



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>V11 and Brisbane City Council [2021] QICmr 39 (6 August 2021)</i></b>
<b>Application Number:</b>	<b>315364</b>
<b>Applicant:</b>	<b>V11</b>
<b>Respondent:</b>	<b>Brisbane City Council</b>
<b>Decision Date:</b>	<b>6 August 2021</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - FORMS OF ACCESS - COPYRIGHT - survey and engineering plans - whether giving access to a copy of the plans would involve an infringement of the copyright of a person other than the State - access granted by way of inspection only - section 68(4)(c) of the <i>Right to Information Act 2009</i> (Qld)</b> <b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - EXEMPT INFORMATION - LEGAL PROFESSIONAL PRIVILEGE - in-house legal advice - whether information would be privileged from production in a legal proceeding - whether access may be refused under sections 47(3)(a) and 48 and Schedule 3, section 7 of the <i>Right to Information Act 2009</i> (Qld)</b>

## REASONS FOR DECISION

### Summary

1. The applicant applied to Brisbane City Council (**Council**)<sup>1</sup> under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to:
  - documents concerning the resurfacing and/or upgrade of a specified street
  - documents concerning the installation and/or removal of a concrete upstand wall in the same street
  - documents concerning the street and the applicant's name; and
  - cadastral survey results referred to in specific correspondence.
2. As Council did not make a decision within the relevant timeframe, Council is taken to have made a decision refusing access to all relevant documents. However, Council purported to make a decision about 1,701 responsive pages as follows:<sup>2</sup>

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<sup>1</sup> On 3 December 2019.

<sup>2</sup> The applicant applied for internal review on 9 March 2020 and Council purported to affirm its original decision on 3 April 2020.

- release 935 full pages and 626 part pages
  - refuse access to 52 full pages and 626 part pages; and
  - grant access to 88 pages by way of inspection only.
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for an external review.<sup>3</sup>
4. In terms of the issues remaining for determination, for the below reasons, I find that:
- Council providing copies of 88 pages would involve infringement of the copyright of persons other than the State, so access to the 88 pages in that form may be refused and given in another form (ie. inspection); and
  - 49 full pages and 22 part pages would be privileged from production in a legal proceeding on the ground of legal professional privilege and therefore may be refused on the ground they comprise exempt information.

## Background

5. The applicant lives on a street that was affected by a development application for another property. Council originally advised the developer on 16 February 2018:<sup>4</sup>

*You are advised that the construction of concrete slab, as well as kerb and channel within the unformed part of [street] has been scheduled on capital works list for the year 2019/20. However, funds are not available for these works at this stage. Where access from [street] is proposed as part of any future subdivision application, all infrastructure for the new lot, including concrete access and kerb and channelling, will have to be provided by the developer and shall be necessary to comply with the following requirements.*

6. Council imposed the following condition in granting approval for the development:<sup>5</sup>

*Construct roadwork (extension of [street]) with any associated drainage, footpath, site access and services for the Transport Network (Road) shown on the APPROVED Civil Road and Drainage Works Plans CV0 Rev E, CV1 Rev E, CV2 Rev E, CV3 Rev E & CV4 Rev E dated 18 Sep 2018 and in accordance with the relevant Brisbane Planning Scheme Codes, the Manual of Uniform Traffic Control Devices - Queensland Department of Transport and Main Roads - Transport Operations (Road Use Management) Act 1995 and the AUSTROADS design standards*

7. In responding to this condition, the developer conducted road works which resulted in a 500mm concrete upstand being erected in front of the applicant's property. In this regard, the applicant considers that a wall was constructed on behalf of Council in front of his house and that it blocks access to the street and needs to be removed.<sup>6</sup>
8. The applicant primarily seeks the most recent copy of the plans that concern the concrete upstand. The applicant was provided with a copy of Revision J of the Civil Road and Drainage Works Plans by the developer in August 2019 but does not have a copy of the final construction drawings which were Revision K. As this version post-dates development approval, it is not publicly available on Development.i. However, it appears

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<sup>3</sup> Application dated 29 April 2020.

<sup>4</sup> The approved Developer's pre-lodgement Advice lodged 14 June 2018 is publicly available on Development.i. Development.i is Council's database of past and current development applications and property information at <<https://developmenti.brisbane.qld.gov.au/>>. It has replaced PD Online, which was Council's previous application tracking system. According to Council, 'all information previously available on PD Online, is now available in Development.i' – see <<https://developmenti.brisbane.qld.gov.au/HelpLinks/General/>>.

