

Publication Date: 21 January 2020

YSP Podcast Transcript: Episode 196. When is it ok withhold documents from inspection?

Listen to this podcast episode [here](#).

Intro: Welcome to Your Strata Property. The podcast for property owners looking for reliable, accurate, and bite-sized information from an experienced and authoritative source. To access previous episodes and useful strata tips, go to www.yourstrataproperty.com.au.

Amanda Farmer: Hello, and welcome to this week's episode of the Your Strata Property podcast. I am your host, Amanda Farmer and it is my job each week to help demystify the legal complexities of apartment living. Sometimes I do that with a guest on the show, an expert in their field helping us to understand this crazy world that is apartment living. Sometimes I do that with a co-host, Reena Van Aalst, strata manager, extraordinaire, often joins me and sometimes I fly solo. And this week I have a solo episode for you. It's great to be here and the topic that I want to get stuck into today relates to the concept of legal professional privilege and what happens when the owners corporation has, within its books and records, documents material that is the subject of legal professional privilege. Access to records and inspecting records of an owners corporation is something that we talk about a fair bit on the podcast.

I generally say it's my pet issue, if you like. There seems to be, in my experience, a distinct lack of understanding in our sector when it comes to what it is that owners and their representatives are entitled to inspect within the books and records of their owners corporation. And too often, I think, I hear about strata managing agents and secretaries refusing to allow access to certain records, even though owners are entitled to see them, to access them and to use the information that's contained within them. But this week I'm getting a little bit more specific because it is a question that I've been asked numerous times by listeners emailing me. It's also a topic that gets discussed inside our members forum quite regularly. Questions around what is legal privilege and what happens when we have privileged documents within our records and we have a lot owner who wants to inspect those records.

Can we, should we, be removing those records from inspection? Is there a general rule that they should be removed? The strata manager does not need to make them available for inspection? And if there is no general rule, in what circumstances can they be removed, in what circumstances do they need to be made available? That's what I want to get stuck into today. We have talked about the topic very briefly, back in Episode 143. Reena and I were answering a listener question about how to identify privileged documents within strata books and records. I put a link to that episode in the show notes under this episode and, of course, all of our episodes available over at yourstrataproperty.com.au/podcasts together with the transcripts. But other than that brief mention, it's not something that I have devoted an episode to, the concept of legal professional privilege. So here it is. A little bit overdue.

First of all, a definition, what is legal professional privilege and when can it be claimed over confidential communications and documents? Now, the high level definition that I want to give you is that broadly speaking, legal professional privilege can be claimed over documents that are created for the dominant purpose of giving or receiving legal advice or documents that are created for use in existing or in anticipated litigation. So, some examples of documents or communications that might fall into those categories. Certainly legal advice, written legal advice, whether that's a letter or an email, even a file note recording a telephone conversation in which a lawyer engaged, by the owners corporation gave the owners corporation legal advice. Draft experts reports may be privileged if they are reports that are prepared for use in litigation or anticipated litigation. You may have instructed an expert to prepare a report and that report has taken a few different forms.

It's been marked draft along the way and it is only the final version that you are going to send to your opponent. Then, those drafts may be subject to privilege. An instruction that is prepared for your lawyer. A brief, if you like, setting out the issues, the facts according to the owners corporation, a history of what's happened, attaching relevant material, explaining the situation to the lawyer. That is a document that is made for the dominant purpose of receiving legal advice and that is a document that would be subject to legal professional privilege. What about cost agreements that are issued by lawyers? What about invoices? Bills that lawyers send you? What about court documents? The official Statement of Claim, the official orders issued by the court or the tribunal? Are those documents privileged? Well, if we apply our test, are they made for the dominant purpose of giving or receiving legal advice?



Publication Date: 21 January 2020

YSP Podcast Transcript: Episode 196. When is it ok withhold documents from inspection?

Amanda Farmer: In my view, no, they're not. And they generally don't contain any legal advice. It's a question that comes up quite often. I have clients ask me this question when an opponent lot owner asks, for example, to see a bill that's been issued by myself or by another lawyer or see a cost agreement, I'm asked whether that document is subject to privilege and can be withheld and I'm generally advising, "No", the documents should be made available even if the lot owner is an opponent. Now, this leads us to the question, "In what different circumstances can privilege be claimed and documents withheld?" Now it's not every time that any lot owner makes an application and attends to inspect the books and records of an owners corporation, that privileged documents can or should be withheld from the file. It is only when the lot owner with whom the owners corporation is involved in litigation, only when that person wants to inspect the records that the question of privilege over the documents relevant to that same litigation, should be asked.

For example, the owners corporation has commenced tribunal proceedings against the owner of lot 4 because that person has carried out a renovation without approval. The owners corporation has obtained some legal advice from a lawyer. That advice has been provided in writing. And the owner of lot 4 makes an appointment to inspect the books and records. That legal advice about the lot for litigation is privileged as against the lot 4 owner and can be, and indeed should be, withheld from the files and not made available for inspection by the lot 4 owner. However, if the owner of lot 6 for example, wants to know what's going on in that litigation between the owners corporation and lot 4, lot 6 is not an opponent of the owners corporation and the owner of lot 6, or their representative, is certainly entitled to see that legal advice to inspect the records and to see any otherwise privileged communication.

