

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: November 4, 2021

CASE: 2020-00396R

Citation: Russell v. York Condominium Corporation No. 50, 2021 ONCAT 103

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

Member: Laurie Sanford, Member

The Applicant,

Rob Russell,
Self-Represented

The Respondent,

York Condominium Corporation No. 50
Represented by Benjamin Rutherford, Counsel

Hearing: Written Online Hearing – April 9, 2020 to October 7, 2020

REASONS FOR DECISION

A. OVERVIEW

- [1] At issue in this case are fourteen records which the Applicant, Mr. Russell, contends were either inadequately kept or not fully provided to him by York Condominium Corporation No. 50 (“YCC50”). Mr. Russell is a unit owner in YCC50 and has made multiple Requests for Records in the period from the fall of 2020 to the spring of 2021. YCC50 takes the position that it has never intentionally withheld records from Mr. Russell and has now provided him with all the records to which he is entitled.
- [2] The dispute began when Mr. Russell became concerned about rumours that YCC50 was planning to install cameras in the residential hallways of YCC50 without consulting the owners. He observed that the camera installation had begun. Mr. Russell initially requested records related to the cameras and to the legal advice which YCC50 may have received in relation to the installation. The disputed records also pertain to the retention and termination of the services of two law firms which may have given advice about the cameras. In his most recent request for records, Mr. Russell also requested records including minutes of board

meetings of YCC50 and other business of the condominium corporation. As a result of his dealings with YCC50, Mr. Russell is concerned that YCC50 is inadequately keeping its minutes and is failing to provide them to owners on request.

- [3] For the reasons set out below, I conclude that while YCC50 eventually provided Mr. Russell with most or all of the records he sought, in many cases it did not do so in the timeframe required by the *Condominium Act, 1998* (the “Act”) and the associated Ontario Regulation 48/01 (the “Regulation”). Mr. Russell was obliged to bring this application to receive some of the records. Some of the reasons YCC50 initially provided for not providing the records were incorrect. YCC50 engaged in some poor practices in keeping minutes of its board meetings and in disclosing these minutes to its owners. In particular, YCC50 erred in not disclosing minutes of what it referred to as in-camera and special meetings.
- [4] I will direct YCC50 to provide Mr. Russell with minutes of any in-camera or special meetings it has not already provided to him. I will further direct YCC50 to implement a procedure to disclose in-camera and special meetings to owners seeking minutes from it and to provide a process for gaining access to these records. This procedure will comply with the requirements of the Act and the Regulation and will be published to the owners. I am ordering YCC50 to pay the filing fees of Mr. Russell in the amount of \$200 and to pay Mr. Russell a penalty in the amount of \$1,000.

B. ISSUES & ANALYSIS

- [5] Subsection 55(1) of the Act obliges a condominium corporation to keep “adequate records”. Of the fourteen disputed records or sets of records requested by Mr. Russell in the period from October 2020 to March 2021, Mr. Russell submits that half were not adequate. He maintains that the records were inadequate either because they were not adequately kept or because they were not kept at all and should have been. In addition to his concerns about the adequacy of the records, Mr. Russell says that some records were refused without reasonable excuse. Mr. Russell also wants a determination as to whether some otherwise satisfactory records were delivered late. YCC50 acknowledges that unspecified errors were made in the keeping and production of the records but blames these on its previous property management company, which it replaced in late 2020. In addition to saying that Mr. Russell now has all the records to which he is entitled, YCC50 contends that Mr. Russell has unrealistic standards of perfection in record keeping that could not be practically met.
- [6] When condominium owners request records, they make a formal Request for

Records under the Regulation. Each Request for Records may include multiple individual records that are being requested. The result may be confusing when attempting to distinguish between the Request for Records and the individual records that are requested. In this case, Mr. Russell made four Requests for Records which encompass the fourteen disputed records. Mr. Russell used a numbering system to identify the disputed records which I have adopted in this decision. The first digit refers to which of the four Requests for Records are referred to and the second two-digit number refers to the specific record requested.

- [7] I will consider the records chronologically in the order in which the request for them was made. The question in each case is whether Mr. Russell has received the records to which he is entitled. Also at issue for some of the records is whether YCC50 kept adequate records and whether it has provided them to Mr. Russell in accordance with the Act and the Regulation. After these determinations, the remaining issues are what remedies flow from the findings and what costs or penalties are appropriate.