<sup>5</sup> The approved conditions dated 2 January 2019 are publicly available on Development.i.

<sup>6</sup> External review application dated 29 April 2020.

that the concrete upstand detail in the Revision J drawings is the same as that in the Revision K drawings and the applicant has been notified of this.

9. Significant procedural steps in this review are set out in the Appendix.

### Reviewable decision

10. The decision under review is the deemed decision refusing access to all documents requested by the applicant that Council is taken to have made<sup>7</sup> on 24 January 2020.

### Evidence considered

11. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including the footnotes and the Appendix).
12. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information as embodied in section 21 of that Act. I consider that in observing and applying the law prescribed in the RTI Act, an RTI decision-maker will be *'respecting and acting compatibly with'* this right and others prescribed in the HR Act,<sup>8</sup> and that I have done so in making this decision, as required under section 58(1) of the HR Act. In this regard, I note Bell J's observations on the interaction between the Victorian analogues of Queensland's RTI Act and HR Act: *'it is perfectly compatible with the scope of that positive right in the Charter of Human Rights and Responsibilities Act for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act.'*<sup>9</sup>

### Information in issue

13. The information in issue in this review is 88 pages of engineering and survey plans (**Plans**) and the 49 full pages and 22 part pages over which legal professional privilege is claimed.

### Issues for determination

14. In his external review application, the applicant raised concerns about the refused information, access by way of inspection and the sufficiency of Council's searches.<sup>10</sup>
15. During the external review, some further information was released to the applicant.<sup>11</sup> OIC asked the applicant to identify any partially refused pages of interest to him and provide details of information which he considered was missing,<sup>12</sup> but received no response. OIC then advised the applicant that his lack of response to these issues would be taken to mean that he did not wish to proceed with review of information partially refused on the basis that its disclosure would, on balance, be contrary to the public interest<sup>13</sup> and sufficiency of search issues,<sup>14</sup> and again received no response to these issues.

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<sup>7</sup> Under section 46(1)(a) of the RTI Act.

<sup>8</sup> *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 at [111].

<sup>9</sup> **XYZ** at [573].

<sup>10</sup> Application dated 29 April 2020.

<sup>11</sup> Attached to Council's email to the applicant dated 19 May 2021, including parts of three of the 52 pages that Council's original purported decision refused in full.

<sup>12</sup> By letter dated 4 May 2021.

<sup>13</sup> Under sections 47(3)(b) and 49 of the RTI Act.

<sup>14</sup> By letter dated 11 June 2021.

16. Accordingly, the issues remaining for determination are:
- whether Council providing copies of the Plans to the applicant would involve infringement of the copyright of persons other than the State, so that access in that form may be refused and given in another form; and
  - whether 49 full pages and 22 part pages would be privileged from production in a legal proceeding on the ground of legal professional privilege and therefore comprise exempt information.

### Form of access and copyright

17. As noted above, the 88 pages of Plans are engineering and survey plans created by engineers and surveyors. Of these, 84 pages comprise plans created by staff of one company, 3 pages comprise plans created by staff of another company and 1 page is a plan created by staff of a third company.
18. It is not in dispute that the applicant may be given access to the Plans. The issue in contention is the form of access to those Plans. Council's position<sup>15</sup> is that providing the applicant with copies of the Plans would infringe the copyright of persons other than Council, and therefore access by providing copies may be refused, and access may be given by way of inspection. In contrast, the applicant maintains that he should be provided with copies of the Plans. He states that there is little utility in a one-off inspection of complicated engineering plans and questions whether copyright applies when, in his view, the Plans should have been made publicly available on PD Online<sup>16</sup> and the companies should have been aware that this would occur.<sup>17</sup>

### Relevant law

19. Generally, OIC is not involved in reviewing 'form of access' decisions involving copyright, as the RTI Act specifically excludes these matters from OIC's jurisdiction.<sup>18</sup> However, as set out above, the reviewable decision in this matter is a deemed decision<sup>19</sup> refusing access to all documents requested by the applicant – including the Plans that Council's purported decisions stated may be disclosed by way of inspection. In this particular circumstance – where Council is deemed to have refused access to the Plans, and OIC determines that access may be given – it falls to OIC to consider the issue of form of access insofar as it relates to copyright in the conduct of this external review.<sup>20</sup>
20. Section 68(4)(c) of the RTI Act provides that, if giving access in the form requested by the applicant would involve an infringement of the copyright of a person other than the State, access in that form may be refused and given in another form. Accordingly, in order to determine whether access to the Plans in the form sought by the applicant (being provided with copies) may be refused and instead given in another form (by way of inspection), it is necessary to consider whether copyright subsists and if so, whether it would be infringed by Council making copies for release under the RTI Act.

