Port Pirie Regional Council

INTERACTION OF DEVELOPMENT ACT, STATE RECORDS ACT & FOI ACT WITH COPYRIGHT ACT POLICY	
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Related Documents	Nil
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1. PURPOSE

The purpose of the policy is to provide clear and consistent guidance on how to provide information requested under the Development Act or Freedom of Information Act without breaching Copyright Law.

2. SCOPE

The policy applies to the reproduction of documents under the Development Act and Development Regulations, State Records Act and Freedom of Information Act and the provision of copies of documents to members of the public.

3. DEFINITIONS

In this Policy:

"Council" means Port Pirie Regional Council;

"Development Act" means the South Australian *Development Act 1993*;

"Development Regulations" means the South Australian Development Regulations 2008;

"Freedom of Information Act" means the South Australian *Freedom of Information Act 1991*;

"State Records Act" means the *State Records Act 1997*;

"Copyright Act" means the Commonwealth *Copyright Act 1968*;

"work" has the same meaning as this term in the *Copyright Act*, i.e. a literary, dramatic, musical or artistic work;

"record" has the same meaning as the *State Records Act*, being:

- written, graphic or pictorial matter; or
- a disk, tape, film or other object that contains information or from which information may be reproduced (with or without the aid of another object or device);

"Official record" has the same meaning as the *State Records Act*, being a record made or received by the Council in the conduct of its business, but does not include:

- a record made or received by an agency for delivery or transmission to another person or body (other than an agency) and so delivered or transmitted; or
- a record made by an agency as a draft only and not for further use or reference; or
- a record received into or made for the collection of a library, museum or art gallery and not otherwise associated with the business of the agency; or
- a Commonwealth record as defined by the *Archives Act 1983* of the Commonwealth or an Act of the Commonwealth enacted in substitution for that Act; or
- a record that has been transferred to the Commonwealth.

4. POLICY STATEMENT

Under the *Development Act* 1993 (SA) and *Development Regulations 2008 (SA)* members of the public have various entitlements to information held by the Council that are relevant to development applications and approved building work.

The Freedom of Information Act 1991 (SA) provides a legally enforceable right for members of the public to access other Council information which is not required to be made publicly available.

Providing information to members of the public may require the reproduction of documents. The Council is also obligated to reproduce documents in the course of adhering to records management obligations under the State Records Act 1997 (SA).

As well as being bound by the requirements of the above Acts, the Council is subject to the Copyright Act 1968 (Cth), which restricts the reproduction of written material, artistic works and other creative works, without permission of the copyright owner.

This Policy affirms the Council's commitment to openness and transparency in the provision of information to the public in accordance with its legislative obligations and its commitment to high standards of records management whilst avoiding infringing copyright in that information.

4.1. INTRODUCTION TO THE COPYRIGHT ACT 1968

4.1.1 What is Copyright?

Copyright is a form of property which exists in written, artistic and other "works". Copyright only exists through the operation of the *Copyright Act*. As with other forms of property, copyright may be sold or transferred, and allows persons who create works to derive an income from them.

The Copyright Act creates legally enforceable intellectual property rights in works by ensuring that works cannot be reproduced without the prior permission of the copyright owner.

Where a work is reproduced without permission, a copyright infringement occurs which, in turn, gives rise to a right for the copyright owner to take civil (and in some cases, criminal) action against the infringer.

Copyright does not protect mere ideas, rather, it protects the way that ideas and information are described, illustrated or documented.

4.1.2 What is "Work"?

Most of the works which the Council deals with including:

- written reports produced by engineers, accountants, planners and other professionals;
- building plans and specifications;
- infrastructure plans;
- tender documents;
- photographs;
- diagrams;
- graphs; and
- charts.

The term "literary works" in the *Copyright Act* is not exhaustively defined and, according to case law authorities, can in some circumstances, include documents such as letters where they contain original creative written "works".

4.1.3 When Does Copyright Protection Arise?

Copyright protection automatically arises as soon as a work is recorded or fixed onto a medium which can be reproduced.

Copyright exists in works regardless of whether or not a work is endorsed with a "©" symbol and whether or not it contains a copyright warning.

4.1.4 Who Owns Copyright?

Generally, copyright is owned by the individual creator or author of the work or, where a work is created by a person during the course of their employment, their employer will own copyright.

For example, where a Council employee creates a "work" during the course of their employment and in accordance with their job description – in such cases, copyright automatically vests in the employer.

Copyright ownership can be transferred ("assigned") by way of a written agreement.

Unless copyright has been assigned to the Council:

- copyright in building plans is owned by the architect or draftsperson who drew them;
- copyright in a report is owned by the author of the report; and
- copyright in a table or graph or other technical information is owned by its creator.
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4.1.5 What is a Copyright Infringement?

