

# THE BAROSSA COUNCIL

## COPYRIGHT MANAGEMENT POLICY



|                                       |                                                                                                                                        |                                 |            |
|---------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------|---------------------------------|------------|
| <b>Corporate Plan Link:</b>           | 6.2 Ensure that Council's policy and process frameworks are based on principles of sound governance and meet legislative requirements. |                                 |            |
| <b>Policy Owner:</b>                  | Chief Executive Officer                                                                                                                | <b>Previous Approval Dates:</b> | None       |
| <b>Document Control Officer:</b>      | Governance Advisor                                                                                                                     | <b>Current Approval Date:</b>   | 19/09/2017 |
| <b>HPE Content Manager Reference:</b> | 17/351                                                                                                                                 | <b>Next Review Date:</b>        | 01/09/2020 |

### 1. Purpose

- 1.1 The Barossa Council is committed to openness and transparency in the provision of information to the public which is contained within its Official Records.
- 1.2 As part of managing and disclosing those records which have copyright protection, Council has sometimes competing obligations under the:
  - Copyright Act 1968
  - Development Act 1993 / Planning, Development and Infrastructure Act 2016
  - Freedom of Information Act 1991 and
  - State Records Act 1997.
- 1.3 This Policy provides a framework for how Council Officers can balance these obligations when they manage Council's copyright protected records and when they receive requests to copy those records and provide them to the public.

### 2. Scope

- 2.1 Council Officers should be aware of their obligations under the *Privacy Policy* to manage the personal information of Council customers wherever the above legislation does not require its reproduction and release.

### 3. Definitions

|                 |                                                                                                                                                                                                                                                                                                                                                                                       |
|-----------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Fair Dealing    | A reasonable reproduction of a reasonable portion of a copyright work. This is prescribed in the <i>Copyright Act</i> 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 | A record made or received by the Council in the conduct of its business.                                                                                                                                                                                                                                                                                                              |

|         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|---------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Record  | A 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(s) | Most of the "work" which Council manages include original: <ul style="list-style-type: none"> <li>- documents associated with a development application including written reports produced by engineers, accountants, planners and other professionals and any representations received;</li> <li>- building plans and specifications;</li> <li>- infrastructure plans; tender documents;</li> <li>- photographs; diagrams; graphs; and charts;</li> <li>- promotional film.</li> </ul> |

## 4. Introduction to Copyright

### 4.1 What is copyright?

Copyright is a form of property right which exists in original written, artistic and other work. The *Copyright Act 1968* creates a legally enforceable intellectual property right in an original work by ensuring that it cannot be reproduced without the prior permission of the copyright owner.

Copyright protects the way that ideas and information are described, illustrated or documented.

### 4.2 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 a work regardless of whether or not a work is endorsed with a "©" symbol and whether or not it contains a copyright warning.

### 4.3 Who owns copyright?

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

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

So, unless copyright has been assigned to Council:

- copyright in a building plan is owned by the architect/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.

### 4.4 What is a copyright infringement?

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

Operationally, copyright infringement can occur when a work is photocopied, photographed, scanned, published on a website, displayed on an overhead screen or e-mailed.

## **5. When can Council lawfully copy a work?**

### **5.1 Council created work**

A work can be reproduced without committing a copyright infringement where Council is the owner of the copyright - ie the work was created by a Council employee or other delegate.

### **5.2 Licence**

A work can be reproduced without committing a copyright infringement where Council has permission from the copyright owner to reproduce that work – this is called a "licence". A licence can be either express or implied.

- Express licence occurs where there is a written agreement between Council and the copyright owner. This is Council's preferred option wherever practicable.
- Implied licence occurs where:
  - reproduction is necessary by way of legal obligation [see specific obligations below in clauses 5.4 - 5.6] 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.

### **5.3 Legislative Exemption under the Copyright Act 1968**

There are a number of legal exemptions which allow Council to reproduce a work for certain purposes, including:

- where reproduction of a work is required for the purpose of obtaining legal advice by a legal practitioner, or for the purposes of litigation;
- where reproduction of a work constitutes a "Fair Dealing" for the purpose of research or study (see definition in clause 3 above).

### **5.4 Copyright considerations under the Development Act 1993 and Regulations 2008 and equivalent provisions upon commencement of the Planning, Development and Infrastructure Act 2016**

#### **5.4.1 Reproduction of works for internal purposes**

Council is entitled to reproduce copyright-protected development application documents during the development assessment process to:

- display plans and other documents on an overhead screen and/or monitors during an Assessment Panel 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 Assessment Panel agenda reports for Assessment Panel members.

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

#### 5.4.2 Public notification of Category 2 and 3 Development Applications

Regulation 34(1) of the *Development Regulations* 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 during the public consultation period associated with the application:

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

Regulations 34(2) and 34(3) of the *Development Regulations* state that Council must provide to a member of the public a copy of the above where:

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

Accordingly, 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*.

#### *Limitation:*

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 complete an application form (ie *Third Parties Obtaining Copies of Category 2 and 3 Development Applications*) and attend Council's offices in person or email the application to the relevant Officer.

