

Our Ref DOIA 23-053

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Dear 

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Response to your official information request

Thank you for your official information request received on 6 September 2022 for information about land tenure and farm land advertising requirements in relation to renewable energy projects.

Background

Your letter seeks a range of specific documents about land tenure and farm land advertising requirements in relation to renewable energy projects.

Land tenure

We understand that developers are largely using freehold and long-term leasehold tenures for large scale solar projects, while wind energy developers are also using easements. We have had brief discussions with developers about the possibility of using *easements* for intensive solar developments but have expressed significant reservations.

We consider that an intensive solar farm may be more than can reasonably be accommodated within an easement arrangement. In general, an easement cannot permit something resembling joint occupation of land (and certainly cannot permit exclusive occupation). Such arrangements (regardless of how they are described) would in substance likely be a lease. Their true nature is ultimately to be determined on a case-by case basis.

We have not yet seen a solar farm that adequately balances the grantee and land-owners respective uses of the land, and the arrangements proposed to date have essentially amounted to joint or exclusive occupation of the land. But that isn't to say that such a case cannot be made, just that it hasn't been made yet.

We do not have the same reservations in respect of wind farms. With the relative footprint of a wind farm being considerably less than that of a solar farm, it is easier to see how the land owner's enjoyment of the land can continue largely undisrupted, such that they remain the dominant occupier of the land.

We also do not anticipate having reservations about the use of easements for incidental solar developments, such as commercial rooftop solar installations. In such a case, the impact on the land-owner's use of the land would be significantly smaller and more likely in keeping with the use of an easement.

If you have a client that wishes to pursue a development in reliance on easements, then the most constructive way forward would be to bring your client's specific circumstances to us so that we can consider whether an easement is a suitable tenure or not. Note that in the absence of such a conversation, any intensive solar farm proceeding on the basis of an easement is likely to be investigated by LINZ for a possible breach of the Overseas Investment Act.

Correspondence (internal and external)

Land tenure

We have had a small number of written engagements with wind and solar developers on the matter of land tenure.

- Wind farm

In February 2021 we had a 'pre-application meeting' with the vendors of wind energy assets that had been developed in reliance on easements. One issue was whether the interests were genuine easements or not.

Internal correspondence following that meeting confirmed our view that the interests were in fact easements. The key email is attached (document 1). The additional information mentioned in the email was subsequently provided, and we confirmed our view that we were satisfied that the interests were genuinely easements. That email is also attached (document 2).

The details of the developer and the development have been withheld under section 9(2)(b)(ii) of the Official Information Act as release would unreasonably prejudice the commercial position of a person.

A description of an unrelated project referred to in document 1 has been withheld under section 9(2)(b)(ii) of the Official Information Act as release would unreasonably prejudice the commercial position of a person.

The identity of the individuals acting for the developer have been withheld under section 9(2)(a) of the Official Information Act to protect the privacy of natural persons.

- Solar farm

In late 2021 we engaged with an investor that was considering the use of an easement for a solar development. This correspondence is attached (document 2A). We expressed concern that the interest being acquired may not in fact be an easement. Also attached is a submission made by the developer (document 2B).

The details of the developer and the development have been withheld under section 9(2)(b)(ii) of the Official Information Act as release would unreasonably prejudice the commercial position of a person.

The identity of the individuals acting for the developer have been withheld under section 9(2)(a) of the Official Information Act to protect the privacy of natural persons.

- Enquiry about wind farm

We responded to a question from a member of the public asking about whether the creation of an easement for a wind farm would require consent under the Overseas Investment Act 2005. We responded that easements are exempted interests that don't require consent, and that we were open minded to an easement being used for a wind farm. This correspondence is attached (document 3).

The identity of the member of the public has been withheld under section 9(2)(a) of the Official Information Act to protect the privacy of natural persons.

- Enquiry about solar farm

In late 2021 we engaged with an investor that was considering a solar development. The focus of the enquiry was the contractual arrangement that would support pre-purchase due diligence, and farm land advertising. The investor's letter is attached (document 4). While there have been several short informal discussions with the investor's lawyer, the letter has not been substantively responded to.

The details of the developer have been withheld under section 9(2)(b)(ii) of the Official Information Act as release would unreasonably prejudice the commercial position of a person.

The identity of the individual acting for the developer have been withheld under section 9(2)(a) of the Official Information Act to protect the privacy of natural persons.

