

user manual

The tape recording of council meetings



privacy**ns**w

May 2004

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Introduction

Councils currently use information collected by tape recording the proceedings of council meetings for two main purposes. Firstly, to clarify what was recorded in the minutes if issues of accuracy are raised and secondly to allow members of the public to access the tapes for other purposes.

A number of councils have asked Privacy NSW for advice about whether tape recording the proceedings of council meetings may be in breach of the *Privacy and Personal Information Protection Act 1998* (the PPIP Act).

This user manual was prepared by Privacy NSW, with the assistance of the Department of Local Government and the State Records Authority of New South Wales, to help councils interpret the requirements of the PPIP Act. However it is not legal advice and should not be treated as determinative. Each council is ultimately responsible for making their own decisions about compliance with the PPIP Act.

What personal information is at issue?

Personal information is defined in section 4(1) of the PPIP Act as:

information or an opinion (including information or an opinion forming part of a database 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.

The types of personal information collected at council meetings could include:

- the identities of any speakers and personal opinions held by them that they express in the meeting - this includes councillors, staff and members of the public who address the meeting
- information or opinions about other people - this is where a speaker talks about a third party whose identity is apparent or is reasonably ascertainable.

The tape recording of meetings must therefore comply with the information protection principles (IPPs) in sections 8-19 of the PPIP Act.

Which are the relevant IPPs?

The information protection principles that relate to the collection, use and disclosure of personal information are particularly relevant. These are IPPs 1, 2, 3, 4, 10, 11 and 12.

The information protection principle that relates to the retention and disposal of personal information are also relevant. This is IPP 5.

What are the issues councils need to consider?

Some of the issues councils need to consider are:

- Is the personal information collected for a lawful purpose?
- Is the collection of the information reasonably necessary?
- Is the information about people other than the speaker?
- Is disclosure of the information in the public interest?
- Does the person know the information has been collected?
- How long will the tapes be kept?

Collection of personal information

IPP 1: Section 8 - Collection of personal information for lawful purposes

(1) A public sector agency 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.

(2) A public sector agency must not collect personal information by any unlawful means.

Is the information collected for a lawful purpose?

Information collected at a council meeting is mainly used to ensure the accuracy of minutes. Keeping accurate minutes is a requirement under the *Local Government Act 1993*, so no question can be raised as to the lawfulness of this purpose (section 8(1)(a) of the PPIP Act).

However a council would need to be satisfied that any other purposes that the information was used for were directly related to a function of the council. Section 10 of the *Local Government Act* provides that the public are entitled to attend council meetings and section 11 provides a mechanism by which the public may have access to correspondence and documents from past meetings. It could therefore possibly be argued that further facilitating public access to or involvement in the council's meetings is directly related to council's responsibilities under sections 10 and 11 of the *Local Government Act*.

Is the collection of the information 'reasonably necessary'?

The test at section 8(1)(b) - that the collection is 'reasonably necessary' - is more difficult to achieve.

Minutes only need to record the decisions made by the council and any other matters that are relevant. Collecting personal information by tape recording all conversations may aid this purpose by enabling the council to check the accuracy of the minutes.

However, the collection by tape recording potentially gathers far more information than is necessary to achieve the purpose. If some or many councils don't tape record their meetings, it could be argued that if they don't find this practice necessary to achieve accurate minutes, why should other councils? On this basis, the collection of personal information by tape recording meetings could potentially breach section 8(1)(b) of the PPIP Act.

It could also be argued that facilitating public access to or involvement in the council's meetings can be achieved by the council simply complying with sections 10 and 11 of the *Local Government Act* and therefore it is not 'reasonably necessary' for council to go beyond its existing obligations.

Privacy NSW understands that tape recordings of meetings can be made if they satisfy cl.47 of the *Local Government (Meetings) Regulation 1999*. This states that:

A person may use a tape recorder to record the proceedings of a meeting of a council or a committee of a council only with the authority of the council or the committee.

The intention of this provision was primarily to allow residents, the media and other interested parties to record some or all of a meeting, subject to the council's permission. Rather than cl. 47 of the *Local Government (Meetings) Regulation*, the appropriate authority for allowing a council to tape record its own meeting should be seen as section 360 in the *Local Government Act*. This provides that councils may adopt a code of meeting practice as long as the provisions of the code are not inconsistent with the Meetings Regulation. It is therefore each council's responsibility to make clear in their code whether they will tape meetings and, if so, for what purpose.