Record Request 1.01 - CCTV Camera Contracts, Statements of Work, Purchase Orders and similar, in place between YCC50 and “IGTA” for camera installation and any other work between Jun-Oct 2020

- [8] On October 23, 2020, Mr. Russell submitted a Request for Records, requesting “CCTV camera contracts, statements of work, purchase orders and similar, in place between YCC50 and ‘IGTA’ for camera installation and any other work between Jun-Oct 2020.” YCC50, through its then property manager, responded by sending invoices from IGTA for the completed installation work. Mr. Russell was concerned that, because the invoices were sent after the agreement for the work was made, the invoices did not confirm the scope of work or the date on which YCC50 entered into the agreement. Mr. Russell also noted that YCC50 did not respond to his request on the “Board Response to Request for Records” form prescribed by the Regulation. He wrote some follow-up emails to which YCC50, again through its then property manager, replied that it did not have an obligation to disclose any records it considered to be “non-core” and denied Mr. Russell’s request. In November 2020, YCC50 hired a new property manager and Mr. Russell renewed his request. The new property manager again denied the request, via email on November 18, 2020, on the grounds that YCC50 was not obliged to disclose records it considered to be “non-core”.
- [9] Ms. Gikondi, then the president of YCC50, testified that she was told sometime in the fall of 2020 that Mr. Russell had requested work orders for the CCTV camera

installation and she was advised that there were no work orders. Her understanding was that work orders were neither core nor non-core records and therefore did not need to be kept, even if they had once existed. Her testimony was that she consulted the Condominium Authority of Ontario and that was its advice. Apparently, no one told Mr. Russell that there were no work orders and he was left with the impression that the work orders were being denied because they did not need to be maintained or provided.

- [10] On December 29, 2020 YCC50 provided the Board Response to Request for Records required under the Regulation (the “Board Response”). In it, Mr. Russell’s request for the CCTV agreements was denied and the stated reason for the refusal was that “there was a quote presented to the Board which they approved. The work was then completed, and invoices were sent to Rob Russell.”
- [11] Eventually, Mr. Russell was provided with minutes of a special meeting of the Board of Directors dated June 6, 2020 which stated that all estimates from IGTA had been accepted, including for the hallway camera installation. Mr. Russell submits that these minutes did not completely clarify the situation as they did not say when the hallway camera installation had been authorized to begin. He bases this concern on his reading of the minutes of a July 23, 2020 Board meeting in which it is stated that the ground floor and underground camera installation work had been authorized to begin but makes no reference to the hallway camera installation. Mr. Russell also submits that the records he had been provided with did not set out the scope of the agreement.
- [12] During the course of this hearing, YCC50 disclosed estimates from IGTA dated June 6, 2020 for the camera installation¹ and a quote from IGTA dated April, 2021 for the work.²
- [13] Ms. Gikondi, in her testimony, stated that she was a member of the Board of Directors from March 4, 2020 to April 28, 2021. In fact, it appears that she was president of YCC50 for at least part of that time. I reach this conclusion because it was as president that she signed a retainer agreement in March 2020 with a law firm. That agreement will be considered below. Her testimony was that the Board of Directors had approved the installation of the cameras, presumably the hallway cameras, in principle but had anticipated that certain steps would need to be followed. The installation was begun, as Mr. Russell observed, but that was done

¹ Exhibit 64.

² Exhibit 67.

in error and the installation was halted. Ms. Gikondi's testimony was that the property manager contacted Mr. Brian Horlick for a "legal opinion on the installation of these cameras". Mr. Russell's requests for records concerning Mr. Holick's advice will also be dealt with below.

[14] Ms. Gikondi acknowledged that errors had occurred in the camera installation but she noted that YCC50 had multiple property managers and had to deal with the "shock" of COVID-19 in the relevant period.

[15] Several issues arise in connection with this records request. First, YCC50 was incorrect in saying, twice, to Mr. Russell that it was not obliged to provide him with non-core records. While the Regulation makes some distinctions between core records and non-core records, those distinctions do not affect an owner's entitlement, granted under subsection 55(3) of the Act, to examine or obtain copies of records in accordance with the Act and the Regulation.

[16] Given that the work orders, that Mr. Russell requested did not exist, it is not necessary to consider Ms. Gikondi's response. I note, however, that Ms. Gikondi is not completely correct in saying that work orders do not need to be maintained or provided to owners. Subsection 55(1) of the Act requires a condominium to maintain "adequate" records of, among other things, "all agreements entered into by or on behalf of the corporation". If there are other records which adequately set out enough of the details of an agreement to document what the condominium corporation has agreed to, then work orders would not be required. If, however, work orders are an integral part of the agreement or are the principal record of the agreement, then it may be necessary to retain them.

