

Lot Owners and Owners Corporations – Getting Access to Your Records

There seems to be a common misconception that an owners corporation requires permission from its strata managing agent to access the strata roll and other records maintained for it by its agent. That access is often denied, frequently citing privacy law concerns. This is a misconception, because these are the owners corporation's own records and it is entitled to them under various legal principles.

In particular:

- The general principle under agency law is that documents created or held by agents in that capacity are the property of the principal, in this case the owners corporation. Although this would be subject to any contrary provision in the agency agreement, such a provision would be unusual and is not contained in the most commonly used templates.
- Failure by an agent to provide access may constitute a breach of the agency agreement, the agent's associated fiduciary duties or give rise to a cause of action in tort, e.g. conversion or detainee. In other words, the owners corporation may be able to sue the agent and hold the agent liable for any loss suffered by the owners corporation.
- Owners corporations also have statutory powers under Section 181 of the Strata Schemes Management Act 2015 ("SSMA"), which provides in effect that a strata committee can give notice to a person in possession or control of property (including records) of the owners corporation requiring the person to deliver the property to a specified strata committee member, non-compliance being an offence.
- Further, failure to provide access may constitute a "failure to account", justifying appointment of a manager or receiver under Part 9 of the Property Stock and Business Agents Act 2002 or action of a type justifying disciplinary action under Part 12 of that act.

- These rights, including under section 181 of the SSMA, are subject to any claim or lien which the agent may have in relation to the records. However, whether an agent has a lien at all, which records it applies to and whether it negates rights under section 181 are all complex questions requiring further legal advice if a lien is asserted.

One of the common claims by agents, which is also incorrect, is that the relevant records are the agent's own business records. Records prepared solely for the agent's own use may be excluded, but the strata roll and other documents normally sought by an owners corporation do not fall into that category.

An inspection under Section 182 of the SSMA is not required for an owners corporation as this section is specifically designed for third parties, e.g. lot owners. The owners corporation is after all seeking access to its own documents, for which it requires no authority as explained above.

What rights does a lot owner, in their individual capacity, have to access to the owners corporation's documents?

There is a statutory right of inspection under section 182 of the SSMA, whereby a lot owner in their individual capacity, as well as mortgagee or covenant charge, or a person authorised by them, may make a request to the owners corporation to inspect the items outlined in section 182(3), subject to submission of a written request accompanied by the fees prescribed in schedule 4 of the *Strata Schemes Management Regulation 2016* (NSW).

The items outlined in section 182(3), amongst others, are:

- strata roll;
- last financial statements; and
- any other record or document in the custody or under the control of the owners corporation.

Particular attention is required as to who can make a request. The section specifically provides that any person authorised by the owner, mortgagee or covenant charge may make a request under section 182. In the context of conveyancing, this provision is often relied upon, as a prospective purchaser of a lot and the lot owner's selling agent can request inspection of the items outlined in section 182(3), subject to obtaining authority from the lot owner. Such authority should be given in

writing. While it is usual to obtain such written approval by email or letter specifically giving authority when the authorised person seeks to inspect the documents under this section, it is possible that such written approval may be provided in the form of a clause in the contract for sale and purchase of land, heads of agreement or, in the case of selling agents, in the agency agreement.

How do privacy laws come into play when requesting access to the owners corporation's records?

Another common misconception is that the owners corporation and lot owners may be denied access to their records due to privacy reasons. This is not the case. Privacy laws do not prevent an agent (i.e. strata manager) from disclosing, to its principal (i.e. owners corporation), information collected or held on behalf of its principal. In fact, privacy legislation permits personal information to be collected, held, used or disclosed if required or authorised by law. The collection/access in issue is required by various provisions of the SSMA. In other words, there is no sound basis for an agent to claim privacy concerns as a basis for withholding access.

Nor do any privacy laws form a sound basis to redact certain information in an owners corporation's document. As explained above, these documents are collected in accordance with various provisions of the SSMA. Any documents created under SSMA (subject to any contrary provision in the strata management agency agreement) are essentially owned by the owners corporation. The strata managing agent does not have authority to modify (by way of redaction) the content of the documents.

Similar logic applies when a lot owner makes a request for inspection under section 182 of the SSMA. The strata managing agent (and/or owners corporation) should not refuse inspection or redact any information (such as personal contact details in the strata roll) as privacy laws do not supersede the lot owner's rights under section 182 of the SSMA. Any non-compliance with section 182 is an offence which could be subject to a maximum of 5 penalty units (\$550.00).

Accordingly, owners corporations and lot owners should not feel frustrated if they are denied access to their records, as there is a great deal which they can do to access to them.

Key takeaways

- Owners corporations are entitled to access their own records, despite common misconceptions.
- Agents may breach their fiduciary duties by denying access to the owners corporation's records.
- Section 181 of the Strata Schemes Management Act 2015 empowers strata committees to demand access to records.
- Lot owners have a statutory right to inspect certain documents under Section 182 of the SSMA.
- Privacy laws do not prevent owners corporations from accessing their own records.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

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