However, neither section 360 of the *Local Government Act* nor cl.47 of the Meetings Regulation places an obligation on councils to tape their meetings. On this basis we do not consider that the Act or the Regulations support a view that the taping of meetings by a council is justified as 'reasonably necessary' in terms of section 8(1)(b).

If, however, a council considers that they can justify their decision to tape record meetings as 'reasonably necessary' and can therefore comply with IPP 1 (section 8), they must still take account of the other information protection principles.

IPP 2: Section 9 - Collection of personal information directly from individual

A public sector agency must, in collecting personal information, collect the information directly from the individual to whom the information relates unless:

- (a) the individual has authorised collection of the information from someone else, or
- (b) in the case of information relating to a person who is under the age of 16 years--- the information has been provided by a parent or guardian of the person.

What if the information is about people other than the speaker?

IPP 2 would only permit a council to record personal information relating to the speaker, but not personal information about people identified by the speaker. However, there are exemptions under section 25 of the PPIP Act.

Section 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).

If a council concluded that collecting personal information by tape recordings under section 8 was permitted, then it appears that cl.47 of the *Local Government (Meetings) Regulation*

and/or section 360 of the *Local Government Act* would permit non-compliance with IPP 2 (section 9) through the application of section 25 of the PPIP Act. On this basis, tape recording of personal information about all people identified by speakers at a council meeting may be permitted.

However the collection of personal information by tape recording may still present a possible breach of section 11 of the PPIP Act.

IPP 4: Section 11 - Other requirements relating to collection of personal information

If a public sector agency collects personal information from an individual, the agency must take such steps as are reasonable in the circumstances (having regard to the purposes for which the information is collected) to ensure that:

(a) the information collected is relevant to that purpose, is not excessive, and is accurate, up to date and complete, and

(b) the collection of the information does not intrude to an unreasonable extent on the personal affairs of the individual to whom the information relates.

The recording of a speech or a debate about a particular individual or individuals may mean that a council is found to have breached this provision.

Use of personal information

IPP 10: Section 17 - Limits on use of personal information

A public sector agency that holds personal information must not use the information for a purpose other than that for which it was collected unless:

(a) the individual to whom the information relates has consented to the use of the information for that other purpose, or

(b) the other purpose for which the information is used is directly related to the purpose for which the information was collected, or

(c) the use of the information for that other purpose is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual to whom the information relates or of another person.

Why was the information collected?

The application of IPP 10 relies primarily on a decision as to what the purpose of collection was under section 8 of the PPIP Act. If this results in a decision that a council can collect personal information through taping meetings, then subsequent use of the information should generally be limited to the same purpose. So if a decision is made that collection is justified as an aid to producing accurate minutes, then use must be confined to this purpose except as otherwise allowed under section 17.

Disclosure of personal information

If a council makes a tape recording of a meeting it is considered to be a 'document' under section 21(1) of the *Interpretation Act 1985* (NSW). Section 12 of the *Local Government Act* provides a process by which documents held by a council can be inspected and copied. As a tape of a council meeting is not listed in section 12(1) of the *Local Government Act*, then access is only permitted under section 12(6). This requires that inspection is permitted unless, on balance, it would be contrary to the public interest. The same test is applied to the copying of a document.

Is disclosure in the public interest?

When determining what is meant by the term 'contrary to the public interest', it is appropriate to take into account any surrounding legislation that might otherwise impose or imply restrictions on disclosure. Such legislation expresses Parliament's intentions about the circumstances in which disclosure should not be made. In particular, it is necessary to consider the public interest in the protection of privacy rights.

This means that councils need to consider the specific limitations imposed on disclosure of personal information by IPPs 11 and 12.

IPP 11: Section 18 - Limits on disclosure of personal information

(1) A public sector agency that holds personal information must not disclose the information to a person (other than the individual to whom the information relates) or other body, whether or not such other person or body is a public sector agency, unless:

(a) the disclosure is directly related to the purpose for which the information was collected, and the agency disclosing the information has no reason to believe that the individual concerned would object to the disclosure, or

(b) the individual concerned is reasonably likely to have been aware, or has been made aware in accordance with section 10, that information of that kind is usually disclosed to that other person or body, or

(c) the agency 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.

