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

JAMAICA ENVIRONMENTAL TRUST (JET) – APPELLANT

V.

THE NATIONAL ENVIRONMENTAL AND PLANNING AGENCY – RESPONDENT

APPEAL NO. AT/NEPA/2010/1

THE APPELLANT WAS REPRESENTED BY MS. NANCY ANDERSON, ATTORNEY-AT-LAW.

THE RESPONDENT WAS REPRESENTED BY MR. GILROY ENGLISH AND MS KEISHA McDONALD

The Tribunal established under section 32 of the Access to Information Act (2002) met on Monday August 9, 2010, to consider the above Appeal and heard submissions from the legal representative of the respective parties.

The Tribunal's Chairperson Hon. Dorothy Pine-McLarty, O.J, before the hearing was called to order, informed the hearing that one of the Directors of Dolphin Cove had been a lifelong friend and partner in a law firm and is now a consultant in that firm. In declaring interest, she sought the advice of the parties to determine whether she should continue. The party representing the Jamaica Environmental Trust had no objections to her hearing the matter. The parties representing the National Environment and Planning Agency however objected and the Chair withdrew from the hearing. The hearing was henceforth chaired by Justice Wesley James.

BACKGROUND

This appeal relates to an application under the Access to Information Act (ATI) made by THE JAMAICA ENVIRONMENTAL TRUST (JET) to THE NATIONAL ENVIRONMENTAL AND PLANNING AGENCY (NEPA) by letter dated February 8, 2010 for information relating to the Dolphin Cove facilities in Ocho Rios and Montego Bay. More particularly, this appeal is in relation to item 5 in the request letter: copies of "veterinary reports from January 2007 for the Dolphin Cove facilities in Ocho Rios and Montego Bay."

NEPA acknowledged receipt of the request in its letter to JET dated February 25, 2010 and advised that it would undertake the necessary research in order to fulfil the request within the prescribed 30 days.

NEPA wrote to JET by letter dated March 9, 2010 and requested an additional 30 days to provide the requested information.

JET responded by letter dated March 10, 2010 and advised that it would not request an internal review at that time. In the letter JET anticipated receiving the requested information within the next 30 days.

NEPA advised JET by letter April 1, 2010 that it would disclose some of the information requested and that some information did not exist. In relation to item 5, NEPA stated:

“Documents in relation to item 5 may not be disclosed at this time on the basis of caution that it may be exempt pursuant to section 20 of the Access to Information Act (2002) which states: “an official document is exempt from disclosure if (a) its disclosure would reveal (ii) any information of a commercial value, which would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed”

NEPA informed JET that it would consult “a third party in order to determine if the document should be released” and requested an additional 14 days to “finalize” the matter and provide JET with a favourable response.

At the end of the fourteen day period, on April 14, 2010, JET wrote to the Principal Officer and CEO of NEPA, Mr. Peter Knight, requesting an internal review of the agency’s refusal to grant access to the information requested. In this letter JET pointed out that it had requested and received veterinary reports from the Dolphin Cove facilities in the past.

NEPA wrote to JET on April 16, 2010 and, among other things, advised that JET’s request for veterinary reports would be referred to the Board of the Natural Resources Conservation Authority (NRCA). The Agency requested an additional 10 days “to allow the Board to review the matter.”

NEPA informed JET of their final decision in letter dated April 26, 2010, in which it refused to grant access to the veterinary reports. NEPA advised:

“...the request was referred to the Board of Natural Resources Conservation Authority. Accordingly, a decision has been taken by the Agency not to disclose the documents on the basis that they may be exempt pursuant to section 20(b) of the Access to Information Act (2002) which states:

“an official document is exempt from disclosure if...it contains information concerning the commercial interest of any person or organization and the disclosure of that information would prejudice those interests.”

JET received two additional letters from NEPA. These are (1) letter dated March 29, 2010 from NEPA to Dolphin Cove Ltd. advising the company of JET’s request and (2) a letter in response by Dolphin Cove Ltd. dated March 30, 2010.

In their March 29 letter to Dolphin Cove Ltd, NEPA advised “we are currently processing the request pursuant to the provisions of the ATI Act and must inform you that the above report is not exempt under the Act, and as such can be disclosed to the public.” NEPA invited Dolphin Cove Ltd. to register its objection in writing by March 31, 2010.

Dolphin Cove Ltd. registered its objection in the letter dated March 30, 2010 to NEPA and opined that the information was exempt under section 20 (1)(b). The reason given for their objection as stated in the letter is:

“the only reason that any member of the public would have an interest in the private operational information (particularly information pertaining to the animals’ welfare) submitted by Dolphin Cove is for the purposed of the environmental activism movement against dolphins in captivity. It has been our experience, on many occasions of which you are aware (and for which can documentary evidence (sic), that where this information has been given to the activists, it has been used to the detriment of the business interests of this company.

We advise further, that should this document be in fact released to the public, it is our intention to pursue this matter to the fullest extent of the law in order to safeguard our constitutional rights to operate a free enterprise permitted by law without regulatory agencies acting to facilitate third party interferences under the Access to Information Act.”

Failing to receive any further information from NEPA, Jet lodged this appeal on June 16, 2010.

SUBMISSIONS

THE APPELLANT’S ARGUMENTS

JET filed its appeal based on the following grounds:

- (i) The Respondent has a duty to grant access to documents specified in the request if they are not exempt documents pursuant to section 7(3)(c) of the Access to Information Act.

