



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2419

Appeal MA07-407

Sault Ste. Marie Economic Development Corporation



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Sault Ste. Marie Economic Development Corporation (SSMEDC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of:

All website development projects/internet/electronic media projects sponsored or developed by the [SSMEDC] between January 1, 2001 and September 1, 2007 including the website name...when it was launched and its lifecycle...the name of the CD/DVD or other electronic media project.

The true cost of each of those projects including the initial budgeted cost and the upkeep costs since site launch.

Which of these projects were put out for bid and which companies were invited to bid.

Which company(s) was successfully awarded each project.

The requester (now the appellant) filed an appeal with this office, advising that thirty days had elapsed since his request and he had not received a response from SSMEDC.

During the intake stage of the appeal, SSMEDC's legal counsel wrote to the appellant and advised him that SSMEDC is a corporation without share capital incorporated under the *Corporations Act*. Counsel for SSMEDC stated that, on this basis, SSMEDC is not subject to the *Act*, and would not be responding to the appellant's request. The appeal then moved directly to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*.

The subject of the inquiry in this appeal is whether records of the SSMEDC are accessible under the *Act*.

I began the inquiry into this appeal by issuing a Notice of Inquiry to SSMEDC, as well as to the City of Sault Ste. Marie (the City) as an affected party. SSMEDC and the City each provided representations. I requested further clarification from SSMEDC concerning how members of SSMEDC are selected, and received supplementary representations on that issue.

The complete representations of SSMEDC were then sent to the appellant along with a Notice of Inquiry, which invited the appellant's representations. The appellant then provided representations.

Following receipt of the appellant's representations, I requested and received clarification from SSMEDC concerning City Council's resolutions pertaining to the establishment of SSMEDC. Subsequently, I sent the appellant's representations to the City and SSMEDC and invited their reply representations. In particular, I invited the City and SSMEDC to comment on whether the appellant's representations support the potential application of particular sections within Regulations 372/91 (under the *Act*) or 599/06 (under the *Municipal Act, 2001*) that could result in

SSMEDC being an institution under the *Act*. Both the City and SSMEDC provided reply representations.

DISCUSSION:

Section 4(1) of the *Act* creates a right of access to records under the custody or control of an “institution,” a term that is defined in section 2(1).

The issues in this appeal are: (1) whether SSMEDC is an institution, or part of an institution, under the *Act*, and if not, (2) whether SSMEDC’s records are otherwise in the custody or under the control of the City based on the relationship between the two institutions.

IS SSMEDC AN “INSTITUTION” UNDER THE ACT?

Introduction

“Institution” is defined in section 2(1) of the *Act* as follows:

- (a) a municipality,
- (b) a school board, municipal service board, city 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 the *City of Toronto Act, 2006* or a predecessor of those Acts,
- (c) any agency, board, commission, corporation or other body designated as an institution in the regulations;

For the purposes of paragraph (c) of the definition of “institution” in section 2(1) of the *Act*, Ontario Regulation 372/91, made under the *Act*, lists the names of a number of bodies that are “designated as institutions.” This list does not include SSMEDC. In addition, however, as explored in more detail below, section 1(1)4 of Ontario Regulation 372/91, designates bodies known as “community development corporations” as institutions, if certain conditions are met.

As well, section 20 of Ontario Regulation 599/06, made under the *Municipal Act, 2001*, deems certain corporations to be institutions under the *Act*. This section states:

A corporation that is a wholly-owned corporation or a corporation whose business or activities include the provision of administrative services to any municipality, local board, public hospital, university, college or school board is deemed to be an institution for the purposes of the [*Act*].

Based on the above, there are four different ways in which SSMEDC could be considered an institution under the *Act*:

- (a) If it constitutes a municipality;
- (b) If it qualifies as one of the 15 entities described in paragraph (b) of the definition of “institution” under the *Act*;
- (c) If it is “designated” as an institution under Ontario Regulation 372/91, made under the *Act*; or
- (d) If it is deemed to be an institution pursuant to Ontario Regulation 599/06, made under the *Municipal Act, 2001*.

Representations

SSMEDC submits that it is not an institution as defined under the *Act*, as it does not meet the criteria set out in paragraphs (a), (b) and (c) of the definition of institution in section 2(1) of the *Act*. SSMEDC also provides representations to the effect that neither section 1(1)4 of Regulation 372/91 nor section 20 of Regulation 599/06 has the effect of making it an institution, as outlined in more detail below.

