



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1966

Appeal MA-040263-1

City of Toronto



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NATURE OF THE APPEAL:

The requester (now the appellant) is seeking access to records relating to the “Toronto Economic Development [TEDCO] Mega Studio Project in the Portlands”.

The appellant first made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to TEDCO. TEDCO responded by informing him that the *Act* does not apply to that organization. The appellant then submitted a similar request under the *Act* to the City of Toronto (the City).

The City responded by informing the appellant:

We have contacted TEDCO. However, they have advised that TEDCO is a share capital corporation incorporated under the *Business Corporations Act (Ontario)*, whose officers are not appointed by or under the authority of the Council of the City of Toronto within the meaning of the *Act*. Therefore, TEDCO records are not in the custody or control of the City of Toronto, nor subject to the *Act*.

The appellant appealed the decisions of both TEDCO and the City. This office then opened this appeal file relating to both decisions.

The City later issued a supplementary decision, in which it indicated that it had located approximately 322 pages of responsive records in its own record-holdings. The City granted access to two pages, and applied the exemptions at sections 6(1)(b), 10(1)(a), (b) and (c), and 11(c), (d) and (e) of the *Act* to deny access to the balance. The appellant did not appeal the City’s supplementary decision and therefore I will not deal with the issue of access to the records located by the City.

The sole issue in this appeal is whether the responsive records held by TEDCO are subject to the *Act*.

This office issued a Notice of Inquiry to the City and TEDCO, initially. Both the City and TEDCO provided representations in response. The complete representations of the City and TEDCO were sent to the appellant along with a Notice of Inquiry.

The appellant provided representations in response.

DISCUSSION:

INTRODUCTION

The scope of the right of access to records under the *Act* is set out in section 4(1), which reads, in part:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution . . .

Here, the question is whether the appellant has a right of access to responsive records held by TEDCO. This conclusion may be reached in one of three ways:

1. TEDCO itself is an institution under the *Act*;
2. TEDCO is considered a part of the City;
3. The responsive records held by TEDCO are in the City's custody or control, despite the fact that TEDCO is not part of the City.

IS TEDCO AN INSTITUTION UNDER THE ACT?

Background of TEDCO

City of Toronto Act, 1985

In 1985, the Ontario Legislature enacted the *City of Toronto Act, 1985*. Section 9 of the *City of Toronto Act, 1985* reads:

(1) The [City of Toronto] may incorporate under the *Business Corporations Act, 1982*, a corporation having as its purposes:

- (a) the provision, operation and improvement of sites, buildings and facilities for; and
- (b) the making of grants or loans to any person upon such terms as may be agreed between the [City] and the person for the carrying on of promotional activities in relation to,

the establishment and carrying on of industries and of industrial operations and uses incidental thereto.

(2) The articles of incorporation of the corporation referred to in subsection (1) shall provide, in addition to the purposes set out in subsection (1), that,

- (a) the corporation shall be carried on without purpose of gain for its shareholder, and any profit or other accretion to the corporation shall be used in promoting its purposes;
- (b) notwithstanding the *Business Corporations Act, 1982*, all of the shares of the corporation shall be allotted and issued to the [City], and the [City] shall not transfer the shares to any other person;

- (c) notwithstanding the *Business Corporations Act, 1982*, the directors of the corporation shall not declare, nor the corporation pay, any dividends on any issued shares of the corporation and the corporation shall not borrow money except from the [City].

(3) The corporation referred to in subsection (1) may acquire land outside of the boundaries of the City of Toronto that was owned by the [City] on the 1st day of December, 1985.

(4) The corporation referred to in subsection (1) shall be deemed not to be a manufacturing business or other industrial or commercial enterprise for the purposes of section 112 of the *Municipal Act*.

(5) The corporation referred to in subsection (1) shall not grant bonuses in aid of any manufacturing business or other industrial or commercial enterprise.

(6) Subject to the *Ontario Municipal Board Act*, the [City] may lend money to the corporation referred to in subsection (1) for its purposes and may charge interest upon the money loaned at a rate as may be agreed.