A copyright infringement is an unauthorised reproduction of a work where it is (amongst other things):

- photocopied;
- scanned;
- published on a website;
- displayed on an overhead screen; and
- e-mailed.

4.1.6 When Can Works Lawfully be Reproduced?

Works can be reproduced without committing a copyright infringement where the Council is the owner of the copyright, or where the Council has permission, called a "licence", which allows it to lawfully reproduce a document.

In this Policy, the Council relies upon implied licences to allow it to reproduce works, where:

- reproduction is necessary by way of legal obligation; or

- reproduction is necessary out of practical necessity and in the circumstances, it is reasonable to expect that the owner of copyright would know that their work is required to be reproduced.

Specific Legislative Exemptions to Copyright Infringements

In addition to licences, there are a number of legislative exemptions which allow the Council to reproduce documents for certain purposes, including:

- where reproduction of a work is required for the purpose of giving professional advice by a legal practitioner or for the purposes of litigation; and
- where reproduction of a work constitutes a "fair dealing" for the purpose of research or study.

4.2 DEVELOPMENT ACT 1993

The following Policy provisions apply to the reproduction of works under the *Development Act* by the Council.

4.2.1 Specific Legislative Exemptions to Copyright Infringements

Internal Reproduction of Documents for Assessment Purposes

During the assessment of a development application, Council staff need to make reproductions of plans and other works so that they may be marked, or drawn upon, and so that original copies may be preserved. Further, such documents often need to be scanned so that they can be logged and viewed electronically, and stored and saved into the Council's records management system.

As the reproduction of works is necessary for development assessment purposes, such works can lawfully be reproduced by the Council for internal purposes.

4.2.2 Public Notification of Category 2 and 3 Development Applications

Regulation 34(1) provides that the Council must ensure that the following documents, lodged with category 2 and 3 development applications, are made available for inspection by the public:

- the application;
- any supporting plans, drawings, specifications or other documents or information provided to the Council; and
- any statement of effect (where applicable).

Regulation 34(2) and regulation 34(3) state that the Council must provide to a member of the public, a copy of any information available for inspection where:

- a request is made within the inspection period (i.e. for 10 business days after notice is given by the Council – see Regulation 35, Development Regulations); and
- a fee fixed by the Council is paid; and
- the person who requests the copy provides their name, address and contact details to the Council.

Accordingly, the Council will reproduce works submitted as part of a development application for the purposes of regulation 34 as this is a necessary requirement of the Development Regulations.

The Council will not publish regulation 34(1) documents on its website. If a member of the public wishes to inspect and/or obtain a copy of a development application document during its public notification period, that person must attend the Council's offices in person.

Practical examples where copies of plans and drawings may be obtained:

Can I get copies of architectural and/or building plans/drawings which form part of a development application yet to be determined from the Council?

- If a member of the public who has received notification of a Category 2 or 3 development application requests a copy of such a document, during the public notification period, then Regulation 34 states that a copy must be provided, so long as the person requesting the copy:
  - pays any applicable fee set by the Council; and
  - provides their name, address and contact details to the Council.
- If a member of the public requests a copy of a plan, etc outside of the notification period, but before a development is approved, the Council will not provide copies of these documents to them.
- Persons making such a request should apply for disclosure of the document under the *Freedom of Information Act*. However, according to section 22(2)(c) of that Act, access to a document must not be given by providing a copy of that document if to do so would constitute a copyright infringement. Accordingly, access to a plan or drawing under the *Freedom of Information Act* would likely be given by inspection, unless the applicant obtains the permission of the copyright owner for a copy of the relevant document to be made.

What happens if I want to make a representation but cannot attend the Council to inspect and get copies of the documents?

- Where a person cannot attend the Council in person due to extenuating circumstances, the Council may, in its absolute discretion and on a case-by-case basis, provide a copy of a development application document to a member of the public, by post, email or fascimile, provided that it is satisfied that the person making the request is entitled to make a representation.

4.2.3 Copies of Application Documents for Council Development Assessment Panel ("CDAP") Agendas

CDAP agendas necessarily contain officer reports and all documents relevant to development applications to be determined by the CDAP, including copyright-protected works.

Section 56A(15) of the *Development Act* provides that members of the public are entitled to reasonable access to the CDAP agendas. An agenda is the list of items to be deliberated upon by the CDAP at its meeting and does not include reports and other attachments to the agenda.

Due to this legal obligation, the Council enjoys an implied licence of necessity for providing copies of such documents to its CDAP members, and to staff attending a CDAP meeting.

The Council cannot provide physical copies of plans, reports and other documents which are attached to a CDAP agenda to members of the public without the permission of the copyright owner, as to do so constitutes a copyright infringement.