<sup>15</sup> As stated in its purported original and internal review decisions.

<sup>16</sup> Which, as noted at footnote 4, is the predecessor of Development.i.

<sup>17</sup> External review application dated 29 April 2020.

<sup>18</sup> Section 85 of the RTI Act provides that '[a] person affected by a reviewable decision may apply to have the decision reviewed by the information commissioner'. 'Reviewable decision' in Schedule 5 of the RTI Act includes '(i) a decision giving access to document in a form different to the form applied for by the applicant, **unless access in the form applied for would involve an infringement of the copyright of a person other than the State**' [my emphasis].

<sup>19</sup> A 'deemed decision' is a reviewable decision – see 'reviewable decision' section (j) of Schedule 5 of the RTI Act.

<sup>20</sup> The Information Commissioner has the power to decide any matter in relation to an access application that, under the RTI Act, could have been decided by the agency (section 105(1)(b) of the RTI Act).

## Findings

### Does copyright subsist?

21. Section 32(1) of the *Copyright Act 1968* (Cth) (**Copyright Act**) provides that copyright subsists in an original literary, dramatic, musical or artistic work that is unpublished and of which the author was a qualified person at the time when the work was made.
22. The *Copyright Act* relevantly defines ‘artistic work’ to include a drawing, whether the work is of artistic quality or not.<sup>21</sup> ‘Drawing’ includes ‘a diagram, map, chart or **plan**’ [my emphasis].<sup>22</sup> I am satisfied that the Plans are artistic works as plans are specifically identified as such in the *Copyright Act*.
23. The word ‘original’ is not defined in the *Copyright Act* but has been taken to mean that the work originates from the author, ie. it was not copied,<sup>23</sup> and will result where the author has applied his/her knowledge, judgement, skill or labour.<sup>24</sup> As the Plans were created by surveyors and engineers applying their special skill and knowledge in their fields, and do not appear to have been copied from another source, I am satisfied that they are original works for the purpose of the *Copyright Act*.
24. The Plans have not been made available on Development.i and do not appear to have been otherwise published.<sup>25</sup>
25. A ‘qualified person’ means an Australian citizen or a person resident in Australia.<sup>26</sup> Given the Plans were authored by staff of three registered Australian companies and relate to property located in Australia, I am satisfied that the persons who authored the Plans are likely to have been Australian citizens or residents.
26. On the basis of the above, I am satisfied that the Plans are original artistic works that are unpublished and of which the authors were qualified people at the time when the works were made. Therefore, I find that copyright subsists in the Plans.

### Would providing copies infringe copyright?

27. Copyright in relation to an artistic work such as the Plans is an exclusive right to do various acts, including reproducing the work in a material form, unless the contrary intention appears.<sup>27</sup> The companies whose staff authored the Plans are the owners of the copyright subsisting in the Plans.<sup>28</sup>
28. Section 36(1) of the *Copyright Act* provides that copyright is infringed when a person who is not the owner of the copyright, and does not have the licence of the owner, does in Australia, or authorises the doing in Australia of, any act comprised in the copyright. The *Copyright Act* does, however, provide that some acts do not infringe copyright – for example, fair dealings for the purpose of criticism or review, research or study, parody

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<sup>21</sup> Section 10 of the *Copyright Act*.

<sup>22</sup> Section 10 of the *Copyright Act*.

<sup>23</sup> *Acohs Pty Ltd v Ucorp Pty Ltd* (2012) 201 FCR 173 at [57]; *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 at 608-610 and Dixon J in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor & Ors* (1937) 58 CLR 479 at 511.

<sup>24</sup> *MacMillan and Co Ltd v Cooper* (1923) 1B IPR 204 at 212-213; *Interfirm Comparison (Aust) Pty Ltd v Law Society of New South Wales* [1975] 2 NSWLR 104 at 115 and *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 at 478-481 per French CJ, Crennan and Kiefel JJ.

<sup>25</sup> Section 29(1)(a) of the *Copyright Act* provides that an artistic work shall be deemed to have been published only if reproductions of the work have been supplied to the public.

<sup>26</sup> Section 32(4) of the *Copyright Act*.

<sup>27</sup> Section 31(1)(b)(i) of the *Copyright Act*.