(2) If personal information is disclosed in accordance with subsection (1) to a person or body that is a public sector agency, that agency must not use or disclose the information for a purpose other than the purpose for which the information was given to it.

IPP 12: Section 19(1) - Special restrictions on disclosure of personal information

(1) A public sector agency must not disclose personal information relating to an individual's ethnic or racial origin, political opinions, religious or philosophical beliefs, trade union membership, health or sexual activities unless the disclosure is necessary to prevent a serious or imminent threat to the life or health of the individual concerned or another person.

Under section 25 of the PPIP Act, councils may disclose personal information if such a disclosure is otherwise authorised, necessarily implied or reasonably contemplated under any Act or regulation. There has not to date been any judicial interpretation as to whether the public interest test under section 12(6) of the *Local Government Act* overrides or is restricted by section 18 or section 19(1) of the PPIP Act.

The question is whether section 12(6) of the *Local Government Act* 'necessarily implies' or 'reasonably contemplates' that the privacy protection afforded by section 18 and section 19(1) of the PPIP Act ought to be ignored. We suggest that, in coming to a view of what is meant by the 'public interest' under section 12(6), a council must take account of the specific provisions of IPP 11 (section 18) and IPP 12 (section 19(1)) in the PPIP Act and balance the public interest in privacy protection against the public interest in ensuring openness and accountability of government decision-making.

We consider therefore that section 12(6) of the *Local Government Act* ought to be read as an additional qualification on the restrictions already imposed under section 18 and section 19(1) in the PPIP Act.

That is, personal information (other than that sourced from public registers or documents listed in section 12(1) of the *Local Government Act*) must be disclosed under section 12(6) of the *Local Government Act* if:

- (a) disclosure would not contravene section 18 or section 19(1) in the PPIP Act, and
- (b) disclosure would not otherwise be contrary to the public interest.

However it should be noted that personal information can in any case only be disclosed under section 12(6) if a person has made a request for such information. Section 12(6) should not be read as authorisation to publish information at large.

Each council must therefore look at whether making available a tape recording would involve a disclosure that would not comply with section 18 or section 19(1) of the PPIP Act.

If the tape recording included personal information about any person's 'ethnic or racial origin, political opinions, religious or philosophical beliefs, trade union membership, health or sexual activities', it is clear that disclosure can only be on the basis that such disclosure is 'necessary to prevent a serious or imminent threat to the life or health' of any person (section 19(1)) or is made with the express consent of the person (section 26(2)).

Does the person know the information has been collected and may be disclosed?

Section 18(1)(b) in particular relates to whether or not the person (who is the subject of the personal information) has been made aware of the collection of information about him or herself under section 10 of the PPIP Act.

IPP 3: Section 10 - Requirements when collecting personal information

If a public sector agency collects personal information from an individual, the agency must take such steps as are reasonable in the circumstances to ensure that, before the information is collected or as soon as practicable after collection, the individual to whom the information relates is made aware of the following:

- (a) the fact that the information is being collected,
- (b) the purposes for which the information is being collected,
- (c) the intended recipients of the information,
- (d) whether the supply of the information by the individual is required by law or is voluntary, and any consequences for the individual if the information (or any part of it) is not provided,
- (e) the existence of any right of access to, and correction of, the information,
- (f) the name and address of the agency that is collecting the information and the agency that is to hold the information.

For people attending a public meeting, section 18(1)(b) could possibly be satisfied at least in terms of any speakers - including councillors, staff and members of the public who address the meeting - and any opinions they express in the meeting about themselves or others present at the meeting. Compliance with section 18(1)(b) might, for example, require a statement being made at the start of the meeting, a clear sign being displayed at the public entrance or in the public gallery, and perhaps information included within the public notice given in advance of each meeting. The statement or sign would need to identify that the meeting is being tape-recorded, the purposes for which the tapes will be used, and whether the tape may subsequently be made available to the public or to third parties. There would also need to be some provisions for those who may arrive later to the meeting.

