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YSP Podcast Transcript: 380. REPLAY: Successful Strata Records Inspections

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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.

Amanda Farmer: Hello and welcome. I'm your podcast host Amanda Farmer, strata lawyer and guide helping you to navigate the legal complexities of apartment living. This week I'm covering a topic that I am regularly asked about by strata owners, strata managers. And over the years, I have become particularly passionate about this topic. It is strata books and records, in particular, the inspection of those books and records. How does an owner or their authorised representative inspect the books and records of an owners corporation? And what are these books and records that are supposed to be held by our owners corporations and made available for inspection? It is sometimes the subject of some angst among owners who are attempting to find out information from the records, information that they feel they haven't been able to get directly from their strata committee or their strata manager, but owners can often be disappointed when they embark on this process of inspecting books and records.

They either find it difficult to access those records or what they're looking for is not held or not made available to them. It's a topic that I have spoken about previously on the podcast on a few occasions, and I will share the previous podcast episode numbers with you, so you can go and check those out. But I haven't recorded an episode bringing together the New South Wales legislation on strata records, what needs to be held, what owners need to do if they want to inspect those records and what options are available, when things go wrong when records aren't being held properly or access can't be obtained, where does an owner turn?

So today I'm sharing my four steps to successful strata records inspections. Owners in particular are going to get a lot out of this episode, but definitely, there's lots to learn here for those who are keeping records and that's strata managers. We heard last week, Dr. Nicole Johnston on the podcast, letting us know that one of the key roles for a strata manager is indeed the custodian of records. And it's really important to know what it is that you are legally required to keep and indeed how to ensure you're complying with that often-technical legislation that governs the inspection of strata records.

Summarising my four steps before we dive in, number one, I'm going to talk about making the request to inspect. How do we do that? What's the relevant legislation and what are the steps we need to follow to make sure we're making a valid request to inspect books and records? Number two, carrying out the inspection. How should the records be made available? What records should be made available? Number three, I'll address some common misunderstandings when it comes to records inspections. Some of these will be familiar to some of you I'm sure, for example, no email correspondence being produced for inspection, no strata roll being produced, or parts of the strata roll being removed, redacted apparently to protect owner's privacy. And what do we do about privileged material? Material that might be the subject of solicitor-client privilege. There's a few misunderstandings that arise from those three issues. And fourthly, and finally, know your last resort. What do you do when things go wrong? Where do you turn when you can't get access to records? Or what you're looking for is not there.

Now I am going to be referring to New South Wales legislation, the StrataSchemes Management Act 2015, though we do have similar legislation right across our country. And I'm going to mention a couple of New South Wales Tribunal cases as well. Links to all the legislation and the cases in the show notes for this episode, over at yourstrataproperty.com.au/podcasts. You'll see this Episode number 282 in the list, click on through, and you'll see the show notes with the links, including your access to the transcript.

Let's dive in the first step to a successful strata records inspection, making your request. How do we do that properly, and in compliance with the law? Section 182 in our Strata Management Act tells us that an owner or a person authorised by an owner may request the owner's corporation to allow an inspection of its records. This is an exercise that is often or at least should be carried out by purchasers of strata properties, preferably before they sign the contract for their purchase. They are entitled to inspect the records if they are authorised by an owner, the obvious owner to authorise them is indeed the vendor, the person who is selling their property, wanting to sell their property, but other people may be authorised by owners. I am often authorised by my clients to go and inspect records at the office of their strata manager. And that is usually where the records are kept. If you have a strata manager, it is that person that you should be contacting to make your request to inspect the records.

Section 182 tells us that the request must be made by written notice. You have to put your request in writing and you also have to pay a fee. Now, this fee is prescribed in the Strata Schemes Management Regulation. It is currently \$31, that's for the first hour of your inspection with an additional \$16 payable for each half-hour or part of the half-hour after that first hour. You'll find that fee in Schedule 4 to the Strata Management Regulation and that is a fee that is payable to the owners corporation, not a fee payable to the strata manager, a fee payable to the owners corporation for making the records available under Section 182 of the Act.