Now that's a really important distinction to be aware of. And all too often, I'm seeing strata managers who say, "These documents are privileged and will not be made available for inspection by anyone." Full stop. End of story. They are not thinking about who is involved in the litigation and whether or not the privilege can be claimed as against everybody rather than just the opponent in the litigation. This issue came up in a 2013 New South Wales Court of Appeals case. It is the case of the owners and strata plan number 74602 and Eastmark Holdings. There were quite a few Eastmark cases around this time. A number of issues hashed out in Supreme Court proceedings in New South Wales involving this particular building. In that case, the section of the act that allows owners to inspect books and records was tested and the owners corporation's opponent in those proceedings was trying to argue that because lot owners are allowed by our Strata Schemes Management Act to inspect records of the owners corporation, then the owners corporation is not allowed to claim legal professional privilege over those documents.

The right to inspect if you like, overrides the right to claim privilege. And the Court of Appeals said, "No, that's not right. We don't agree with you. The section of the Act that permits inspections of records to happen back in 2013 it was Section 108, now in our most recent incarnation of our act, it is Section 182. That section does not revoke or prevent any right on the part of an owners corporation to claim privilege and withhold documents for inspection on that basis where documents include legal advice or relate to the proceedings or prospective proceedings and if they are documents to which privilege would normally attach, then our strata legislation does not displace this important common law right to the protection of legal professional privilege." And so, an owners corporation can, in particular circumstances, withhold records from inspection.

However, the court was very clear in saying how important it is for owners corporations and strata managers to understand when the privilege does not exist and that would include a situation like my earlier example where a lot owner with whom the owners corporation is not involved in litigation, wants to inspect the records.

Now a point that I want to make here is that, if privileged documents are accidentally, inadvertently, mistakenly made available for inspection by someone who the lot owner is actually involved in litigation with, and there are documents that are privileged and should have been withheld, then it is possible that the privilege may be lost and by providing the documents for inspection, the owners corporation may be waiving the privilege and the lot owner may be entitled to use those documents against the owners corporation in litigation. Now that can become disastrous in a situation where, for example, a lawyer may have advised the owners corporation of all the weaknesses in its case and perhaps may have pointed to some of the strengths in the lot owners case or some points that the lot owner may be able to raise against the owners corporation if a lot owner who is an opponent or adversary in proceedings with the owners corporation gets their hands on those documents, the owners corporation is going to find itself in a

YSP Podcast Transcript: Episode 196. When is it ok withhold documents from inspection?

very difficult position indeed.

And if you are the strata manager who has made that mistake, accidentally provided those documents, then you can imagine your owners corporation is going to have some pretty hard questions for you to be answering. So that's one of the reasons why and this issue of legal professional privilege is so important and why it's so important to understand. It really works both ways. It's about allowing lot owners to inspect the records that they are entitled to inspect, particularly records relating to litigation, if they are not the opponents in that litigation and protecting the owners corporation's privilege and making sure it is not accidentally waived to its detriment. Now, the Eastmark case has been mentioned in other jurisdictions as well, and these concepts that I'm talking about are not unique or confined to New South Wales.

There have been cases in Queensland, in Victoria that I have been able to put my hand to that quote, the smart decision and confirm the same principles apply in those jurisdictions. I'm specifically referring to a case from the Queensland Body Corporate Commissioner in March, 2018, Brits Wolf Hamilton, and I will put a link to that case in the show notes for this episode and the Victorian case from VCAT in February, 2015 owners corporation, RP003605 and Chung. I'll give you the link for that one as well for our listeners who are not in New South Wales and I know there are many of you from across the country, even across the world. I'm being contacted by overseas listeners. Special hello to you and even back in New South Wales, a recent tribunal appeal panel case from May, 2019. The owners Strata Plan 2000 and Bylinska the Appeal Panel confirmed those principles set out in the Eastmark Holdings case by our Court of Appeal.

Now I want to give you a few practical tips here. I know so many of you are on the ground dealing with requests from owners to inspect records, managing those records yourselves as secretaries, if not professional strata managers. Is there a way that we can, once we're in litigation, whoever it is that may be involved, keep our records properly in line with the law and in a way that makes dealing with these requests more straightforward? Well, first of all, I always suggest when I get involved in litigation on behalf of an owners corporation, I always say to the strata manager, if that's who I'm working with, that, "I will mark my correspondence, my emails, my letters with the word 'Privileged' in the subject line or at the top of the email, on the front of the letter," if it is in my view, a document that is subject to legal professional privilege.

If your lawyer is not doing that, it's a good idea to ask or perhaps remind them. If they forget, they send you an email containing some advice and if you're not sure you might want to ask, "Hey, is this email privileged? Should I put it in my privileged folder?" Because, that's what I say you should be doing with this material. Keeping it separately so that if, and sometimes this is inevitable in drawn out litigation, if when you get a request from the lot owner who is your opponent in the litigation, you already have all of your privileged materials separated out into a folder that can be marked "Not for inspection," and that might be an electronic folder or a hard copy folder. It's very clear to you, to your staff that it is a folder that contains privileged material and should not be inspected by, of course, the lot owner who is the opponent to the proceedings.

