

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU**

Decision [2023] NZEnvC 125

IN THE MATTER OF

appeals under clause 14(1) of Schedule 1
of the Resource Management Act 1991

AND

an application for confidentiality orders
under section 277 of the Act

BETWEEN

BAY OF ISLANDS MARITIME
PARK INCORPORATED

(ENV-2019-AKL-000117)

ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF
NEW ZEALAND
INCORPORATED

(ENV-2019-AKL-000127)

Appellants

AND

NORTHLAND REGIONAL
COUNCIL

Respondent

Court: Environment Judge J A Smith sitting alone under s 279 of the
Act

Hearing: On the papers

Last case event: 23 May 2023

Date of Decision: 20 June 2023

Date of Issue: 20 June 2023

DECISION OF THE ENVIRONMENT COURT

Pursuant to section 277(2)(b) of the Resource Management Act 1991 and



rule 6(a) of the District Court (Access to Court Documents) Rules 2017, the Environment Court orders that the evidence in chief set out at Appendix A, which contains information related to catch and position of commercial fishing effort, and commercially sensitive information regarding the revenue and profits of certain fishing operators (**the confidential information**) be managed on the following terms:

- (1) Publication or communication of the confidential information is prohibited;
- (2) The evidence in chief containing confidential information may only be made available to the public if it has been redacted to exclude any confidential information;
- (3) These orders apply to any brief of evidence which refers to or quotes from the confidential information. Any such evidence:
 - (a) Is to be kept on the Court file and is to have a notice attached notifying the reader that it contains confidential information; and
 - (b) Is not to be uploaded to the Environment Court's, nor any other, website unless it has been redacted to exclude any confidential information;
- (4) The transcript produced from that part of the hearing at which the information in the confidential information is discussed is not to be distributed to the public but is to remain on the Court file and is to be marked "confidential" with a copy of this order attached. Those parts of the transcript in respect of which this order applies are set out at Appendix A;
- (5) Any exhibits or other materials containing or referring to confidential information which were produced during the course of the hearing are not to be distributed to the public but are to be kept on the Court file with a notice attached marking them as "confidential" and subject to the same treatment described at (a) to (b) above; and
- (6) The Court files are not to be searched, inspected or copied without leave of

the Court;

- B: These orders apply to the evidence in chief and parts of the transcript as set out at Appendix A;
- C: These orders remain in force permanently; and
- D: Leave is reserved for any party to make an application to amend these orders (if necessary).

REASONS

Introduction

[1] These proceedings relate to the Marine Protected Areas in the proposed Northland Regional Plan, also known as Topic 14.

Interim confidentiality orders

[2] On 14 May 2021, the Court granted interim confidentiality orders over the evidence of some of the witnesses for The New Zealand Rock Lobster Industry Council, Fisheries Inshore New Zealand, and the Minister for Oceans and Fisheries (together **the applicant parties**).¹

[3] On 19 July 2021, the Court granted an application for the confidentiality orders to continue for the duration of the hearing in respect of a subset of the evidence covered by the initial interim confidentiality order.²

[4] A final decision on the substantive issues and report to the appellants, the Council and Minister of Conservation was issued on 11 May 2023.³ That decision included an order that pending further order of this Court, the interim order for confidentiality continues in force.

¹ Minute dated 14 May 2021, Attachment B.

² *Bay of Islands Maritime Park Incorporated v Northland Regional Council* [2021] NZEnvC 102.

³ *Bay of Islands Maritime Park Incorporated v Northland Regional Council* [2023] NZEnvC 86.

Application for permanent confidentiality orders

[5] On 1 May 2023, in anticipation of the hearing being complete in the foreseeable future, the applicant parties sought an order under s 277(2)(b) RMA for the permanent protection of sensitive information.

[6] The information at issue relates to catch and position of commercial fishing effort, and the revenue and profits of certain fishing operators. The applicants for the order are concerned as the information is not publicly available and its disclosure could:

- (a) breach privacy requirements between the Ministry for Primary Industries and fishers and impact negatively on the supply of similar information in the future; and
- (b) be utilised in a commercial sense by other parties and therefore unreasonably prejudice the commercial position of fishers.