(7) For the purposes of enabling the corporation referred to in subsection (1) to be dissolved, subsection (2) shall not prevent the distribution to the [City] of any real or personal property of the corporation remaining after the payment of all debts and liabilities of the corporation.

Incorporation of TEDCO

On March 24, 1986, the City incorporated TEDCO under section 9 of the *City of Toronto Act, 1985* and the *Business Corporations Act, 1982*, with the City as its sole shareholder.

Powers and scope of business

TEDCO's powers and the scope of its business reflect the provisions in section 9 of the *City of Toronto Act, 1985*.

TEDCO's website <www.tedco.ca> describes its mandate as follows:

TEDCO was incorporated in 1986 to pursue industrial development, and to attract and retain jobs in the City of Toronto.

TEDCO owns over 400 acres of land in the Port Lands of Toronto and leases properties to more than 75 businesses. This area is designated as a Regeneration Area in the City's new Official Plan and Central Waterfront Secondary Plan: Making Waves.

TEDCO provides the City of Toronto with an ability to implement selected elements of its broader economic development strategy. Through its “incubator” program, TEDCO continues to do its part to encourage new employment formation in key industries. More significantly, TEDCO plays an important role in stimulating reinvestment in strategic lands and underutilized sites. This includes the identification, acquisition, rehabilitation, and development of strategic lands and buildings to create “development-ready” sites, particularly as a catalyst for new employment-related investment.

Directors

Section 3 of TEDCO By-Law No. 1 (as amended) speaks to TEDCO’s directors, and states:

- the directors are appointed or elected (these terms are defined to be interchangeable) by City Council [s. 3.05]
- the City may remove any director from office and may elect or appoint any person in his stead for the remainder of the term [s. 3.06]

The Board of Directors consists of:

- six citizen members
- the Mayor or his/her designate
- the Chair of the City’s Economic Development and Parks Committee
- two City Councillors from the Economic Development and Parks Committee
- the Commissioner of Economic Development, Culture and Tourism or his/her designate (*ex officio*)

[TEDCO website]

Officers

Section 5 of TEDCO By-Law No. 1 speaks to TEDCO’s officers, and states:

- TEDCO must have three officers, consisting of a president and chief executive officer, a secretary and a director of land acquisitions [s. 5.01]
- TEDCO may have other officers, including vice-presidents and a comptroller [s. 5.01]
- TEDCO’s officers are elected or appointed by TEDCO’s board of directors [s. 5.01]

- TEDCO's board of directors may remove an officer from office [s. 5.08]

Relationship between TEDCO, and the City and its Economic Development Committee

Section 3.19 states that the board of directors of TEDCO "shall generally communicate with" the City, through the City's Economic Development Committee, regarding its purposes.

TEDCO's website states the following with respect to the relationship between it and the City:

TEDCO is strategically aligned with the City's Economic Development Department and its strategy.

Analysis

Introduction

The responsive records held by TEDCO will be subject to the *Act* if TEDCO itself qualifies as an "institution" under the *Act*.

The word "institution" is defined in section 2(1) of the *Act* as follows:

"institution" means,

- (a) a municipality,
- (b) a school board, municipal service board, transit commission, public library board, board of health, police services board, conservation authority, district social services administration board, local services board, planning board, local roads board, police village or joint committee of management or joint board of management established under the *Municipal Act, 2001* or a predecessor of that Act,
- (c) any agency, board, commission, corporation or other body designated as an institution in the regulations;

TEDCO by itself clearly does not qualify as a "municipality" under paragraph (a) of the definition. Therefore, TEDCO may be considered an institution in its own right only if:

- it fits within one of the terms set out in paragraph (b) of the section 2(1) definition of institution; or
- it is designated as an institution in the regulations.

Does TEDCO fit within one of the terms set out in paragraph (b) of the section 2(1) definition of “institution”?

It is clear that TEDCO does not qualify as a school board, a municipal service board, a transit commission, a public library board, a board of health, a police services board, a conservation authority, a district social services administration board, a planning board, a local roads board, a police village or a joint committee of management or joint board of management established under the *Municipal Act, 2001* or a predecessor of that Act.

The appellant submits that TEDCO qualifies as a “local services board”, and states:

The term “local services board” is not defined in [the *Act*].

