate accompanying statements required by s. 13.8 of Ontario Regulation 48/01 (“O.Reg 48/01” or the “Regulation”), which show the board’s reason for the redaction and provide an indication on which provision of s. 55 of the Act or the Regulation the board bases its reason.

Issue 2: Is YCC 238 entitled to charge a fee for the labour associated with the production of the board meeting minutes? If so, what is a reasonable fee?

- [25] The minutes for the time period of January 1, 2020 – December 31, 2020 requested by Mr. Zamfir are considered “core records” as per s. 1(1) of O.Reg 48/01 and no fee should be charged for the production of these records.
- [26] However, the minutes from January 2018 – December 2019 are considered “non-core” records, which means that YCC 238 is entitled to charge a fee for the labour associated with the production of these records.
- [27] Mr. Zamfir agrees that YCC 238 is entitled charge for these records, however he maintains that as per s. 13.3(8) of O.Reg 48/01 the fees charged by the corporation must be reasonable and represent the actual costs of the condominium. He does not accept that the fee proposed by YCC 238, which is \$85 per hour, and two hours of labour, for a total of \$170 is reasonable.
- [28] Mr. Zamfir, referred me to several Tribunal decisions such as *Shaheed Mohamed v. York Condominium Corporation No. 414, 2018 ONCAT 3* (“Mohamed”), *Bolanos v. Carleton Condominium Corporation No. 14, 2021 ONCAT 52* (“Bolanos”) and *He v. Waterloo Standard Condominium Corporation No. 541, 2020 ONCAT 34* (“He”), among others, all of which have determined that there is a range of fees that may be ‘reasonable’ depending on the type of nature of the work required to produce the record(s) requested, the relevant fact circumstances, and the type of content in the records. These fees range from \$32 per hour and \$31.50 per hour for work that was non-professional, unspecialized clerical work in Bolanos and Mohamed respectively, to \$60 per hour for work that involved reviewing video footage and compiling a wide range of different records in He. Mr. Zamfir argues that the circumstance in this case most closely resemble Bolanos and Mohamed and that a reasonable fee in this case would be \$30 per hour.
- [29] I note that prior to this proceeding no fee estimate for producing the records was provided to Mr. Zamfir, as a response to his request was never proffered by YCC 238. However, as part of these proceedings, YCC 238’s initial submissions indicated that they believed \$85 per hour is a reasonable fee to produce these

records and they estimated two hours of labour for a total cost of \$170. The rationale provided for this fee was that the management agreement that the YCC 238 has with Malvern Condominium Property Management indicates that non-core records will be compiled by the condominium manager at a cost of \$85 per hour.

- [30] However, YCC 238's submissions on this matter did not end there. As I noted above, to get clarification on the position of the parties in relation to s. 55(4)(b), the scope of redactions and solicitor-client privilege, I made a request of the parties to submit additional submissions on these specific topics. Although I was specific in my request, YCC 238 took that opportunity to extend its arguments on why \$85 was a reasonable fee, and provided counter-arguments to Mr. Zamfir's original submissions on fees.
- [31] In these additional submissions YCC 238 referenced *Robert Remillard v. Frontenac Condominium Corporation No. 18, 2018 ONCAT 1* ("Remillard") to argue that the Tribunal has found that a labour rate of \$130 was reasonable where the condominium's law firm may be involved with the redaction of the records. They submit that the minutes requested by Mr. Zamfir may require redaction and this process may involve YCC 238's legal counsel whose rate would be more than \$85 per hour. No specific hourly rate was cited for YCC 238's counsel.
- [32] Mr. Zamfir objected to these additional submissions on the grounds that YCC 238 had the opportunity to provide their arguments on what constitutes a reasonable fee during the proper course of the hearing, and that these additional submissions, which went beyond the scope of the submissions requested, resulted in prejudice towards him. I agree with Mr. Zamfir that the submissions by YCC 238 went beyond the scope of what was requested by this Tribunal, and that YCC 238 should have followed my instructions, but I do not find that they prejudiced Mr. Zamfir's case as he did have the opportunity to refute these submissions and did so.
- [33] In deciding on what fee is reasonable in this case, I have kept consistent with this Tribunal's approach to determining reasonable fees, which has been to consider what evidence I have in front of me that speaks to the actual nature of work required to provide these records, the amount of work involved, who will be doing this work, and the time it might take to produce the record.
- [34] Based on the submissions before me, I have decided that in this case, a fee of \$30 per hour is a reasonable fee. I find this fee reasonable because other than indicating that they are entitled to charge a reasonable fee the production of non-core records, YCC 238 has offered no substantive evidence demonstrating that they have given proper consideration to the actual labour that may be involved in

