I'VE GOT IT AND YOU CAN'T HAVE IT

INFORMATION HELD BY COUNCILS

By Trevor Cork, Principal, McPhee Kelshaw Solicitors

1. Introduction

This paper considers provisions regulating access to information held by local councils in New South Wales. The paper considers relevant provisions of the Local Government Act 1993 (LGA), the Environmental Planning and Assessment Act 1979 (EP&A Act), Environmental Planning and Assessment Regulation 2000 (EP& A Regulation), the Privacy and Personal Information Protection Act 1998 (PPIPA) and the Freedom of Information Act (NSW) (FOI Act).

Access to information held by councils has often been the source of grievance in the relationship between councils and individuals and community groups. On the one hand, the PPIPA was introduced to ensure that personal information held by a council was not released or used inappropriately. The focus of that legislation is the privacy and rights of the individual. On the other hand, the New South Wales Parliament has made amendments to the LGA in an attempt to secure relatively easy access to most council records, and to introduce an access path for documents that is easier to pursue, and less cumbersome to administer, then similar provisions under the FOI Act.

Whether acting for councils or for members of the community seeking access to council records, the scope and interaction of all of this legislation raises important practical and philosophical issues for our consideration. Not least of those issues is the concept of "public interest", and the related issue of legal professional privilege. To what extent is the latter consistent with the former? Could it be suggested that legal professional privilege should give way to a different and wider "public interest" to make legal advice to a council open to scrutiny?

Under section 343 of the LGA it is the public officer of a council who has the responsibility of assisting people to gain access to public documents of the council. Many of the issues addressed in this paper will often fall to the public officer in a council to consider and determine.

2. Chapter 4 of the LGA - 1993

When originally enacted, the provisions of the LGA found in Parts 1 and 2 of chapter 4 (sections 9-13) were reasonably confined. Section 12 comprised sections 12(1) to 12(6) (as set out in the Appendix to this Paper). The section provided that it did "*not prevent the council from allowing inspection free of charge"* of documents other than those identified in the earlier sub-sections. The provision was permissive rather than mandatory.

Section 10 was also limited in its scope. The major focus of the original provision was found in sub-section (2) which provided that a council could close to the public only so much of a meeting as comprised the receipt or discussion of any of the matters specified in paragraphs (a) to (i). One of those matters was "*the receipt and consideration of legal advice concerning litigation*".

Access to documents held by a council was one of the issues considered in the discussion paper "*Options To Reform Those Provisions Of The Local Government Act 1993 Regulating Open Council Meetings And Public Access To Council Information*", released by the then Minister for Local Government in October 1996, although the focus of that document was on the closure of council meetings, which was addressed in issues 1-13 (out of a total 17 issues).

Issues 14 to 17 in the paper addressed access to documents held by a council as follows:

Issue 14 - right to copy documents
Issue 15 - review of decisions to restrict access to information
Issue 16 - access to information – councillors
Issue 17 - access to information – building and development applications

There was no specific consideration in any of issues 14-17 to documents held by a council that may be subject to legal professional privilege, or that may be confidential for other reasons, such as documents brought into existence in the circumstances specified in the then section 10. However, the paper did consider the absence of any mechanism for a council to review decisions to deny access to its documents, and also addressed the right of councillors to secure access to information that was required to fulfil his or her duties under section 232 of the LGA.

The issue of legal obligations of confidence was considered in the paper in the context of issue 10, dealing with section 10(2)(e). That section, in its original terms, permitted a council to close a meeting to the public when considering information that was subject to legal obligations of confidence.

On that matter, the Paper observed:

> "*Section 10(2)(e) of the Local Government Act provides that a council may close a meeting to the public when considering information that is subject to legal obligations of confidence .....*
>
> *It is not for the law to override an obligation of confidence entered into legally by two or more parties. Such an amendment could place councils in an untenable position, with a statutory requirement –v- a legal obligation. It could also create a restraint on trade because a business may not be prepared to trust the council with secret commercial information in the absence of a legal obligation of confidence .....*".

3. Local Government Amendment (Open Meetings) Act 1997 ("1997 Act")

Following the circulation of the discussion paper, the 1997 Act was introduced. This legislation deleted the then existing section 10 and inserted new sections 10-10E, dealing with council meetings. The legislation also amended section 12(1), inserted section 12(1A), omitted section 12(4) and inserted new sections 12(6), (7), (8), 12A and 12B.

(It should be noted that the Local Government Amendment (Meetings) Act 1998 subsequently amended section 10A(4), and omitted sections 10A(5) and (6) and section 10E. Amendments were also made to section 12(1) in relation to agendas, business papers and minutes of council and committee meetings that are closed to public.)

The Explanatory Note to the 1997 Act identifies one of the objects of the amendments in the following terms:

> "*(b) to require a council to allow public inspection and copying of its documents (subject to certain exceptions),.....*"

In relation to section 12(6) the Explanatory Note stated that the schedule to the amending Act:

> "*..... repeals section 12(6), which currently provides that the council's obligations under section 12 in relation to public inspection of the documents specified in that section do not prevent it from allowing inspection (free of charge) of any other of its documents. Schedule 1[9] replaces section 12(6) with proposed sub-sections (6-8). Rather than merely empowering a council to* ***allow*** *inspection of its other documents free of charge, proposed section 12(6)* ***requires*** *a council to do so, unless the council is satisfied that allowing inspection of the document would, on balance, be contrary to the public interest. Proposed section 12(7) exempts some documents from this requirement (the same documents as are exempted from the requirements to the proposed section 10E), and proposed section 12(8) precludes a council from determining that inspection is not in the public interest on grounds that the inspection may cause embarrassment to the council or on similar grounds.*"

The then Minister's second reading speech was delivered in the New South Wales Parliament on 13 November 1997. The focus of the speech was the conduct of council meetings, and the circumstances in which a meeting might be closed. In relation to the amendments to section 12 the Minister stated:

> "*..... the Bill will also apply the public interest criteria to the provision of information to the public by councils under section 12 of the Local Government Act, subject to the same protection of the privacy of individuals when it relates to personal hardship and personnel matters concerning particular individuals and trade secrets.....*

> *Section 12 of the Local Government Act provides a list of documents that a council must make available to the public on request. Development and building applications will be included in the list to encourage public participation in building and development approval processes. It will allow members of the public to more closely scrutinise complex development and building proposals that may have a direct impact on them ....."*

The focus of the debate in both the Lower House and the Upper House was on the amendments to section 10, and on the circumstances in which council meetings could be closed. Virtually no consideration was given to the scope of section 12(6), or to the apparent inconsistency between the section and the circumstances in which a council meeting could be closed under section 10A and following provisions. In particular, there was no consideration in the debate, apart from issues raised in question by opposition members of the Upper House, on the interaction between sections 12(6) and the issue of legal professional privilege.