[17] Mr. Russell's main concern with this request is that he does not believe he was provided with adequate records concerning the agreement for the installation of the CCTV cameras. He contends that he still has not seen the scope of the work and has not been provided with a resolution of the Board authorizing the commencement of the work.

[18] In the case of *McKay v. Waterloo North Condominium Corp. No. 23*, 1992 CanLII 7501 (ON SC) the court considered the entitlement of owners to access condominium records and the concomitant obligation of condominium corporations to maintain those records, Cavarzan, J. set out the principle that the affairs of a condominium corporation are an "open book":

... The Act embodies a legislative scheme of individual rights and mutual obligations whereby condominium units are separately owned and the common elements of the condominium complex are co-operatively owned,

managed and financed. In the interest of administrative efficiency an elected board of directors is authorized to make decisions on behalf of the collectively organized as a condominium corporation, on condition that the affairs and dealings of the corporation and its board of directors are an open book to the members of the corporation, the unit owners.

Caravzan, J. went on to say:

The Act obliges the corporation to keep adequate records. One is impelled to ask – adequate for what? An examination of the Act provides some answers. The objects of the corporation are to manage the property and any assets of the corporation (s. 12 (1)). It has a duty to control, manage and administer the common elements and the assets of the corporation (s. 12 (2)). It has a duty to effect compliance by the owners with the Act, the declaration, the by-laws and the rules (s. 12 (3)). Each owner enjoys the correlative right to the performance of any duty of the corporation specified by the Act, the declaration, the by-laws and the rules. The records of the corporation must be adequate, therefore, to permit it to fulfil its duties and obligations. ...

- [19] In the case of the IGTA agreement with YCC50 for the camera installation, Mr. Russell now has the estimates for the work, the quotation for the work, the minutes of the Board meeting that authorised part of the work and the invoices for the work done. It is important to note that Mr. Russell was obliged to make multiple follow-up records requests and to bring this Application in order to receive the estimates and quotations that YCC50 ought to have provided him in response to his initial request. The records that were eventually provided are adequate records for the IGTA agreement. I accept Ms. Gikondi's testimony that the installation work for the hallway cameras has not yet been authorized. It would not be reasonable to expect YCC50 to record actions that it did not take so Mr. Russell's request for authorizing minutes is premature.

Record Request 2.01 – Records relating to the termination of legal services from Horlick Levitt Di Lella LLP, specifically the record containing the date of termination – Jan 2020 to Nov 2020

Record Request 2.02 – Records relating to the agreement with Lash Condo Law, specifically the record containing the date that the agreement began effect – Jan 2020 – Nov 2020

- [20] I will deal with both the requests for records relating to the termination of legal services from Horlick Levitt Di Lella LLP and the records relating to the agreement with Lash Condo Law as YCC50 chose to group these requests together in the Board's Response. Mr. Russell requested these records on November 23, 2020. In

responding on December 29, 2020, the Board Response denied access to these records, saying “Lawyers are not contracted in or out; they are retained. Horlick was only spoken to for legal advice. Lash was retained for current and future matters ...”

- [21] Subsequently, on January 4, 2021, YCC50 provided Mr. Russell with an agreement for legal services prepared by Lash Condo Law.³ The letter agreement contains a general statement that Lash Condo Law has been chosen as YCC50’s solicitors and is signed by Lash Condo Law on March 18, 2020. YCC50 confirms its responsibility for fees and disbursements in an undated signature of the president of YCC50. The agreement attaches a resolution of the Board of Directors of YCC50 that was passed at a meeting held on March 18, 2020, which retains Lash Condo Law as counsel to YCC50 and authorizing the law firm to execute certain documents and undertake other actions necessary for the retainer. Mr. Russell does not dispute that the Lash Condo Law record is adequate, although he expressed concern that the agreement appears to have been sourced from the law firm rather than from YCC50’s internal records. I conclude that what matters in this situation is that YCC50 has provided this record.
- [22] Concerning Mr. Russell’s request for records relating to the termination of Horlick Levitt Di Lella LLP, it should be noted that a retainer is an agreement. It may be a specialized form of agreement but it is an agreement nonetheless and if the agreement exists in writing, then, in the absence of any solicitor/client or statutory privilege or exemption, an owner is entitled to see it. YCC50’s initial position that it did not need to grant access to a retainer was incorrect. In subsequent correspondence with Mr. Russell, he came to believe that there was no written agreement in place between YCC50 and the law firm, although there might have been an agreement between the property management company and the law firm. A formal agreement would not necessarily be required; a resolution of the Board of Directors setting out the scope of the retainer and the effective date of it might be adequate. However, in this case, Mr. Russell did not request the retainer for Horlick Levitt Di Lella LLP; he requested records relating to the termination of their retainer. YCC50 has said they spoke with the law firm for legal advice. If, as YCC50 asserts, the firm was only retained for a specific piece of advice, no formal termination was required. Mr. Russell has received adequate records in both cases, although in each case, both the Board Response and the records were provided outside the time frame specified in the Regulation.

