



# Maddocks

## Email Letter

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<b>To</b> Lydia Wilson Chief Executive Officer	<b>Council/Department</b> Yarra City Council	<b>Email</b> wilsonl@yarracity.vic.gov.au
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Our Ref JXR:5053935

Dear Lydia

### Access by the public to Council's planning files

I have been asked to provide advice and recommendations to help develop a policy concerning access to Council's planning files.

Specific mention has been made of a recent interim measure taken by Council's Planning Unit regarding giving public access to:

- firstly, closed planning files;

[Note: a closed planning file is one where the application for permit has been determined and rights of review were either not pursued or exhausted – following either the grant or refusal of a permit.]

- secondly, correspondence, memorandum and/or file notes between members of staff of the Planning Unit and members of staff or consultants who provide technical information or professional opinions in relation to a permit application.

[Note: in this advice I will describe this material as "internal referral material" – although I am conscious that it would include materials passing to and/or emanating from Council's external consultants (eg architecture advice).]

It was an interim measure pending the receipt of this advice and the consideration of recommendations arising out of this advice.

[5053935/JXR/M0266365:1]

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## **Introduction**

In developing a policy relating to access to Council's planning files, Council needs to be mindful of, and manage, four key issues, namely:

### *Issue one*

- Council's legal obligations to, on the one hand, protect the personal information Council collects and handles in carrying out Council's planning functions; and
- on the other hand, Council's legal obligation to disclose information and documents according to statutory requirements.

### *Issue two*

- Council's own interest in ensuring Council manages the disclosure of information contained within Council's planning files (including where there is a prospect that documents on Council's files may affect the prospects of a decision Council is defending at a VCAT review).

### *Issue three*

- The administrative time involved in providing access to Council's planning files (particularly given the workload the planners within the Planning Unit already have).

### *Issue four*

- The expectations of the community, VCAT and other stakeholders such as DSE in terms of the appropriate level of access to information on Council's planning files (particularly in the lead-up to VCAT review hearings).

These issues may be, to varying degrees, in conflict with each other.

I do not propose to deal with the last two issues as they are issues of a more policy nature. I will focus on the first two issues.

## **Issue one – legal obligations**

In 2000, the *Information Privacy Act 2000* (IP Act) was enacted. Following a phase-in period of a year, from 1 September 2002 an organisation must not do an act, or engage in a practice, that contravenes an Information Privacy Principle in respect of personal information collected, held, used, disclosed or transferred by it.

An understanding of this Act and its operation is necessary when developing a policy concerning access to Council's planning files, given that Council's planning files contain personal information.

### **The Information Privacy Act**

The objects of the Act are as follows:

- to balance the public interest in the free flow of information with a public interest in protecting the privacy of personal information in the public sector;
- to promote awareness of responsible personal information handling practices in the public sector and to promote the responsible and transparent handling of personal information in the public sector.

The IP Act regulates the collection, handling and disclosure of personal information by the public sector. It requires personal information to be managed in accordance with a set of ten "Information Privacy Principles" (**IPPs**).

By subject matter, the IPPs are as follows:

- Principle 1 – Collection
- Principle 2 – Use and Disclosure
- Principle 3 – Data Quality
- Principle 4 – Data Security
- Principle 5 – Openness
- Principle 6 – Access and Correction
- Principle 7 – Unique Identifiers
- Principle 8 – Anonymity
- Principle 9 – Transborder Data Flows
- Principle 10 – Sensitive Information

Relevantly, personal information is:

- information or an opinion (including information or an opinion forming part of a database), that is recorded in any form and whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

Personal information held on Council planning files is likely to include:

- contact details (eg names, addresses, telephone numbers and e-mail addresses);
- credit card details (in relation to records kept on planning files of payment of various application fees and advertising fees);
- information concerning ownership and interest in land;
- other planning approvals held;
- planning enforcement documents (eg witness statements, photos, records of interviews);
- in some cases, information from surveys or questionnaires;
- complaints about land use activities, noise etc.

For present purposes, the most relevant IPPs are Principle 2, Principle 4 and Principle 5.

Principle 2 provides relevantly that Council may only use or disclose personal information for a purpose other than the primary purpose of collection (a "secondary purpose") in specified circumstances which include:

- the secondary purpose is related to the primary purpose of collection and the subject of the information would reasonably expect the organisation to use or disclose the information for the secondary purpose; or
- the individual has consented to the use or disclosure.