Following the passage of the 1997 Act the Department of Local Government ("Department") issued circular 98/12, noting the commencement of the legislation on 1 March 1998. The circular briefly considered the amendments to section 12, noting that the public interest criteria would apply to the provision of information to the public under section 12. The circular also noted that if the general manager or another officer of council refused to give the public or councillors access to information then the person concerned would be required to give reasons for the refusal. That decision was then subject to review by the council after 3 months, and was then to be the subject of further 3 monthly reviews *"until the council finds that there are no grounds for refusal or access to the information is obtained under the Freedom of Information Act"*.

Formatted: English (Australia)

In circular 98/51 the Department again considered the 1997 Act, including changes to the Local Government (Meetings) Regulations. In 5.1 the circular stated:

> "*The council must allow inspection of its documents not covered by section 12(1) free of charge, unless it is satisfied that allowing inspection of a particular document would, on balance, be contrary to the public interest.....*
>
> *The provision of information to the public by councils is subject to the same public interest criteria as applies to the State Government under section 59A of the FOI Act .....*
>
> *While section 12(1) gives entitlement to inspect some documents, persons might chose to inspect or access other documents under the FOI Act, where there is protection from defamation. Reference might also be made to section 664 of the Local Government Act, concerning disclosure and misuse of information"*.

In relation to section 12(6), 5.3 of the circular stated:

> "*Section 12(6), allowing inspection of documents not referred to in section 12(1), does not override the common law right of councils to refuse access to documents that contain advice concerning litigation or advice that would otherwise be privileged from production in legal proceedings on the grounds of legal professional privilege."*

The circular also addressed the issue of refusal of access to documents, in the following passage:

> "*If the General Manager or other staff member of a council denies access to information held by the council to the public or a councillor, the person concerned must provide the council with written reasons for the restriction. The reasons must be publically available.*
>
> *A council must review any restriction no later than three months after it is imposed. If requested by any person, the council must carry out a further review of the restriction three months after the first review or three months after any subsequent review. If the council finds that there are no grounds for the restriction, or if access to the information is obtained under the FOI Act, the council must review the restriction.*"

4. Section 12 of the LGA - Current

Section 12(1) has been broadened to include documents submitted or prepared under the EP&A Act. The 1997 Act also introduced new section 12(1A) which confined a persons right to inspect a development application, or an application under part 1 of chapter 7 of the LGA for approval to erect a building, in certain respects.

In substance, the only plans and specifications submitted with such an application that are available for inspection are those which show the height of the proposed building and its external configuration in relation to the site on which it is proposed to be erected. Commercial information which is likely to prejudice the commercial position of the person who supplied it, or that reveals a trade secret, is also excluded. Other relevant provisions of the EP&A Act are specifically addressed below.

Section 12 deals with the inspection of documents, which is required to be "*free of charge*", as specified in sub-sections (1), (2) and (6). The issue of copying documents is addressed in section 12B. Sub-section 12B(1) provides that the right to inspect a document includes the right to take away a copy of the document. Sub-section 12B(2) requires that the council have a copy of all relevant documents available for copying by or on behalf of any person who asks for one. Copies may be taken away either free of charge or on payment of reasonable copying charges, as the council chooses (except as otherwise specifically provided by or under the LGA). The exceptions to that entitlement are found in sub-section (4), which provides, amongst other matters, that section 12B does not apply to "*building certificates"*.

Locating documents to make them available for inspection and for copying may impose a significant administrative burden on a council. It is not unusual for files to be stored away from the council's administrative headquarters, or for particular files that include information sought by members of the public to be very large.

The Department, in circular 02/54 addressed the issue of attempts to impose a "*retrieval charge*" and expressed the opinion that such a charge was not appropriate. In the circular the Department pointed out that section 12B(3) allows the council to impose "*reasonable copying charges"*. Having reviewed the relevant provisions under section 12 the Department concludes:

> *"In accordance with all these principles, therefore, the Department considers that the charging of 'retrieval charges', or other similar charges, except in the very limited case of versions of documents that are neither current nor immediately preceding versions and are also not reasonably accessible, is neither lawful nor appropriate.*
>
> *In this regard the Department's view is that the cost of copying a document cannot reasonably be said or argued to include or extend to the cost of retrieving or accessing a document to enable it to be copied."*

Notwithstanding its overall view that a retrieval fee should not be imposed, the Department in circular 02/54 appears to accept that some "*retrieval charge*" may be permissible. However, that right would appear to apply only in the case of documents covered by sub-section (5), where the requirement that the council allow inspection of documents other than the current and immediately preceding version of those documents is not qualified by the words "*free of charge*". Sub-section (5) would not appear to cover the case of old or bulky files that are retrieved from storage or archive, or the inspection of those files to identify the documents sought by the applicant.