³ Exhibit 35.

Record Request 3.01 – Records (i.e. emails to, or notes presented at board meetings) relating to advice or guidance from Nadlan-Harris or Horlick Levitt Di Lella LLP with regard to hallway cameral installation, notice or privacy policy.

- [23] On January 18, 2021, Mr. Russell submitted a third Request for Records requesting records concerning the advice given by either the former Property Management company, Nadlan-Harris, or by Horlick Levitt Di Lella LLP concerning the hallway camera installation. On February 2, 2020 YCC50 provided Mr. Russell with the letter of advice from Mr. Horlick. Mr. Russell states, and YCC50 does not dispute, that YCC50 still has not provided him with the prescribed Board Response form. Mr. Russell is also concerned that YCC50 has not confirmed to him that the letter of advice was the only advice received from either Nadlan-Harris or Horlick Levitt Di Lella LLP concerning the camera installation or the notice requirements or the privacy considerations for it.
- [24] The current president of YCC50, Mr. Ramesh Maharaj, testified that no other opinion beyond that given by Horlick Levitt Di Lella LLP has been provided to the Board. He also testified that a draft policy for the camera installation had been provided to the Board in March, 2021 but it had not yet been approved.
- [25] It is not reasonable to expect YCC50 to produce records of advice it did not receive. I accept Mr. Maharaj's testimony that there was no advice given beyond that contained in the letter from the law firm. Mr. Russell requested records of the advice received and he has obtained that record.

Record Request 4.02 - Board's meeting minutes held within the past 12 months

- [26] On March 29, 2021 Mr. Russell made a fourth Request for Records. This request repeated elements of some of his earlier requests but was more specific. Mr. Russell contends that he was provided with inadequate records for some of the records he requested.
- [27] Mr. Russell submits that the minutes he was provided with are inadequate. His testimony is that he was not provided with minutes from all meetings. He testified that he had seen draft minutes of a November 19, 2020 Board meeting but no minutes from this meeting were included in the records he initially received, despite the fact that minutes of a December 17, 2020 meeting, which were provided, had approved minutes of a November 19th meeting. The provided minutes did not include a special June 6, 2020 meeting, which was referred to in the July 23, 2020 minutes which were provided. He received the June 6th meeting minutes in February, 2021 in response to a different records request. Mr. Russell noted that the approved minutes from an October 29, 2020 meeting differed

substantially from the draft minutes posted on a notice board earlier and that no explanation had been provided.

- [28] Mr. Russell introduced testimony from two of his fellow owners. These witnesses testified that they were denied access to special or in-camera meetings in response to record requests they made in 2021. One of these witnesses testified that when she questioned YCC50 about why these minutes were missing, she was told that Board meetings were not held during these months.
- [29] In cross-examination, Ms. Gikondi explained that “standard” minutes concern general business and contain no mention of homeowners, board members and no discussion of sensitive matters. In-camera meetings, she testified, “is all the rest that is not open to the public. In-camera is not kept in the minute book because owners are not entitled to see them.” She testified that if there was a mention of a unit, that could be easily blacked out but if the minutes contained sensitive matters that could not be easily blacked out, then it went into the in-camera folder and a legal opinion was needed before these minutes could be released.
- [30] Mr. Maharaj testified that the minutes of the November 19, 2020 meeting were withheld from Mr. Russell in error but that apart from those minutes, he has received all the records to which he is entitled and which exist.
- [31] YCC50’s position on what they call in-camera or special meeting minutes is incorrect. It is at odds with the “open book” philosophy set out in the *McKay* case. The Tribunal had the opportunity to consider the status of in-camera meetings in the case of *Robinson v. Durham Condominium Corporation No. 139*, 2021 ONCAT 81 (CanLII). The Tribunal in that case noted that the Act makes no mention of in-camera meetings. The Tribunal quoted with approval from the submission of a party to the proceedings, “such a label is not recognized in the Act and certainly does not clothe these minutes with a veil of invisibility to owners”. Keeping these minutes segregated from what YCC50 called standard minutes is not a best practice. Ms. Gikondi testified in cross-examination that in-camera meetings were kept separate so that owners who came into the office asking to see the minutes would not have access to them. Her concern is that these minutes should not be disclosed without a legal opinion. There is no excuse not to disclose the existence of these meetings. Denying owners the ability to examine or obtain copies of these minutes, in the absence of any statutory exemption for them, is a breach of subsection 55(3) and would constitute a withholding of records without reasonable excuse under subsection 55(8).
- [32] YCC50 also provided testimony to the effect that they did not provide Mr. Russell with the June 6, 2020 minutes of the special meeting in response to his March 29,