It can, as we've discussed, certainly be inspected by other owners. There is no privilege in relation to those owners. So, it's really important to understand who is inspecting. What lot are they there representing? And if there's no connection to the owners corporations opponent, then there's no basis on which to withhold the records from inspection. If you do get a request from the opponent to inspect the records, whether it's the lot owner directly or their lawyer, and if you do, as an owners corporation, have a lawyer engaged to act for you and advise you in the litigation, it is a very, very good idea to tell that lawyer that the opponent is coming in inspecting records and even invite the lawyer to have a look at the files that are going to be provided before they are provided. Just to check, to double check, that there's no privileged material in them.

It's something that I do reasonably often for clients and it's a little scary how much slips through the cracks even with experienced strata managers who understand this concept. And I think that's because there are a number of people touching a file within a large strata management office. They may not have the internal operating procedures that are necessary to prevent privileged material from floating around amongst the rest of the files and that's something to think about as a practical step for strata managers. What systems procedures do you have in place to deal with this issue for a building that is involved in litigation? By now, some of you may be thinking, "Well, it's all well and good Amanda, that this material is privileged as against the opponent lot

Publication Date: 21 January 2020

YSP Podcast Transcript: Episode 196. When is it ok withhold documents from inspection?

owner. It's not privileged for anybody else. What is stopping the owner of lot 6, with whom we are not in litigation, inspecting the records and then telling the owner of lot 4 all about it, everything that's in those records, the subject of the legal advice?"

Very good question and very difficult issue to manage within an owners corporation. This issue gets even more complex when we are talking about community associations, large complex schemes that have a number of different entities and you're trying to manage hundreds, sometimes thousands of people and to make sure that privileged information does not leak out to the place it shouldn't be. I have attempted to deal with that issue for a particular building in the past where we were concerned that an owner who was not involved in the litigation was inspecting the records for the purpose of passing on information to the owners corporations opponent and what we did in that circumstance was require the owner who was inspecting, to sign a confidentiality agreement.

We had something short drawn up. We were involved in court litigation where we had a barrister assisting us and that person was able to provide a short agreement for us that we asked the inspecting lot owner to sign with no real expectation necessarily that it would need to be or would be enforced down the track by the owners corporation, but simply that act of asking the lot owner to acknowledge the owners corporations concerns, to be aware that they had obligations not to be sharing this information with the owners corporations opponent, and that if they did, there were serious consequences, not just for the owners corporation in the litigation, but for the lot owner personally, if they were to breach that confidentiality agreement.

That is a suggestion for how you might deal with that issue. I would say it would be the minority, significant minority of situations where you may be concerned about that, but it is a good question and something to be alive to. But certainly being educated on this issue, understanding that it is an issue, understanding what privilege is, legal professional privilege when it arises, what it attaches to and when it can be claimed. Understanding that, is going to give you an excellent foundation to be talking to your clients, your buildings about this, if you're a strata manager or talking to your fellow committee members, if you're a committee member or even just an owner who is concerned about compliance within your scheme and concerned to make sure that your committee, that your strata manager is on top of this issue, particularly when you're involved in some hard-fought litigation.

So I hope this episode has provided that foundation for you today. There will be links to all of the sections and the resources, the cases that I've mentioned in the episode over at yourstrataproperty.com.au. I do intend to do a few more solo episodes this year for the podcast on discrete issues. Similar to what you've just heard, and I would love to hear from you. If you'd like me to talk about a particular issue of concern to you, a question, a strata challenge that you have faced, whether you're a manager, a committee member, or resident, let me know if you'd like me to cover it off in a solo episode. I'd love to do that and I'm always looking for ways in which I can continue this mission of demystifying the legal complexities of apartment living for you.

I also want to take this opportunity to remind our members, the members of the Your Strata Property Online Membership Community, you've all received emails from me about YSP Live 2020. This is an opportunity that I've opened to members only this year and it's time for you to get registered for that event. So, members check your inboxes. All details are there for you. If you haven't registered for YSP Live 2020 yet, go ahead and do that.

And if you're not a member and you're wondering what all this membership palaver is all about, you want to get yourself on the wait list for membership. So, the next time I open the doors to the membership, you will be the first and probably the only, because I tend to only open to waitlist these days. The only ones to know that membership is open and you'll find out how you can join us on the inside. That's it from me, this week.

I'm looking forward to hearing your thoughts on this topic, seeing your comments on our social media and under this episode and hearing how you are grappling with the issue of legal professional privilege. Catch you next time.

Outro: Thank you for listening to Your Strata Property, the podcast which consistently delivers to property owners reliable and accurate information about their strata property. You can access all the information below this episode via the show notes at www.yourstrataproperty.com.au. You can also ask questions in the comments section, which Amanda will answer in her upcoming episodes, How Can Amanda Help You Today?



The podcast for property owners looking for reliable, accurate and bite-sized information. from an experienced and authoritative source.