As already noted, new section 12(6), is drawn in mandatory terms. The section reads:

> *"(6) The council must allow inspection of its other documents free of charge unless, in the case of a particular document, it is satisfied that allowing inspection of the document would, on balance, be contrary to the public interest".*

Certain exceptions to this mandatory obligation were introduced by new section 12(7), the text of which is found in the appendix to this paper. Section 36DA, referred in sub-paragraph (e), deals with the location of places and items of Aboriginal significance. Under sub-section 36DA(2) a council may resolve, at the request of an Aboriginal person traditionally associated with the land concerned or on the council's own initiative, to keep confidential parts of a draft or adopted plan of management which would disclose the nature and location of a place or an item of Aboriginal significance.

Further, new section 12(8) identified certain matters that were irrelevant to any determination of whether allowing inspection of a document would be contrary to the

public interest. Section 12(8) is, in substance, in identical terms to section 59A of the FOI Act.

5. Some Issues in Relation to Section 12(6)

This part of the paper considers a request for access for a document that is the subject of legal professional privilege. Having reviewed some of the issues that arise in that situation, the paper also reviews the steps to be taken in response to such an application, if the responsible officer within council determines that access should be refused.

The first and obvious issue that arises in relation to a request for access to a document under section 12(6) is that the council "*must allow inspection*" of the document unless the council is satisfied that allowing inspection of the document would, on balance, be contrary to the public interest. It is not sufficient for the council to simply respond by noting that the document is a communication between the council and its solicitors, and therefore the subject of privilege. Importantly, communications that are subject of legal privilege are not the subject of an automatic exemption from production under section 12(7).

In contrast to section 10A and the fact that a document is subject to privilege is not a matter that is determinative, in itself, for council's obligations under section 12(6). The council must be satisfied that allowing inspection of the privilege document would, on balance, be contrary to the public interest.

The "public interest" is addressed in the Ombudsman's FOI Policies and Guidelines (1997, 2nd edition). While that document was prepared in the context of the FOI Act, some of the matters addressed by the Ombudsman are helpful in the context of section 12(6) and to determinations made by council officers under that section. In the context of determining the "public interest" the guidelines recommend:

> "*5.1.4 The notice of determination must show that the decision maker has considered the matters favouring disclosure as well as those which don't in relation to each exemption clause which applies. One matter favouring disclosure will always be the general public interest in the widest possible access to government held information. Decision makers should draw on:*
>
> > *"their own knowledge and/or submissions of the applicant or other information to think laterally to identify relevant public interests favouring disclosure, and balance these fairly against those tending against disclosure, BEFORE REACHING A FINAL DECISION. In the course of this exercise preliminary views will often change." (Commonwealth FOI memorandum No. 26, para 64).*
>
> *5.1.5 In summary, where exemption is claimed using a clause with a public interest consideration, the notice of determination must show the public*

> *interest in release as well as the public interest in exemption, and why the latter was chosen over the former. Any determination that disclosure would not be in the public interest should be based on evidence which is referred to in the notice, and not just on the subjective views of the decision maker."*

At paragraph 5.2 of the guidelines there is consideration of the meaning of the expression "public interest" in the context of freedom of information. The guidelines refer to the decision of the Full Court of the Victorian Supreme Court in *Director of Public Prosecutions v. Smith* (1991) 1VR51. At page 75 the Court made the following observation:

> *"The public interest is a term embracing matters among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals."*

The council's response to the request would appear to involve the following steps:

(a) An officer of the council (not the council's solicitor) must consider the request for access to the document.

(b) The nature of the communication is to be considered. Factors such as those specified in section 10B(2) would be relevant. Issues such as those raised by the Ombudsman, (see Part 6 of this paper) may also be considered.

(c) The officer concerned must consider the factors favouring inspection and those supporting refusal of inspection. For example, maintenance of legal professional privilege, and the need for the council to obtain advice and to order its affairs accordingly would be balanced against the Parliament's preference that the administration of the council should be open, transparent and obvious to the public.

(d) In reaching his or her decision the council officer must exclude the matters specified in section 12(8).

(e) If inspection is refused, the reasons must be recorded in writing and must be provided to the council: s.12A(1).

(f) The reasons must be publicly available: s.12A(2).

(g) The council (not the decision maker) must review the restriction on access no later than three months after the original decision was made: s.12A(3).

(h) A further review of the decision must be carried out after the expiry of the initial review date if any person so requests: s.12A(4).

(i) The council must remove the restriction if, at any time, it finds that there are no grounds for the restriction or if access to the relevant document or other information is obtained under the FOI Act.

A decision by a council not to allow inspection of one of its documents is not reviewable by the Administrative Decision Tribunal. The option for a dissatisfied applicant would appear to be the initiation of action before the Land and Environment Court, challenging the council's decision. Such an action would be based on section 674(1) of the LGA, under which any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the Act. The application would fall within the jurisdiction of the Court under section 20(1)(d) of the Land and Environment Court Act (Class 4).

In December 2002 the New South Wales Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission released a document entitled "*First Report On The Inquiry Into Access to Information*". In its report the Committee considered submissions received from the Department, the Privacy Commissioner and the Ombudsman in relation to the interaction of the FOI Act and section 12 of the LGA.

The Ombudsman recommended that sections 12(6) and 12(7) of the LGA should be repealed. However, the Committee did not support that suggestion. The Department recommended some minor reforms, with the Committee noting the following:

> "..... *Considered, too, in the Department's submission were the different avenues of appeal available under the two regimes – the Land and Environment Court (LEC) under section 12 of the LG Act, and the Administrative Decisions Tribunal (ADT) under the FOI Act. On this issue, the Department concluded:*
>
> > *'While the remedies available in the LEC may be wider than in the ADT, it is a more complex and expensive jurisdiction for an applicant to contemplate. This may make enforcement of s.12 less practical than enforcement of applications made under the FOI Act. However, the Department is of the view that the very existence of a second avenue – namely, FOI applications which may in turn be pursued in the relatively inexpensive ADT – should act as an encouragement to councils to deal with s.12 applications effectively in the first place. Therefore no change is recommended with respect to enforcement issues.'"*

6. The Ombudsman's Approach

The approach of the New South Wales Ombudsman to the issue of access to legal advice held by a council is outlined in a series of principles entitled "*Ombudsman Principles on*