2021 Request for Records because they had already provided him with those minutes in a follow-up disclosure made to him in February, 2021. A better response, given the piecemeal way in which YCC50 provided records to Mr. Russell, would have been to list the June 6, 2020 minutes as one of the records that existed and to advise Mr. Russell that these minutes were not being provided because they had already been given.

- [33] Mr. Russell provided copies of minutes of in-camera meetings that he received on April 29, 2021. These include the minutes of the in-camera meetings held on January 21 and 28, 2021 and March 6, 2021. These minutes contained block redactions of the substance of the meetings. Subsection 13.8 (1)(b) of the Regulation requires that, when a record is redacted, a statement explaining the reason for each redaction is to be provided, together with a reference to the statutory reason relied on for the redaction. YCC50 did not do this.
- [34] Mr. Russell became concerned not only that YCC50 was keeping inadequate minutes of its Board meetings but also that Ms. Gikondi was maintaining a separate set of corporate minutes and that she was writing some minutes in response to Mr. Russell's request for records. He bases this primarily on his reading of metadata taken from the records of a Microsoft Word application that shows some documents appearing on Ms. Gikondi's work personal computer or on a work computer to which she had access. It cannot be shown, based on the metadata, when the minutes were first recorded or whether Ms. Gikondi wrote them herself or wrote them with an improper purpose. However, the conditions for such suspicions have been fostered by the record keeping practices of YCC50. Prior to 2021, it appears that YCC50 did not sign its board minutes. As a result, there is no easy way to distinguish between draft and approved minutes. Ms. Gikondi acknowledges that YCC50 kept separate records of its in-camera meetings. YCC50 was not only not providing these in-camera meetings to owners but, in its dealings with at least one owner, it denied that the meetings took place.
- [35] One of the extraordinary examples of YCC50's record keeping was what are labelled as draft minutes of an in-camera meeting held on July 23, 2020. I was provided with three versions of these minutes. Two versions were provided by Mr. Russell. One was posted in a hallway glass case for all owners to read.⁴ The second version was apparently provided to Mr. Russell by YCC50 and differed in

⁴ Exhibit 25

substance from the draft minutes which had been posted.⁵ Neither of these versions are signed. The third version was provided by YCC50⁶ at this hearing and differed in form and substance from the other two. This third set of draft minutes appear to be signed or initialled by four unidentified people. The third set of minutes is shorter and introduces an explanation of some discrepancies in an earlier meeting, which is not contained in the other two versions. It does not appear that any version of the draft minutes was approved in its entirety at subsequent meetings. The opportunities for confusion and suspicion are obvious.

[36] In the case of *Yeung v. Metropolitan Toronto Condominium Corporation No. 1136*, 2020 ONCAT 33, the Tribunal found, at paragraph 17:

I conclude that amongst the records of a condominium corporation, the minutes of board meetings have a special place and purpose in helping to ensure that “the affairs and dealings of the corporation and its board of directors are an open book to ... the unit owners,” and in helping owners protect their “unique interest in how the corporation is managed.” Considering all these points and principles, it seems reasonable that, in the case of minutes of board meetings in particular, a reasonably high standard and expectation for accuracy should be applied.

[37] YCC50 has fallen short of this standard, particularly with regard to its handling of what it calls in-camera and special Board meetings. There are also practices in the minute keeping that give rise to confusion and the possibility of error. Before January 2021, Board minutes were not signed. Since then, the minutes are signed but the minutes no longer record which Board members were in attendance. The minutes appear only to list the Board members. It is not obvious whether a quorum of Board members is present at any meeting. Best practices include both indicating who is in attendance at a meeting and signing and dating the minutes.