The Council will provide a copy of a plan, report or other development application document attached to a CDAP agenda where a member of the public obtains the permission of a copyright owner to obtain such a copy.

(PLANS AND DOCUMENTS)

The Council publishes its CDAP agendas on its website in accordance with section 56A of the Development Act. Officer reports and other attachments are not published on the Council's website as to do so could amount to an infringement of copyright.

Practical Examples – Agendas for Development Assessment Panel Meetings

Must the Council include copies of development application documents, such as plans specifications and reports, in its Development Assessment Panel Agendas?

- The Council may include these documents in the Agendas which are provided to Panel members, as it is necessary to do so by law, which would protect the Council from copyright infringement.
- However, the *Development Act* does not specifically require agenda reports and attachments be published on the Council's website or otherwise provided to members of the public. Accordingly, if the Council were to provide copies of plans and other documents to members of the public in this manner, it will infringe copyright in those documents and expose itself to a risk of legal action.

4.2.3 Copies of Application Documents for Council Development Assessment Panel ("CDAP") Agendas (Cont'd)

Practical examples – Agendas for Development Assessment Panel Meetings

- Access to Agenda attachments may only be provided in accordance with clause 4.3 of this Policy.

But sections 34(15) and 56A(15) of the *Development Act* state that members of the public are to have reasonable access to RDAP and CDAP agendas and minutes – doesn't this mean that the Council must give me a copy of all documents attached to the agenda?

- "Reasonable access" means that access to agendas and minutes must be provided in a way which is not overly onerous or complicated.

- Many Councils provide reasonable access to agendas and minutes under the *Development Act* by providing a copy for public inspection at their offices, and by publishing these documents on the Council's website.
- However, this requirement extends only to the provision of the agenda alone, being the list of items to be considered by the Panel at its meeting and the minutes alone, being the record of decisions made by the Panel.
- Agenda reports and attachments are not part of the "agenda" at law, and therefore do not need to be provided to the public at large. The public notification process allows sufficient opportunity for members of the public to access those documents which support a development application. Access to information between the public notification phase of a development application and its approval is strictly controlled by the *Development Act*, and is intended to limit third party "interference" in this process.
- See by way of contrast section 84(5) of the Local Government Act 1999 which requires that copies of all documents and reports presented to Council Members during a Council meeting must be made available for inspection by members of the public.

4.2.4 Inspection and Copies of the Register of Applications

The Council is required to keep a register of development applications, pursuant to regulation 98(1). From 1 January 2014, this register must also be published on the Council's website.

The register is required to contain information about development applications, not the application documents themselves. The register should contain:

- the name and address of the applicant (or of each applicant);
- the date of the application;
- the date on which the application was received by the Council or other relevant authority;
- a description of the land which is the subject of the application;
- a brief summary of the matters, acts or things in respect of which any consent or approval is sought;
- details of any referral or concurrence on the application;
- whether any decision is made on the application by the Council, a regional development assessment panel, the Development Assessment Commission or the Governor (where appropriate);
- any decision on the application;
- in the case of an application for building rules consent – the fee or fees payable;
- the date of the commencement of any building work and the date of the completion of any building work; and
- if any decision on the application is the subject of an appeal, the result of the appeal.

The Council must make the register available for inspection by the general public (no fee).

Regulation 98(3) provides that the Council may provide to a member of the public a copy of any part of the register, or document kept for the purposes of regulation 98(1), on payment of a fee fixed by the Council.

The Council will provide copies of documents kept for the purposes of its register where to do so would not constitute a copyright infringement.

Where a copyright infringement could arise, the Council will not provide copies of these documents, unless the person requesting such has obtained permission from the copyright owner, or otherwise has signed a statutory declaration to the effect that the owner of copyright cannot be located after reasonable enquiries have been made.

4.2.5 Inspection and Copies of Documents Relating to Approved Developments

In the case of applications that have been assessed and a decision made, regulation 101(1) obliges the Council to retain certain development application documents relating to building work only (i.e. not regulated/significant trees, land divisions or land uses). These documents include "*all technical details, particulars, plans, drawings, specifications and other documents or information relating to building work*".

Further, regulation 101(a1) requires the Council to retain a copy of each document provided to it by a private certifier in relation to any application for development plan consent assessed by the private certifier.

Regulation 101(4)(a) provides that a person may inspect at the offices of the Council during its normal office hours any document retained by the Council under regulation 101(a1) or 101(1), without charge.

Regulation 101(4)(b) states that a person may, on payment of a reasonable fee fixed by the Council, obtain a copy of any document retained by the Council under regulation 101(a1) or 101(1).

This obligation however is subject to a number of exceptions in regulation 105(b), including where copying a document would:

- in the opinion of the Council, unreasonably jeopardise the present or future security of a building; or
- involve an infringement of copyright in matter contained in a document; or
- constitute a breach of any other law.