Obtaining and Distributing Legal Advice". That document includes the following passages:

> *"7. Under section 12(6) of the Local Government Act 1993, councils are entitled to refuse to allow legal advice they hold to be inspected principally on the grounds that they are satisfied allowing inspection of the document would be contrary to the public interest. The other exceptions to section 12(6) set out in section 12(7) will seldom apply to legal advice.*
>
> *Councils are not entitled to refuse to allow legal advice to be inspected specifically on the grounds the information is subject to legal professional privilege.*
>
> *However, generally, it would be contrary to the public interest, for example, to release legal advice in relation to current or immediately contemplated litigation to a party to that litigation having interests adverse to the council or that party's advisors.*
>
> *8. In general terms, it is unlikely to be contrary to the public interest to allow legal advice relating to council affairs to be inspected if:*
>
> - *it contains information likely to contribute to positive and informed debate about issues of serious interest*
> - *it reveals significant reasoning behind council's decisions that will affect or will affect a significant number of people*
> - *it shows the pathway by which council policy was created*
> - *it will significantly contribute towards the public accountability of council*
> - *it will assist or allow enquiry into possible deficiencies in council's conduct (for example, by removing suspicion of significant impropriety or exposing significant impropriety).*
> - *it consists of information that is legally in the public domain*
> - *it relates to the affairs of the individual who requested the right to inspect the document*
> - *it shows how council has dealt with a person's complaint and the outcome of the complaint*
> - *it is innocuous by reason of its stale or trivial contents, or*
> - *it will overcome any special disadvantages facing persons making claims against councils.*
>
> [Footnote 1.] *The basis for this view is that section 12 represents a codification of the law and that, as such, it would appear that common law privileges such as legal professional privilege have been excluded)."*

As will be noted, the position of the Department outlined in circular 98/15, varies significantly from the position proposed by the Ombudsman in the Principles quoted above.

7. Issues Raised by the Ombudsman

At least some support for the Ombudsman's position can be found in section 10A, which identifies the circumstances in which a council meeting may be closed to the public. The matters that allow a council to close its meeting are listed in section 10A(2). One of those matters is the following:

> "*(g) Advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege."*

Section 10B(2) further restricts that ground for exclusion of the public, and is in the following terms:

> "*(2) A meeting is not to be closed during the receipt and consideration of information or advice referred to in section 10A(2)(g) unless the advice concerns legal matters that:*
>
> *(a) are substantial issues relating to a matter in which the council or committee is involved, and*
> *(b) are clearly identified in the advice, and*
> *(c) are fully discussed in that advice.*"

Section 10B(4) is in similar terms to section 12(8). The section identifies matters that are relevant for purposes of determining whether discussion of a matter in an open meeting would be contrary to the public interest.

It is therefore the case that section 10A contemplates that a meeting may be closed for the receipt of legal advice in the terms described, and specifically identifies advice that would be privileged from production. However, section 12(6) incorporates no such exclusion. Instead, the sole test is that of public interest. The Ombudsman's suggestions concerning the release of legal advice, and their identification of the public interest in such a release, therefore merit serious consideration.

8. Public Interest – S59A FOI Act

As already noted, section 12(8) is drawn in similar terms to section 59A of the FOI Act. That section is as follows:

> "***Public Interest***
>
> ***59A Public Interest***

For the purpose of determining under this Act whether the disclosure of a document would be contrary to the public interest it is irrelevant that the disclosure may:

(a) cause embarrassment to the Government or a loss of confidence in the Government, or
(b) cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason."

9. EP&A Act – Documents

Section 12(1) identifies a number of documents, brought into existence under the provisions of the EP&A Act, which council is obliged to allow "*everyone"* to inspect, free of charge. The documents listed include the following:

- development applications *"and associated documents"*
- records of building certificates under the EP&A Act
- environmental planning instruments
- development control plans
- plans made under section 94AB of the EP&A Act applying to land within the council's area.

The obligations imposed on a council under section 12(1) include the obligation to allow inspection of versions of documents, other than current and immediately preceding versions, if those other versions are reasonably accessible. As a result, a council is required to make available for inspection earlier versions of its planning instruments, control plans etc, subject only to documents concerned being "*reasonably accessible*". Presumably this would not require the council to make available for inspection, free of charge, copies of planning instruments that have been repealed.

The restrictions imposed by section 12(1A), on the plans and specifications for any residential parts of a proposed building, are also material in this context.

Section 100(1) of the EP&A Act requires a council to keep, in the prescribed form and manner (if any) a register of:

(a) applications for development consent
(b) the determination of applications for development consent (including the terms of development consents granted)
(c) the determination of applications for complying development certificates (including the terms of such certificates)
(d) decisions on appeal from any determination made under Part 4

Section 100(2) requires that the register be available for public inspection, without charge, at the office of the council during ordinary office hours.

Under section 113 of the LGA a council is required to keep a record of approvals granted under Part 1 of Chapter 7. The Environmental Planning and Assessment Amendment (Savings and Transitional) Regulation includes clause 54, in the following terms:

> "***Records Under Section 113***
>
> ***54.*** *Records kept by a council under section 113 of the unamended LG Act 1993 in relation to approvals for prescribed activities are taken to be records kept by the council under section 100 of the amended EP&A Act 1979."*

The definition of "*prescribed activity*" is found in clause 3 (Definitions) of the Savings and Transitional Regulation and includes an activity specified in the Table to section 68 in Items 1, 2, 5, 6 or 7 of part A (Buildings, Temporary Structures of Movable Dwellings).

Clause 56 of the EP&A Regulation applies to "*all development other than designated or advertised development"*. Clause 56(2) is in the following terms:

> "*(2) Extracts of a development application relating to the erection of a building:*
>
> *(a) sufficient to identify the applicant and the land to which the application relates, and*
>
> *(b) containing a plan of the building that indicates its height and external configuration, as erected, in relation to the site on which it is to be erected, if relevant for that particular development,*
>
> *are to be made available to interested persons, either free of charge or on payment of reasonable copying charges."*

Section 4(b) to the EP&A Act specifies that a reference in the Act to the erection of a building includes a reference to each of the matters specified in sub-paragraphs (i) to (v). Sub-paragraph (i) includes the re-building of a building or the making of alterations to or the enlargement or extension of a building.