However if the tape recorded personal information about people who were not present, then disclosure of that information could only be subject to consideration under section 18(1)(a) or (c). These tests would probably be very difficult for a council to meet.

Section 18(1)(a) again turns on adequate justification for the collection in the first place, and whether or not the subject is likely to object to the disclosure.

To make each decision about disclosure, councils would need to:

1. Find out whether each person, whose personal information was mentioned in the meeting, was present at the meeting and therefore informed that their information may be disclosed. This poses difficulties as lists of members of the public who were present at a council meeting are not normally obtained and any move to do so may cause anger or concern and itself probably breach the IPPs.
2. If a person was not present, assess whether or not they would be likely to object to their information being further disclosed by council.

Section 18(1)(c) requires that the disclosure be reasonably necessary 'to prevent or lessen a serious and imminent threat to the life or health' of any person. This is highly unlikely to be the case in relation to the routine public availability of tapes.

Retention and destruction of personal information

IPP 5: Section 12- Retention and security of personal information

A public sector agency that holds personal information must ensure:

(a) that the information is kept for no longer than is necessary for the purposes for which the information may lawfully be used, and

(b) that the information is disposed of securely and in accordance with any requirements for the retention and disposal of personal information, and

(c) that the information is protected, by taking such security safeguards as are reasonable in the circumstances, against loss, unauthorised access, use, modification or disclosure, and against all other misuse, and

(d) that, if it is necessary for the information to be given to a person in connection with the provision of a service to the agency, everything reasonably within the power of the agency is done to prevent unauthorised use or disclosure of the information.

How long will the tapes be kept?

The test at section 12(a) and (b) can be met by following the appropriate disposal authority and guidelines under the State Records Act.

Under the *General Disposal Authority - Local Government Records* (GDA 10) entry 13.6.3, voice and video recordings used to prepare for meetings and produce council and committee minutes are permitted (but not required) to be destroyed three months after action was completed or after the last action. GDA 10 is available online at:

<http://www.records.nsw.gov.au/publicsector/disposal/gda10-locgov/gda10-functions.htm>

A further State Records Authority publication *Destruction of Records - A Practical Guide* (July 2000) states:

'Records that have been identified as being authorised for destruction may only be destroyed once a public office has ensured that all requirements for retaining the records have been met. Reasons for longer retention of a record can include legal requirements, administrative need, and government directives. These requirements may also affect methods of destruction. For example, financially accountable records must be kept until all audit requirements have been fulfilled. A public office must not dispose of any records required for current or pending legal action or where the records may be required as evidence in a court case. A public office should not destroy records that are the subject of a current or pending Freedom of Information (FOI) request or any other statutory access request.'

This guideline is available online at:

<http://www.records.nsw.gov.au/publicsector/disposal/guideline3-dest/guideline3.htm>

For further advice on the disposal or destruction of council records, please contact the State Records Authority of New South Wales.

Conclusion

Councils must first decide why they are tape recording council meetings and then if this purpose complies with IPPs 1 and 4 in the PPIP Act.

Each council is ultimately responsible for making their own decisions about compliance with the PPIP Act. They must also be confident of, if necessary, defending those decisions in the Administrative Decisions Tribunal in a review under Part 5 of the PPIP Act.

We recommend that if a council decides to tape record meetings they make appropriate provision in their code of meeting practice (adopted under section 360 of the Local Government Act) to ensure that:

1. Tape recordings of meetings are only used for verifying the accuracy of minutes.
2. Tape recordings of meetings are not made available to the public or disclosed to any third party under section 12(6) of the *Local Government Act*, except as allowed under section 18(1)(c) or section 19(1) of the PPIP Act, or where council is compelled to do so by court order, warrant or subpoena (see eg section 23(5) of the PPIP Act) or by any other law (eg the FOI Act).
3. Tape recordings of meetings are destroyed as soon as their original purpose is served or three months after their creation (whichever is the later), except where retention for a longer period is otherwise required or recommended under the State Records Act 1998.
4. Appropriate signage is displayed in the public gallery or at the public entrance to council meetings, and verbal statements made at the start of each meeting, to notify the public of the matters required under IPP 3 (section 10(a)-(e) of the PPIP Act).

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Reference: AD09-2004-01

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