In the context of [the *Act*] the word “board” has a wide meaning.

Black’s Law Dictionary defines “board” as “a group of persons having managerial, supervisory or advisory powers . . .”

The meaning of the words “local board” was considered in the Ontario case of *Mangano v. Moscoe* [(1991), 6 M.P.L.R. (2d) 29 at 34 (Ont. Gen. Div.)] in the context of the *Municipal Conflict of Interest Act*. By virtue of the penal nature of the statute, the Court gave a strict interpretation to the words “local board” which was a defined term in the Act. In referring to the statutory definition and whether a sub-committee of council would be included within the meeting, Farley J. stated:

The nature of the entities described in the s. 1(g) definition of “local board” would appear to be rather autonomous decision-making or action-taking entities.

TEDCO’s articles of incorporation state that the purposes of the corporation are, *inter alia*, to provide grants or loans, and to provide and improve sites or buildings. Its mandate of providing grants, loans, buildings and property amounts to the provision of services.

Given TEDCO’s mandate, its decision making authority and its composition, . . . it would come within the definition of a local services board.

Neither the City nor TEDCO makes submissions on this point.

I do not accept this submission. In my view, the ordinary meaning of “local services board” would include boards that deal with such infrastructure matters as water supply, garbage collection, and the like. I am reinforced in my view by the (no longer in force) *Local Services*

Boards Act. In setting out the types of by-laws a local services board may make, the schedule to that statute lists the following types of services boards:

- water supply
- fire protection
- garbage collection
- sewage
- street or area lighting
- recreation

The current equivalent of the *Local Services Boards Act* is the *Northern Services Boards Act*, which lists in its schedule the same types of services boards listed above, as well as the following additional types:

- roads
- public library service
- emergency telecommunications

TEDCO does not provide the type of service envisioned by the *Local Services Boards Act* and the *Northern Services Boards Act*, although it might be considered to provide a “service” in the broader sense.

In my view, TEDCO cannot reasonably be considered a “local services board” under paragraph (b) of the section 2(1) definition of “institution”.

In summary, I find that TEDCO does not qualify as an “institution” under paragraphs (a) or (b) of the definition.

Does TEDCO fit within the terms of paragraph (c) of the definition of “institution”?

As noted previously, paragraph (c) of the definition of “institution” at section 2(1) of the *Act* states that an institution means:

any agency, board, commission, corporation or other body designated as an institution in the regulations . . .

Section 1 of Ontario Regulation 372/91 designates a number of bodies as institutions under the *Act*. The only one that could possibly apply here is section 1(1)4 which reads:

The following bodies are designated as institutions:

Each community development corporation incorporated under section 109 of the *Municipal Act, 2001* if,

- i. the corporation receives assistance from a municipality under subsection 109(4) of that Act, or
- ii. one or more of the corporation's directors are nominated by the council of a municipality as provided for in subsection 109 (10) of that Act.

Therefore, TEDCO would qualify as an institution under section 1(1)4 of the regulation if it passes a two-part test:

1. It is a community development corporation incorporated under section 109 of the *Municipal Act, 2001*; and
2. (a) it receives assistance from a municipality under subsection 109(4) of the *Municipal Act, 2001*; or
(b) one or more of the corporation's directors are nominated by the council of a municipality as provided for in subsection 109(10) of the *Municipal Act, 2001*.

Section 109 of the *Municipal Act, 2001* reads (in part):

(1) The council of a municipality, either alone or with one or more persons or municipalities, may incorporate a corporation under Part III of the *Corporations Act* as a community development corporation.

(2) The community development corporation must be incorporated,

- (a) with the sole object of promoting community economic development with the participation of the community by facilitating and supporting community strategic planning and increasing self-reliance, investment and job creation within the community; or
- (b) with objects substantially similar to those described in clause (a).

(4) Despite section 106, a municipality may, except as may be restricted or prohibited by regulation, provide financial or other assistance at less than fair market value or at no cost to a community development corporation, and such assistance may include,

- (a) giving or lending money and charging interest;

- (b) lending or leasing land;
- (c) giving, lending or leasing personal property; and
- (d) providing the services of municipal employees.