Principle 4 provides that Council must take reasonable steps to:

- protect the personal information it holds from misuse and loss and from unauthorised access, modification or disclosure; and

- destroy or permanently de-identify personal information if it is no longer needed for any purpose.

Principle 5 provides that Council must have clearly expressed policies on the Council's management of personal information which must be readily available.

The IP Act provides that if a provision of the Act is inconsistent with any other Act, the provision in the Act is (to the extent of the inconsistency) of no force or effect.

In particular, it provides that nothing in the Act affects the operation of the *Freedom of Information Act 1982 (FOI Act)*.

### **The *Planning and Environment Act 1987***

There are sections in the *Planning and Environment Act 1987 (P&E Act)* which mandate that Council makes certain information available for public inspection. These sections are examples of where Council's obligations to protect the privacy of personal information are relegated by its obligations to provide information.

What documents is Council required to make available under the P&E Act?

- **P&E Act, section 49** provides that a responsible authority must keep a register of all permit applications and all decisions and determinations relating to permits.

The expression "all decisions and determinations relating to permits" covers, in my view, refusals, decisions in relation to amendments to permits and decisions in relation to the endorsement of plans and other documents under permit conditions.

The register referred to in section 49 must be available for public inspection. There is a prescribed form of register (regulation 18 and Schedule 2 to the *Planning and Environment Regulations 1998*). Notably, the prescribed form includes personal information (but there will be no breach of the IP Act or any IPPs in making this available).

- **P&E Act, section 51** provides that a responsible authority must make a copy of every application and the prescribed information supplied with it available for inspection until either the end of the period specified in the Act for bringing applications for review or, where an application for review has been lodged, until the application is determined by the Tribunal or withdrawn.

This information is likely to contain personal information. Again, there will be no breach of the IP Act or any IPP in making this available during the review period.

- **P&E Act, section 57(5)** provides that a responsible authority must make a copy of every objection available for inspection until the end of the period specified in the Act for bringing applications for review.

An inspection of these copies must be able to be made free of charge.

Again, objections are likely to include personal information. Again, no breach of the IP Act or any IPP will occur in making this available during review period.

- **P&E Act, section 70** provides that a responsible authority must make a copy of every permit that it issues available at its office for inspection by any person during office hours free of charge.

### **General observations regarding Council's legal obligation**

I have not to this point discussed the *Freedom of Information Act* 1982. I will come that that later.

In terms of the IP Act and the P&E Act, the following propositions emerge.

1. Council's planning files (and that includes closed files) inevitably include personal information of the type governed by the IP Act.
2. In most cases the "primary purpose" for the collection of that personal information will be discernible (so, for example, the primary purpose for collecting an objection to the grant of a permit, is so that it can be taken into consideration when it comes to determining the application: s.60(1)(a) P&E Act).
3. Notwithstanding that the IP Act operates so that personal information of that type is not to be disclosed, the P&E Act overrides that by placing a statutory obligation to provide public access to it. The P&E Act prevails in that circumstance, even if the person who made the objection did not realise that the objection might be seen by anyone other than Council.

4. When the primary purpose for the collection of the information is discharged (so, for example, Council has considered the objection and determined the application), Council must not use or disclose that information for a secondary purpose unless the secondary purpose is related to the primary purpose and the subject of the information would reasonably expect the organisation to use or disclose the information for the secondary purpose **or** unless the individual consents to the use or disclosure.
5. Council's planning files (including closed files) will inevitably contain information which is not personal information of the type governed by the IP Act. Materials passing between members of staff and between staff and referral bodies probably come within that category (although even that is provided the materials do not disclose personal information about an individual).
6. In relation to this latter type of information, there is nothing in the IP Act which prohibits its disclosure. Some of it may be required to be made available to the public by the P&E Act, but some of it is not subject to such requirement (thereby leaving it to Council to decide whether or not to make it available).

### ***Freedom of Information Act 1982***

I have mentioned the Freedom of Information Act 1982 (**FOI Act**).

The FOI Act prevails over the IP Act to the extent of any inconsistency between the two Acts.

Hence, even if under the IP Act personal information is prevented from disclosure, the information must nevertheless be released to a person who makes application for access under the FOI Act **and**, if there is no ground for withholding access as set out in that Act.

The salient point about access to documents through the FOI Act is that, firstly, someone must make a proper application for access under that Act and, secondly, access is given where there are no grounds for withholding that access as set out in that Act.

