

122 AUG 2008

**DECISION OF THE ACCESS TO INFORMATION
APPEAL TRIBUNAL IN RESPECT OF THE
FOLLOWING APPEAL**

JAMAICA ENVIRONMENT TRUST (JET) -APPELLANT

V.

**THE NATIONAL ENVIRONMENT AND PLANNING AGENCY
(NEPA)-RESPONDENT**

APPEAL NO. AT/NEPA/2007/1

**THE APPELLANT WAS REPRESENTED BY MISS DANIELLE
ANDRADE, LEGAL DIRECTOR, JAMAICA ENVIRONMENT
TRUST**

**THE RESPONDENT WAS REPRESENTED BY MRS. MARLENE
ALDRED, DIVISIONAL DIRECTOR, ATTORNEY GENERAL'S
CHAMBERS AND MS. SIMONE PEARSON, CROWN COUNSEL,
THE ATTORNEY GENERAL'S CHAMBERS**

**The Tribunal established under section 32 of the Access to Information
Act (2002) met on March 26, 2007 to consider the above Appeal and
heard submissions from the legal representatives of the respective
parties.**

BACKGROUND

The Appellant, the Jamaica Environment Trust "JET" by letter dated October 11, 2006 to the Respondent, National Environment and Planning Agency "NEPA" requested copies of applications relating to the construction of a Captive Dolphin Facility in Hanover. NEPA responded by letter dated NOVEMBER 16, 2006 refusing to disclose the documents, claiming exemption under section 20 (2) of the Act, which speaks to documents dealing with business affairs; but recommending that JET avails itself during the period for public scrutiny and comments by referring to the Terms of Reference 'TOR' on NEPA's website.

SUBMISSIONS

Ms. Andrade representing the Appellant, submitted that JET adopted the recommendation put forward by NEPA by making submissions on the draft 'TOR'; however, no Environment Impact Assessment 'EIA' for that development was ever posted on NEPA'S website; with the result that the public consultation appeared to have ended abruptly.

In addition, NEPA appears to have abandoned its original ground for refusal, as by letter dated March 16, 2007 from its legal representative, Ms Simone Pearson of the Attorney General's Chambers, Ms Andrade was advised that access to the documents requested was deferred until they had been considered by NEPA'S board and a decision made in accordance with section 10 (2) (B) AND (C) of the Act; as prior release could prejudice the application process, which would not be in the public interest.

Ms. Andrade referred specifically to section 2 of the Act which states which states that the main objects are to reinforce and give effect to fundamental principles of constitutional democracy, namely, governmental accountability, transparency and public participation in national decision-making.

Therefore NEPA should not rely on the section permitting deferral to defeat the main objects of the Act and having indicated that public consultation would take place, JET had anticipated accordingly, in order that the public interest would be served and access to the documents granted to JET; or alternatively, access to the confidential or sensitive information expunged.

Ms Simone Pearson on behalf of the Respondent stated at the outset that they would be relying on her letters of March 16, 2007 and March 22, 2007; having conceded that NEPA had failed to advise of its decision to defer access within fourteen (14) days in accordance with subsection (2) of the Act.

The foregoing requirements were supported by Mr. Gilroy English, Legal Counsel for NEPA, who Ms. Pearson also invited to address the question of the timing of the application for a beach control licence for the proposed Dolphin facility in Hanover, which had to await the EIA and also further details relating to the application generally. At Ms. Pearson's request, he highlighted the negative impact or prejudice arising from premature release of information on the applicant's financing arrangements and/or the possible influence of a strong lobby the decision-makers against the application.

Ms. Pearson then opined that there is a public consultation process that remains inviolable but which does not extend to making the application document available, although the public is aware of the purpose of the application; hence 'the public interest' extends to the protection of the applicant as well as the process itself.

Ms. Pearson confirmed that an EIA will be conducted in this appeal and then invited Ms. Neufville, representative of NEPA, to clarify the process as follows: Once the application is submitted, it is reviewed to determine whether an EIA is needed, if so, a draft TOR is produced and circulated to both the relevant sections of the community and Government Agencies for their comments, which are incorporated into a final TOR, and after agreement with the applicant, submitted for the completion of the EIA. Further comments are sought by way of posting the EIA on the website of the NRCA, arranging a public meeting for presentation of the plans, which are circulated to the relevant agencies. Thereafter the application is submitted to the board for approval.

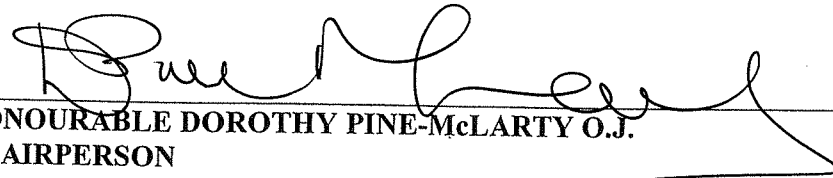
Mention was made that where no EIA is required, a notice is posted on the property and/or the website, which must not prove difficult for public access. However, this was not part of the substance of the appeal before the Tribunal.

DECISION

The tribunal has taken note of letter dated November 19, 2007, from Dolphin Cove that their initial objection to the release of the information sought from the NEPA, is based on a concern that no longer exists.

Dolphin Cove has however asserted a new basis for continuing the objection. The Tribunal is not in a position to comment on the question of whether this concern is or is not justified, as it depends entirely on assumptions of future actions of third parties. Suffice it to say, that the duty of the Tribunal is restricted to considering whether the objection is based upon an exemption stated in the Act; and the Tribunal is satisfied that the new concerns expressed are not so stated.

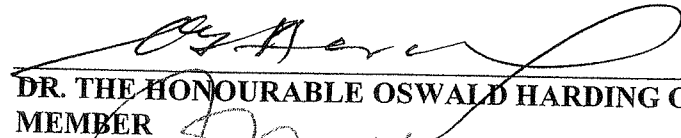
The Tribunal therefore sees no basis on which release of the documents could be refused and proposes to give directions that these documents should be released to the Applicants.



HONOURABLE DOROTHY PINE-McLARTY O.J.
CHAIRPERSON



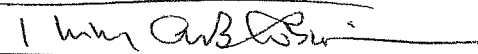
HONOURABLE DAVID COORE O.J., Q.C.
MEMBER



DR. THE HONOURABLE OSWALD HARDING O.J., C.D., Q.C., PhD.
MEMBER



MR. JOHN MAXWELL, C.D.
MEMBER



REVEREND PHILIP G.O'B. ROBINSON
MEMBER

10/10/10