Clauses 264 to 268 inclusive of the EP&A Regulation deal with registers and other records to be maintained by a council. The relevant provisions are as follows:

> "*Cl. 264 Register of details of development applications (1) and of development consents (2), and an index of development consents (3). For the purpose of section 100 of the EP&A Act the prescribed*

form for the register is a book, in loose leaf form, or an electronic data retrieval system

Cl. 265 *Register of details of each complying development certificate (whether or not the council is the certifying authority), and an index of complying development certificates (2), the form of register (3), is a book in loose leaf form or electronic data retrieval system*

Cl. 266 *Certain documents relating to development applications and consents (1), including documents furnished to a council in accordance with the EP&A Regulation by any other consent authority or certifying authority, where the council does not fulfil those roles*

Cl. 267 *Certain documents relating to complying development certificates".*

Clause 268(1) provides that:

> *"(1) Council must make available for inspection at its principal office, free of charge, during the council's ordinary office hours:*
>
> *(a) the registers kept under cl 264 and 265*
> *(b) the documents kept under cl 266 and 267."*

A copy of any extracts from the register or a copy of any other documents may be made on payment of a reasonable copying charge set by the council (2). Clause 268(3) confirms that the clause does not entitle any person to inspect, copy or take extracts from any document that because of section 12(1A) of the LGA a person does not have the right to inspect.

10. Privacy and Personal Information Protection Act 1998 (PPIPA)

One of the issues that councils must address in the context of their obligations under Part 2 of Chapter 4 of the LGA is the issue of the PPIPA. That Act regulates the way in which a public sector agency (which by definition includes a local government authority) "*collects and holds personal information"*. That term is defined in section 4 of the PPIPA to include:

> "*information or an opinion (including information or an opinion forming part of a data base and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion"*.

Under section 8, and in common with all public sector agencies, a council must not collect personal information unless:

> "*(a) the information is collected for a lawful purpose that is directly related to a function or activity of the agency; and*
> *(b) the collection of the information is reasonably necessary for that purpose."*

Further, a council must not collect personal information by any unlawful means.

These obligations are found in Part 2 of the PPIPA, which sets out 12 information protection principles. The principles found in sections 18 and 19 of the PPIPA relate to the disclosure of personal information. Under section 18 a council that holds personal information must not disclose that information to a person other than the individual or to another body unless:

> "*(a) the information disclosed relates directly to the purpose for which the information was collected and there is no reason to believe that the individual would object to its disclosure;*
> *(b) the individual is reasonably likely to have been aware, or has been told, that information of the kind is usually disclosed to the other person or body; or*
> *(c) the council believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person.*

If a council receives personal information from a third party then it must use or disclose the information only for the purpose for which it was given to it. If a council is required to release information to another public sector agency, then a council must do everything reasonable to prevent the unauthorised use of that information by that other agency (section 12).

Section 19 very closely confines the circumstances in which personal information relating to an individual's ethnic or racial origin, political opinions, religious or philosophical beliefs, trade union membership or sexual activities may be released. This may only be done if the disclosure is necessary to prevent a serious an imminent threat to the life or health of the individual concerned or of another person. Section 19 also limits the circumstances in which a public sector agency may disclose information to a person or body who is in a jurisdiction outside New South Wales or to a Commonwealth agency. In substance, there must be a relevant privacy law that applies to the personal information concerned that is in force in the other jurisdiction, or that applies to the Commonwealth agency concerned.

The PPIPA includes a number of exemptions to the limitations that it imposes on the disclosure of information. One of those exemptions is found in section 25, which is in the following terms:

"***25.*** *Exemptions where non-compliance is lawfully authorised or required*

A public sector agency is not required to comply with section 9, 10, 13, 14, 15, 17, 18 or 19 if:

(a) the agency is lawfully authorised or required not to comply with the principle concerned, or

(b) non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law (including the State Records Act 1998)".

This exemption raises the issue of the interaction between the PPIPA and section 12 of the LGA. The first issue to note is that to the extent that any personal information is contained in the documents listed in section 12(1), then a council would nonetheless be obliged to make those documents available for inspection and, if necessary, for copying. More difficult issues arise in relation to section 12(6).

The PPIPA deals in Part 3 with privacy codes of practice and management plans. Section 29(1) permits privacy codes of practice to be made for the purpose of protecting the privacy of individuals. Such a code may regulate the collection, use and disclosure of, and the procedures for dealing with, personal information held by public sector agencies. A privacy code of practice may modify the application to a council of one or more of the information protection principles or the application of the provisions of the PPIPA dealing with public registers.

To assist councils with this aspect of the PPIPA, the Department prepared and circulated a model privacy management plan, which was made available for adoption by councils, if they saw fit. A privacy code of practice for local government was also prepared. Section 32 provides that a council must comply with any privacy code of practice that applies to it.

The model privacy management plan circulated by the Department identified the following as public registers under the LGA:

- section 53 – land register
- section 113 – records of approvals
- section 449-450A – register of pecuniary interests
- section 602 – rates records

The model plan identified the following as public registers under the EP&A Act:

- section 100 – register of consents and approvals
- section 149G – record of building certificates

Other registers under other legislation were also identified.

Part 6 of the PPIPA deals with public registers. That term is defined in section 3 as follows:

> *"**public register** means a register of personal information that is required by law to be, or is made, publicly available or open to public inspection (whether or not on payment of a fee)."*

Section 57 of the PPIPA specifies that a council responsible for keeping a public register must not disclose any personal information kept in the register unless it is satisfied that the personal information is to be used for a purpose relating to the purpose of the register or the Act under which the register is kept. Section 57(2) allows a council to require any person who applies to inspect personal information contained in a public register *"to give particulars, in the form of a statutory declaration, as to the intended use of any information obtained from the inspection"*.