(6) If a municipality has assisted a community development corporation in a manner permitted by subsection (4) or has nominated a person who has become a director of a community development corporation, the board of directors of the community development corporation shall,

- (a) make an annual financial report, and additional financial reports as requested, to the municipality at the time, in the manner and with the information specified by the municipality; and
- (b) upon the request of the municipality, permit the municipal auditor to conduct an audit of the corporation, including an examination of the corporation's assets.

(7) In conducting an audit, the municipal auditor may inspect all records of the community development corporation.

(9) The Minister may by regulation deem community development corporations to be local boards for the purposes of specified provisions of this Act and the *Municipal Affairs Act*, and may prescribe the extent and manner of application of those provisions to corporations deemed as local boards.

(10) Community development corporations that receive municipal assistance in a manner permitted by subsection (4) or that have one or more directors nominated by the council of a municipality may be designated under the *Municipal Freedom of Information and Protection of Privacy Act* as a class of institution to which that Act applies.

In my view, TEDCO's economic development purposes could be construed as falling within the scope of the objects of a community development corporation under section 109(1) of the *Municipal Act, 2001*. In TEDCO's words, its purpose is to "pursue industrial development, and to attract and retain jobs in the City of Toronto." The purposes of a section 109(1) corporation are to "promote community economic development with the participation of the community by facilitating and supporting community strategic planning and increasing self-reliance, investment and job creation within the community".

On the other hand, there appear to be some differences in functions between TEDCO and section 109(1) corporations:

- TEDCO can make grants or loans, while it appears section 109 corporations do not have this power;
- TEDCO can acquire land, while it appears section 109 corporations cannot; and
- Section 109 corporations can receive assistance from municipalities in the form of money, land, personal property and municipal employees, while TEDCO does not have such express provisions.

I also note that TEDCO was incorporated as a share capital corporation under the *Business Corporations Act, 1982* and the *City of Toronto Act, 1985*.

This is distinct from a corporation *without* share capital established under the Part III of the *Corporations Act* and the *Municipal Act, 2001*. The *Corporations Act* is distinct from the *Business Corporations Act, 1982*, because the two statutes are different and deal with different types of corporations.

TEDCO does not fit within the terms of section 1(1)4 of the regulation since it was not incorporated under section 109 of the *Municipal Act, 2001*, and was not incorporated under the *Corporations Act*. However, it could be argued that, based on this part of the regulation, the Legislature intended that economic development corporations such as TEDCO, although not designated in the regulation, would be covered by the *Act*.

In view of my conclusion concerning section 2(3) of the *Act* below, it is not necessary to pursue this intention further in the context of section 1(1)4 of the regulation.

IS TEDCO A PART OF THE CITY UNDER SECTION 2(3) OF THE ACT?

Introduction

The responsive records held by TEDCO will be subject to the *Act* if TEDCO may be considered “a part of” the City, as opposed to being an institution in its own right. This determination turns on section 2(3) of the *Act*, which reads:

Every agency, board, commission, corporation or other body not mentioned in clause (b) of the definition of “institution” in subsection (1) or designated under clause (c) of the definition of “institution” in subsection (1) is deemed to be a part of the municipality for the purposes of this Act if all of its members or officers are appointed or chosen by or under the authority of the council of the municipality.

The parties focus most of their representations on this issue.

Representations

TEDCO submits that it has no “members”, since it is not a non-share capital corporation under Part III of the *Corporations Act*. It therefore states that the remaining issue is whether TEDCO’s officers are “appointed or chosen by or under the authority of” City council.

TEDCO goes on to submit that under the *Business Corporations Act* and TEDCO’s documents, TEDCO’s officers are appointed by its *directors*, not City council.

TEDCO then submits that it cannot be said its officers are appointed “under the authority of” the City, as sole shareholder. It states that for this test to be met, City council would need to have “some level of responsibility in the directors’ appointment of the officers”. TEDCO submits that there is no such responsibility here. It states:

The Supreme Court of Canada has considered the term “under this *Act*” (see *Kelvin Energy Ltd. v. Lee*, [1992] 3. S.C.R. 235 . . .). The Court concluded that the phrase “under this Act” refers to powers specifically conferred *by* the *Act*. Applying this interpretation to the issues here, it appears that to be considered “under” something, there must be some form of conferral. The power to appoint officers is not conferred upon City Council, rather it is specifically conferred upon the directors of the corporation by the provisions of the *OBCA*.