<sup>28</sup> Section 35(6) of the *Copyright Act*.

or satire, reporting news, judicial proceedings or giving professional advice,<sup>29</sup> and acts done for the services of the Crown.<sup>30</sup> Therefore, in order to determine whether a particular act would involve an infringement of copyright, it is necessary to consider:

- does the person have the licence of the copyright owner to do the act; and
- does the act fall within any of the exceptions that the *Copyright Act* specifies do not constitute infringement of copyright.

29. Here, the act in question is Council's copying (ie. reproducing) of the Plans for the purpose of providing access to them under the RTI Act.

### **Licence**

30. There is no evidence to suggest that the copyright owners provided any formal licence or authority for Council to copy the Plans for the purpose of releasing them under the RTI Act. OIC has contacted each of the copyright owners and sought permission to release the Plans, but this has not been provided.<sup>31</sup>

31. The applicant submits that the copyright owners waived their exclusive rights to copy the Plans when they submitted the Plans to Council:<sup>32</sup>

*The consulting engineers either knew, or ought to have known, that the plans would probably be published on PD [O]nline. In those circumstances, the consulting engineers should be regarded as having already given permission for the plans to be published. Therefore, there is no reason to withhold the plans from me on the basis of copyright.*

32. As there is no provision concerning waiver in the *Copyright Act*, I have understood the applicant's submissions as suggesting that the owners of the copyright impliedly granted a licence to Council to copy the Plans when they were submitted.<sup>33</sup>

33. A licence may be implied by conduct,<sup>34</sup> by law in relation to a particular class of contracts<sup>35</sup> or by the need to give business efficacy.<sup>36</sup> I am not aware of any circumstances surrounding the provision of the Plans to the developer that would indicate the parties intended to imply a licence to Council to copy the Plans for providing access under the RTI Act. Nor am I aware of any circumstances in the conduct of the copyright owners nor the developer which would lead to the implication of a licence for Council to copy the Plans for the purposes of responding to an RTI application. The cases concerning implied licences usually involve the transfer of consideration for the preparation of works where it would be unfair to otherwise deprive that party of the product of the work, and therefore the presumption of the parties to use the works can be implied.<sup>37</sup> For example, if there was not an express licence given by the copyright owners to the developer to make copies of the Plans for the purpose of providing them to Council, then one might be implied. This is because the developer is the client who provided consideration for the preparation of the Plans for the specific purpose of those plans being provided to Council.

<sup>29</sup> Part III, Division 3 of the *Copyright Act*— *Acts not constituting infringements of copyright in works.*

<sup>30</sup> Section 183(1) of the *Copyright Act*.

<sup>31</sup> Letter dated 2 February 2021 and telephone calls on 24 June 2021 and 1 July 2021.

<sup>32</sup> External review application dated 29 April 2020.

<sup>33</sup> The applicant did not refute this assumption.

<sup>34</sup> *Lorenzo & Sons Pty Ltd v Roland Corp* 23 IPR 376 at 380-2 and *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 231 ALR 663 (**Concrete**) at [59].

<sup>35</sup> For example, contracts for architectural work. See *Beck v Montana Constructions Pty Ltd* (1963) 5 FLR 298 at 304 per Jacobs J; applied in *Ng v Clyde Securities Ltd* [1976] 1 NSWLR 443 at 445 per Wooten J and *Concrete* at [59].

<sup>36</sup> *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 and *Concrete* at [59].

<sup>37</sup> *Concrete* at [124] and [156].

34. The applicant submits that:<sup>38</sup>

*If I am in any way to adjust the front of my property (build a gate, driveway or make any other change), I will need to understand how this wall works.*

35. Council is aware that the applicant may submit an application for works to be undertaken which affect the upstand, for example, if the applicant were to change the driveway for his property to enter from the street in question, rather than the street on which it currently enters his property.<sup>39</sup> Council has advised the applicant that, if he makes such an application, it will need to be supported by detailed engineering designs and drawings which clearly demonstrate the proposed works and the impact of the proposed works on the road.<sup>40</sup> Therefore, the applicant submits that there exists a necessity to obtain a copy of the Plans so that he can engage his own engineer to prepare plans for changes to the upstand to be submitted to Council.<sup>41</sup> However, as set out in paragraph 8 above, the applicant has previously been given a copy of the engineering drawings of the concrete upstand that have the same details as those in the final versions in the Plans. The applicant may also inspect the Plans. On this basis, I do not consider that the necessity for the applicant to get a copy of the Plans in this matter is sufficient to imply a licence for Council to make a copy for his purposes.<sup>42</sup>

