

ENQ-40622-H5Q8V2

8 April 2021

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Via: ██████████@simpsongrierson.com

Official Information Act 1982 (OIA) decision on request

Dear ██████████

1. I refer to your request received on 23 December 2020 for the following information:

BWO requests copies of all information that the EPA relied on in (1) giving its advice to BWO that the 2017 Ruling could not be relied on, and that BWO should apply for some other source of authority and/or (2) making its decision to issue the abatement notices, including but not limited to:

- (a) *legal advice received from both internal and external legal advisors. Given the Environment Court has now issued its decision and the appeal period has expired, the EPA's legal advice should be disclosed;*
- (b) *notes of EPA meetings, discussions and deliberations held internally and/or with legal advisors; and*
- (c) *copies of technical assessments or other professional advice commissioned and/or received by the EPA.*

For the avoidance of doubt, the request includes information generated or received in the lead-up to the 21 and 28 January 2020 letters from the EPA to BWO that state that the 2017 Ruling could not be relied on. BWO does not require further copies of information that has already been provided to BWO in written form.

2. Your request has been treated as a request for information under the OIA. On 12 February 2021 the EPA notified you that the time limit for making a decision on your request was extended until 13 April 2021.
3. For clarity, the EPA did not give 'advice to BWO' as it is not the EPA's role, as regulator of activities in the EEZ, to give advice. Rather, the EPA adopted an interpretation of its own statutory decision (the 2017 ruling) and communicated that interpretation to you and to your client BWO. The EPA also informed BWO that there were other lawful sources of authority under which BWO's proposed disconnection activities could be carried out.
4. I note that the majority of the information you have requested has already been provided to BWO in written form either because it was information:
 - a. originating from BWO;
 - b. sent to BWO; or
 - c. included in the common bundle filed in Environment Court proceeding ENV-2020-AKL-025.

As you requested, that information has not been provided again by way of this OIA response.

5. The EPA maintains legal privilege over communications made in the course of and for the purpose of giving or receiving legal advice, and accordingly this information is withheld under s 9(2)(h).
6. The EPA has considered whether there is a countervailing public interest in releasing this information but does not consider that any public interest in releasing the information outweighs the public interest in maintaining legal privilege. I note that BWO has not itself put forward any countervailing public interest factors, but rather asserts that the EPA's legal advice should be disclosed '*given the Environment Court has now issued its decision and the appeal period has expired*'. This appears to confuse litigation privilege with legal professional privilege (noting that the claim that litigation privilege may come to an end at the conclusion of the Environment Court proceeding is in any event not accepted). The EPA holds enduring legal professional privilege over these communications, and the completion of the substantive Environment Court litigation does not change the status of that privilege.
7. Please find attached the information requested and not already provided or withheld under s 9(2)(h), or refused under s 18(d) (these are the documents identified as 'released' in the attached schedule: the remaining documents are those that we believe BWO already has).
8. For completeness, I note that ROV footage was listed in the EPA's 28 January 2020 letter as relevant information showing the condition of the subsea infrastructure. The ROV footage itself was not itself included in the common bundle in the Environment Court but was summarised in written form in reports such as the Tamarind icam incident investigation report (CB1503). If you would like a copy of the ROV footage please let me know (noting that these files are extremely large).
9. You have the right to seek an investigation and review by the Ombudsman of this decision. You can contact the Ombudsman on 0800 802 602, or by email at info@ombudsman.parliament.nz.
10. If you have any further queries, please do not hesitate to contact us via ministerials@epa.govt.nz.
11. We will publish your request and our response on our website, www.epa.govt.nz, within 10 working days from today. We make OIA responses available so others can read more about the work we do and the questions we are asked. Any information that might identify you will be removed to protect your privacy.

Yours sincerely



Siobhan Quayle
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Regulatory Systems and Operations