producing these records or the actual time it might take. Rather, they have simply pointed generally to their management contract which sets the rate at \$85 per hour for the compilation of non-core records by the condominium manager and made a broad statement that the redactions would “*likely* require the involvement of the Respondent’s legal counsel” (emphasis added). Simply having an hourly rate stated in a management agreement is not evidence that speaks to the nature of the work required to produce the records or prepare them for examination. Nor is the “likely” involvement of counsel convincing evidence for a higher rate, particularly when no submissions have been made on what the hourly rate of the counsel may be, what specific work they would perform, how much time it may take, etc. Unlike in Remillard, where there was specific evidence provided to demonstrate the need for legal counsel to conduct the work and detailed calculations used to estimate the fee, in this case, YCC 238 has provided no such calculations and no such detailed explanation on what work is to be done or how much actual time that might take.

[35] Thus, in the absence of any compelling evidence that would allow me to conclude that a higher fee is reasonable and based on actual work and fees incurred by the corporation, I accept Mr. Zamfir’s position that a rate of \$30 per hour is reasonable in this case as it will cover the basic cost of the preparation and review of these records. Given that several meetings worth of minutes will need to be reviewed I will accept YCC 238’s estimation of two hours of labour to perform the work and find that YCC 238 will be allowed to charge a total of \$60 for the redactions and Mr. Zamfir must pay this amount prior to receiving the records.

Issue 3: Is YCC 238 required to pay a penalty under s. 1.44(1)6 of the Act for refusing to provide the records without a reasonable excuse? If so, in what amount?

[36] Under s.1.44(1)6 the Tribunal may order a condominium corporation “to pay a penalty that the Tribunal considers appropriate to the person entitled to examine or obtain copies under s.55(3) if the Tribunal considers that the corporation has without reasonable excuse refused to permit the person to examine or obtain copies under that subsection.” As per s.1.44(3) this penalty may be up to a maximum of \$5000.

[37] Mr. Zamfir has asked that the Tribunal award him the maximum penalty of \$5000 and cited several Tribunal cases such as *Rice v. Peel Condominium Corporation No. 9*, 2020 ONCAT 43, *Terence Arrowsmith v. Peel Condominium Corporation No. 94*, 2018 ONCAT 10 and *Niekraszewicz v. York Region Condominium Corporation No. 835*, 2021 ONCAT 73, among others, to demonstrate that a

penalty is warranted when a condominium fails to respond to a request and that the penalty has ranged from \$3000 to the maximum of \$5000.