#### 5.4.3 Copies of application documents for the Assessment Panel agendas

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

Section 56A(15) of the *Development Act* provides that members of the public are entitled to reasonable access to the Panel agendas.

The Assessment Panel agenda for public access purposes will only consist of a list of items and Officer reports to be deliberated upon by the Panel at its meeting - it will not include attachments to the agenda.

Council enjoys an implied licence of necessity to provide copies of all agenda documents to its Assessment Panel members, and to staff attending an Assessment Panel meeting.

*Limitation:*

This implied licence of necessity does not extend to a right to members of the public to access attachments to that agenda. Accordingly, Council will not include plans and other supporting documents for a development application within copies of the Assessment Panel agenda and attachments available to members of the public, unless the copyright owner of those documents has granted permission.

5.4.4 Inspection and copies of documents relating to approved developments

In the case of applications that have been assessed and a decision made, Council is obliged to retain:

- certain development application documents relating to building work only - these documents include "all technical details, particulars, plans, drawings, specifications and other documents or information relating to building work" (Regulation 101(1) of the *Development Regulations*) and
- 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(a1) of the *Development Regulations*).

A person may inspect at the principal Council office during normal office hours any of these documents for free, or obtain a copy for a fee - Regulation 101(4)(b) of the *Development Regulations*.

*Limitation:*

This access however is subject to a number of exceptions in Regulation 105(b) of the *Development Regulations*, including where copying a document would:

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

*Exception to the limitation:*

In recognition of the practical need for copies of such documents to be provided in certain situations, while still balancing copyright considerations, Council may provide copies where the person requesting the copies:

- is the current owner of the building; or
- is the applicant who obtained development authorisation of the building (see case law in paragraph below); and
- the person and/or Council officers have documented reasonable enquiries to locate the copyright owner without success, or documented that the copyright owner is no longer trading or practising, as the case may be.

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 Council will unlikely be exposed to copyright infringement in providing a copy to the applicant.

## **5.5 Copyright considerations under the *Freedom of Information Act 1991***

- 5.5.1 Applications for disclosure of copyright protected works may be made by a person under the *Freedom of Information Act*, and such applications may request that access to Council documents be given in a particular way, eg inspection, hard copies or electronic copies.

Council cannot lawfully reproduce works protected by copyright for the purpose of providing access under the *Freedom of Information Act* without the prior permission of the copyright owner.

- 5.5.2 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 otherwise providing a copy would involve an infringement of copyright in matter contained in the document.

- 5.5.3 In order to avoid infringing copyright, Council should consider providing access to copyright-protected documents only by way of inspection, unless:

- the applicant is the owner of copyright in those documents; or
- the applicant has obtained the written permission of the owner of copyright in those documents to have them copied; or
- the applicant or Council's Freedom of Information Officer have documented reasonable enquiries to locate the copyright owner without success, or documented that the copyright owner is no longer trading or practising, as the case may be.

## **5.6 Copyright considerations under the *State Records Act 1997***

- 5.6.1 Under the *State Records Act*, Council has an obligation to maintain official records in its custody in good order and condition. This obligation applies to the capture, storage, maintenance and disposal of physical and electronic records.

- 5.6.2 To ensure that official records are kept in safe custody in accordance with the *State Records Act*, Council allows reproductions of all works, including electronic copies of documents to be saved in its records management system, and may create additional hard or electronic formats of those records, where appropriate for inspection or preservation purposes.

## 6. Supporting Documentation

Copyright Permission Form  
Managing Requests for Copyright-Protected Records Process  
Request for Public Access to Council Records (Form)  
Third Parties Obtaining Copies of Category 2 and 3 Development Applications (Form)

## 7. Related Policies

Knowledge Management Policy  
Privacy Policy

## 8. References

Copyright Act 1968  
Development Act 1993 and Development Regulations 2008  
Freedom of Information Act 1991  
Planning, Development and Infrastructure Act 2016  
State Records Act 1997  
LGA's Model Policy on the Interaction of the above

## 9. Review

This Policy shall be reviewed by Policy Owner, in consultation with the relevant stakeholders, every three years or more frequently if legislation or Council needs change.

## 10. Further Information

This Policy is available for inspection at the Council offices at 43-51 Tanunda Road, Nuriootpa and all Council branches, during ordinary business hours. It is also available for inspection, download or printing, free of charge, from Council's web site: [www.barossa.sa.gov.au](http://www.barossa.sa.gov.au).

Complaints regarding this Policy or its application can be made to the Customer Service team on 8563 8444 or [barossa@barossa.sa.gov.au](mailto:barossa@barossa.sa.gov.au) at first instance, who will refer you to the most appropriate officer according to Council's *Complaints Handling Policy*.

*The Barossa Council*

Signed:   
Chief Executive Officer

Dated: 19/9/17

Copyright Management Policy approved by the Chief Executive Officer on 19 September, 2017

Page 7 of 7

This electronic copy is the approved version and is stored in Council's Record Management System (TRIM).  
Printed copies are considered uncontrolled. Before using a printed copy please verify that it is the current version.