Access to Plans and other Copyright-Protected Documents Policy

Strategic Reference	Outcome 5 – Leadership Strategy 3.1 – Council is an organisational leader, reinforcing our position as a leading local government body. Strategy 3.5 – Council reports openly and transparently on its performance.
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Applicable Legislation	Planning, Development and Infrastructure Act 2016 Development Act 1993 Freedom of Information Act 1991 State Records Act 1997 Copyright Act 1968
Related Policies	Records Management Policy
Related Documents	Nil

1. Purpose

The purpose of this policy is to ensure the openness and transparency of governance to stakeholders from a copyright perspective, while protecting the privacy of individuals.

Members of the public often seek access to plans and other documents held or dealt with by the Council and/or dealt with by its Assessment Manager and Assessment Panel and which are subject to access entitlements and procedures under various pieces of legislation.

Development application documents are subject to two (2) different pieces of legislation, the *Planning, Development and Infrastructure Act 2016* (SA) and regulations under that Act as well as the *Development Act 1993* (SA) and *Development Regulations 2008* (SA) for development applications lodged prior to 31 July 2020. Members of the public have various entitlements to information that is 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. 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, 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.

The Policy affirms 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.

2. Scope

This Policy applies to the provision and reproduction of documents under the *Planning, Development and Infrastructure Act*, 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

For the purposes of this policy

"Business Day" means a day when the Council is normally open for business, ie. Monday to Friday, excluding public holidays.

"Fair dealing" is a reasonable reproduction of a reasonable portion of a copyright work. This is prescribed in the *Copyright Act* to be 10% of the number of pages in a book; or if the book is divided into chapters – a single chapter. Where a text is published electronically, 10% of the number of words is prescribed to be a fair dealing, or if the text has chapters, a single chapter.

"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.

"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)

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

4. Introduction to the *Copyright Act 1968*

4.1 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.

4.2 What is “work”?

Most of the works which Council deals with qualify under this definition 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".

4.3 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.

4.4 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 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.

Elected Members and/or Council volunteers will generally not create "work" during the course of their official duties. Should either party be in a position where intellectual property rights and copyright arise, Council will refer to the *Copyright Act* and/or legal advice, as appropriate.

4.5 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.

4.6 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.

4.7 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.

5. Planning, Development and Infrastructure Act 2016

The Planning, Development and Infrastructure Act established the State-wide Planning and Design Code as well as a State-wide development application and information system – the PlanSA portal.

All development applications submitted on and from 31 July 2020 must be submitted on or otherwise uploaded to the PlanSA portal.

The PlanSA portal is administered by the Department for Housing and Urban Development and the State Planning Commission.

Pursuant to section 51(6) of the Planning, Development and Infrastructure Act, the State Records Act does not apply to or in relation to documents and records that are received, created or held on or through the PlanSA portal.

Pursuant to section 55 of the Planning, Development and Infrastructure Act, the Freedom of Information Act does not apply to or in relation to documents and records that are received, created or held on or through the PlanSA portal.

Some development application documents and records are publicly available on the PlanSA portal through the development application register. Where a development application is publicly notified under the Act, the application documents are accessible through the PlanSA portal during the notification period and representations may be made supporting or objecting to applications through the PlanSA portal.

Where a development application is assessed by the Coorong Assessment Panel (CAP), plans and documents relevant to the development application as well as representations are published on the CAP's agenda which is publicly available prior to each scheduled meeting on Council's website – www.coorong.sa.gov.au

For access to development application documents not otherwise publicly available through Council's website or on the PlanSA portal, contact the PlanSA Service Desk, details of same can be located on the PlanSA website at www.plan.sa.gov.au

Section 238 of the Planning, Development and Infrastructure Act provides for copyright provisions for documents and records on the PlanSA portal.

6. Development Act 1993

The following Policy provisions apply to the reproduction of works under the *Development Act* by the Council. The Development Act applies to all development applications lodged with the Council prior to 31 July 2020.

6.1 Inspection and copies of the register of applications

Council is required to keep a register of development applications, pursuant to regulation 98(1) for all development applications lodged prior to 31 July 2020 and it must be published on Council's website from January 2014.

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

- 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.

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, 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.

6.2 Inspection and copies of documents relating to approved developments

In the case of applications that have been assessed and a decision made under the Development Act, regulation 101(1) of the *Development Regulations* obliges Council to retain certain development application documents relating to building work only (ie. 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) 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 Council under regulation 101(a1) or 101(1), 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, Council will provide copies where the person requesting the copies:

- is the owner of copyright in the documents;
- 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 obtained a written permission from the owner of copyright in the document for it to be reproduced; or
- 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.

7. 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*, 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 – ie. 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, 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 5 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 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 will provide 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
- the applicant has attempted to locate the owner of copyright, but has not been successful, and the applicant signs a statutory declaration to this effect.

Documents over 20 years old

Where a document is over 20 years old Council is obliged to provide access to that document under 20(2)(c) of the *Freedom of Information Act* but must still adhere to section 22(2)(c) and only allow inspection as the method of access if providing a copy would constitute a copyright infringement.

8. State Records Act 1997

Under this Act, 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 Elected 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 Elected 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*, 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 40: Local Councils and Local Governing Bodies and Authorities in South Australia establish the criteria for enabling the destruction of source documents. GDS40 is available from www.archives.sa.gov.au.

9. Availability/Accessibility

This Policy is available for inspection at Council's offices during normal business hours and Council's website and will be emailed to interested parties on request (please lodge request in writing via email to council@coorong.sa.gov.au).

10. Document History

This Policy will be reviewed at least every three (3) years or more frequently if legislation or Council requires.

Version	Adopted	Minute No	Description of change(s)
1	18 February 2025	034/25	New policy (replaces former *Interaction of the Development Act, State Records Act and Freedom of Information Act with the Copyright Act Policy)*