[7] The applicant parties seek the orders on a permanent basis because the risks outline above remain applicable indefinitely, notwithstanding the determination of the proceeding.

[8] The applicant parties submit that in particular, notwithstanding that as a result of the Court's substantive (interim) determination, specified commercial fishing methods will be prohibited from parts of Te Ha Tangaroa protection areas, it will remain lawful for commercial methods other than those specified, or recreational or customary fishing to occur in part or all of these areas. Furthermore, some of the information at issue relates to areas outside the boundaries of Te Ha o Tangaroa protection areas, where fishing activities will not be controlled by the regional plan's provisions.

[9] The applicant parties consider that the proposed terms of the permanent confidentiality orders strike an appropriate balance between avoiding disclosure that may breach privacy requirements, impact the supply of similar information in future or cause unreasonable commercial prejudice and protecting the public interest in

making that information available in these proceedings. The extent of information proposed to be protected by the permanent confidentiality orders has been narrowed as much as is possible, and the applicant parties consider the remainder of the evidence that will be permanently publicly available provides suitable information for the public on the relevant fishing activity in the context of this proceeding.

[10] Additionally, pursuant to directions dated 23 March 2023, the Court authorised Northland Regional Council to publish the Topic 14 evidence-in-chief, rebuttal and joint witness statements (including the agreed statements of facts) on its website (with the exception of the evidence subject to the existing interim confidentiality order). The applicant parties consider the orders sought are consistent with the Court's directions authorising the Council to publish that evidence on its website, and will not impact on the making available of evidence relating to this matter on the Council's website.

Relevant evidence containing sensitive information

[11] The witnesses whose evidence is affected, and the relevant parts of their briefs are set out at **Appendix A** to this decision.

[12] The applicant parties have identified transcript references where they consider that sensitive confidential information is described, which is not readily available in the public area. Those transcript extracts are set out in **Appendix A**.

[13] The applicant parties confirm that there are no rebuttal briefs containing sensitive information and no exhibits in respect of which confidentiality is sought.

Other parties' views

[14] The applicant parties memorandum of 1 May 2023 advised that counsel for the appellants, respondent and s 274 parties had been consulted, having been provided a draft of the application for permanent confidentiality orders, and requested to advise if any party opposed or had other concerns. No party indicated that it opposes the application. However, the New Zealand Sports Fishing Council, Bay of Islands Maritime Park Inc and Ngāti Kuta, while stating that they do not oppose the confidentiality order sought, asked that the memorandum records that these parties

do “not accept that the information is in fact of a nature that properly attracts a claim of confidentiality”.

[15] On 2 May 2023, the Court issued directions that any objections to the application should be filed and served by 5:00pm Friday, 5 May 2023. No objections were received.

Legal framework

[16] Sections 279(3)(c) and 42(2) RMA provide the Court with the power to make an order prohibiting or restricting the communication of any information obtained by it during the proceedings and to exclude the public from a hearing where that information is likely to be referred to. The Court is not obliged to make such orders, even where those orders are unopposed by the parties. The exercise of any statutory discretion, here whether to make the confidentiality orders sought, must be undertaken in a principled way.

[17] Section 277 RMA provides that all hearings shall generally be held in public but that the Court may (relevantly) require that evidence be heard in private and/or prohibit or restrict the publication of any evidence if it considers the reasons for doing so outweigh the public interest in a public hearing and publication of evidence.

[18] Section 278 RMA gives Environment Judges the same powers that the District Court has in the exercise of its jurisdiction which means the District Court Rules are applicable where appropriate. Rule 6(a) of the District Court (Access to Documents) Rules 2017 is relevant here as it concerns restrictions on access to Court files.

Consideration

[19] On this occasion I accept the applicant parties advice that the information is commercially sensitive and disclosure would cause unreasonable commercial prejudice.

[20] I conclude that making of the orders would not offend principles of open justice and are appropriate to secure the proper and orderly administration of justice. I find the consequences are sufficiently adverse to make orders protecting against that, to

the extent necessary. I am satisfied the parties have limited the parts of the evidence and transcript to be protected by the permanent confidentiality orders as much as is possible.

[21] In coming to this decision, I have given weight to the fact that no other party has specifically opposed the application for permanent confidentiality orders.