- (ii) The grant of access to the veterinary reports is not exempt under any section of the Act:
 - (a) This is accepted by the Respondent in its letter dated 29.3.10 to Mr. Stephen Burrows (Dolphin Cove Ltd.),
 - (b) The Respondent has previously granted access to similar veterinary reports for the period 2001, 2002, and 2006 for dolphins held at the Dolphin Cove Ocho Rios facility pursuant to an Access to Information request submitted in 2007.

- (iii) The information requested, and therefore the documents requested, do not fall within the category of exemption (under section 20 (1) (b) (ii)) claimed by the Respondent for the following reasons:
 - (a) The veterinary reports do not contain information concerning the commercial interests of any person or organization where the disclosure of such information would prejudice those interests as required by s. 20 (1)(b) of the Access to Information Act.
 - (b) The information contained in the reports related to the medical health of dolphins in captivity in the Ocho Rios and Montego Bay facilities and therefore has no commercial value.

- (iv) It is further submitted that there is a general right, in the public interest, for access to the said veterinary reports as this disclosure is likely to:
 - (a) Bring to light information affecting public safety,
 - (b) Promote the general public interest in accessible information and
 - (c) Inform people as to whether there is any danger to the public's health.

- (v) In consideration of the aforementioned, the Respondent had breached its duty to grant access to the documents requested by the Appellant.

THE RESPONDENT'S ARGUMENTS

The Agency is well aware of its obligation under the Act to disclose information where it deems that such information is disclosable or where it thinks there is no exemption under the Act to disclose.

NEPA, though acknowledging, in a letter dated March 31, 2010, that it was of the opinion that the information could be and should be disclosed, the letter quite clearly ends by stating that it is writing to seek advice as to how to proceed. Therefore the matter was still under consideration and NEPA had not yet made a decision as to whether or not to disclose the information.

The Respondent further argued that what was done, as mandated under the Act, is to make a decision as to whether or not to disclose the document and the decision was taken not to disclose. Advice was sought from an Attorney, who provided a number of options under the Act. He gave the following options:

- If you are uncertain, you may withhold the information;
- If you believe that there may be some exemption under the Act, then the access to the process which he described, loosely captured here as a report to the Tribunal, is, in fact, an appeal;

NEPA further indicated that the decision to withhold the information, as is their mandate if necessary, was influenced by the advice sought by one of the affected parties, Dolphin Cove Ltd. They went on to state that Section 2 of the Act states that some of the objects of the Act are –

“..to reinforce and give further effect to certain fundamental principles underlying the system of constitutional democracy;”

to promote “public participation in national decision-making, by granting to the public a general right of access to official documents held by public authorities, subject to exemptions which balance that right against the interest in exempting from disclosure governmental, commercial or personal information of a sensitive nature.”

In writing to Dolphin Cove to allow them opportunity to object or to register any concern they may have, NEPA argued that they are fulfilling part of the aims of the Act in giving the public – Dolphin Cove also being a member of the public – a part of the decision making process and, based on the opportunity and advice given to them, they came to the decision to withhold the documents because of the potential adverse effect on Dolphin Cove’s commercial interest, under Section 20 of the Act.

Attorney for the Respondent contends that the Agency had reviewed the Act, in particular as this request refers to veterinary reports of a specific company, in that these reports are those which detail how animals are treated and other such information that is related to the activities of the company, and the Agency felt that, based on their interpretation, such reports would fall under Section 20 of the Act.

DECISION

In refusing JET’s request for the veterinary reports, NEPA advised that the decision taken not to disclose the documents was on the basis that they may be exempt pursuant to section 20(b) of the Access to Information Act.

Counsel for JET submitted that, pursuant to section 32 (6)(a) of the Act, burden of proof is on NEPA as a public authority to prove that the information requested is exempt. In its effort to discharge the burden of proof legally placed on it, NEPA in its letter to JET dated 26/04/10 stated:

“Accordingly, a decision has been taken by the Agency not to disclose the documents on the basis that they may be exempt pursuant to section 20(b) of the ATI Act which states:

‘an official document is exempt for disclosure if it contains information concerning the commercial interest of any person or organization and the disclosure of that information would prejudice those interests.’

Counsel for the respondent NEPA, readily accepted that the Act is definitive in the use of the word ‘would’ which is quite different from the word ‘may’ as used by NEPA in refusing to grant access to the information sought.

It would appear that, although NEPA had, by their letter dated 29/3/10, to Dolphin Cove, stated in part “...and must inform you that the above report is not exempt under the Act and as such can be disclosed to the public”, NEPA had resiled from that position when Dolphin Cove made an objection. A public authority should never abdicate its responsibility to make a decision which it is required to make under the law, with the expectation that the Tribunal will discharge that responsibility. Where a document is not exempt under the Act, the public authority is obligated to release the document.

A threat of lawsuit should never prevent a public authority from fulfilling its mandate under the Act. Having perused the authorities cited and heard submission of counsel, the Tribunal has concluded that the information sought is not exempt under the Act and should be made available to the Appellant.

W. James

HONOURABLE JUSTICE WESLEY JAMES (RET.)
CHAIRPERSON

Edward Baugh

PROFESSOR EDWARD BAUGH, C.D.
MEMBER

Philip G. O'B. Robinson

REVEREND PHILIP G. O'B. ROBINSON, O.D.
MEMBER