

The GIPA Act and Copyright

Compliance with the mandatory proactive release requirements of the *Government Information (Public Access) Act 2009* (GIPA Act) and the *Government Information (Public Access) Regulation 2018* (GIPA Regulation) does not require or permit the release of information by an agency that would constitute an infringement of copyright.

This fact sheet details the relationship between copyright and open access requirements and form of access provisions under the GIPA Act, as they apply to local authorities.¹

Open Access – Local Authorities

Under the GIPA Act a ‘local authority’ means a council, county council or joint organisation within the meaning of the *Local Government Act 1993*.²

Local Authorities have particular obligations under the GIPA Act. In summary they must:

- release specified open access information
- release that information in specified ways
- facilitate release of open access information by deleting those portions of the information that might otherwise prevent its public release
- keep a record of information that it does not release
- preserve copyright in providing access to information.

Section 6 of the GIPA Act deals with mandatory proactive release of certain government information. An agency must make the ‘open access information’ that it holds publicly available unless there is an overriding public interest against disclosure of the information.³

The scope of what constitutes ‘Open access information’ is defined in section 18 of the GIPA Act as well as in the GIPA Regulation. In particular, clause 3 of Schedule 1 of the GIPA Regulation provides that information about development applications is open access information of local authorities.

See [IPC Fact Sheet – Open Access Information for Agencies](#).⁴

Schedule 1 of the GIPA Regulation lists additional categories of open access information that apply specifically to local authorities.

Clause 5(1) of the GIPA Regulation provides that:

A local authority must make its open access information publicly available by:

- (a) *making the information available for inspection free of charge by any person at the office of the local authority during ordinary office hours, and*
- (b) *providing a copy of a record containing the information (or providing the facilities for making a copy of a record containing the information) to any person either free of charge or for a charge not exceeding the reasonable cost of photocopying.*

This provision applies to both the open access information listed in section 18 of the GIPA Act and that listed in Schedule 1 of the GIPA Regulation.⁵

Open Access – Copyright

Section 6(6) of the GIPA Act provides that nothing in section 6 or the GIPA Regulation requires or permits an agency to make open access information available in any way that would constitute an infringement of copyright.⁶

This means that if providing access to open access information by, for example, providing a copy of a document would breach copyright, then access cannot be provided in this manner.

¹ What is discussed in this fact sheet is not legal advice. Agencies may wish to obtain their own legal advice on these issues.

² Clause 1, Schedule 4 GIPA Act.

³ Section 6(1) GIPA Act. Note that copyright is not specified as an overriding public interest consideration against disclosure in section 14 of the GIPA Act.

⁴ [IPC Fact Sheet – Open Access Information for Agencies](#)

⁵ Clause 5(3), GIPA Regulation.

⁶ Copyright owners have rights under Commonwealth legislation and State legislation must be read subject to those rights: see section 109, *Constitution*.

Copyright in Australia is governed by the *Copyright Act 1968* (Cth). This is Commonwealth legislation and protects literary, dramatic, musical or artistic work among other things. For an overview of copyright in Australia see 'An introduction to copyright' on the Australian Copyright Council website.⁷

Copyright may be infringed by using copyright material without permission of the copyright owner. Using copyright material can include:

- reproducing the work (including by photocopying, copying by hand, filming, recording and scanning)
- making the work public for the first time
- communicating the work to the public (for example, via email, broadcasting or the internet).

The above uses are exclusive rights of the copyright owner and anyone who wants to use someone else's material in any of these ways generally needs permission of the owner. The Australian Copyright Council provides advice about this.

Action to meet open access requirements and preserve copyright

A significant responsibility is placed upon local authorities to ensure that their open access obligations are met. Agencies must ensure that their open access information is publicly available.

Agencies are also required to provide advice and assistance to members of the public to facilitate access and this includes providing access to copyrighted information.

Where the information contains some copyrighted material there are several options available to facilitate its release without infringing the copyright.

1. Consent

In respect of the DA process (which is subject to open access requirements), a practical step may be taken to not infringe copyright. The DA applicant could obtain permission from the copyright owner (e.g. an architect) to make multiple copies of records the subject of copyright (e.g. plans/drawings). The DA applicant could then make multiple copies of these to be provided to council for use by the council under the GIPA Act. This approach is contingent upon permission being given from the copyright owner.⁸

See 'An introduction to copyright'⁹ on the Australian Copyright Council website for information about:

- what copyright law protects and does not protect
- who owns copyright and the rights of the owner
- activities which infringe or do not infringe copyright.

