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8 March 2022

Environmental Protection Authority
by email

Attention: Alex Erceg

Dear Alex

COVID-19 Recovery (Fast-track Consenting) Act 2020 (FTCA) – Federal Street Residences Referred Project Application

1. I act for P0012 Auckland NZ Pty Limited (**Applicant**).
2. This letter, directed to the Expert Consenting Panel for the Federal Street Residences (**Panel**) requests that certain identified information is not made publicly available, for reasons set out below.

Request

3. The Applicant has lodged information which includes a CIA prepared by Ngaati Te Ata Waiohua.¹ The author of the CIA has requested that parts of the CIA not be made publicly available – those parts to be withheld from publication are redacted in the redacted version of the CIA accompanying the application. The reason for that request is that withholding the information is necessary to avoid serious offence to tikanga Maori.
4. In addition, the ICD Developers Report includes commercially sensitive information - those parts to be withheld from publication are redacted in the redacted version of the ICD Developers Report accompanying the application.

¹ Dated December 2021.

5. Finally, Attachment M – Engagement Summary to the Application includes private information of natural persons. The Applicant has redacted addresses and contact details for private persons in the redacted copy of Attachment M.

Panel's Powers

6. The jurisdiction for the Panel to make the decisions requested above is set out below.
7. Clause 10 of Schedule 5 of the FTCA states that a panel must regulate its own procedure as it thinks appropriate, without procedural formality, and in a manner that best promotes the just and timely determination of an application.
8. Clause 16 of Schedule 5 of the FTCA specifies that Part 1 of the Local Government Official Information and Meetings Act 1987(**LGOIMA**) applies, with any necessary modifications, as if a panel were a board of inquiry given authority to conduct a hearing under section 149J of the Resource Management Act 1991.
9. With reference to Part 1 of the LGOIMA, this means that in general, information held by the panel is to be made available unless there is good reason for withholding it.² The reasons for withholding information are set out in sections 6 and 7 of the LGOIMA. In the context of material received by a panel as part of a hearing, clause 21(10) of Schedule 6 of the FTCA provides:

(10) A panel may, in its discretion, make an order that prohibits or restricts the publication or other means of communication of information supplied to the panel or obtained by it in the course of a hearing.
10. Subclause 21(10) specifically relates to information received in the course of a hearing. Any information held or received by a panel other than in the course of a hearing (including for proceedings where no hearing is held) is also subject to the provisions of Part 1 of the LGOIMA by virtue of clause 16 of Schedule 5.
11. Clause 21(11) of Schedule 6 makes clear that sections 6 and 7 apply to the exercise of a discretion under clause 21(10):

² Section 5 of the LGOIMA.

(11) Subclause (10) applies whether or not the information is material to determining a consent application or notice of requirement if there would be good reason to withhold the information under section 6 or 7 of the Local Government Official Information and Meetings Act 1987.

12. The Panel, in exercising its discretion under cl 21(10), must consider whether there are grounds for withholding the information under sections 6 or 7 of the LGOIMA.

Section 7 LGOIMA

13. Part 1 of the LGOIMA includes:

- (a) Section 7(2)(a) which provides that information may be withheld where doing so is necessary to protect the privacy of natural persons.
- (b) Section 7(2)(b)(ii) which provides that information may be withheld where doing so is necessary to protect information where making the information available would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information.
- (c) Section 7(2)(ba), which provides that in the case of an application for resource consent good reason for withholding information exists where withholding the information is necessary to avoid serious offence to tikanga Maori, or to avoid the disclosure of the location of waahi tapu, and this is not outweighed by the public interest in making that information available.

14. The Applicant says that the above sections are engaged.

15. With respect to the redactions to Attachment M – Engagement Summary, redactions are required to protect personal addresses/contact details of individuals.

16. With respect to the redactions to the ICD Developers Report, redactions are required to protect commercially sensitive financial information which could unreasonably prejudice the commercial position of the Applicant and its parent company.

17. With respect to the CIA, s7(2)(ba) of LGOIMA is engaged. The authors of the CIA say that withholding the information is necessary to avoid serious offence to tikanga Maori.

18. In each case above, good reasons exist for withholding the redacted information which are not outweighed by the public interest.