[38] While I find no persuasive evidence of an improper intent in its record keeping, there are examples of poor practices in the keeping of the minutes of the Board as noted above. Moreover, there are repeated instances of YCC50 showing a startling lack of knowledge about its obligations to provide records to its owners. Examples include: YCC50’s position that owners were not entitled to non-core records; Ms. Gikondi’s position that owners were not entitled to the minutes of in-camera or special Board meetings, and the practice of block redactions without

⁵ Exhibits 25 & 26.

⁶ Exhibit 49.

explanation. While YCC50 did eventually provide most or all of the requested records to Mr. Russell, an owner should not have to bring an application to the Tribunal in order to obtain the records that owner is entitled to receive.

- [39] Of equal concern is YCC50's position regarding these practices. YCC50 acknowledges that unspecified errors were made but it does not accept responsibility for them. Ms. Gikondi testified in cross-examination that it is not the role of the Board but of the management office to keep the minutes and to respond to requests for records. Ms. Gikondi also declined to say what steps, if any, YCC50 had taken to improve its record keeping practices, in particular the keeping of the minutes of Board meetings. Mr. Marahaj likewise declined the opportunity to say what steps YCC50 had taken to address the unspecified errors in its record keeping and, like Ms. Gikondi, blamed the previous management company for these mistakes. I note, however, that some of the problems with providing records to Mr. Russell persisted under the new management company. Moreover, while the Board may delegate the responsibilities for record keeping and record provision, it cannot abrogate its responsibility to take and maintain adequate minutes of Board meetings. The prescribed response form for records requests is titled "Board Response to Records Request". It is the Board which is ultimately responsible for ensuring that owners receive the records they are entitled to request and receive.
- [40] While there were some irregularities in the minute keeping, both before and after January, 2021, the main problem in this case lies with YCC50's failure to meet its obligations to provide its minutes to its owners on request. The practice of keeping in-camera and special meetings hidden from owners might be considered a single error that can easily be corrected. However, I am troubled by YCC50's attitude that errors are the responsibility of the previous management company. I am also concerned that YCC50 refuses to specify what steps it is taking to avoid these errors in the future. This attitude can provide little comfort that the record keeping at YCC50 will improve materially. In the result, I cannot determine with certainty that, even now, Mr. Russell has received all of the minutes of board meetings he requested.
- [41] If the Board intends to persist in the practice of keeping a separate set of minutes for those things it believes should be subject to redaction before being provided to unit owners, it must understand that it still has to provide the records. It cannot hide the fact of their existence from owners. It cannot simply not provide them. It must provide owners who request minutes with all the minutes of all the Board's meetings with appropriate redactions made and explained.

[42] I will order YCC50 to disclose to Mr. Russell copies of all in-camera or special meetings held in the 12 months prior to his request and to explain any redactions in accordance with subsection 13.8(1)(b) of the Regulation. I will also direct YCC50 to develop and implement a process that permits owners who request the Board's minutes to have access to all of those minutes in accordance with the Act and the Regulations. Given the secrecy that has surrounded the keeping of the Board minutes, I will direct YCC50 to publish its new process to the unit owners. I also encourage YCC50 to better understand its obligations to both maintain adequate records and to provide them to owners in accordance with the Act and Regulations.

Record Request 4.03 - All agreements with Rutherford & Mathews for legal or other professional services including signed minutes of relevant board meetings to confirm that the business was transacted by a quorum of the board

[43] Mr. Russell made the above request for agreements with Rutherford & Mathews, a law firm. In its Response of April 29th, YCC50 referred Mr. Russell to the minutes of its January 28, 2021 meeting.⁷ These minutes appear to have a quorum and were signed and dated by two directors. The minutes contain a resolution requesting Rutherford & Mathews to prepare a draft privacy policy and contain an action item to make this request. This is an adequate record of the retainer.