Now, how and where does this inspection happen? Well, Section 183 tells us that the inspection is to take place at the time and place agreed upon. So that's an agreement between the owner or their representative wanting to make the inspection and the owners corporation or their representative, probably the strata manager. If there is no agreement, then the inspection is to take place at the property at the time and on the date determined by the owners corporation. Now Section 183 goes on to tell us that if there is no agreement on the time and place of the inspection within 3 days of the owners corporation receiving the request, the owners corporation must immediately give the person requesting the inspection a written notice, fixing a specified time between 9:00 AM and 8:00 PM on a specified date that is not later than 10 days after the owners corporation received the inspection request. So, it's up to the owners corporation to set the date and time, complying with those specific requirements. If there is no agreement on the date and time for the inspection.

As for the method of inspection, this is something that has been quite interesting to watch over the last almost 2 years now, as we make the shift to being out of the office and rely so much more heavily on our electronic records. Our legislation does say that you can inspect records in person, through electronic access, or any other means agreed on. Now I'm often asked by frustrated owners whether their strata manager can insist on inspecting records in person at their office because they don't have an electronic system. My answer to that is yes. If that's how the records are kept, they're only kept in hard copy, or there is no ability for an owner to log in to a system remotely and inspect the records, then in-person is the only way the records can be inspected.

If that's something that is a concern or a frustration for many owners in your building, then it might be an idea to consider whether another strata management company, perhaps a little more modern, perhaps more up-to-date with its systems and processes might better serve you in the future. I do feel that management companies that are not keeping up with the times, especially now we know how important it is to be able to work from anywhere, will be seeing their clients vote with their feet and move on to those companies that are embracing all of the benefits available to us with modern technology. So that's the first step to a successful strata records inspection. Get your request, right. Make sure you're meeting those requirements in Section 182. And you are aware of the provisions of Section 183, particularly if you haven't been able to reach agreement on a date, time, and place for your records inspection.

The second step, actually carrying out the inspection. What needs to be made available to you? What should you expect if you are turning up to the strata manager's office in person, or maybe you're clicking that button to log in to the portal. What should you expect to see? My short answer to this question is everything. Section 182 tells us that all records or documents in the custody or under the control of the owners corporation must be made available for inspection. Now you do want to head over and have a look at the list that is in Section 182. It includes the strata roll, the CapitalWorks Fund Plan, the last set of financial statements, every current policy of insurance, a copy of the strata manager's agreement, and the building manager's agreement. But really in my view, the list that you see there in Section 182, and I've told you what some of it contains, is not really necessary because the section does say the owners corporation must produce any record or document in its custody or under its control.

So yes, absolutely, that includes email correspondence that the strata manager may have. And I know strata managers, you have thousands of emails and thousands even for one building in particular. I remember attending a records inspection a couple of years ago, and the hard copy books were plunked on the table for me to have a look at, minute books, and some other selected documents that were printed out for my perusal. And I turned to the strata manager and said, "I'd like to see all of the emails." And the strata manager blinked, looked surprised, and said, "But Amanda, there are thousands of them." And I said, "I bet there are. And I'd like to see them." You are entitled to see the email correspondence that the strata manager is holding. Those are emails in the custody and control of the owners corporation.

Now very interestingly, I think failure to produce any of the records listed in Section 182, which as I've said a few times now includes all records or documents in the custody or under the control of the owners corporation is an offence and breach, exposes the owners corporation to a penalty of up to \$550. There aren't too many penalty provisions like that in our StrataSchemes Management Act. But our legislature has decided that this should be one of them, owners corporations and their strata managers should be taking these obligations very seriously. Now, I always make sure particularly if I am attending a records inspection in person that I take with me the list that is in Section 182, to remind me of the types of documents I should be making sure are held within the owners corporation's records. Use it as a bit of a tick list, if you like.