36. Alternatively, the applicant submits that Council has an implied licence to copy plans and drawings of infrastructure which Council itself owns (ie. infrastructure within the road reserve).<sup>43</sup> The applicant distinguishes decisions of the New South Wales Civil and Administrative Tribunal (**NSWCATAD**) on this basis, ie. the NSWCATAD decisions relate to private works, not public infrastructure.<sup>44</sup> However, the applicant did not provide, and I am not aware of any, legal authority for this point. I also note that accepting the applicant's contention that the owner of public infrastructure has an implied licence to reproduce copyrighted material relating to that infrastructure would have far-reaching implications which are clearly not intended by the copyright scheme – for example, Council would be taken to have an implied licence to reproduce any artistic paintings of Brisbane City Hall. The applicant also submits that, given the possibility that Council may wish to modify the upstand wall, Council must own or have an implied licence to use the Plans.<sup>45</sup> Council's possible *use* of the Plans in relation to further works by Council is different to Council's *reproduction* of the Plans for the purpose of providing access to them under the RTI Act. Here, I am only required to consider the latter. In my view, I am not satisfied Council's ownership of the relevant infrastructure is a sufficient basis to imply a licence to reproduce the Plans in order to provide access to them pursuant to the RTI Act.

37. I also consider that the following weigh against a conclusion that Council has an implied licence with respect to any of the Plans:

- for all of the Plans except one page, Council was not the client and did not provide consideration for the preparation of the Plans
- in the one circumstance in which Council was the client, the copyright holder expressly asserted its copyright in writing on the plan and stated that it was for the 'exclusive

<sup>38</sup> External review application dated 29 April 2020.

<sup>39</sup> Council's letter to the applicant dated 17 March 2020, attached to the applicant's submission dated 7 June 2021.

<sup>40</sup> Council's letter to the applicant dated 17 March 2020, attached to the applicant's submission dated 7 June 2021.

<sup>41</sup> Submission dated 7 June 2021.

<sup>42</sup> *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279 (**Copyright Agency**) at [92] referring to *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 450 per McHugh and Gummow JJ.

<sup>43</sup> Submissions dated 7 June 2021 and 1 July 2021.

<sup>44</sup> Submission dated 7 June 2021.

<sup>45</sup> Submissions dated 7 June 2021 and 1 July 2021.

use' of Council and its other professional advisers and was not to be used for any other purpose or by any other person

- most of the Plans demonstrate the author's intention to assert copyright by way of written warnings that prohibit the copying of the document without written permission from the copyright holder<sup>46</sup>
- the copyright holders would not have assumed that the Plans would be published on Development.i (formerly POnline), and indeed they were not, as they were part of correspondence which occurred after the development was approved by Council;<sup>47</sup> and
- there is no necessity for Council to have the right to copy the Plans for the purposes of release under the RTI Act, given the specific contemplation of inspection access under section 68 of the RTI Act.<sup>48</sup>

38. For these reasons, I find that Council does not have the implied licence of any of the three copyright owners to copy the Plans for the purpose of providing access to them under the RTI Act.

### **Crown use**

39. Section 183(1) of the *Copyright Act* provides a statutory licence for acts done in the service of the Commonwealth or States as follows:

*The copyright in a literary, dramatic, musical or artistic work or a published edition of such a work, or in a sound recording, cinematograph film, television broadcast or sound broadcast, is not infringed by the Commonwealth or a State, or by a person authorized in writing by the Commonwealth or a State, doing any acts comprised in the copyright if the acts are done for the services of the Commonwealth or State.*

40. Where this statutory licence is used, the copyright owner must be notified and terms agreed.<sup>49</sup>

41. It is unclear whether the Crown use provision extends to local governments such as Council.<sup>50</sup> In this respect, the Australian Law Reform Commission (**ALRC**) observed in its Report on Copyright and the Digital Economy in 2013:<sup>51</sup>

*Local governments are subject to state and territory FOI laws, and they are not covered by the statutory licence in the Copyright Act. The effect is that they risk copyright infringement when using copyright material in a way that is required by an FOI law. It has been necessary to make special provision in FOI laws so that, if access to a document in the form requested would breach copyright, then access in that form may be refused and access given in another form. The only form of access that does not breach copyright is making the document available for inspection, which is an inadequate approach in the digital age. [footnotes omitted]*

42. The ALRC made the following recommendation:<sup>52</sup>

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<sup>46</sup> '[An implied licence] cannot be drawn if there was an agreement of an inconsistent character.' *Torpey Vander Have Pty Ltd v Mass Constructions Pty Ltd* (2002) 55 IPR 542 per Spiegelman CJ at [18].