Farm land advertising

We have attached a copy of a farm land advertising exemption (document 5) granted to Aquila Capital and Far North Solar Farms. The details of the developments being undertaken have been withheld under section 9(2)(b)(ii) of the Official Information Act as release would unreasonably prejudice the commercial position of a person.

The 'commercial matters' referred to in the reasons for the exemption include the risk that requiring the farm land to be advertised risks a competitor acquiring the land in reliance on the site specific research, due diligence, and resource management consenting undertaken by the exemption holder.

We would be please to discuss the applicability of this approach with your clients if this would assist them.

Minutes and records from meetings and discussions of the OIO with the Legal Reference Group

Farmland advertising was raised at the Legal Reference Group (LRG) meeting of 30 May 2022.

An LRG member asked for an update on when our proposed guidance document would be published. We advised that a guidance note was not imminent, and that we would continue to respond to individual enquiries in the meantime. Our views on land tenure and farm land advertising were not discussed.

Farmland advertising was again raised at the LRG meeting of 14 September 2022.

We shared a copy of the advertising exemption granted to Aquila Capital and noted the importance of identifying specific properties in any advertising exemption application. We also spoke about the timing of the proposed guidance note, and our hope to publish it before the end of 2022. Our views on land tenure were not discussed.

No formal minutes of either the meeting exist, though a recording of each meeting exists.

Minutes and records from meetings and discussions within the OIO

The only minutes of meetings and discussions that exist are from meeting of senior LINZ overseas investment technical experts on 2 November 2021 and 22 March 2022.

The 2 November 2021 minutes read:

s9(2)(b)(ii) Solar Farm query – it was not immediately clear to us that this was likely to be a genuine easement (although we did not reject the idea that it might be) – we thought that a lease would be the more usual scenario for projects of this nature, given the dominance of the solar panels on the land. We were also conscious that this is currently farmland, and so subject to significant protections under the Act. It may be that further information might make the picture clearer but we thought that any such engagement would be better pursued via a pre-application meeting. Pedro to craft a response along those lines.

The response sent following this discussion is in document 2A (referred to above).

The name of the developer has been withheld under section 9(2)(b)(ii) of the Official Information Act as release would unreasonably prejudice the commercial position of a person.

The 22 March 2022 minutes read:

- a. the Investigation Licences appeared to be genuine contractual rights of access for due diligence purposes, and therefore not interests in land.*
- b. The options to acquire an interest in land do give an equitable interest in land, but so long as the duration of the options fell within the 3 year/10 year thresholds for non-freehold interests in s12 then would be OK without consent.*

- c. *the exercise of those options (whether that be for long term leases or outright purchase) were subject to OIA consent and therefore should be OK.
So we didn't consider the proposed arrangement would breach the Act (assuming consent obtained when options exercised).
There was also a question about Farmland Advertising in the letter – FLA must occur before a transaction is entered into – in this case we would see the transaction as occurring at the time the option is exercised.*

This discussion followed the enquiry connected with document 4 above.

Research carried out in relation to these aspects

While a small amount of research has been conducted, no record of that research has been kept. The research undertaken was focussed on chapter 16 of Hinde McMorland & Sim Land Law in New Zealand.

As the information you requested is not held by Toitū Te Whenua Land Information New Zealand and we have no reason to believe that it is held by another agency, we are refusing this part of your request under 18(g) of the Official Information Act.

Discussion documents

No discussion documents exist.

As the information you requested is not held by Toitū Te Whenua Land Information New Zealand and we have no reason to believe that it is held by another agency, we are refusing this part of your request under 18(g) of the Official Information Act.

Drafts of the proposed technical guidance

No drafts exist.

As the information you requested is not held by Toitū Te Whenua Land Information New Zealand and we have no reason to believe that it is held by another agency, we are refusing this part of your request under 18(g) of the Official Information Act.

We are of the view that the withholding of the information described above is not outweighed by other considerations which render it desirable in the public interest to make that information available.

If you wish to discuss this decision with us, please feel free to contact Pedro Morgan, pmorgan@linz.govt.nz.

You have the right to seek an investigation and review by the Ombudsman of this decision. Information about how to make a complaint is available at www.ombudsman.parliament.nz or freephone 0800 802 602.

Please note, this response letter outlining our decision on your request, **with your personal details withheld**, and any attached documentation will be published on the

Toitū Te Whenua Land Information New Zealand's website. This is likely to be published by 31 October 2022.

Yours sincerely



Rebecca McAtamney
Head of Regulatory Practice and Delivery

Proactive Release