Accordingly, where a person does not have permission from the owner of copyright in plans and other documents held by the Council under regulation 101(a1) or 101(1), the Council is not obliged to provide a copy of that document to that person.

However, in recognition of the practical need for copies of such documents to be provided in certain situations, and taking into account copyright considerations, the Council will provide copies where the person requesting the copies:

- is the current owner of the building;
- is the applicant who obtained development authorisation of the building;

- requires the documents for the purposes of litigation, or to seek legal advice;
- has signed a statutory declaration to the effect that they have made reasonable enquiries to locate the owner of copyright in the documents and has not been able to find them.

Note: Although the applicant for development authorisation may not own copyright in plans and other documents, in many circumstances, they will have the benefit of an implied licence to copy plans and documents that they have commissioned, see *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* (1993) 113 ALR 225. In these circumstances, the existence of an implied licence between the applicant and the copyright owner would mean that the Council will unlikely be exposed to copyright infringement in providing a copy to the applicant.

4.3 FREEDOM OF INFORMATION ACT 1991

Applications for disclosure of development application documents may be made pursuant to the *Freedom of Information Act*.

According to section 13(f) of the Freedom of Information Act, applicants may request that access to Council documents be given to them in a particular way.

According to section 20(1)(b) of the Freedom of Information Act, the Council may refuse to grant access to documents the subject of an application under this Act if the documents are available for inspection by the Council or another agency – e.g. a State Government department – or if they are available for inspection through a separate process under another Act.

For instance, where development application documents are made available for inspection during the public notification period under Regulation 34 of the Development Regulations, the Council may refuse access to those documents requested under the Freedom of Information Act. For more information on when development application documents are made publicly available, see clause 4 of this Policy.

Section 22(1) of the Freedom of Information Act provides that access to Council documents may be given via various means, including by giving the applicant a copy of the document.

However, section 22(2)(c) of the Freedom of Information Act provides that where an applicant has requested that a copy of a document be provided to them, an alternative form of access may be given where providing a copy would involve an infringement of copyright in matter contained in the document.

This means that the Council cannot lawfully reproduce works subject to copyright for the purpose of providing access under the Freedom of Information Act without the prior permission of the copyright owner.

In order to avoid infringing copyright, the Council should consider providing access to copyright-protected documents under the *Freedom of Information Act* by way of inspection, unless:

- the applicant is the owner of copyright in those documents; or
- the applicant has obtained the permission of the owner of copyright in those documents to have them copied; or

- where the applicant has attempted to locate the owner of copyright, but has not been successful, the applicant signs a statutory declaration to this effect.

What if a document is over 20 years old and therefore must be disclosed under 20(2)(c) of the Freedom of Information Act?

In this situation, the Council is obliged to provide access to that document, but must still adhere to section 22(2)(c) of the *Freedom of Information Act* and only allow inspection as the method of access if providing a copy would constitute a copyright infringement.

4.4 STATE RECORDS ACT 1997

Under this Act, the Council has an obligation to maintain official records in its custody in good order and condition. This obligation applies not only to the capture, storage, maintenance and disposal of physical records, but also to records in electronic format.

An official record is defined in section 3 of the Act to mean a record made or received by the Council *in the conduct of its business*. This means that, because Council Members and staff of the Council variously act as representatives of the Council, any record created, sent, received, forwarded or transmitted by Council staff and/or Council Members in the performance and discharge of their functions and duties may be classified as an official record.

In order to ensure that official records are kept in safe custody in accordance with the requirements of the *State Records Act*, the Council may cause reproductions of works to be made, including electronic copies ("scans") of documents to be saved in its internal records management systems, and may create additional hard copies of documents, where appropriate. Where an official record is reproduced into an Electronic Document Records System, the original may be destroyed in accordance with General Disposal Schedule 21.

The reproductions of works for records management purposes should only be made available to the general public where the original no longer exists. In certain circumstances original works which are digitised (scanned) may be destroyed.

General Disposal Schedule 21: For management and disposal of source documents and digitised versions after digitisation and the accompanying Digitisation of Official Records and Management of Source Documents Guideline establish the criteria for enabling the destruction of source documents. Both GDS21 and the Guideline are available from www.archives.sa.gov.au.

5. FURTHER INFORMATION

This policy will be available for inspection at the Council offices listed below during ordinary business hours and available to be downloaded, free of charge, from Council's internet site: www.pirie.sa.gov.au

- Port Pirie Council Administration Centre, 115 Ellen Street, Port Pirie
- Crystal Brook Rural Office, Bowman Street, Crystal Brook

Copies will be provided to interested parties upon request, and upon payment of a fee in accordance with Council's Schedule of Fees and Charges.