<sup>47</sup> Council explained in its submissions dated 3 December 2020: The Plans 'are part of the subsequent post-DA approval condition compliance processes that eventually result in plan sealing and refund of maintenance securities. Neither these post-DA approval nor building approval plans are required to be published on Council's website via Development.i (formerly PD Online).'

<sup>48</sup> *Copyright Agency* at [92].

<sup>49</sup> Section 183(4) and (5) of the *Copyright Act*. The inclusion of section 68(4) of the RTI Act indicates that there are some circumstances in which the statutory licence does not apply.

<sup>50</sup> 'State' means a State of the Commonwealth (section 2B of the *Acts Interpretation Act 1901* (Cth)). See J Bannister, 'Open Government: From Crown Copyright to the Creative Commons and Culture Change' (2011) 34 *UNSW Law Journal* 1080, 1098.

<sup>51</sup> ALRC, *Copyright and the Digital Economy* Report No 122 (2013) at [15.53]. See also ALRC *Copyright and the Digital Economy* Issues Paper 42, (2012) at [207].

<sup>52</sup> ALRC, *Copyright and the Digital Economy* Report No 122 (2013) at [15.67].



*Recommendation 15–4 The Copyright Act should provide for a new exception for uses where statutes require local, state or Commonwealth governments to provide public access to copyright material.*

43. It does not appear that this amendment has been adopted, however an update to the statutory licencing scheme to permit use by government of correspondence and other material sent to government, if the use is for non-commercial purposes, is being considered.<sup>53</sup>
44. The applicant did not raise the Crown use provision, nor make any specific submissions when OIC conveyed the above ALRC information to him. Based on the material currently before me, I am unable to conclude that Council’s copying of the Plans for the purpose of providing access to them under the RTI Act would be an act done for the services of the Commonwealth or State falling within the purview of the statutory licence contemplated in the Crown use provision.

### ***Fair dealing***

45. The applicant submits that he requires the Plans to ‘*understand why the wall was built in the first place and what engineering studies were undertaken in relation to the wall.*’<sup>54</sup> He also submits that he requires the Plans for the purpose of providing legal advice, in his capacity as a barrister, to himself and his wife as the wall is an unlawful interference with the common law right of access between his property and the street.<sup>55</sup>
46. Therefore, I have considered whether Council providing the applicant with a copy of the Plans would constitute a ‘fair dealing’ that does not constitute infringement of copyright under:

- section 41 of the *Copyright Act* which provides:

*A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of criticism or review, whether of that work or of another work, and a sufficient acknowledgement of the work is made.*

- section 43(2) of the *Copyright Act* which provides:

*A fair dealing with a literary, dramatic, musical or artistic work does not constitute an infringement of the copyright in the work if it is for the purpose of the giving of professional advice by:*

*(a) a legal practitioner...*

47. The relevant dealing for the purpose of considering these fair dealing exceptions is the act of copying by Council;<sup>56</sup> it is not the applicant’s subsequent use of those copies for the purposes nominated by him. Council would be making the copies for the purpose of providing access under the RTI Act – not the purpose of criticism or review, or the purpose of giving legal advice, as raised by the applicant. Accordingly, these fair dealing exceptions to infringement of copyright do not apply.

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<sup>53</sup> See <<https://www.communications.gov.au/departmental-news/copyright-access-reforms>>.

<sup>54</sup> Submission dated 29 April 2020.

<sup>55</sup> Submission dated 7 June 2021, which refers to *Walsh v Ervin* [1952] VLR 361.

<sup>56</sup> *Amos v Central Coast Council* [2018] NSWCATAD 101 (**Amos**) at [75]; *Sandy v Kiama Municipal Council* [2019] NSWCATAD 49 (**Sandy**) at [40] and *Hoyts Multiplex Cinemas Pty Ltd and City of Gosnells* [1997] WAICmr 1 at [25]-[30].

