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YSP Podcast Transcript: Episode 030. How Private Are Owner's Personal Details
When It Comes to Strata Books and Records?

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Amanda Farmer: Hello and welcome. I'm Amanda Farmer and this is Your Strata Property.

Today, I am asking the question: how private are owners personal details when it comes to strata books and records? Now, this question crops up very regularly in my day to day practice as a strata lawyer here in New South Wales and there are 3 misconceptions or myths about this issue that I want to take the time today to debunk for you.

Quick summary of those 3 myths and then we'll get stuck into the detail. Firstly, a number of owners out there, and some strata managers and committee members believe that other owners in your building are simply not allowed to access your personal information, such as your email address or your mailing address, even though that information is included on the strata records.

The second myth is that privacy laws protect your personal information. So far as it is contained on strata records and the third myth is that when legal proceedings are on foot, all documents relating to those proceedings are privileged and can be withheld from the owners corporations' books and records.

Now I want to clear up those misconceptions and debunk those myths. I am going to be talking about laws that are specific to New South Wales. I don't have the expertise to comment on other jurisdictions but certainly if you are interested in this topic and you are not residing in or managing buildings in New South Wales, let me know and I can put you in touch with the experts in the relevant jurisdiction so that you can have your specific question answered.

Okay. Let's answer the question: how private are owners' personal details when it comes to strata books and records? Now, in New South Wales, an owner or a person authorised by an owner can inspect the books and records of the owners corporation upon request. That request is usually made to your strata manager if you have one and the strata manager, upon receiving the request, will arrange a suitable date and time for the person who's made the request to come in and go through the owners corporation's records.

Now, this is all set out in Section 108 of the Strata Schemes Management Act 1996 – that's our current Act of course, due for replacement on the 30th of November 2016 -, and the replacement section is 182 in the Strata Schemes Management Act 2015 and on my reading that is substantially the same as the current section 108.

So Section 108 sets out what needs to be provided when an owner or an owner's representative makes a request to inspect the records, and basically it's everything: it's every document, every piece of communication withheld electronically or in hard copy on behalf of the owners corporation and to do with the owners corporations' functions and specifically – and I want make this really clear – it includes the strata roll, so it includes that document that records all of the contact details for each lot owner and those details usually include the owner's name, their mailing address, often includes their email address and their phone number.

Now I regularly come across committee members and strata managers who take the view that the entire strata roll does not need to be provided to a lot owner or their representative inspecting the records, and I want to be very clear today that that view is incorrect. The strata roll certainly does need to be provided, it needs to be provided in full, and this is something that has actually been confirmed by the tribunal here in New South Wales.

There's a case called Legge – I'll put a link to that in the show notes – and that is a case determined by the tribunal when it was known as the Consumer Trader and Tenancy Tribunal back in 2013, and in that case the member who heard the case and made the decision found that the owners corporation had wrongfully failed to make the strata roll available for an inspection by the lot owner applicants.



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The member found that the applicants were entitled under Section 108 to access that record and the member ordered the owners corporation to supply a copy of the strata roll to the applicant lot owner and that strata roll included addresses for service of notices on all lot owners in the building and their personal contact details, such as email addresses. So that's a short decision, it's a quick read, I'll put a link in the show notes as I said and you can check that one out, but it is a case that I regularly refer to when I'm asked that question by managers or owners: should the entire strata role be provided? I always advise: yes.

Now, what about privacy laws? The 2nd myth or misconception that comes up regularly, yes we do have privacy laws in Australia, from about 2014 they have been National Privacy Laws and they take the form of the 13 Australian Privacy Principles, and these principles regulate the handling of personal information by government agencies and private sector organisations, which specifically have an annual turnover of 3 million dollars or more.

So, yes the Australian Privacy Principles will generally apply to strata management companies, assuming that they have that level of annual turnover, and this was an argument that was raised in the Legge case that I've just referred to. In that case, the owners corporation said "well, we've got these National Privacy Principles, if we're providing the addresses of lot owners by way of providing this strata roll, aren't we breaching the National Privacy Principles?"

Well the tribunal member in that case said that argument was misconceived and she said it was misconceived for 3 reasons:

Firstly, the strata role requires an address for service of notices to be recorded and the member was not satisfied that an address for service of notices fell within the definition of 'personal information' – that's the term used in the privacy principles -, she didn't think that an address for service of notices was personal information as that term is defined in the privacy principles. Okay, so that was her first reason.

Secondly, she said that even if an address for service of notices is personal information within the meaning of those privacy principles, part of the primary purpose of collecting lot owners addresses and including them on the strata roll is so that they can be contacted, and she specifically said so that they can be contacted by other lot owners, which I suppose is one point of view, some might say so they can be contacted by the strata managing agent or whoever it is that's managing the owners corporation, but she said even if I'm wrong and an address for service of notices is personal information within the meaning of the privacy principles, because the primary purpose of collecting that information and including it on the strata role is so that other owners can contact other owners, then that primary purpose should be facilitated.