If you want to take copies of any of the documents, Section 183 also tells us that you are entitled to make a copy of the document, but must not without the consent of the owners corporation remove the document. I do find that most in-person inspections that I carry out these days, there is absolutely no objection to me taking photos of documents with my iPhone, very handy. And certainly, when you are inspecting through an online portal, it is, or at least should be quite easy to download documents and save them to your own computer. Having said that I do hear from owners from time to time that they are not given the ability or the facility to be able to make copies. That is a breach of Section 183. As long as the person inspecting is not removing the document from the custody of the owners corporation, they are entitled to make copies of the document.

Step three of our 4 steps to successful strata records inspections, being aware of some common misunderstandings and better yet, knowing how to address those. I've already mentioned one of the common misunderstandings or sources of frustration for those of us inspecting records. And that is the lack of production of email communications. This is often where the real story is as to what's going on in our buildings. Potential purchasers are going to discover from the email communications what's happening right now at the building. Perhaps what the level of harmony is like, you can gain real insight into a community from up-to-date emails, and there is no legal basis for those being withheld from you, especially if you are a potential purchaser. I'll speak in a minute about the one legal basis upon which communications may be withheld.

Another common misunderstanding is that the strata manager or the custodian of the records is entitled to remove the strata roll from the books so that you can't see in particular, the personal contact details of owners or their agents. The strata roll definitely must be made available for your inspection and it should not be amended, redacted, changed in any way. I'm often given strata rolls with all email addresses removed from the roll. And I have to go back to the strata manager and explain that they have not given me a complete strata roll. If an owner has provided an email address, which many, if not most owners do these days, then that email address goes on the strata roll and you are entitled to inspect the whole strata roll. There is no reason why the strata roll or any part of it should be removed or redacted. I know strata managers are often telling owners that contact details are removed from the strata roll for privacy reasons, privacy law, privacy legislation is often cited.

We actually have Case Law in New South Wales confirming that any reference to Privacy Law or the National Privacy Principles is misconceived and that is not a reason to withhold records, in particular, to withhold a strata roll. The case I'm referring to is, Legge or perhaps it's Legge, L-E-G-G-E, and Network StrataServices. It's an oldie, but a goodie. I wheel it out quite regularly, 2013 case. What was then the New South Wales CTTT now NCAT. A link to that one for you in the show notes. The Tribunal member in that case very clearly dismisses the strata manager's argument that the addresses of lot owners cannot be disclosed because of Privacy Law. In that case, the strata manager made a submission that the PrivacyLaw supersedes the provisions of the Strata Schemes Management Act. The member thought it unlikely that the PrivacyLaw being referred to in that case applied, or if it did, it did not supersede the provisions of the Act, which require access to be given to the strata roll upon request by a lot owner or authorised person.

And in that case, it was found that refusing to give access to the strata role meant that the owners corporation had wrongfully failed to make records available and had breached the Act. More recent case, dealing a little more broadly with the types of documents to be produced and why it is that everything needs to be produced. Check out Walker and The Owners of Strata Plan number 1992 (2020) Appeal Panel case. That case was about the production of levy registers. The owner's corporation, in that case, wanting to withhold those registers, being a record of how much everyone had paid towards their levies, who might be overdue in their levies. Withholding those records for privacy purposes was not a valid reason to refuse access. And of some concern to me was the fact that the appeal panel actually overturned the tribunal member who made the decision at first instance. That tribunal member

having said that it was okay to withhold levy registers. Certainly not the case. As we now know all records in the custody or control of the owners corporation must be produced.

If a building is being managed by a strata manager, there will be levy registers, there will be statements of income and expenditure. There will be detailed financial documents. Just because these documents are not attached to a Notice of Annual General Meeting or are not otherwise made available to owners doesn't mean that they shouldn't be made available on a records inspection, or certainly upon receiving a specific request for those documents. A further misunderstanding I want to touch on is that related to solicitor-client privileged material. I spoke about this with Reena Van Aalst in one of our chats a couple of years ago now. It's Episode Number 143. There's often a misunderstanding that any documents that relate to litigation that's going on between a lot owner and their owners corporation should be withheld from every records inspection. Now that's not the case on a couple of fronts. First of all, records are only privileged and may only be withheld when the inspection is being carried out by the owner who is actually in dispute with the owners corporation.