Record Request 4.04 - All agreements with Wilson Blanchard for condominium management or other professional services, including signed minutes of relevant board meetings to confirm that this business was transacted by a quorum of the board

[44] Mr. Russell requested agreements with Wilson Blanchard Management Inc. ("Wilson Blanchard"), the current condominium management firm used by YCC50. In its April 29, 2021 Board Response, YCC50 refers Mr. Russell to the minutes of its February 27, 2021 meeting. In fact, these appear to be included in the minutes of a February 13th meeting but the minutes do include a summary of an interview with Wilson Blanchard about the scope of its services and a resolution of the Board to offer Wilson Blanchard the contract on February 27th. The minutes are not signed. They were not approved in the next Board meeting, which apparently took place on March 6, 2021. It is, therefore, impossible to determine if these are draft minutes or approved minutes. However, there are separate minutes from an in-camera Board meeting which also took place on March 6, 2021. While these

⁷ Exhibit 61.

minutes contain block redactions, there is one resolution which is not redacted. It summarizes the bidding process for the management company's services and resolves to retain Wilson Blanchard with a commencement date specified. YCC50 also provided Mr. Russell with a copy of the agreement it entered into with Wilson Blanchard. I conclude that the March 6, 2021 minutes combined with the agreement constitute an adequate record.

Record Request 4.07 - Privacy Policy for CCTV camera videos recorded by the corporation, including all legal opinions from all law firms received or considered by the board relating to installation or compliance with Private Security and Investigative Services Act, 2005

[45] Mr. Russell requested the privacy policy that had been provided for the cameras. YCC50's position is that at present, all the Board has is a draft privacy policy which they have not yet adopted at a board meeting. Therefore, they assert that this is not yet a record of YCC50. I agree. Draft policies are not yet adopted policies of a condominium corporation and therefore are generally not yet records. It is not simply a question of timing. The draft privacy policy in this case may never be adopted by YCC50 or it may be significantly amended. This is not a record and that is a sufficient explanation for not providing it.

Record Request 4.09 Draft minutes for all board or owner meetings with quorum held in the last 12 months that have not yet been formally approved to become records of the corporation, but that serve as de facto interim records due to unnecessary delay of approval

[46] In the case of *Lagan v. Carleton Condominium Corporation No. 331*, 20 ONCAT 30, the Tribunal held that draft minutes are not records of a condominium corporation and need not be disclosed to owners. The reasoning is similar to that in the case of draft policies. There is no way of knowing if the draft minutes will be subsequently approved or if they will be materially amended.

[47] Mr. Russell argues that the minutes of owners' meetings in particular are often not approved until the next year's annual general meeting and that therefore, the draft minutes should be made available. Approval of minutes often does not occur until the next meeting. This general practice, while not ideal, is not an unusual delay. Mr. Russell characterizes this as an "unnecessary" delay but given that only the owners can approve the minutes of the prior meeting, it is hard to see how draft owners' meetings can be approved earlier. I find no undue delay in the approval of the board meetings.

[48] I conclude that these are not records and there is a reasonable explanation for not

providing them.

Were Records 4.01, 4.05, 4.06, 4.08 and 4.10 provided late?

- [49] Mr. Russell made his fourth Request for Records on March 29, 2021. YCC50's prescribed response form is undated but Mr. Russell produced a covering email from YCC50 dated April 29th.⁸ The question is whether this response was made within the prescribed time of 30 days. Under subsection 89(3) of the *Legislation Act, 2006*, c. 21, Sched. F, the passage of time between two days is computed by excluding the first date and including the second. By this calculation, the number of days between March 29th and April 29th is 31, or one day over the prescribed 30-day response period. While this might seem a minor matter, it is part of a pattern.
- [50] Mr. Russell contends that the other Requests for Records he made were not responded to in a timely way. I agree. The Board Responses to three of four of Mr. Russell's records requests were delivered late and, in the case of his third record request, he still has not received a formal Board Response. Some minutes were not provided until months after the request and some in-camera minutes were not provided until this application was brought. YCC50 persistently replied to Mr. Russell's records requests by e-mail rather than on the prescribed form. Other documents, such as the Lash Condo Law agreement, were also provided outside the regulatory time frames. These are not merely technical failures. The Regulation sets out prescribed forms and these must be delivered in accordance with the schedule set out in the Regulation. The purpose of these deadlines is to assist owners in obtaining the records to which they are entitled in a timely way. The persistent failure to meet these requirements is another source of concern about YCC50's record keeping practices.

What remedies flow from these findings?

- [51] Mr. Russell has requested a range of remedies, focussed on having YCC50 acknowledge the inadequacies in its keeping of Board minutes. I prefer to take a more remedial approach. As noted above, I will direct YCC50 to provide Mr. Russell with any in-camera or special meeting minutes for the 12 months proceeding March 29, 2021 not already provided to him. I will also direct YCC50 to comply with subsection 13(1)(b) of the Regulation with respect to any redactions contained in these minutes. Further I will direct YCC50 to develop and implement a procedure to provide those making records requests with information about the

⁸ Exhibit 51.

existence of in-camera and special meetings. This should include a process whereby YCC50 management will respond in the time set out in the Regulation and will provide access to in-camera or special meetings with any redactions being explained in compliance with the Regulation. I believe this order will address Mr. Russell's principal concerns.

