

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: February 24, 2025

CASE: 2024-00430R

Citation: O’Sullivan v. Toronto Standard Condominium Corporation No. 2438, 2025 ONCAT 32

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

Member: Anne Gottlieb, Member

The Applicant,

Julia O’Sullivan

Self-Represented

The Respondent,

Toronto Standard Condominium Corporation No. 2438

Represented by Michael Sopora, Agent

Hearing: Written Online Hearing – September 9, 2024 to January 27, 2025

Video Conference Hearing – December 10, 2024

REASONS FOR DECISION

A. INTRODUCTION

- [1] Dr. Julia O’Sullivan is the owner of a unit of Toronto Standard Condominium Corporation No. 2438, (“TSCC 2438”). This case deals with a Request for Records that she made dated April 22, 2024, which was a request for five non-core records (the “Request”).
- [2] On May 20, 2024, Mr. Sopora, president of the Board of Directors of TSCC 2438 (the “Board”), wrote to Dr. O’Sullivan and denied each of the five non-core records. The same statement was used for each of the five records, as follows: “Request Denied at this time in accordance with the Condominium Act of Ontario, Section 55 (4) (b) – this record relates to actual or contemplated litigation or insurance investigations involving the corporation.”
- [3] Dr. O’Sullivan seeks a ruling from the Tribunal regarding her entitlement to the records she requested, as at the date of her Request. She indicates that she is not seeking a penalty nor is she seeking reimbursement of her costs or fees paid to

bring this case to the Tribunal.

- [4] TSCC 2438 asks for an order that the denial of the Applicant's request for records under the *Condominium Act, 1998* (the "Act") was properly made by the Respondent under s. 55 (4) (b) of the Act. TSCC 2438 further asks for an order indicating that the Applicant is seeking the records for an improper purpose and is, therefore, not entitled to obtain the records under s. 55 (3) of the Act.
- [5] For the reasons set out below I find that Dr. O'Sullivan was and is entitled to four of the five requested records, being: the Performance Audit April 1, 2015 – March 31, 2016; the Performance Audit April 1, 2016 – March 31, 2017; the Reserve Fund Study 2019; and the Final Settlement with Tarion January 21, 2017 – December 31, 2023. I do not find that she is entitled to the WSP Report on in-suite leakage January 1, 2023 – April 1, 2024.
- [6] Dr. O'Sullivan indicated that she is not asking the Tribunal to order production of the records, because she believes they will be part of productions in an ongoing court case. Nonetheless, I am ordering the production of the four records, to emphasize the exclusive jurisdiction of the Tribunal, pursuant to the Act, over records.

B. BACKGROUND

- [7] There were numerous preliminary matters raised in this application. The rulings are known to the parties and can be found in the record of proceeding. These include requests by TSCC 2438: that this application be dismissed; that a certain law firm representing an insurance company be provided with observer status and access to this case; for a 45-day adjournment the week prior to the scheduled video-recorded testimony; that the law firm for the insurer be allowed to appear at the video-conference portion of the hearing; and a late request to add a witness. Dr. O'Sullivan also made a late request to add documents as evidence.
- [8] From the evidence provided, it appears that there was a Tarion claim pursuant to the Ontario New Home Warranty program, that settled during 2023. According to TSCC 2438, the claim "relates to deficiencies that came to light in the building during the first year after the Declaration Date". In December 2023, the law firm Shibley Righton LLP was engaged by TSCC 2438 to provide advice on limitation periods and litigation relating to deficiencies in the building. Minutes of an Owners' Meeting held by video conference on February 8, 2024, indicate that owners were advised that, on the advice of legal counsel, there would be no distribution of records to owners relating to building deficiencies.

- [9] Ms. Brack, an owner who appeared as witness for Dr. O’Sullivan in this case, made a Request for Records on February 11, 2024. The request was for two Performance Audits, the first covering April 2015 to March 2016, and the second covering April 2016 to March 2017. This time period is prior to Ms. Brack’s ownership of her condominium unit. The records she requested were denied by letter dated March 14, 2024. The reason cited by TSCC 2438 was that the corporation’s legal counsel had advised to withhold distribution of documents related to “the Garage Water Ingress issue and the In-Suite Water Ingress issue pending legal review of all related documents and pending issuance of a legal opinion covering these matters.”
- [10] Dr. O’Sullivan made a Request for Records dated April 22, 2024. The records included the two performance audits requested by Ms. Brack and three other non-core records. These records were denied by TSCC 2438. In an email dated May 20, 2024, TSCC 2438 cited s. 55 (4) (b) of the Act as the reason for the refusal to provide records.
- [11] On May 29, 2024, Dr. O’Sullivan and Ms. Brack issued a Statement of Claim against TSCC 2438 in the Superior Court of Justice. TSCC 2438 claims that the records requested by Dr. O’Sullivan will be presented as evidence in the claim in the Superior Court of Justice. There is also evidence of an insurance claim with TSCC 2438’s insurer, Wawanesa Mutual Insurance Company (“Wawanesa”).

