Copyright and compliance with the GIPA Act

knowledge update
April 2011

The *Government Information (Public Access) Regulation 2009* ("the GIPA Regulation") requires local councils to publish on their websites, and provide copies to the public, of a range of open access information, including architectural plans submitted as part of a development application. However, these plans are protected by copyright law.

Local councils have approached the OIC for assistance on how to fulfill their obligations under the GIPA Regulation with regard to publishing, copying and distributing plans submitted as part of a development application (DA), while not infringing copyright laws. The OIC has obtained advice from the Crown Solicitor's Office and from a Senior Counsel. This update summarises that advice and provides some practical suggestions for local councils.

Obligations on local councils under the GIPA Regulation

The *Government Information (Public Access) Act 2009* (NSW) (the GIPA Act) makes it mandatory for agencies to make certain information publicly available on their websites, and in any other way they choose, unless there is an overriding public interest against disclosure of the information. The type of information that must be made publicly available is set out in section 18.

Schedule 1 to the GIPA Regulation contains a list of open access information that local councils must make available on their websites, and for inspection and copying at council offices, including documents associated with DAs, whenever created.
Schedule 1[3](2) states that this does not include information that consists of:

- the plans and specifications for any residential parts of a proposed building, other than plans that merely show its height and external configuration in relation to the site on which it is proposed to be erected; or
- commercial information, if the information would be likely to prejudice the commercial position of the person who supplied it or to reveal a trade secret.

While it is not mandatory for plans and specifications concerning the internal layout of proposed buildings to be published or disclosed under the GIPA Act, the Act does not prevent plans from being copied and released in response to a request if disclosure is in the public interest.

The requirement to provide access to this information, and allow copies to be made was previously contained in section 12 of the *Local Government Act 1993* (NSW), which was repealed and replaced by the GIPA Act on 1 July 2010. The only new requirement imposed by the GIPA Act in this regard is the additional direction to make the information available on councils' websites.

The *Copyright Act 1968* (Cth)

The *Copyright Act 1968* (Cth) (the Copyright Act) gives copyright owners the exclusive right to do certain acts. In relation to architects' plans, these include reproduction, communication to the public (eg by emailing or uploading to a website) and publishing the plans (section 31). With certain limited exceptions, copyright is infringed where someone other than the copyright owner does any act, or authorises any act to be done, that is the exclusive right of the copyright owner, without the owner's permission (see sections 36 and 13(1)).

Copyright is not infringed where the copyright owner has given consent to the particular actions, either expressly or by means of an implied licence.

There is also a statutory licence permitting Commonwealth and State (including Territory) agencies to deal with copyright material on certain conditions. Section 183 of the Copyright Act provides that copyright is not infringed by the Commonwealth or a State, or a person authorised in writing by the Commonwealth or a State, doing any acts that would otherwise breach copyright if the acts are done for the services of the Commonwealth or State. Commonwealth or State governments are required to pay a licence fee for use of the material to the copyright owner or a collecting agency, but do not have to ask permission.

In addition, the Copyright Act provides for certain defences whereby, in the right circumstances, certain actions will not infringe copyright. In particular, sections 40 and 103C allow fair dealing for the purpose of research or study, while sections 41 and 103A allow fair dealing for the purpose of criticism or review.

Questions asked by the OIC

As "artistic works", architectural plans and drawings are protected by copyright, which is generally owned by the firm, or the architect or draftsperson. As we noted above, the requirement for local councils to provide copies of plans attached to DAs is not new, having pre-dated the GIPA Act. However, as the issue of how councils can meet this requirement without infringing copyright had never been satisfactorily resolved, local councils asked the OIC to provide some clarity with regard to their obligations under the GIPA Act to publish, copy and distribute material to which copyright is attached.

Initially, the OIC approached the Crown Solicitor's Office for advice. We asked the following questions:

1. In what circumstances will the provisions of the GIPA Act requiring copies of plans to be made and given to members of the public showing the external configuration of proposed buildings subject to DAs, and publishing these plans on councils' websites, contravene the Copyright Act?
2. In what circumstances will the provisions of the GIPA Act permitting copies of plans to be made showing the internal layout of proposed buildings subject to DAs contravene the Copyright Act?
3. Could sections 40 and 41 of the Copyright Act, concerning fair dealing with material for the purpose of research or study, or criticism or review, respectively, be invoked in relation to providing copies of plans for comment or study? If so, in what circumstances would these sections apply?
4. What practical steps can councils take to ensure that they avoid infringing the Copyright Act, while fulfilling their obligations under the GIPA Act? For example, is it sufficient to note on the copies of plans that copyright laws apply?

Advice of the Crown Solicitor's Office

The Crown Solicitor's Office advised that the Copyright Act applies irrespective of the requirements of the GIPA Act or Regulation. Therefore, local councils will always be in breach of the Copyright Act when copying, publishing and distributing documents under the GIPA Act or Regulation to which copyright attaches, unless:

- acting with the express or implied consent of the copyright owner;
- covered by the statutory licence in section 183 of the Copyright Act; or
- able to rely on one of the defences in the Copyright Act.

No implied licence

In some circumstances, a licence to deal with material in ways that would otherwise be a breach of copyright may be implied, either by the conduct of the copyright owner, or by law to a specific class of contracts, or where necessary to give effect to business arrangements. For example, courts have found that where copyright material is produced for a particular purpose, there is an implied permission for that material to be used in accordance with that purpose.

However, the Crown Solicitor considers it unlikely that local councils could rely on an implied licence to reproduce plans because:

- there is nothing in an architect's conduct in preparing plans to be submitted as part of DA that can be taken as constituting an abandonment of his or her exclusive rights conferred by the Copyright Act, especially where the rights to be infringed occur from councils' uses connected to the GIPA regime rather than the DA regime.