- [38] Mr. Zamfir highlights that in many of these cases, the Tribunal noted that one of purposes of the penalty has been to impress upon condominium corporations that they must be aware of their responsibilities under the Act, understand what is involved in meeting these responsibilities, and take these responsibilities seriously. This is a consideration in this case. However, I also note that in the cases cited by Mr. Zamfir, the number of records requested and not provided are more substantial than in this case and in some instances the Respondent failed to participate at all in the Tribunal process – which is not the case here.
- [39] I have no reason to doubt Mr. Zamfir's claim that he never received a response to his request. YCC 238 submits that while "there was a response form found on Malvern's server" they have no idea if it was sent. While YCC 238 did submit this form as documentary evidence, I find it of limited value as it has no date on it, appears incomplete as it only responds to part of Mr. Zamfir's request (i.e., the minutes but not the financial records, which were part of the initial request) and could have been generated at any time. Moreover, YCC 238 has not been able to provide any convincing evidence that it was sent. They submit that they cannot confirm anything at all about the response (or lack thereof) as the employee(s) responsible for managing the property at that time no longer work for Malvern.
- [40] Given the facts before me, and the fact that it has been clearly established by this Tribunal that it is the corporation's responsibility to understand and meet their obligations under the Act and to ensure that, in most cases, those acting on behalf of the corporation understand and meet them as well, I find that in this case, on the facts before the Tribunal, failure to respond to Mr. Zamfir's request constitutes a refusal, without a reasonable excuse, to provide the record.
- [41] In its final submissions, YCC 238 does acknowledge the importance of meeting their responsibilities under the Act. They note that having now consulted their legal counsel about this Tribunal case, they will make best efforts to comply with the 30-day requirement to respond to records requests in the future and that their legal obligations under the Act have been impressed upon them. They further offer that that the need for YCC 238 to engage legal counsel and incur legal fees in relation to this Tribunal case could substitute for a penalty since these costs "should suffice to satisfy the purposes of a penalty".
- [42] Mr. Zamfir made a straightforward request, on the appropriate form, for a set of records to which he is entitled and received no response whatsoever from YCC 238. While I appreciate YCC 238's commitment to doing better in the future, I do

not accept that such a statement constitutes a reasonable excuse for not providing the records to Mr. Zamfir. It does not change the fact that YCC 238 did not provide a response to Mr. Zamfir within the mandated 30-day time frame, did not provide the records requested, nor any reasonable excuse for why they did not provide them prior to this hearing. Nor does incurring legal fees related to participating in this hearing, which may have been avoided if YCC 238 had met its responsibilities in the first place, “satisfy” the purposes of the penalty.

[43] Based on the facts of this case, I find that a penalty of \$1,000 is appropriate. I would hope that having to pay a monetary penalty will only further serve to highlight for YCC 238 the requirement to meet their obligations under the Act going forward.

Issue 4: Should costs be awarded to either party?

[44] YCC 238 has not requested any costs. Mr. Zamfir has requested \$500 in costs. He requests \$200 to cover the cost of Tribunal filing fees and \$300 to cover the costs of the time he spent on pursuing this application.

[45] Pursuant to Rule 45.1 of the Tribunal’s Rules of Practice a User may be ordered to reimburse another User for their Tribunal fees when that User has been at least partially successful. Such an order is appropriate in this case. I order YCC 238 to pay \$200 of filing fees to Mr. Zamfir.

[46] While Mr. Zamfir did have to spend time to pursue this matter, I do not find that there are circumstances in this case that would have required Mr. Zamfir to spend more time than might reasonably be anticipated and necessary to participate in this process and will not award additional costs in this matter.

C. ORDER

[47] The Tribunal Orders that:

1. YCC 238 is to provide Mr. Zamfir with the board meeting minutes for the period of January 2018 – December 2020 within 30 days of receiving the payment as set out in paragraph 4 of this Order.
2. YCC 238 may redact the minutes provided in accordance with s. 55(4)(b) of the Act which, in this case, includes redactions to any references relating to actual or contemplated litigation even when those references relate to Mr. Zamfir or his unit.

3. If YCC 238 determines redaction is necessary, a written statement of the board's reasons for its determination and an indication on which provision of s. 55 of the Act or O. Reg 48/01 the board bases its reason is to be provided to Mr. Zamfir along with the minutes.
4. Mr. Zamfir must pay a fee of \$60 for the minutes.
5. YCC 238 is to pay a penalty of \$1000 to Mr. Zamfir within 30 days of this Order.
6. YCC 238 is to pay Mr. Zamfir \$200 for his costs within 30 days of this Order.

Nicole Aylwin
Member, Condominium Authority Tribunal

Released on: December 13, 2021