If there are Tribunal proceedings on between the owner of lot 2 and the owners corporation and the owner of lot 2 or their representative seeks access to records, it is fine. In fact, it is important for the owners corporation to remove from the file those records that may contain legal advice to the owners corporation about the Tribunal proceedings with lot 2. But if it's the owner of lot 6 inspecting the records, the owner of lot 6 is absolutely entitled to see the legal advice given to the owners corporation about the dispute with lot 2, the records are not privileged as between lot 6 and the owners corporation only between lot 2 and the owners corporation.

And as for whether or not documents are privileged in the first place, not everything that comes from a lawyer or that arises because of legal proceedings is a privileged document. The question or the test is whether the document has been prepared for the dominant purpose of legal advice. That's not the case for every document. That's for sure. It's really important if you are an owners corporation wanting or needing to quarantine documents from inspection because a lot owner litigant is attending to inspect, you get some guidance from your legal advisor to make sure that you are removing the documents you should be removing and leaving available those that should remain available.

Our fourth and final step to a successful strata records inspection, know what to do when things go wrong. What if you have major requests, you have complied with Section 183, you know you've done all the right things and you can't get access to your records? Perhaps you have major inspection and what you are looking for or what you believe should be there is not there. You've asked for it, but it still hasn't been produced. Where do you go next? Section 188 in our Strata Management Act tells us that the Tribunal may order an owners corporation or a strata manager to supply information that the Tribunal considers the owners corporation or strata manager has wrongfully withheld. If you are at the stage where you need to make such an application to the tribunal, it's worth being aware that you don't need to apply for mediation before you make your tribunal application. These applications are exempt from mediation under Section 227 of our Act. Do make sure that you have a clear description of the documents that you are looking for or a detailed list, if it's a few things.

And it's a good idea that you have made that request, presented list to your owners corporation, care of the strata manager first before you make your Tribunal application. Many times I have attended on records inspections, I haven't found what my client may have asked me to look for, but when I have then asked the strata manager, either verbally or later in writing for particular documents, those documents have been produced. And the Tribunal really is a last resort. The other thing to be aware of, if you're thinking of making one of these applications, is to ensure that the document actually exists.

The owners corporation can only produce records that are in its custody or control. It may be that what you're looking for doesn't exist. I appreciate it's hard to know what you don't know, but if you're looking for a particular document that is referenced, perhaps in another document, maybe there is a report from an expert that refers to an instruction given to that expert by the strata committee or the strata manager. If you're looking for that instruction, then you can point to the report that refers to it as giving you some indication that that is a document that exists, or at least did exist. Often the mere filing of an application like this does mean that the documents turn up, which is helpful. If you're an owners corporation faced with one of these applications, the best thing to do is comply with the request to the best of your ability. And if you can't explain to the owner and ultimately the Tribunal, why it is

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that you are unable to produce the documents required, bearing in mind that there is going to be very few reasons in my experience, why documents cannot be provided.

Those are my four steps to successful strata records inspections. I appreciate we are just uncovering the tip of the iceberg there, and there's a lot more to this topic. Please do post your questions and comments under this episode over at yourstrataproperty.com.au/podcasts. I did tell you that I would share the details of past episodes, where I have spoken about records, access to records, keeping of records. They are episode number 30, How Private are Owners PersonalDetails when it comes to Strata Books and Records. Episode number 62, Reena and I in conversation about, Who Can View Strata Records.

Episode number 143, I mentioned that earlier, When are Records Privileged, and episode number 185 Reena and I discussing access to strata records. I am indeed committed to making sure as many owners and strata managers are as educated as possible about the legal obligations of record keeping for our owners corporations, and facilitating access to records. The more we understand these technical provisions in our legislation, the smoother everybody's experience of community living can be. That's it for me this week. I look forward to catching 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 yourstrataproperty.com.au.