These qualifications are important because, in relation to information of the type governed by the IP Act, Council must not disclose that information until both qualifications are met. One must not disclose personal information of the type governed by the IP Act on the basis that "the person can get it under the FOI Act anyway". Whether a person could get access to information under the FOI Act is irrelevant unless, at the very least, an application for access under that Act has been made.

The FOI Act operates in the same way with documents containing personal information (of the type governed by the IP Act) as it does to those that do not contain such information.

Documents passing between members of staff and between staff and external consultants (and file notes generated as a consequence of such dialogue) may well be obtainable under the FOI Act although, I am not able to advise on any particular document or class of documents without seeing the document (or class of documents) and without an understanding of the circumstances in which the document (or class of documents) was produced and the circumstances in which the request for access is being made.

I would not want to be taken to be saying that all documents passing between members of staff or between staff and its consultants are obtainable under the FOI Act. I am simply expressing an instinctive view that they may well be obtainable.

### **Issue two – Council's interest**

As I have already alluded to, it is legitimate for Council to exercise discretion over giving access to information and documents that go beyond those documents that Council is obliged to provide under the P&E Act.

I would add to this that it is particularly legitimate for Council to exercise discretion in respect of documents that were never intended for public comment or use and which have been generated solely for the purpose of assisting Council in exercising its planning functions under the P&E Act. Such documents can, in some instances, also have a bearing on Council's prospects in running a particular argument during the course of a VCAT review.

The fact is that once a person makes application to VCAT to review Council's planning decision (whether it be a developer against a refusal or failure to determine or an objector to a notice of determination), Council finds itself in a quasi-litigious situation.



Like any litigant, Council wishes to win the case (or more correctly stated, have its decision upheld) and wishes to put its best case forward.

That said, Council's position is different from other parties to a VCAT proceeding because it is a public body whose principle role is to administer and enforce its planning scheme. In my view, this imparts upon a council a greater duty to act fairly than may be imparted on other parties.

Aside from this there are expectations placed upon Council to give the public access to documents by the State government (see DOI – now DSE – practice note "Improving Access to Planning Documents") and VCAT (see VCAT Practice Note No. 2).

In my view, by reason of the matters I have just mentioned, Council is probably obliged to provide to those who are parties to the VCAT proceedings or may be entitled to become parties to such proceedings, all material relevant to the merits of the planning permit. [Bearing in mind I am here still referring to materials which do not contain personal information of the type governed by the IP Act.]

This is an obligation which is not a strict statutory duty but one which emerges out of Council's role as the administrator and enforcer of its planning scheme and its obligation to act fairly in review proceedings.

In my view, the obligation extends to material on Council's file that runs contrary to, or which weakens, the arguments Council wishes to advance at the Tribunal – including where the material is internal referral materials.

I am not sure that the obligation I am referring to necessarily extends to giving access to documents prior to the commencement of a VCAT review (such as, for example, during the public notice period) or to non-parties to a VCAT review (such as interested but unaffected persons). I am inclined more to the view that access to documents in such circumstances is ultimately a matter entirely for Council to make a policy about, unconstrained by any statutory requirement or obligation to act fairly.

If Council was to adopt a policy of public access to all persons, it is important that it do so in the knowledge that:

- firstly, it would need to be an unequivocal policy so that access is given regardless of the person seeking access (eg whether it is a developer or objector) or the nature of the document (whether it supports Council's ultimate position or is contrary to it) – otherwise Council will be criticised for not acting even-handedly, and

- secondly, the information contained in it might ultimately act against Council should there be a review of its decision.

I come back to this issue later.

Again, so that there is no confusion, the latter part of this advice relates to materials which contain information which is not personal information governed by the IP Act and which Council is not under a statutory obligation to make available under the P&E Act.

### **Access to documents on closed planning files**

This brings me to the first of the specific matters I have been asked to consider, namely giving the public access to documents on closed files.

As alluded to earlier, closed files will inevitably contain personal information of the type governed by the IP Act.

Reiterating, that for the purposes of this advice a file is closed once Council has determined the permit application and the rights of review are either not pursued or are exhausted. [Note: in saying this I am conscious that closed files are, from time to time, reopened when further dealings occur on the file (such as if there is a request for amendment of plans). In cases such as this a planning file may need to have added to it some divider which separates the "active" sections of the file from the closed (or inactive) sections.]