2. Form of Access

Under section 72(1) of the GIPA Act access to government information in response to a formal access application may be provided in any of the following ways:

- by providing a reasonable opportunity to inspect a record containing the information
- by providing a copy of a record containing the information
- by providing access to a record containing the information, together with such facilities as may be necessary to enable the information to be read, viewed or listened to (as appropriate to the kind of record concerned)
- by providing a written transcript of the information in the case of information recorded in an audio record or recorded in shorthand or other encoded format.

An agency must provide access in the way requested by the applicant unless to do so would involve an infringement of copyright.¹⁰

As a practical measure the GIPA Act enables information to be deleted from a record or for a new record of the information to be created to facilitate the provision of open access information without infringing copyright.

Another form of access that can be provided to avoid copyright infringement is to make open access information available for inspection free of charge at the office of the local authority during ordinary office hours.¹¹

Providing access in this way may not infringe copyright because access by inspection does not involve reproduction of a copyrighted work.

⁷ <https://www.copyright.org.au/browse/book/ACC-An-Introduction-to-Copyright-in-Australia-INFO010>

⁸ <https://www.copyright.org.au/browse/book/ACC-Building-Plans-&-Copyright-INFO017>

⁹ <https://www.copyright.org.au/browse/book/ACC-An-Introduction-to-Copyright-in-Australia-INFO010>

¹⁰ Section 72(2)(c), GIPA Act.

¹¹ Clause 5(1)(a), GIPA Regulation. Section 72(1)(a), GIPA Act.

The provision of access in these ways aligns with the open access object of the GIPA Act in which proactive public release of government information is promoted.¹²

For more information about activities that do not breach copyright see the Australian Copyright Council's information sheets about:

- Research or Study¹³
- Fair Dealing: What Can I Use Without Permission?¹⁴

It is important to note that the intended use of information by an applicant or member of the public, such as to seek legal advice, is not relevant to the issue of whether a fair dealing exception to copyright can apply. The relevant dealing or use will be that of the agency because the agency will be the one making the copy or otherwise using the copyright in providing access to the information and thereby potentially infringing the copyright.

Accordingly, the agency's purpose in using the copyright by, for example, making a copy will be to fulfil its obligations under the GIPA Act and this is not a purpose which attracts a fair dealing exception.¹⁵

NCAT – Copyright

In *Sandy v Kiama Municipal Council*¹⁶ the applicant applied under the GIPA Act for access to information (plans, drawings and reports) relating to a development application for an abattoir adjacent to his property. The Tribunal affirmed the decision of the respondent to provide access to information by way of inspection, on the basis that to provide a copy of the records containing the information, as sought by the Applicant, would infringe copyright under the *Copyright Act 1968* (Cth).

In making its decision, the NSW Civil and Administrative Tribunal (NCAT) provided guidance about determining whether information associated with a development application will be subject to copyright and when copyright will be infringed by providing access under the GIPA Act.¹⁷

Significantly, there is no protection from breach of copyright in section 113 of the GIPA Act which provides protection to decision-makers acting in good faith in respect of actions for defamation or breach of confidence.

Accordingly, steps must be taken to ensure that a decision-maker/agency does not breach copyright in

providing access to information under open access requirements or in response to a formal access application.

For more information

Contact the Information and Privacy Commission NSW (IPC):

Freecall: 1800 472 679
Email: ipcinfo@ipc.nsw.gov.au
Website: www.ipc.nsw.gov.au

NOTE: The information in this fact sheet is to be used as a guide only. Legal advice should be sought in relation to individual circumstances.

¹² Section 3, GIPA Act.

¹³ <https://www.copyright.org.au/browse/book/ACC-Research-or-Study-INFO053>

¹⁴ <https://www.copyright.org.au/browse/book/ACC-Fair-Dealing:-What-Can-I-Use-Without-Permission-INFO079>

¹⁵ *Gardner v Transport for NSW* [2023] NSWCATAD 56

¹⁶ [2019] NSWCATAD 49

¹⁷ The IPC has published a case note about *Sandy v Kiama Municipal Council*: <https://www.ipc.nsw.gov.au/sandy-v-kiama-municipal-council-2019-nswcatad-49>