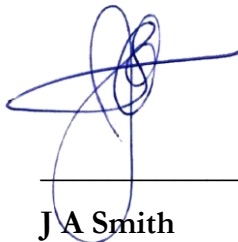
Orders

[22] The application for confidentiality orders is granted as follows:

A: Pursuant to section 277(2)(b) of the Resource Management Act 1991 and rule 6(a) of the District Court (Access to Court Documents) Rules 2017, the Environment Court orders that the evidence in chief set out at Appendix A, which contains information related to catch and position of commercial fishing effort, and commercially sensitive information regarding the revenue and profits of certain fishing operators (the confidential information) be managed on the following terms:

- (1) Publication or communication of the confidential information is prohibited;**
- (2) The evidence in chief containing confidential information may only be made available to the public if it has been redacted to exclude any confidential information;**
- (3) These orders apply to any brief of evidence which refers to or quotes from the confidential information. Any such evidence:**
 - (a) Is to be kept on the Court file and is to have a notice attached notifying the reader that it contains confidential information; and**
 - (b) Is not to be uploaded to the Environment Court's, nor any other, website unless it has been redacted to exclude any confidential information;**

- (4) The transcript produced from that part of the hearing at which the information in the confidential information is discussed is not to be distributed to the public but is to remain on the Court file and is to be marked “confidential” with a copy of this order attached. Those parts of the transcript in respect of which this order applies are set out at Appendix A;
- (5) Any exhibits or other materials containing or referring to confidential information which were produced during the course of the hearing are not to be distributed to the public but are to be kept on the Court file with a notice attached marking them as “confidential” and subject to the same treatment described at (a) to (b) above; and
- (6) The Court files are not to be searched, inspected or copied without leave of the Court;
- B: These orders apply to the evidence in chief and parts of the transcript as set out at Appendix A;
- C: These orders remain in force permanently; and
- D: Leave is reserved for any party to make an application to amend these orders (if necessary).



J A Smith
Environment Judge



1. **Appendix A**

1.1 Jacob Hore Evidence in Chief for the Minister for Oceans and Fisheries (Fisheries Activities) [EB Tab 42], specifically:

1.1.1 Figure 2 and 3 and Appendix 2;

1.1.2 *Transcript P691 L19 – P693 L13;*

1.2 Graeme Bailey Evidence in Chief for the Fishing Industry Parties [EB Tab 45], specifically paragraphs [16]-[20], [22]-[24], [32] and [36];

1.3 Mark Ngata Evidence in Chief for the Fishing Industry Parties [EB Tab 46], specifically:

1.3.1 Paragraphs [26]-[28];

1.3.2 Table at paragraph [26]; and

1.3.3 Map at paragraph [28];

1.4 Mark Semmens Evidence in Chief for the Fishing Industry Parties [EB Tab 47], specifically:

1.4.1 Paragraphs [10]-[11], [13] and [16]-[18];

1.4.2 *Transcript P1485 L23 - P1486 L16; P1488 L10 – P1489 L27; P1494 L6 – L31; P1498 L10 – L18; P1500 L5-L6; P1500 L20 - L21;*

1.5 Thomas Clark Evidence in Chief for the Fishing Industry Parties [EB Tab 48], specifically:

1.5.1 Paragraphs [89]-[91], [93]-[103], [105]-[107], [109], [118], [126], [135]-[136] and [147];

1.5.2 *Maps on pages 29-31, 33-35 and 37; and*

1.5.3 *Table on pages 27-28;*

1.5.4 *Transcript P1561 L24-27;*

1.6 Simon West Evidence in Chief for the Fishing Industry Parties [EB Tab 49], specifically:

1.6.1 Struck out Figures 3 and 4; and

1.6.2 Appendices 4, 5 and 7;

1.6.3 *Transcript P1459 L24 – L25; P1463 L10 – L12;*

1.7 Agreed Statement of Facts on Fishing Issues [EB Tab 72], specifically:

1.7.1 Paragraphs [19]-[21];

1.7.2 Tables at paragraphs [19.3] and [20.3]; and

1.7.3 Maps on pages 8, 9, 11, 12, 13 and 14.