

 City of Mount Gambier	D160 – DEVELOPMENT ACT INSPECTION AND COPYING OF DOCUMENTS	Version No:	6
		Issued:	20 February, 2018
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1. INTRODUCTION

This document sets out the policy of the City of Mount Gambier ("Council") for the public inspection and copying of documents received and stored by Council in relation to development applications.

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.

This 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. APPLICATION OF POLICY

This Policy applies to the reproduction of documents under the *Copyright Act*, *Development Act* and *Development Regulations* and the provision of copies of documents to members of the public.

In this Policy:

- the "Council" means City of Mount Gambier
- the "*Development Act*" means the South Australian *Development Act 1993*;
- the "Development Regulations" means the South Australian Development Regulations 2008;
- the "*Freedom of Information Act*" means the South Australian *Freedom of Information Act 1991*;
- the "*State Records Act*" means the *State Records Act 1997*;
- the "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.

 <p>City of Mount Gambier</p>	D160 – DEVELOPMENT ACT INSPECTION AND COPYING OF DOCUMENTS	Version No:	6
		Issued:	20 February, 2018
		Next Review:	February 2019

3. INTRODUCTION TO THE COPYRIGHT ACT 1968

3.1 What is Copyright?

- a) 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.
- b) 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.
- c) Where a work is reproduced without permission, a copyright infringement may occur which, in turn, may give rise to a right for the copyright owner to take action against the infringer.
- d) Copyright does not protect mere ideas, rather, it protects the way that ideas and information are described, illustrated or documented.

3.2 What is "work"?

- a) The types of work that Council may deal with that may be protected by copyright can include:
 - written reports produced by engineers, accountants, planners and other professionals;
 - building plans and specifications;
 - infrastructure plans;
 - tender documents;
 - photographs;
 - diagrams;
 - graphs; and
 - charts.
- b) 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".

3.3 When does copyright protection arise?

- a) Copyright protection automatically arises as soon as a work exists in a form which can be reproduced.
- b) Copyright can exist in work regardless of whether or not a work is endorsed with a "©" symbol and whether or not it contains a copyright warning.

3.4 Who owns copyright?

- a) Generally, copyright is owned by the creator or author of the work and where created during the course of employment, the employer will own copyright.

3.5 What is copyright infringement?

- a) Copyright infringement is unauthorised reproduction of work that can include where it is (amongst other things):
 - photocopied;
 - scanned;

 City of Mount Gambier	D160 – DEVELOPMENT ACT INSPECTION AND COPYING OF DOCUMENTS	Version No:	6
		Issued:	20 February, 2018
		Next Review:	February 2019

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

3.6 When can works lawfully be reproduced?

- a) Works can be reproduced without committing a copyright infringement where the permission, called a "licence" allows it to be lawfully reproduced.
- b) The Council relies upon implied licences to allow it to reproduce works, where:
 - reproduction is necessary by way of legal obligation; or
 - reproduction is 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.
- c) In addition to licences, there are legislative exemptions which allow the reproduction of documents for certain purposes, including:
 - where 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. DEVELOPMENT ACT 1993 AND DEVELOPMENT REGULATIONS 2008

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

4.1 Specific legislative exemptions to copyright infringements

- a) 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 Council's records management system.
- b) As the reproduction of works is necessary for development assessment purposes, such works can lawfully be reproduced for internal purposes.
- c) For example, Council may reproduce copyright-protected application documents during the development assessment process to:
 - display plans and other documents on an overhead screen and/or monitors during a Council Assessment Panel (CAP) meeting;
 - make copies of documents for internal discussions and other internal assessment processes;
 - scan and otherwise create electronic copies of documents for internal records management purposes; and
 - reproduce documents to attach to CAP agenda reports for provision to CAP members.

4.2 Public notification of category 2 and 3 development applications

- a) Regulation 34(1) provides that 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;

 City of Mount Gambier	D160 – DEVELOPMENT ACT INSPECTION AND COPYING OF DOCUMENTS	Version No:	6
		Issued:	20 February, 2018
		Next Review:	February 2019

- any supporting plans, drawings, specifications or other documents or information provided to the Council; and
 - any statement of effect (where applicable).
- b) 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 Council – see Regulation 35, Development Regulations 2008); and
 - a fee fixed by Council is paid. A full list of applicable fees can be found in Council's Fees and Charges Schedule; and
 - the person who requests the copy provides their name, address and contact details to Council.
- c) 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 2008.
- d) 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.
- e) 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 only, unless the applicant obtains the permission of the copyright owner for a copy of the relevant document to be made.
- f) Where a person cannot attend the Council office on person, due to extenuating circumstances, Council may, in its absolute discretion and on a case-by-case basis, provide a copy of a development application documents to a member of the public, by post, email or facsimile, provided that it is satisfied that the person making the request is entitled to make a representation.
- g) 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 Council's offices in person.