## Conclusion

48. I note a number of cases of NSWCATAD have considered similar documents (eg. engineering reports, surveys, drainage and building plans) under substantially similar provisions of the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**) and determined that the copying of documents for the purpose of release under the GIPA Act would constitute an infringement of copyright, and therefore access may be limited to inspection.<sup>57</sup>
49. Similarly, for the reasons outlined above, I am satisfied Council does not have an express, implied or statutory licence of any of the three copyright owners to copy the Plans for the purpose of providing access to them under the RTI Act. Further, I am satisfied the act of copying the Plans does not fall within the fair dealing exceptions noted above. Indeed, I consider that providing access under the RTI Act is a type of dealing not envisaged by any of the fair dealing exceptions in the *Copyright Act*. In these circumstances, I am satisfied that, if Council copied the Plans in order to give the applicant access to them under the RTI Act, this would constitute reproduction in a material form, which would infringe the exclusive copyright of the companies in question.
50. Therefore, I find that access to the Plans in the form sought by the applicant (being provided with copies) may be refused and instead given in another form (by way of inspection) under section 68(4)(c) of the RTI Act.

## Legal professional privilege

### Relevant law

51. Access to a document may be refused where information is exempt information.<sup>58</sup> Information is exempt information if it would be privileged from production in a legal proceeding on the ground of legal professional privilege (**LPP**).<sup>59</sup> Council refused access to 49 full pages and 22 part pages on this basis.
52. The exemption under the RTI Act reflects the requirements for establishing LPP at common law.<sup>60</sup> LPP protects confidential communications between a lawyer and their client, made for the dominant purpose of:
- seeking or giving legal advice or professional legal assistance (advice privilege); or
  - use in legal proceedings either on foot or reasonably anticipated, at the time of the relevant communication (litigation privilege).<sup>61</sup>
53. LPP may protect communications between salaried employee legal advisors of a government department or statutory authority and his/her employer as the client (including communications through other employees of the same employer) provided there is a professional relationship of legal advisor and client, which secures to the advice an independent character, notwithstanding the employment.<sup>62</sup>

<sup>57</sup> *Amos; Sandy; Hoggett v Campbelltown City Council* [2019] NSWCATAD 258 and *Brown v Wingecarribee Shire Council* [2020] NSWCATAD 102, all of which consider section 72 of the *Government Information (Public Access) Act 2009* (NSW).

<sup>58</sup> Sections 47(3)(a) and 48 of the RTI Act.

<sup>59</sup> Schedule 3, section 7 of the RTI Act.

<sup>60</sup> *Ozcare and Department of Justice and Attorney-General* (Unreported, Queensland Information Commissioner, 13 May 2011) at [12].

<sup>61</sup> *Esso Australia Resources Ltd v Commission of Taxation* (1999) 201 CLR 49 and *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 552.

<sup>62</sup> *Waterford v Commonwealth* (1987) 163 CLR 54 at 95-96 per Dawson J; *Potter and Brisbane City Council* (1994) 2 QAR 37; *F60XCX and Department of Natural Resources and Mines* [2017] QICmr 19 (9 June 2017); *Gapsa and Department of Transport and Main Roads* (Unreported, Queensland Information Commissioner, 12 April 2013) and *Hillier and Redland City Council* (Unreported, Queensland Information Commissioner, 9 June 2011).

## Findings

54. I am limited in the extent to which I can describe the information Council claims is subject to LPP.<sup>63</sup> However, it comprises emails between Council employees and solicitors in City Legal (Council's legal division) in which advice is requested, instructions provided, and advice conveyed. Where other matters are mentioned in the correspondence, I have assessed the dominant purpose of the communication and, in all cases, I am satisfied that this purpose is to seek, and provide, legal advice. There is nothing to suggest that the advice was not treated confidentially.

55. The applicant submits that LPP has been waived.<sup>64</sup> He referred to a letter, in which a solicitor for City Legal stated:<sup>65</sup>

*We do not accept your argument that the concrete upstand can be categorised as a "physical barrier which excludes access to the road", thereby being unlawful and entitling you to remedies at common law ... We dispute the fact that the concrete upstand excludes pedestrian access to your property from [street].* [applicant's emphasis]

56. The applicant submitted that these statements:<sup>66</sup>

*... constitute an assertion of belief by the Council which is objectively likely to have been informed by its legal advice. In those circumstances, it is unfair and inconsistent for the Council to claim privilege over legal advice which may inform or contradict that assertion and, therefore, privilege has been waived...*

57. The applicant did not provide any legal authority for this submission. The logical extension of the submission is that any correspondence sent by a lawyer for one party to another party in a dispute would result in waiver of privilege for any advice relating to statements in that correspondence. I do not accept that waiver extends to such circumstances. If it did, it would render large parts of the doctrine ineffective.

