information and privacy commission
new south wales

[redacted]
Telephone: 1800 472 679
Our reference: IPC17/A000321

Department of Communications and the Arts
GPO Box 2154
Canberra ACT 2601

Attention: Mr Steven Zorzi
Director, Copyright Law Section

By email: copyright.consultation@communications.gov.au

Dear Mr Zorzi

Copyright modernisation consultation paper

The purpose of this correspondence is to provide comments on the *Copyright Modernisation Consultation Paper* released by the Department of Communications and the Arts on 19 March 2018.

The consultation paper considers a number of possible reform options on three areas of the *Copyright Act 1968 (Cth)* that may benefit from modernisation:

1. flexible exceptions
2. contracting out of exceptions, and
3. access to orphan works

The following comments focus on item one above and are provided to assist the Department in its consideration of this issue.

About the IPC

The Information and Privacy Commission NSW (IPC) oversees the operation of information access and privacy laws in New South Wales. The Information Commissioner has responsibility for overseeing and advising NSW government agencies on compliance with the *Government Information (Public Access) Act 2009* (GIPA Act). The GIPA Act is the main legislative vehicle facilitating public access to government-held information in New South Wales.

The Government Information (Public Access) Act 2009 (NSW)

The object of the GIPA Act is to promote transparency and accountability in government decision-making by opening up access to government information to the public. In addition to providing a mechanism for information to be released via formal access applications, the GIPA Act also authorises and encourages the proactive public release of government information by agencies. Section 5 of the GIPA Act contains a general presumption that access to government information should be restricted only when there is an overriding public interest against disclosure.

Mandatory disclosure of information under the GIPA Act

Section 6 of the GIPA Act requires that agencies must make certain information publicly available on their website, and in any other way that is appropriate, unless there is an overriding public interest against disclosure of the information. The rationale for the

mandatory disclosure provision is that certain information about the way that government decisions are made is of such importance to the public that it should be made available proactively without people having to make a formal information access request.

This type of information is known as 'open access information'. Section 18 of the GIPA Act specifies that open access information includes:

(a) the agency's current agency information guide

(b) information about the agency contained in any document tabled in Parliament by or on behalf of the agency, other than any document tabled by order of either House of Parliament

(c) the agency's policy documents

(d) the agency's disclosure log of access applications

(e) the agency's register of government contracts

(f) the agency's record of the open access information (if any) that it does not make publicly available on the basis of an overriding public interest against disclosure,

(g) such other government information as may be prescribed by the regulations as open access information.

Section 14 of the GIPA Act contains an exhaustive list of the public interest considerations against disclosure that agencies may have regard to when deciding whether or not to disclose information they hold. The fact that copyright exists in relation to a document is not in itself an overriding public interest against disclosure for the purposes of the GIPA Act, although section 6(6) of the Act states that agencies are not required or permitted to make open access information available in any way that would constitute an infringement of copyright.

Difficulties for local councils

Some of the open access information that agencies are required to disclose on their websites contains copyright material. This is particularly the case for local councils.

Schedule 1 to the *Government Information (Public Access) Regulation 2009* (NSW) (GIPA Regulation) lists a significant amount of information held by local councils that must be proactively disclosed on a website, such as information about development applications (DAs), including architectural plans and drawings, and engineering reports that would be expected to be protected by copyright. That information must also be made publicly available by 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.

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. It is arguable that mandatory disclosure by State Government agencies under provisions of the GIPA Act would fall within section 183, being 'acts done for the services of the 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.

However, there is a problem where local councils hold and seek to copy or disclose copyright information under the GIPA Act. In advice provided to the IPC, the Crown Solicitor has expressed the opinion that councils are not the 'State' for the purposes of the Copyright Act, and so cannot avail themselves of the statutory licence provision in section 183 when copying or in other ways doing acts comprised in the copyright pursuant to their obligations under the GIPA Act.

Furthermore, the Crown Solicitor advised that local councils are unlikely to hold an implied licence permitting them to reproduce or communicate material that is covered by copyright. Nor, according to the Crown Solicitor, can councils rely on the fair dealing defences concerning research or study, or criticism or review, in sections 40 and 41 of the Copyright Act respectively. This is because, while research or study or criticism or review might be the goal of the member of the public seeking access to the information, councils would be reproducing or distributing the information for the purpose of complying with the GIPA Act, which falls outside the scope of the fair dealing defences.

This presents a problem since much of the information held by local councils is open access information and therefore must be disclosed under the GIPA Act. Consequently, councils will infringe copyright where, under section 6 of the GIPA Act, they make plans and reports submitted as part of a DA publicly available on their websites without the prior consent of the copyright holder. Councils will also infringe copyright where they make copies of plans and reports and provide them to members of the public in accordance with the GIPA Regulation.

This constraint undercuts the transparency and effectiveness of the GIPA Act by limiting councils' ability to provide public access to documents that inform the basis of their decisions. It also presents practical difficulties for councils in terms of knowing what is covered by copyright and what is not, and how to provide access under the GIPA Act and Regulation while not infringing copyright. This is particularly difficult for councils where people ask for copies of plans to their own house prepared years before for a different owner, and permission to copy cannot be obtained because the architect cannot be contacted or may be dead.

What the IPC has advised

The IPC has published knowledge updates to assist local councils to navigate their way through the complexity created by the interaction of the Copyright Act and the GIPA Act with particular regard to information associated with development applications. We have advised that 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
- consider asking for multiple copies of plans, copied with the consent of the copyright owner, to be submitted with 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 (since the public may be able to rely on this defence even though councils cannot), with notices near the photocopiers 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 member understand they must not provide any copyright advice to members of the public, nor expressly permit them to copy plans.

I have been advised by a number of councils that the issue of reconciling copyright and compliance with the GIPA Act and Regulation continues to create practical difficulties for local councils in New South Wales. Some councils do not have photocopying facilities available to members of the public, or the storage space for multiple copies of material. It is inconvenient for members of the public to have to attend council offices to view plans and not be able to obtain copies, particularly when the plans relate to their own house.

Need for a workable solution

It would greatly assist local councils if they had some resolution to the uncertainty they currently experience. That resolution should ideally balance the legitimate interests of copyright holders in protecting their rights, with the public interest in providing public access to information on which government decisions that affect the community are based.

The consultation paper proposes two reform options in relation to flexible exceptions under the Copyright Act:

- Option 1 - a prescribed purposes approach involving the insertion of additional fair dealing exceptions into the Act, including an exception for 'certain government uses' which could include uses where a statute requires public access, or
- Option 2 - an open-ended 'fair use' copyright exception which would adopt the fairness factors as used in the current research and fair dealing exception. This option would also introduce specific illustrative purposes to assist in the interpretation of the fairness factors. The purposes would mirror the existing and additional purposes specified under option 1 and include 'certain government uses'.

The IPC does not have a specific view about the preferred option to be progressed. I note that both options under consideration will include an exception for 'certain government use' and, therefore, would be sufficient to address the concerns noted in this submission.

I trust these comments will be of assistance to you in your consideration of these issues. Please do not hesitate to contact me if you have any queries. Alternatively, your officers may contact [redacted], on 1800 472 679, or by email at ipcinfo@ipc.nsw.gov.au.

Yours sincerely

[redacted] 3 July 2018

Elizabeth Tydd
CEO, Information and Privacy Commission NSW
Information Commissioner
NSW Open Data Advocate