

TWO COMMON MISCONCEPTIONS ABOUT WITHHOLDING ACCESS TO RECORDS

Take the following real-life example (and assume that the person satisfies all eligibility requirements):

- An 'interested person' or committee member starts, or threatens to start, a legal proceeding against the body corporate.
- Shortly after, the person then requests access to the financial records of the body corporate, including profit and loss statements, bank statements, tax invoices, voting papers approving expenditures, and balance sheets.
- The body corporate believes the person is fishing for information to help them in the legal proceedings.

Can the body corporate withhold access to these records?

Grounds

There are only two recognised grounds on which a body corporate may withhold access to its records.

These are:

- a legal proceeding between the body corporate and the record requester has started or is threatened, and the records are privileged from disclosure;
- the body corporate reasonably believes a record contains defamatory material.

Legal proceedings and privilege

If a legal proceeding (which would include an application to the Commissioner's Office) between a person and the body corporate has started or is threatened, that alone is not sufficient to allow a body corporate to withhold access to its records.

The records must also be privileged from disclosure.

Unless those financial records in the above example are also privileged from disclosure (which we would think unlikely, although privilege does need to be assessed on the circumstances of each case), the body corporate would not be entitled to withhold access to those financial records.

Defamatory material

The ability of a body corporate to withhold access to its records based on there being defamatory material applies regardless of whether the requester is a committee member or an 'interested' person.

If a record, or part of a record, is reasonably believed to contain defamatory material, it does not mean that other non-defamatory records cannot be accessed.

The body corporate must have a 'reasonable belief' that a record contains defamatory material. A 'reasonable belief' is more than a guess, and would usually be a belief based on:

- legal advice;
- other expert advice.

It could arguably also be a belief based on, at a minimum, the committee members viewing the records and, acting reasonably, resolving to withhold access to certain records on the ground of the records containing defamatory material.

What does this mean?

A body corporate may not withhold access to its records solely because the records are confidential, or legal proceedings have been started or threatened.

The records must be privileged from disclosure, or there must be a reasonable belief that the records contain defamatory material, to entitle a body corporate to withhold access to its records.

Getting this wrong could lead to a dispute resolution application in the Commissioner's Office, so it is important to obtain early, tailored advice about the obligations of a body corporate to allow access to its records.

Article Written by Brendan Pitman (19 July 2022)

Liability limited by a scheme approved under Professional Standards Legislation
Disclaimer – This article is provided for information purposes only and should not be regarded as legal advice.