4.3 Copies of application documents for Council Assessment Panel ("CAP") agendas

- a) Council Assessment Panel agendas necessarily contain reference to officer reports and documents relevant to development applications to be determined by the CAP, including copyright-protected works.
- b) Section 56A(15) of the *Development Act 1993* provides that members of the public are entitled to reasonable access to the CAP agendas. The agenda is the list of matters to be deliberated upon by the CAP at its meeting and does not include the reports and other attachments to the agenda.
- c) Council publishes its CAP agendas on its website in accordance with section 56A of the *Development Act*. Officer reports and other attachments are not published on Council's website, as to do so could amount to an infringement of copyright.

 City of Mount Gambier	D160 – DEVELOPMENT ACT INSPECTION AND COPYING OF DOCUMENTS	Version No:	6
		Issued:	20 February, 2018
		Next Review:	February 2019

- d) Council does not provide physical copies of copyright-protected works, such as plans and other supporting documents associated with a development application included on the CAP agenda, to members of the public as this would constitute a copyright infringement.
- e) Council will provide a copy of an applicants plan, report or other development application document attached to a CAP agenda, where a member of the public obtains the permission of a copyright owner to obtain such a copy.

4.4 Inspection and copies of the register of applications

- a) Council is required to keep a register of development applications, pursuant to Regulation 98(1). From 1 January 2014, this register is also available on Council's website.
- b) 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.
- c) Council must make the register available for inspection by the general public (no fee).
- d) Regulation 98(3) provides that 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 Council.
- e) Council will provide copies of documents kept for the purposes of its register where to do so would not constitute a copyright infringement.
- f) 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 submitted a signed a statutory declaration to the effect that reasonable enquiries have been made and the owner of copyright cannot be located.

 City of Mount Gambier	D160 – DEVELOPMENT ACT INSPECTION AND COPYING OF DOCUMENTS	Version No:	6
		Issued:	20 February, 2018
		Next Review:	February 2019

4.5 Inspection and copies of documents relating to approved developments

- a) In the case of applications that have been assessed and a decision made, Regulation 101(1) obliges 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*”.
- b) Further, Regulation 101(a1) requires 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.
- c) Regulation 101(4)(a) provides that a person may inspect at the offices of Council, during its normal office hours, any document retained by the Council under Regulation 101(a1) or 101(1), without charge.
- d) Regulation 101(4)(b) states that a person may, on payment of a reasonable fee fixed by Council, obtain a copy of any document retained by Council under Regulation 101(a1) or 101(1).
- e) This obligation however is subject to a number of exceptions in Regulation 101 (5), 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.
- f) 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.
- g) 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 current owner of the building;
 - is the applicant who obtained development authorisation of the building;
 - 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.
 - has an order of a court requiring a copy of the documents to be provided.

5. FREEDOM OF INFORMATION ACT 1991

Applications for access to Council records (including development application documents) may be made pursuant to the *Freedom of Information Act 1991*.

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, including copies.

In accordance with Section 20(1)(b) of the *Freedom of Information Act*, the Council may refuse to grant access to documents if the documents are available for inspection under another Act.

 City of Mount Gambier	D160 – DEVELOPMENT ACT INSPECTION AND COPYING OF DOCUMENTS	Version No:	6
		Issued:	20 February, 2018
		Next Review:	February 2019

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 under the *Freedom of Information Act*.

Similarly, where documents relating to approved developments are available for inspection under Regulation 101(4) of the Development Regulations, the Council may refuse access to those documents under the *Freedom of Information Act*.

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.

6. 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

 City of Mount Gambier	D160 – DEVELOPMENT ACT INSPECTION AND COPYING OF DOCUMENTS	Version No:	6
		Issued:	20 February, 2018
		Next Review:	February 2019

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.

7. AVAILABILITY OF POLICY

This Policy will be available for inspection at Council's principal office during ordinary business hours and on the Council's website www.mountgambier.sa.gov.au. Copies will also be provided to interested members of the community upon request, and upon payment of a fee in accordance with Council's Schedule of Fees and Charges.

 City of Mount Gambier	D160 – DEVELOPMENT ACT INSPECTION AND COPYING OF DOCUMENTS	Version No:	6
		Issued:	20 February, 2018
		Next Review:	February 2019

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Related Procedures:	Development Assessment Procedures Development Control Administrative Standard Operating Procedure
Related Documents:	Freedom of Information – City of Mount Gambier Information Statement

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