The Supreme Court has also considered the term “authority” (see *R. v. Audet* (1996), 135 D.L.R. (4th) 20 . . .). The Court held that the term authority means the “power or right to enforce obedience,” or the power to influence the conduct and actions of others.” Generally, the Court held that “authority” related to the status between two entities. Applying this interpretation to the issue under consideration, it appears that the City Council must have the power or right to choose the officers that the directors appoint, or the ability to influence the directors’ selection of officers. It could be argued that since the City Council appoints the directors of the corporation, that it could appoint directors who would likely appoint certain officers. However, under the *OBCA*, the directors must act in the best interests of the corporation. Absent any indication to the contrary, it does not appear that the City Council has the authority or influence to appoint the officers of the corporation. Furthermore, in the hypothetical situation where City Council did influence the directors’ selection of a particular officer, section 2(3) of the *Act* clearly states that *all* of its officers must be appointed or chosen by the municipal council in order for the designation of “institution” to be triggered. In this case there are officers of TEDCO who are appointed by directors under the authority of the *OBCA*.

The City’s submissions focus on Order M-415 in which Adjudicator Anita Fineberg found that a non-profit housing corporation was part of a municipality. Adjudicator Fineberg based her conclusion on the fact that the term “officers” in section 2(3) can be interpreted broadly to

include “directors”, and that the directors in that case were “appointed or chosen by or under the authority of” the municipality.

The City states that based on this order the City “has no option but to conclude that TEDCO does not fall under section 2(3) . . .”, without further elaboration or explanation.

The appellant relies on Order M-415 and submits that because TEDCO’s directors are chosen by the City, section 2(3) applies to it. Following the reasoning in Order M-415, the appellant submits that the directors of TEDCO are the “controlling minds” of the corporation.

Analysis

In her Order M-415, Adjudicator Fineberg stated the following regarding the issue of whether “members or officers” may include directors:

The terms “members” and “officers” are nowhere defined in the *Act*. However, the term “officer” has been very broadly defined in law, particularly in the public law context. For example, the *Dictionary of Canadian Law* defines “officer” as including the position of a corporation director.

In my view, the use of the term “officers” along with “members” in section 2(3) is intended to identify the principal directing or controlling minds of a wide variety of entities, including “every agency, board, commission, corporation or other body not mentioned in subsection 2(1)(b)”. A purposive interpretation of the *Act* suggests that the term “officers” should encompass the controlling or directing minds of a non-profit corporation, namely its board of directors, whether or not directors are otherwise described as “officers” in the corporate documents.

In my opinion, to interpret the term “officers” narrowly to include those positions commonly referred to as officers in a business law context, such as president, secretary, treasurer, would be inconsistent with the purpose of section 2(3). The purpose of this section is to include within the definition of “institution” those bodies controlled by municipalities in the most direct way, that is by virtue of the power to appoint the body’s “members” or “officers.” This result would not necessarily be achieved if this test were applied at a secondary level of management. Accordingly, it is my view that the threshold established in section 2(3) should be applied to those positions which can be said to be the “directing minds” of the corporation.

Adjudicator Fineberg goes on to find that the directors of that corporation are its “directing or controlling minds”:

Section 7 of the incorporating by-law (By-Law No. 1) of the Housing Corporation states:

The affairs of the Corporation shall be managed by a board of six directors of which at least one must be a member of the municipal council, who may exercise all such powers and do all such acts and things as may be exercised or done by the corporation and are not by the by-laws or any special resolution of the corporation or by statute expressly directed or required to be done by the corporation at a general meeting of members.

The Housing Corporation has advised that this by-law has never been amended.

In my view, it is clear from section 7 of the by-law that the directors are the “directing mind” of the Housing Corporation. Accordingly, I conclude that, in the circumstances of this appeal, the term “officer” should be interpreted as including “directors” for the purpose of section 2(3) of the *Act*.