19. The EPA is requested to publish a redacted version of the documents on the EPA website. Only the Panel should view the unredacted documents.

EPA's powers

20. I add some additional comment directed to the EPA, given:
- (a) I understand there is no Panel formally appointed as yet.
 - (b) Schedule 6, Clause 8 of the FTCA requires (inter alia) that the EPA publish every document received, which prima facie includes the entirety of the application as lodged.
 - (c) It is the EPA rather than a Panel, which bears the responsibility of releasing information under clauses 8(2) and 25(4), Schedule 6 of the FTCA, and I understand it is the Official Information Act 1982 (**OIA**), not the LGOIMA, that applies to the EPA.
21. Although there is no express statement in the FTCA that the requirements in clause 8(2) and 25(4), Schedule 6 are subject to any decisions to withhold information made by a Panel, I say as a matter of statutory interpretation, that this must be the case.
22. The EPA's obligations to release information are subject to the power to withhold information where there is statutory authority to do so. The OIA applies to the EPA, so it has powers to withhold information pursuant to Part 1 of the OIA. Clause 8(1), Schedule 6 of the FTCA confirms that the EPA may make administrative decisions that are incidental or ancillary to the conduct of the Panel.
23. If no Panel is appointed, the EPA's obligation to release such information is also subject to its own power to make administrative decisions that are incidental or ancillary to the conduct of the Panel. If the EPA decides to withhold information, this should be pursuant to the OIA rather than the LGOIMA.
24. In the circumstance above, if the EPA has made the decision to withhold, it should cite the relevant part of the OIA.
25. There are equivalent provisions to s7(2)(a) LGOIMA (s9(2)(a) OIA) and s7(2)(b)(ii) LGOIMA (s9(2)(b)(ii) OIA).

26. LGOIMA s 7(2)(ba) specifies that in the case of an application for a resource consent, avoiding serious offence to tikanga Māori, or avoiding the disclosure of the location of waahi tapu are good reasons for withholding information. However, there is no equivalent reason for withholding information under the OIA.
27. Section 7(2)(ba) expressly applies to applications under the RMA, given that clause 16, Schedule 5 of the FTCA provides that Part 1 of the LGOIMA applies to the Panel “with any necessary modifications”, and consents and notices of requirement granted under the FTCA have the same force and effect as though they were granted under the RMA (per s12 FTCA). Thus, I consider that section 7(2)(ba) would be an available reason for withholding information by the Panel. However, it is possible that the EPA itself could not decide to withhold information on this ground, given that this is not a ground for withholding information under the OIA.
28. If a jurisdictional issue does arise as referenced above, in my submission it is solved by the EPA not publishing the CIAs in question prior to appointment of a Panel, and the Panel considering the request made once appointed. Taking this course of action would avoid frustrating the ability for an applicant to request information to be withheld (to avoid serious offence to tikanga Māori, and/or avoid the disclosure of the location of waahi tapu). In my view such a course of action would not offend the directive in s8(3) Schedule 6 FTCA to the EPA to "as far as reasonably practicable...avoid delay". No prejudice would be caused to any party or potential party or third person, by a decision as to publication of the CIAs awaiting appointment of an Expert Consenting Panel.
29. I add that delay in determining whether the CIAs can be withheld in part or in total (as the case may be) from publication until a Panel is appointed has no implication for the EPA's determination under Schedule 6, Clause 3 FTCA as to whether the application contains all the information required under clauses 9 to 13.

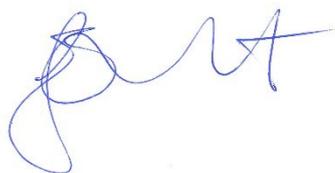
Summary

30. In summary the position is:
- (a) The obligation of the EPA to publish documents under clause 8(2), Schedule 6 and the obligation to provide copies of further information under clause 25(4), Schedule 6 is subject to any decision made by the Panel pursuant to Part 1 of the LGOIMA to withhold information.

- (b) The EPA's obligation to release such information is also subject to its own power to make administrative decisions that are incidental or ancillary to the conduct of the Panel. If the EPA decides to withhold information, this should be pursuant to the OIA rather than the LGOIMA.

31. I am happy to enlarge upon any of the points addressed above, if so requested.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'J. Brabant', with a stylized flourish at the end.

Jeremy Brabant