C. ISSUES

- [12] I have considered all the evidence and submissions of both parties. I will only refer to matters that are relevant to the issues to be decided. The issues to be addressed in this case are:
1. Was/Is Dr. O’Sullivan entitled to the following records requested:
 - a. Performance Audit: April 1, 2015 – March 31, 2016
 - b. Performance Audit: April 1, 2016 – March 31, 2017
 - c. Report of 2019 Reserve Fund Study
 - d. WSP Report on in-suite leakage: January 1, 2023 – April 1, 2024
 - e. Final Settlement with Tarion: January 1, 2017 – December 31, 2023
 2. Did TSCC 2438 have a reasonable excuse for refusing to provide the records?

D. ANALYSIS

Issue 1: Was/Is Dr. O'Sullivan entitled to the records requested?

[13] TSCC 2438 alleges that Dr. O'Sullivan seeks the records for an improper purpose. Based on her testimony, I find that the Request is directly related to her interest as an owner. I find her to be a credible witness.

[14] An owner has a right to request records, pursuant to s. 55 (3) of the Act.¹ TSCC 2438 refused to provide the records based on the exemption set out in s. 55 (4) (b) of the Act which states that:

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

...

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

[15] The evidence of TSCC 2438 is that in early December 2023, it sought the opinion of its legal counsel regarding building deficiencies. On February 11, 2024, Ms. Brack made a request for two Performance Audits. These were the same Performance Audits requested by Dr. O'Sullivan on April 22, 2024. The condominium corporation denied Ms. Brack's request. The correspondence from the Board on March 14, 2024, included the following paragraph, which is similar to the wording that Dr. O'Sullivan received in her email from the Board on May 20, 2024:

As previously communicated, the Corporation's legal counsel advised the Corporation prior to the Owner's meeting held on February 8, 2024, to withhold distribution of all documents related to the Garage Water Ingress issue and the In-Suite Water Ingress issue pending legal review of all related documents and pending issuance of a legal opinion covering these matters. This advice was discussed during the February 8 Owner's meeting and was formally reiterated to the Board on February 23, 2024, during a discussion regarding your specific requests.

As the subject legal review is not complete and the associated legal opinion

¹ Subsection 55 (3) states that:

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).

has not been issued, the Board will not provide copies of these records at this time.

- [16] The issue to be decided is whether Dr. O’Sullivan was or is entitled to the records that she requested. Cases decided by this Tribunal have looked at various factors for considering s. 55 (4) exemptions. These include the nature of the records requested. The two performance audits requested by Dr. O’Sullivan cover a time prior to her purchase of the unit. The performance audits would have been done as a requirement of s. 44 of the Act, and not in contemplation of litigation.
- [17] The Report of the Reserve Fund Study for 2019 also predates Dr. O’Sullivan’s purchase of her unit. TSCC 2438 outlined that four of the records (namely, the two Performance Audits, the 2019 Reserve Fund Study and the Final Tarion Settlement) were part of a prior Tarion claim. A Tarion claim is neither litigation nor an insurance matter. TSCC 2438 submits that these records disclose building deficiencies and were therefore denied. However, such a claim to Tarion would have been initiated on behalf of all owners, and that claim to Tarion has since settled.
- [18] I find that the four records are records that Dr. O’Sullivan was entitled to receive as at the date of her Request. They were created on behalf of all the owners in the building in the context of the Tarion program and are documents filed pursuant to the corporation’s obligation/requirements under the *Ontario New Home Warranties Plan Act*, for the benefit of all owners. Therefore, I conclude that Dr. O’Sullivan is entitled to receive a copy of these four records and that the litigation privilege does not apply to these records.

Was there a reasonable prospect of litigation at the time of the Request?

- [19] Subsection 1 (2) of Ontario Regulation 48/01 under the Act (the “Regulation”), defines the term “contemplated litigation” to mean “any matter that might reasonably be expected to become actual litigation based on information that is within a corporation’s knowledge or control”. It appears that the Board of TSCC 2438 may have been contemplating litigation and had consulted its legal counsel in December 2023.
- [20] There is evidence regarding a meeting of owners on February 8, 2024, where an announcement was made to the owners that no documents would be provided to them, pending a review by counsel. However, there was no indication how long such a review might take.
- [21] TSCC 2438 argues that nowhere does the Act or the Regulation specify that the

actual or contemplated litigation must exist at the time that a Request for Records is made. I conclude that, at a minimum, the contemplated litigation must be real, whether the litigation has or has not already commenced. It was clear that there was the possibility of litigation, known as ‘contemplated litigation,’ at the time of Dr. O’Sullivan’s request. TSCC 2438 had consulted its legal counsel. In closing submissions, Dr. O’Sullivan confirmed that as of December 15, 2024 – more than six months after her Request –, owners were still not advised of any legal action commenced by TSCC 2438 regarding building deficiencies. This argument misses the point. The point is that the Board, based on advice from its legal counsel, considered that a possibility of litigation at the time of her Request.