No statutory licence

The Crown Solicitor is also of the view that local councils do not hold a statutory licence to use copyright material under section 183 of the Copyright Act, since a council is not the "State" for the purposes of that Act in terms of its functions in assessing DAs.

Fair dealing defences do not apply to local councils

The Crown Solicitor also advised that the fair dealing provisions in sections 40 and 41 of the Copyright Act do not apply to local councils in respect of publishing or copying material subject to the GIPA Act. This is because councils would be publishing or copying the material in accordance with statutory obligations, and not for the purposes of criticism or review, or research or study.

Furthermore, the Crown Solicitor doubts that the defence of fair dealing for criticism or review would be available at all in relation to architects' plans in this context.

However, it is possible that members of the public who wish to assess the impact of proposed plans may be able to copy them in reliance on the defence of fair dealing for research or study. Ultimately, the question of whether this defence is available will depend on the circumstances and reason for which the plans are sought.

Indemnity provisions

Clause 57 of the *Environmental Planning and Assessment Regulation 2000* (NSW) (the EPA Regulation) provides that:

- [u]pon a development application being made under section 78A of the [*Environmental Planning and Assessment*] Act, the applicant (not being entitled to copyright) is taken to have indemnified all persons using the development application and documents in accordance with the Act against any claim or action in respect of breach of copyright.

This provision means that councils and their staff (and any other persons using the plans in accordance with the EPA Act) are entitled to claim an indemnity from the person who applied for the DA to cover costs they incur arising from claims they have infringed copyright in the plans and the DA, where these materials were being used in accordance with the EPA Act. Section 79 of the EPA Act requires councils to make DAs and accompanying information, including plans, publicly available, and provides a right for people to inspect and make copies of the plans during the submission period.

Accordingly, local councils may make and distribute copies of DA plans in accordance with their functions under the EPA Act. However, this indemnity applies only to things done under the EPA Act. **It does not cover reproduction or distribution of copyright material under the GIPA Act**.

Practical steps

In response to our question about practical steps that local councils could take to provide access to DA plans without infringing copyright law, the Crown Solicitor suggested that local councils:

- consider asking for multiple copies of plans, copied with the consent of the copyright owner, to be submitted with future DA applications (these plans could be distributed after the assessment period closes and the copyright indemnity in clause 57 no longer applies);
- should continue to provide "view only" access to DA plans; and
- may provide photocopying facilities for the public to make copies of plans for the purpose of research and study, with notices near alerting users to their copyright obligations (these notices do not provide indemnity, but may assist councils in the event any claim is made that they are authorising infringement of copyright). Councils should make sure staff understand they must not provide any copyright advice to members of the public, nor expressly permit them to copy plans.

Further advice received

The OIC is aware that the advice of the Crown Solicitor's Office would significantly affect the practices that many councils have followed for some time with regard to publishing, copying and distributing DA plans. Accordingly, we wanted to make sure that all options had been explored before notifying local councils.

The OIC sought a second opinion from a Senior Counsel, who confirmed the Crown Solicitor's view.

The Senior Counsel raised the possibility of persuading the Commonwealth legislature to provide for local councils in the same way as it has for Commonwealth agencies in sections 90 and 91 of the *Freedom of Information Act* 1982 (Cth) (FOI Act). Those sections state that no action for breach of copyright, among other things, lies against a Commonwealth agency for information provided in good faith, nor does providing access to a document constitute an authorisation or approval of any action that would amount to a breach of copyright.

However, the OIC understands that these provisions need to be seen in the light of the statutory licence provision in section 183 of the Copyright Act. Sections 90 and 91 of the FOI Act do not provide a free exception to copyright infringement for Commonwealth agencies since they already pay for the use of copyright material under the statutory licence. Rather, those sections appear intended to protect staff of Commonwealth agencies against a potential argument that a good faith dealing with copyright material under the FOI Act, which is held to be outside the scope of that Act, is for that reason not "for the services of" the Crown, and therefore is outside the statutory licence in s 183 and an infringement of copyright.

Amendment of the Copyright Act, either to provide a new free exception or to extend the s 183 statutory licence to local councils, would be a long and onerous process, and in either case would be likely to have undesirable implications.

What this means for local councils

Local councils should **not** publish any copyright material on websites, or provide any copies (including by email) **under the GIPA Act** unless the copyright owner has expressly consented.

Councils should continue to allow "view only" access to copyright material for GIPA purposes (unless the copyright owner has authorised other uses). However, councils could ask DA applicants to provide multiple copies of plans, so that councils can supply copies on request under the GIPA Act without infringing copyright.

For the purpose of fulfilling their functions under the EPA Act, local councils should continue to provide copies of DA plans and other copyright material, relying on the indemnity in clause 57 of the EPA Regulation.

This indemnity applies during the submission period of the assessment phase.

Ongoing work

The OIC understands that this advice may cause some difficulty for local councils. However, it is our responsibility to alert councils to the legal position with respect to copyright and the GIPA Act.

We will continue to explore this issue and endeavour to uncover further legal and practical solutions. We will post updates on our website as further information becomes available.

Where can I get more information?

- go to: http://www.oic.nsw.gov.au
- email: oicinfo@oic.nsw.gov.au
- mail: GPO Box 7011 Sydney NSW 2001
- visit: Level 11, 1 Castlereagh Street, Sydney NSW 2000
- call: 1800 INFOCOM (1800 463 626) between 9am and 5pm, Monday to Friday (excluding public holidays).