On 4 July 2000 the Department issued circular 00/44, attaching a copy of The Privacy Code of Practice for Local Government, which was approved by the Attorney General and made by order published in the Government Gazette on 30 June 2000. The Code took effect from 1 July 2000.

The Code of Practice modified the application of Part 6 of the PPIPA and the application of the twelve information protection principles insofar as they applied to local government.

Importantly in the context of public registers, the Code of Practice specifies in Part 2 that:

> *"A council may allow any person to:*
>
> *(i). inspect a publicly available copy of a public register in council premises, and*
> *(ii). copy a single entry or page of the register*
>
> *without requiring the person to provide a reason for accessing the register and without determining that the proposed use of the register is consistent with the purpose of the register or the Act under which the register is kept."*

The Code of Practice also specifies that a council should not require any person to provide a reason for inspecting the council's pecuniary interest register or any register on which the council records declarations made by councillors or designated officers under Chapter 14 Part 2 Divisions 3 or 4 of the LGA. (The latter provisions relate to the disclosure of pecuniary interests at meetings (Division 3) and the disclosure of pecuniary interests in council dealings (Division 4)).

The Code of Practice notes that requests for access, copying or sale of the whole or a substantial part of the public register held by a council may not accord with the purpose

for which the register was created. Provision is therefore made for that action to be taken, provided that the names and addresses of current and previous property owners, and current and previous applicants, are not disclosed. Alternatively, the whole or a substantial part of a public register may be the subject of access, copying or sale if the council has secured a statutory declaration, made by the person requesting the information, confirming that the information is to be used for a purpose of the register or the Act under which the register is kept.

In relation to granting access, or allowing copying or sale of the whole or a substantial part of a public register, the Code provides that the council must ensure that the provisions of section 12(1A) (which limits a right of inspection in relation to a development application or an approval to erect a building) and of section 149G of the EP& A Act (which restricts the right of a person to obtain a copy of a building certificate) are observed. While section 149G compels a council to keep a record of building certificates issued by it, and to allow inspection of that record, a copy of a building certificate may be obtained from the record only with the consent of the owner of the building and on payment of the fee prescribed by the regulation.

The Code then reviews the way in which the twelve information protection principles under the PPIPA will be applied by a council, in each case incorporating various modifications to those principles.

When considering the interaction between the PPIPA and the LGA, it is important to note that section 59 of the PPIPA provides that the provisions of Part 6 (which deal with public registers) "*prevail to the extent of any inconsistency with the requirements of the law under which the public register concerned is established*".

The Department's circular 00/75 considers the issue of whether the council's rates record is a "public register", having regard to the definition of that term in section 3 of the PPIPA. If the rates records do fall within that category then the release of personal information from the record would be governed by section 57.

The circular notes that the PPIPA does not include a definition of "register", while section 602 of the LGA (which requires the council to keep a record of rates and charges in relation to each separate parcel of land within its area, including details of the owner of that land) does not refer to the rates records as either a "public register" or a "register". Having considered the dictionary definition of "register" the circular concludes that:

> *"It will depend upon the record-keeping system of the Council as to whether rates records kept under s.602 of the LGA are kept together in such a manner as to meet the normally accepted definition of a "register"."*

The circular concludes that if the rates record is a "public register" for the purposes of the PPIPA, then a disclosure of personal information must not be made unless:

(i) the disclosure is allowed under section 57(1); and

(ii) the disclosure would not be contrary to the public interest as per section 12(6) of the LGA.

In concluding its consideration of the issue the circular concludes:

> *"It is therefore for each Council to determine for itself whether or not their rates record-keeping system is likely to meet the above definition of "public register", and hence be subject to the provisions governing "public registers" with respect to disclosure to third parties.*
>
> *However if a Council determines that their rates record-keeping system is* ***not*** *likely to meet the above definition of "public register", the provisions of the LGA and the PPIPA regarding third-party disclosures from other sources should be applied. In particular, when applying the "public interest" test under s.12(6) of the LGA, Councils should bear in mind the public interest objective of privacy protection.*
>
> *The Department acknowledges that the interaction of the PPIPA and the LGA is a complex area for Councils. It is understood that Privacy NSW will be reconvening the Local Government Privacy Working Party in the new year, in order to try and address some of the issues arising since the implementation of the PPIPA."*

11. NV v Randwick City Council [2005] NSW ADT 45 (4 March 2005)

On 4 March 2005 the New South Wales Administrative Decisions Tribunal (ADT) delivered its decision in NV v Randwick City Council.

The applicant sought a review of the conduct of Randwick City Council in relation to its dealing with personal information of the applicant. The applicant alleged that the Council contravened the information protection principles by providing one of the applicant's neighbours with access to letters written by the applicant to the Council. The applicant sought monetary compensation and other orders.

Ultimately, the respondent successfully contended that the Tribunal had no jurisdiction because the internal review application was not lodged with the Council within six months of the time at which the applicant first became aware of the conduct in respect of which the applicant sought relief. However, the observations of the ADT concerning the substantive matters in issue between the parties are of relevance to decisions made by public authorities when attempting to balance information protection principles on the one hand and statutory obligations to disclose information on the other hand.

The decision sets out the text of a comprehensive statement of agreed facts which was submitted by the parties to the ADT. The ADT noted that the context of the application was *"a long-running and often very bitter neighbourhood dispute which, as the applicant's legal representative put it, 'clearly got completely out of hand'".*

The applicant and the neighbours each lived in two storey residential properties. The neighbours secured consent to erect extensions to their property. The construction of those extensions was opposed by the applicant. The applicant contended that the extended dwelling impeded her privacy "*by the unfortunate positioning of two windows*". The applicant alleged that the neighbours were able to look into her home, which in turn caused great upset to the applicant and to her two adult children.