- [52] I believe that encouraging YCC50 to understand its record keeping requirements should avoid the irregular practices that have been followed in the past. YCC50 pointed out that it posted some draft minutes publicly in the spirit of transparency and that Mr. Russell was concerned that the minutes provided to him differed from those posted. I would suggest that YCC50 now include a statement in these postings that the draft minutes may be changed before becoming finalized.

What costs or penalties are appropriate?

- [53] This application should never have been necessary. There was nothing particularly technical about the records Mr. Russell was requesting and eventually, he was provided with most or all of them. However, he was obliged to make numerous records requests and to bring this application to receive them. In the process, he exposed a considerable lack of knowledge on the part of the YCC50 Board about its obligations to both keep adequate records and to provide owners with copies of records. In particular, Mr. Russell exposed some poor practices on the part of YCC50 in keeping minutes of its Board meetings and exposed a serious misunderstanding on the part of YCC50 about its obligation to disclose to owners requesting records the existence of minutes of in-camera and special meetings of the board.
- [54] Mr. Russell is entitled to his costs of bringing this application in the amount of \$200.
- [55] Mr. Russell also requests the maximum penalty be awarded in this case. Section 1.44(6) of the Act provides that the Tribunal may order a penalty if it finds that the condominium corporation has, without reasonable excuse, refused to permit an owner to examine or obtain records. In this case, Mr. Russell did not receive all the records he requested in the timeframe set out in the Regulation. Moreover, some of the reasons he was initially denied records, including that YCC50 had no obligation to provide him with non-core records or minutes of in-camera or special board meetings, were wrong in law. When eventually provided, the in-camera meetings contained block redactions with no explanations, in contravention of the Regulation. What is particularly concerning is that these were not defensible positions. It is clearly set out in the Regulation that non-core records are to be provided to owners in the absence of a statutory exemption. The Regulation also

clearly sets out what is required when minutes are redacted. While the situation regarding in-camera meetings is not prescribed in the statute, any practice that includes misleading owners as to whether there has been a Board meeting or not ought to raise concerns within the Board about whether the practice is proper. Mr. Russell was repeatedly denied records to which he was entitled without reasonable excuse. The fact that he persisted and eventually obtained the records does not remedy the initial conduct of YCC50.

[56] Penalties serve a variety of purposes. They may serve as a specific deterrent by sanctioning unacceptable conduct. Penalties may also serve as a general deterrent by communicating to a class of interested people and organizations within the condominium community that such conduct is to be avoided. In all the circumstances of this case, I conclude that a penalty of \$1,000 is appropriate and I will direct YCC50 to pay it to Mr. Russell within 30 days of this decision.

C. ORDER

[57] The Tribunal Orders that:

1. Within 30 days from the date of this Order, YCC50 will provide Mr. Russell with any minutes of in-camera or special meetings for the 12 months preceding March 29, 2021 not already provided to him. If there were no such meetings, YCC50 will provide Mr. Russell with a statement to this effect.
2. Within 30 days from the date of this Order, YCC50 will comply with subsection 13(1)(b) of the Regulation with respect to any record provided to Mr. Russell that contains redactions.
3. Within 60 days from the date of this Order YCC50 will develop and implement a transparent procedure for providing access to minutes of in-camera or special meetings of the Board to anyone who is entitled to and who requests such access under the Act and the Regulation. This process will address how YCC50 will disclose the existence of these meetings and how YCC50 will deal with redactions. The process will be published to YCC50 unit owners, whether by posting in a public place or otherwise.
4. Within 30 days from the date of this Order, YCC50 will pay Mr. Russell his filing fee costs in the amount of \$200.
5. Within 30 days from the date of this Order, YCC50 will pay a penalty in the amount of \$1,000 to Mr. Russell.

6. To ensure that Mr. Russell does not have to pay any portion of the cost and penalty awards in this Order, he shall be given a credit toward the balance of any common expenses that may be attributable to his unit, if any, in the amount equivalent to his proportionate share of the cost and penalty awarded.

Laurie Sanford
Member, Condominium Authority Tribunal

Released on: November 4, 2021