Clearly, in circumstances such as this, the primary purpose for which the personal information was originally collected dissipates upon the Council closing the file. So that, for example, the information provided to Council by an applicant in order to obtain a planning permit (some of which may contain personal information) is no longer needed for that purpose. Or, objections to the grant of a permit (again which may contain personal information) are no longer needed for that purpose.

Which begs the question, is it open to Council to disclose such information to members of the public who wish to access a closed file?

I suppose it is open for one to argue that the keeping of information on a closed file is a purpose related to the primary purpose of the information, and to argue further that a person who gives personal information for a primary purpose ought reasonably expect that the information will be used for a secondary purpose (the "secondary purpose" being for the purpose of giving people background information about Council's planning decisions).

I do not see merit in Council mounting such an argument. Aside from the risks that it might entail if pursued in front of a court or tribunal (that is, I do not believe the argument will prevail), the argument is not likely to find favour with the Privacy Commissioner (who, if displeased with the position Council takes on such matters, can make adverse public findings against Council).

Bearing in mind that we are now dealing with personal information contained in documents which, by this stage, the P&E Act does not require Council to give public access.

In my view, Council should adopt the safer (and more legally sound) position to treat personal information contained in documents in a closed planning file as not being related to the original primary purpose for which it was provided. Access to it should not be given to the public in the absence of either the consent of the person who gave the personal information or an application under the FOI Act and in circumstances where the information can not be withheld on the grounds set out in that Act.

I suppose also that it is possible for Council staff to go to a closed file whenever a request for access is made and extract from it the documents containing personal information but that would:

- firstly, require a significant addition to their workload,
- secondly, a knowledge and understanding by them of the IP Act and, hence, an ability to differentiate between personal information of the type governed by the IP Act and that which is not.

In my view, the community would not expect this level of resourcing and/or knowledge and understanding. It would accept a policy by Council that requests for access to documents on closed planning files be done by application under the FOI Act.

#### **Access to internal referrals**

To reiterated I am now referring to documents which do not contain personal information of the type governed by the IP Act and which are not required to be provided to the public by the P&E Act.

Examples of such documents include responses from Council's traffic engineers, or its heritage advisor or its urban design advisor.

In my view, the protocol which is most sustainable when assessed against the somewhat conflicting considerations is one where access to internal referral materials, regardless of the content of those documents, should be provided to all persons who have a direct interest in or are directly affected by the grant of a permit.

I am conscious that a protocol along the lines I am suggesting means that persons who do not have a direct interest or who are not directly affected by the grant of a permit would not be given access to internal referral materials (and that this might not find favour with the general community).

I believe, nevertheless, that it is a supportable and appropriate protocol.

That said, I am conscious that it means that, in the majority of cases, the information contained in internal referral materials will become common knowledge and that there is a certain inevitability that even those persons who do not have a direct interest in or are not directly affected by the grant of a permit will gain access to the materials (through other sources).

### **Protocol for internal referrals**

The analysis contained in this advice leads to me to conclude that, in relation to internal referral materials, the desirability is not so much in having a protocol for the provision of access to the public, but in a protocol to be employed by members of Council staff for such things as:

- referring permit applications for technical input or professional advice from internal or external staff or consultants;
- the manner in which staff or consultants respond to requests for technical or professional input;
- recording dialogue (by filenote or in correspondence) between members of Council staff and between Council staff and external consultants.

I should stress that this would not be a protocol which seeks to compromise the technical input or professional opinions given by staff or consultants or which seeks to curtail honest and frank exchange of views.

On the contrary, I would envisage a protocol which should improve the planning process and lessen the number of occasions that the technical and/or professional input is contrary to or weakens the position ultimately taken by the Planning Unit staff (when preparing their reports to Council) and by Council or the Council delegate (when it, he or she makes the decision).

To this end I have prepared a form of protocol with the view that it be used by Council for discussion as part of the ongoing consideration of the issue. I trust that it, together with the advice and recommendations contained in this letter provides Council with sufficient measure of guidance.

I also believe that it is desirable for Council to formulate protocols regarding the file management of planning files and for giving access to materials on planning files. These protocols would be directed at ensuring that documents produced in the course of a planning permit application are responsive, accurate and relevant and to ensure that, when access to a planning file is given, planning staff are made aware of their statutory responsibilities and that members of the public are encouraged to use information obtained from a Council file in a responsible manner.

Should Council wish to formulate a general file management of planning files protocol and a protocol for giving access to materials on planning files, I would, of course, be happy to assist.

Yours faithfully  
Maddocks

Transmission authorised by:  
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Partner