During the development approval process the applicant met with Council staff and made written submissions to the Council on behalf of her husband and herself. Notwithstanding the applicant's objections development consent was granted in June 1999 and construction work began in May 2000. In December 2000 the applicant forwarded a letter to the Mayor of Randwick complaining about the installation of transparent windows in the neighbour's property, which the applicant believed would impinge upon her privacy.

The applicant then forwarded a further letter to the Mayor in February 2001. The statement of agreed facts summarised the contents of that letter as raising "*privacy concerns and complaints about the activities of the residents of the neighbours' property*". The Tribunal noted that the letter went considerably further than the statement would indicate, and that the letter made specific allegations about the conduct of one of the residents of the neighbours' property.

When no response was received to the first letter, the applicant in May 2001 forwarded a further letter to the Council. This letter again made allegations about the conduct of the neighbours, and also about visitors to the neighbour's property who looked through the disputed windows.

These letters were placed by the Council on the file relating to the neighbours' development application. In April 2001 the Council wrote to the applicant advising that no further action would be taken.

In July 2002 the neighbours applied to inspect the file relating to their property. That application was made pursuant to section 12 of the LGA. The Tribunal noted the terms of section 12(6), and also referred to sections 12A, 12B and 13 of the LGA.

The ADT observed that:

> "*Council granted the [neighbour's] section 12 request in early August 2002;*
>
> *a. without considering whether, pursuant to section 12(6) of the Local Government Act, inspection of the document would, on balance, be contrary to the public interest; and*
> *b. without regard to the Privacy and Personal Information Protection Act 1998."*

The neighbours inspected the Council file in August 2002, and read the applicant's two letters. The applicant apparently became aware of that fact and approached the Council and asked how the neighbours had been permitted to read her letters to the Mayor. The Council suggested that the applicant should herself seek access to the file, and subsequently the applicant did seek that access, again pursuant to section 12.

In March 2003 the neighbours made another request for access to the file which was granted by the Council. In the meantime, solicitors instructed by the neighbours wrote to the applicant demanding that the applicant take certain action, including the publication of an apology, the payment of costs and the payment of damages.

The ADT found that in granting the neighbour's second application for access to the file the Council again failed to consider the public interest under section 12(6) or the provisions of the PPIPA.

Subsequently defamation proceedings were commenced against the applicant. Those proceedings were ultimately settled. On 3 October 2003 the applicant forwarded a letter to the Council's Privacy Officer to request an internal review of the disclosure to the neighbours of the applicant's two letters.

The Council subsequently advised the applicant that it had received legal advice to the effect that it was not in breach of the PPIPA, and advising the applicant of her right of review to the ADT. The ADT notes that the Council's Privacy Officer, based on the legal advice to the Council, found that there was no breach of the PPIPA because:

> " - *the two letters were 'unsolicited';*
> - *they did not contain 'personal information' under the Act; and*
> - *section 12 of the Local Government Act authorised release of the documents."*

In December 2003 the applicant lodged an application for review of the conduct of a public sector agency under section 55(1) of the PPIPA.

In January 2004 the Council forwarded a further letter to the applicant outlining why the Council maintained that it was not in breach of its obligations under the PPIPA. That letter included the following statements:

> "*Council's view was that it would not have been contrary to public interest to allow access to the documents and therefore access was allowed. Had Council refused access to the documents it would have been required to provide its reasons for doing so to the Applicants (the neighbours).*
>
> *Council did not consider that any valid reasons for refusing access existed and therefore pursuant to section 12(6) of the LGA Council was bound to allow inspection of the subject documents."*

A major part of the ADT's decision is devoted to the issue of jurisdiction. As previously noted, the ADT ultimately concluded that it had no jurisdiction in the matter. However, in paragraphs 31-38 the ADT made a number of observations which are relevant to the subject of this paper. A summary of those observations, and of the context in which they were made, is as follows:

1. The neighbours file was probably inspected by one of the neighbours as early as May 2001, without the Council keeping any record of that inspection. During that inspection the two contested letters were on the file, and copies were taken by the neighbours.
2. If the ADT had been required to make a finding as to whether the Council considered the public interest requirement in section 12 of the LGA, when allowing the various inspections of the letters, the ADT would have held that the Council did not consider that requirement.
3. The applicant contended that the letters contained personal information relating both to the applicant and to her neighbours and that the applicant's personal information is to take "*priority*" under the scheme of the PPIPA. The ADT was "*minded*" to accept the applicant's submission.
4. Neither party attempted to argue that the disclosure was authorised by subparagraphs 18(1)(a), (b) or (c) of the PPIPA. The Council primarily argued that it had a duty of disclosure under section 14 of the PPIPA, and by operation of section 12 of the LGA. The ADT stated:

> "*I am comfortably satisfied, given the evidence of the Council's officer Mr Barnes concerning the Council's practice and procedure regarding how the public interest test was applied to section 12 requests (it was applied usually only to obvious legal advice) and the statement of agreed facts, that the Council did not in fact consider the public interest question at all in connection with dealing with the neighbour's access application. Accordingly, the Council cannot call section 12 in aid in these proceedings as it was not formally applied."*

5. The Council should not have disclosed the letters to the neighbours by reason of section 18 of the PPIPA. If the ADT had held jurisdiction in the matter, the ADT would have found that the disclosure of the two letters was a breach of the PPIPA.

12. Conclusion

The NV decision, and the approach taken by the ADT, is a reminder that decision makers must understand the statutory framework within which requests for access to information will be considered. In particular, in relation to section 12 of the LGA, a Council must carefully and appropriately apply the public interest test to its decision making, and assess the interaction between section 12 of the LGA and the PPIPA.

The balance between the competing “public interest” and open government aspect on the one hand and the legitimate protection of personal information on the other hand, is an important matter that will arise for determination with increasing frequency.

May 2005.

APPENDIX

SECTION 12 – AS INTRODUCED 1 JULY 1993

PART 2—ACCESS TO INFORMATION
What information is publicly available?