There is additional authority to support Adjudicator Fineberg’s interpretation of “officer”. For example, the term “officer” is defined in the U.K. *Companies Act 1985* as including a corporate “director”. There is Ontario case law that supports the proposition that in the context of litigation and examining a representative of a corporation, “officer” includes a director [see, for example, *Bazos v. Bazos*, [1965] O.J. No. 326 (H.C.) and *Hamilton Harbour Commissioners v. J.P. Porter Co.* (1978), 19 O.R. (2d) 66 (H.C.)]. Also, the words have been used interchangeably in rules of civil procedure [*Columbia Dry Wall Ltd. v. William Berkenbos & Sons Construction Co.*, [1971] B.C.J. No. 575 (Co. Ct.)].

Regarding the term “appointed or chosen by or under the authority of” the council of the municipality, Adjudicator Fineberg states:

Black’s Law Dictionary defines “authority” as “permission” or “control over”. In my opinion, based on either definition, the municipality can be said to have the authority to determine who may or may not serve as a director of the Housing Corporation, notwithstanding that the municipality does not actually choose all of the directors. Because the approval of the municipality is a necessary condition for the appointment of a director, I am satisfied that the municipality has “control over” who is eligible to be elected or appointed to the board of directors. Accordingly, I find that the directors are appointed or chosen “under the authority” of the municipality.

I am of the view that this is the case not only with regard to the appointment or election of first-time directors, but also directors of the Housing Corporation who are elected or appointed to fill a vacancy according to the provisions of section 11 of By-Law No. 1.

The appellant has provided me with a copy of the minutes of Township Council dated December 10, 1992. I note that, at that meeting, council went beyond mere approval and actually appointed two directors to the Housing Corporation for a period of two years. Neither of these individuals appeared to be a council member at that time.

I adopt and apply this line of reasoning here.

I conclude that TEDCO's directors fall within the term "officers" in section 2(3). In my view, the case that the directors are appointed by or under the authority of the council of the municipality is stronger here than in Order M-415 since, unlike the earlier case, it is clear that *all* of the directors are appointed or chosen by municipal council, rather than only some of them, with only council's approval being required for others.

To conclude, I find that TEDCO, while not an institution in its own right, is deemed to be a part of the City under section 2(3) of the *Act*. Therefore, by definition, any responsive records held by TEDCO are within the custody or control of the City pursuant to section 4(1) of the *Act*, and the appellant has a right of access to them, subject to any applicable exemptions.

In the circumstances, it is not necessary for me to determine whether the City otherwise has custody or control of the responsive records held by TEDCO.

REMEDY

The circumstances of this case are unusual, in that both the City and TEDCO believe that TEDCO is not part of the City, yet I have concluded otherwise.

Since TEDCO does not believe the *Act* applies to its records, it appears that TEDCO has not designated an individual or group within its offices as being responsible for processing access requests under the *Act*. Further, the responsive records do not appear to be held in the City's main record-holdings.

As a result, it may not be sufficient to simply order "the City" to search for responsive records and make an access decision.

Under the *Act*, the head of the institution is responsible for carrying out the institution's obligations to respond to a request. In addition, the head of the institution is responsible for compliance with the provisions of any order of this office directed to the institution. The head of the City of Toronto is City Council. City Council has, in turn, delegated authority under the *Act* to the City Clerk.

Accordingly, I have decided to order the head or, alternatively, the head's delegate, to secure the records and make an access decision in accordance with Part I of the *Act*.

ORDER:

1. I order the Council of the City of Toronto or, alternatively, the Clerk of the City of Toronto, to secure either the original, or copies of, records responsive to the appellant's request in the custody or under the control of TEDCO, and to make an access decision under Part I of the *Act*, treating the date of this order as the date of the request.

2. In order to verify compliance with this order, I order the Council of the City of Toronto or, alternatively, the Clerk of the City of Toronto, to provide me with a copy of the decision letter referred to in Provision 1 at the same time it is sent to the appellant. The decision letter should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, Suite 1400, 2 Bloor Street East, Toronto, Ontario, M4W 1A8.

Original Signed By: _____
Beverley Caddigan
Adjudicator

_____ September 20, 2005