Is there actual litigation?

- [22] Ms. Schwarz is Secretary of TSCC 2438 and member of the Board of the Respondent. She testified about a conversation she had with Dr. O’Sullivan on April 4, 2024. She recounts the conversation with Dr. O’Sullivan in an email to the Board at the same date, in which she raises a concern. She advises the Board to warn their lawyers that there may be a lawsuit due to deficiencies in the status certificate at the time of Dr. O’Sullivan’s purchase of the unit. It appears that this is a real concern of Ms. Schwarz following her conversation with Dr. O’Sullivan. I am not convinced that anything was said outright by Dr. O’Sullivan. She recounts the conversation very differently. Nevertheless, Dr. O’Sullivan did commence a lawsuit with Ms. Brack, less than two months later, on May 29, 2024, and the status certificate as it relates to her unit is at issue in the lawsuit.
- [23] There is evidence of actual litigation ongoing at the time of this hearing. This is acknowledged by both parties. There is a claim in the Superior Court of Justice initiated by Dr. O’Sullivan and Ms. Brack. There also appears to be an insurance claim through Wawanesa, the condominium corporation’s insurer. TSCC 2438 claims that the WSP Report is part of the insurance litigation and therefore not a record to which Dr. O’Sullivan is entitled. An insurance claim would fall under the s. 55 (4) (b) exemption.
- [24] With respect to the WSP Report on in-suite leakage, I accept the submission of TSCC 2438 that this report by the engineering firm hired by the condominium corporation deals directly with matters related to ongoing litigation and the cause of building deficiencies and leaks. I find that TSCC 2438 has made its case that the report relates to matters at the core of the Superior Court litigation relating to garage leakage, in-suite leakage, and balcony ponding, and that this record falls within the exemption set out under s. 55 (4) (b) of the Act.

Are the records covered by some other legal consideration?

- [25] TSCC 2438 references the decision of the Divisional Court in Pachai² as standing for the proposition that “litigation privilege is designed to create a zone of privacy around documents held by a party in litigation”. The condominium corporation argues that since the requested records are not public documents, the exemption under s. 55 (4) of the Act should apply. While I agree that the records requested are not public in the way that a pleading is a public document, I have found that four of the requested records are not covered by s. 55 (4) (b) of the Act.
- [26] TSCC 2438 has asked that this case be dismissed based on prejudice to the Respondent in the case before the Superior Court of Justice. The submission that the records are discoverable under the Rules of Civil Procedure is acknowledged by both parties. I do not find it prejudicial to order TSCC 2438 to produce records, to which Dr. O’Sullivan was entitled, at the time of her Request, if they are not covered by an exemption contemplated in the Act. Records are within the exclusive jurisdiction of this Tribunal, as designated by the Act.

Issue 2: Did TSCC 2438 have a reasonable excuse for refusing to provide the records?

- [27] I note that TSCC 2438 relied on advice given by its legal counsel to deny Dr. O’Sullivan’s Request. In the context of this case, the Board had a reasonable excuse to deny the records. Based on the legal advice of its lawyers, it was reasonable for the Board to deny Dr. O’Sullivan’s Request, even though the outcome of this case is that Dr. O’Sullivan was entitled to some of the records requested and that TSCC 2438 should produce four of the five records to Dr. O’Sullivan.
- [28] I have found that Dr. O’Sullivan was entitled to receive four of the five records as at the date of her Request. TSCC 2438 made no submissions on any costs to produce these records, as permitted by the Act to produce non-core records. They will therefore be produced and provided to Dr. O’Sullivan without any charges for photocopying or labour.

E. ORDER

- [29] The Tribunal orders that:

1. Within 30 days of the date of this Order TSCC 2438 shall provide to Dr. O’Sullivan, at no cost to her, the following records:

² *Pachai v. MTCC No. 850*, 2024 ONSC 2001 (CanLII) (“Pachai”)

- a. Performance Audit: April 1, 2015 – March 31, 2016
 - b. Performance Audit: April 1, 2016 – March 31, 2017
 - c. Report of 2019 Reserve Fund Study
 - d. Final Settlement with Tarion: January 1, 2017 – December 31, 2023
2. Each party shall bear their own costs in relation to this proceeding.

Anne Gottlieb
Member, Condominium Authority Tribunal

Released on: February 24, 2025