58. If there was a statement in Council's letter indicating that legal advice had been obtained upon which the letter was founded, along with circumstances in which it would be inconsistent or unfair to otherwise refuse access to the advice, my conclusion might be different.<sup>67</sup> However, this is not the case.

59. I am satisfied that 49 full pages and 22 part pages are subject to LPP and therefore access may be refused under section 47(3)(a) of the RTI Act.

## DECISION

60. I vary<sup>68</sup> Council's decision and find that:

- Council providing copies of the 88 pages comprising the Plans to the applicant would involve infringement of the copyright of persons other than the State, so access in that form may be refused and given in another form (ie. inspection),<sup>69</sup> and

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<sup>63</sup> Section 108(3) of the RTI Act.

<sup>64</sup> Submission dated 7 June 2021.

<sup>65</sup> Dated 17 March 2020.

<sup>66</sup> Submission dated 7 June 2021.

<sup>67</sup> *Mann v Carnell* (1999) 201 CLR 1 per Gleeson CJ, Gaudron, Gummow and Callinan JJ at [29] and *Osland v Secretary, Dept of Justice* (2008) 234 CLR 275 at [44]-[49].

<sup>68</sup> Noting that, as Council did not make a decision within the timeframe set out in the RTI Act, Council is deemed to have made a decision refusing access to all relevant documents.

<sup>69</sup> Under section 68(4)(c) of the RTI Act.

- 49 full pages and 22 part pages would be privileged from production in a legal proceeding on the ground of legal professional privilege and therefore may be refused on the ground they comprise exempt information.<sup>70</sup>

61. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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A Rickard  
**Assistant Information Commissioner**

**Date: 6 August 2021**

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<sup>70</sup> Under sections 47(3)(a), 48 and schedule 3, section 7 of the RTI Act.

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
29 April 2020	OIC received the application for external review.
30 April 2020	OIC emailed the applicant acknowledging receipt of his external review application. OIC emailed Council requesting preliminary information.
12 May 2020	Council provided preliminary information.
1 June 2020	Council provided further preliminary information.
2 June 2020	OIC emailed the applicant to advise that the external review application had been accepted. OIC emailed Council requesting copies of the documents in issue. Council provided copies of the documents in issue.
23 July 2020	OIC provided the applicant with an update.
27 October 2020	OIC conveyed a preliminary view to Council. OIC provided the applicant with an update.
25 November 2020	OIC emailed Council regarding its overdue response to the preliminary view.
3 December 2020	Council responded to OIC's preliminary view.
2 February 2021	OIC wrote to the applicant providing details of the Plans and suggesting the scope be narrowed to only those engineering plans concerning the concrete upstand. OIC wrote to the company responsible for creating 84 pages of the Plans, seeking consent to release them. OIC wrote to Council requesting that the relevant plans be provided to the company.
15 February 2021	The applicant confirmed that he sought access to all versions of all of the Plans.
9 March 2021	OIC requested further information from Council.
20 April 2021	OIC provided the applicant with an update.
4 May 2021	OIC asked Council to release a small amount of further information to the applicant. OIC provided a preliminary view to the applicant.
19 May 2021	Council released the further information to the applicant.
23 May 2021	The applicant contacted OIC to request an extension within which to provide a response to OIC's preliminary view.
25 May 2021	OIC agreed to provide the applicant with an extension of time to respond to the preliminary view.
7 June 2021	The applicant provided a submission in response to OIC's preliminary view.

Date	Event
11 June 2021	<p>OIC conveyed a further preliminary view to the applicant.</p> <p>OIC made further enquiries with the company responsible for creating 84 pages of the plans to determine whether they would consent to Council copying and releasing their documents.</p>
15 June 2021	<p>OIC emailed Council to request further information.</p>
24 June 2021	<p>OIC contacted two further companies responsible for creating the remaining four pages of the Plans to determine whether they would consent to Council copying and releasing their documents.</p> <p>OIC confirmed to Council and Council accepted that its reviewable decision is a deemed decision.</p>
25 June 2021	<p>Council provided OIC with further information regarding documents published on Development.i.</p>
1 July 2021	<p>OIC had further contact with one of the companies responsible for creating the remaining four pages of the Plans.</p> <p>OIC wrote to the applicant about its communications with all three companies responsible for creating the Plans.</p> <p>The applicant provided a response to OIC.</p>
22 July 2021	<p>OIC emailed the applicant to clarify his email dated 1 July 2021 and asked that the applicant advise by 29 July 2021 if he wished to narrow the scope of his application.</p>