12. (1) Everyone is entitled to inspect the current version of the following documents free of charge:

- the council's code of conduct
- the council's code of meeting practice
- annual report
- annual financial reports
- auditor's report
- management plan
- EEO management plan
- the council's policy concerning the payment of expenses incurred by, and the provision of facilities to, councillors
- the council's land register
- register of investments
- returns of the interests of councillors, designated persons and delegates
- returns as to candidates' campaign donations
- business papers for council and committee meetings (but not including business papers for matters considered when a meeting is closed to the public)
- minutes of council and committee meetings (but not including minutes of a meeting or any part of a meeting that is closed to the public other than the recommendations of that meeting)
- any codes referred to in this Act
- register of delegations
- annual reports of bodies exercising delegated council functions
- local policies adopted by the council concerning approvals and orders
- records of approvals granted and decisions made on appeals concerning approvals
- records of building certificates
- plans of land proposed to be compulsorily acquired by the council
- leases and licences for use of public land classified as community
- plans of management for community land
- environmental planning instruments, development control plans and plans made under section 94AB of the Environmental
- Planning and Assessment Act 1979 applying to land within the council's area
- the statement of-affairs, the summary of affairs and the register of policy documents required under the Freedom of Information Act

1989.

(2) Everyone is entitled to inspect free of charge:
(a) a document that was replaced by a current document referred to in subsection (1); and
(b) if a document referred to in subsection (1) is produced annually- the corresponding document produced for the previous year.

(3) The documents may be inspected at the office of the council during ordinary office hours.

(4) The council must have copies of the documents available for taking away (either free of charge or on payment of reasonable copying charges, as the council chooses) by anyone who asks for a copy. However, a copy of a building certificate must not be taken away unless the owner for the time being of the building to which the certificate relates has given the council written permission to release copies.

(5) The council must allow inspection of versions of the documents other than the current and immediately preceding versions if those other versions are reasonably accessible.

(6) This section does not prevent the council from allowing inspection free of charge of any other' of its documents.

NOTE: A council could also make copies of the documents available at other places, for example, at libraries.
A council may have other information available for inspection free of charge: for example, the rate record, the valuation list and the register of dog registrations.

SECTION 12 – AS AT 15 FEBRUARY 2005

12 What information is publicly available?

(1) Everyone is entitled to inspect the current version of the following documents free of charge:

• the model code prescribed under section 440 (1) and the code of conduct adopted by the council under section 440 (3)

• the council's code of meeting practice

• annual report

• annual financial reports

• auditor's report

• management plan

• EEO management plan

• the council's policy concerning the payment of expenses incurred by, and the provision of facilities to, councillors

• the council's land register

• register of investments

• returns of the interests of councillors, designated persons and delegates

• returns as to candidates' campaign donations

• **agendas and** business papers for council and committee meetings (but not including business papers for matters considered when part of a meeting is closed to the public)

• minutes of council and committee meetings, **but restricted (in the case of any part of a meeting that is closed to the public), to the resolutions and recommendations of the meeting**

• any codes referred to in this Act

• register of delegations

• annual reports of bodies exercising delegated council functions

• **applications under Part 1 of Chapter 7 for approval to erect a building, and associated documents**

• development applications (within the meaning of the Environmental Planning and Assessment Act 1979) and associated documents

• local policies adopted by the council concerning approvals and orders

• records of approvals granted, **any variation from local policies with reasons for the variation,** and decisions made on appeals concerning approvals

• records of building certificates under the Environmental Planning and Assessment Act 1979

• plans of land proposed to be compulsorily acquired by the council

• leases and licences for use of public land classified as community land

• plans of management for community land

• environmental planning instruments, development control plans and plans made under section 94AB of the Environmental Planning and Assessment Act 1979 applying to land within the council's area

• the statement of affairs, the summary of affairs and the register of policy documents required under the Freedom of Information Act 1989

• Departmental representatives' reports presented at a meeting of the council in accordance with section 433

• the register of graffiti removal work kept in accordance with section 67C.

(1A) Despite subsection (1) and the other provisions of this Act, a person does not have the right to inspect so much of a development application, or an application under Part 1 of Chapter 7 for approval to erect a building, as consists of:

(a) the plans and specifications for any residential parts of a proposed building, other than plans that merely show its height and its external configuration in relation to the site on which it is proposed to be erected, or

(b) commercial information, if the information would be likely:

(i) to prejudice the commercial position of the person who supplied it, or

(ii) to reveal a trade secret.

(2) Everyone is entitled to inspect free of charge:

(a) a document that was replaced by a current document referred to in subsection (1), and

(b) if a document referred to in subsection (1) is produced annually—the corresponding document produced for the previous year.

(3) The documents may be inspected at the office of the council during ordinary office hours.

(5) The council must allow inspection of versions of the documents other than the current and immediately preceding versions if those other versions are reasonably accessible.

(6) The council must allow inspection of its other documents free of charge unless, in the case of a particular document, it is satisfied that allowing inspection of the document would, on balance, be contrary to the public interest.

(7) However, subsection (6) does not apply to the part (if any) of a document that deals with any of the following:

(a) personnel matters concerning particular individuals (other than councillors),

(b) the personal hardship of any resident or ratepayer,

(c) trade secrets,

(d) a matter the disclosure of which would:

(i) constitute an offence against an Act, or

(ii) found an action for breach of confidence,

(e) that part of a draft or adopted plan of management that is the subject of a resolution of confidentiality under section 36DA.

(8) For the purpose of determining whether allowing inspection of a document would be contrary to the public interest, it is irrelevant that the inspection of the document may:

(a) cause embarrassment to the council or to councillors or to employees of the council, or

(b) cause a loss of confidence in the council, or

(c) cause a person to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

Note: Subsection (8) is in similar terms to section 59A (Public interest) of the Freedom of Information Act 1989 .

Note: A council could also make copies of the documents available at other places, for example, at libraries. A council may have other information available for inspection free of charge: for example, the rate record, the valuation list and the register of dog registrations.