And her third reason for finding that argument about privacy laws was misconceived on the part of the owners corporation, was that disclosure of the information on the strata roll is required by the Strata Schemes Management Act and one of the exceptions to disclosure in the privacy laws is that the disclosure is required under another law. So even if the privacy law does apply to this information, the information is required to be disclosed under another law being the Strata Schemes Management Act.

So, for those 3 reasons, the member found that the privacy laws were not going to enable an owners corporation to withhold the strata roll and she certainly made an Order that that information be provided in the case of the request made in that situation.

Alright, so our 3rd myth or misconception: what about documents that are the subject of legal professional privilege? Now, broadly speaking, legal professional privilege can be claimed over confidential communications and documents that are made for the dominant purpose of (a) giving or receiving legal advice or (b) use in existing or anticipated litigation. So what in the world does that mean? Well I say where an owners corporation is engaged in a legal dispute or a legal proceeding with a lot owner, then generally an owners corporation can claim legal professional privilege in relation to documents that the owners corporation's lawyer has prepared, which contain legal advice about that dispute.

When those documents are privileged, then they can be withheld from the owners corporation's books and records, and I always suggest that they are put in a separate file marked 'legal professional privilege', and set aside so that they are not mistakenly provided to an owner or their representative who is conducting an inspection.



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Now bear in mind that the privilege only exists where it is the owner that you're having a dispute with who is inspecting the records. So let me flesh that out a bit: if you're having a dispute with the owner of lot 2 in relation to unpaid levies and you have engaged a lawyer to provide advice in respect to that dispute and that lawyer has given you a letter saying these are all the reasons why you can and should prosecute this person for their unpaid levies, if the owner of the lot 2 makes an appointment to go and inspect the records, then the owner of the lot 2 is not entitled to see that advice, that advice is privileged.

If the owner of the lot 4 who has nothing to do with this dispute and is otherwise simply an interested owner who is wondering what's on the books and records, if that owner makes an appointment to inspect the records, the letter from the lawyer about the dispute with lot 2 is not privileged with respect to lot 4's inspection. Lot 4 can see that letter. Why? Because they are not the other party to the dispute. Lot 2 is the other party, so the privilege does not arise with respect to lot 4's inspection. That's a really fine point to be aware of and it's where I see a number of strata managers and owners experiencing some confusion and mistakenly not providing documents and communications that should otherwise be provided under a request to inspect.

Now there is a case here in New South Wales, it's a Court of Appeal case that's relevant to this question of what happens when documents are privileged and which documents are privileged, and that's the Eastmark Case. It's a 2013 Court of Appeals case – I'll put a link to that one as well into the show notes under this episode – and in that case the Court of Appeal confirmed that Sections 108 doesn't remove an owners corporation's right to claim privilege over documents that form part of its books and records, and the owners corporation can indeed withhold those records from inspection by certain lot owners and, confirming the point that I just made a moment ago, those circumstances where records should be removed are circumstances where an owners corporation and a lot owner are adversaries, so the Court of Appeal has found that that is certainly allowed.

Now be aware that where documents are mistakenly made available, legal professional privilege may be lost, we call that 'waived', a 'waiver' of privilege, and if a lot owner who is an adversary of an owners corporation comes into position of privileged documents, they may be entitled to rely on those documents in litigation, rely on them to their advantage, because the privilege has been lost or waived, so it's really important where you as a strata manager or a committee member, if you're not sure about what should or shouldn't be provided when an owner makes a request to inspect, seek some advice. Get some advice from the lawyer who might be assisting you in the particular case if there are legal proceedings on foot, and that lawyer will be able to tell you which documents to withhold and which to leave within the records.

Okay, so let me give you a summary of what we've just had a chat about. Firstly, lot owners and their authorised representative are entitled to inspect the records of their owners corporation pursuant to Section 108 of the Strata Schemes Management Act. That is the current Act and the new section in the new Act due to commence on the 30th of November is Section 182.

Secondly, these records will usually – if they're kept in accordance with the requirements of the Act – contain personal contacts of lot owners including email addresses, phone numbers, mailing addresses. These personal details are usually included in the strata roll and the strata roll in full certainly needs to be provided to a lot owner who is inspecting the records.

Thirdly, National Privacy Laws do not protect this information and fourthly, where the lot owner is an adversary of the owners corporation in legal proceedings, then the owners corporation will generally be entitled to claim legal professional privilege over confidential communications and documents which relate to the dispute, and of course where privilege is claimed, the documents can be removed from the file and shouldn't be provided to a lot owner inspecting, and the specific test is whether the specific communications and documents have been made for the dominant purpose of giving or receiving legal advice. If you aren't sure whether the documents meet that test, please consult the lawyer who is assisting you in legal proceedings or if those proceedings have finished then certainly go back to the lawyer who created the document and let that person know who has requested to inspect the records and whether or not the information you're concerned about is privileged.

Well I hope that assists in clearing up some misconceptions around that common question of owner's personal details when it comes to inspections of strata books and records, and please feel free to share this information with your colleagues if you're a strata manager, your fellow committee members or lot owners. I firmly believe the more educated we all are in respect to these issues, the better our communities will be. Thanks for listening, catch you next time.

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