The appellant submits that SSMEDC is an institution under the *Act* because:

- it receives the major portion of its annual operating funds from public sources, and a significant percentage of its annual operating budget from the City;
- it relies upon those monies for core funding; and
- it receives additional indirect assistance from the City, in the form of sharing financial/human resource administration with the City and free office space at City Hall.

The appellant further submits that:

...the only reason that the SSMEDC was established was to engage in economic development activities (as a legal entity) on behalf of the City in order to take advantage of opportunities that the City could not otherwise engage in because of legal restrictions placed upon the economic development activities of municipalities.

The appellant also submits that the services provided by SSMEDC are within its mandate to “market and promote Sault Ste. Marie,” and are carried out to generate a net benefit solely to the City, and not to SSMEDC. The appellant is of the view that SSMEDC acts as an economic development agency on behalf of the City.

In its reply representations, SSMEDEC submits that:

- 60% of its budget is from non-municipal sources;
- its operations are separate and distinct from those of the City;
- it is invoiced for and pays for services it receives from the City;
- its receipt of free space from the City is an “in kind” contribution from the City;
- City Council and staff have never done line-by-line control of its budget;
- it was not created under the *Municipal Act* and has proven its independence;
- it provides services to citizens, not to the City as a corporate entity;
- the City could, if it chose to, deliver similar services to those of SSMEDEC by establishing a community development corporation.

SSMEDEC also submits that only the Mayor, as an *ex officio* member, and one other member of City Council, sit on the Board of SSMEDEC.

Additional representations of the parties are set out in the analysis that follows.

Analysis

(a) *Is SSMEDEC a municipality?*

It is clear that SSMEDEC is not a municipality in its own right. Therefore, SSMEDEC cannot be considered an “institution” under paragraph (a) of the definition of “institution” in section 2(1).

(b) *Is SSMEDEC one of the 15 entities described in paragraph (b) of the definition of “institution” under the Act?*

It is clear that SSMEDEC does not qualify as a school board, a municipal service board, city board, transit commission, public library board, board of health, police services board, conservation authority, district social services administration 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. It is also abundantly clear that SSMEDEC was not established under the *City of Toronto Act, 2006* or its predecessors. Accordingly, paragraph (b) of the definition provides no basis for finding that SSMEDEC is an institution.

(c) *Is SSMEDEC designated as an institution under Ontario Regulation 372/91 (made under the Act)?*

As noted above, Regulation 372/91 lists bodies that are “institutions” under the *Act*, and SSMEDEC is not listed by name as a body designated as an institution. The only way in which SSMEDEC could be considered an institution under Ontario Regulation 372/91 is if it falls within the scope of a “community development corporation” under section 1(1)4 of the regulation, which states:

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, SSMEDC would qualify as an institution under section 1(1)4 of Regulation 372/91 if it meets the following requirements:

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* was repealed by S.O. 2006, c. 32, Schedule A, section 50. Nevertheless, as explained below, I consider its contents to be relevant to a determination of whether Regulation 372/91 supports a finding that SSMEDC is an institution. Section 109 states (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).

(3) A municipality shall appoint one or more persons to apply on the municipality's behalf for incorporation under subsection (1).

(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.

...

(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.

Requirement 1: Is SSMEDC a community development corporation incorporated under section 109 of the Municipal Act, 2001?

SSMEDC submits that it is not a community development corporation incorporated under section 109 of the *Municipal Act, 2001*, for the following reasons:

The SSMEDC is a not for profit corporation incorporated under the *Corporations Act* on February 3, 1986 by way of Letters Patent entirely independent from the City.... The incorporation of SSMEDC long predates section 109 of the *Municipal Act, 2001*. SSMEDC cannot be a "Community Development Corporation" as set out in section 109 of the *Municipal Act, 2001* because the objects of a Community Development Corporation must be, as set out in section 109(2)(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 with the community; or with objects substantially similar to those described in clause a)."

The objects of the SSMEDC are much wider and allow such things as acquiring land, building, leasing and selling factories, buildings and industries.

The City also submits that SSMEDEC was not incorporated under the *Municipal Act, 2001* and argues that Regulation 372/91 only applies if a community development corporation was incorporated under section 109 of that statute. The City repeats this argument in its reply representations, stating that, as opposed to being incorporated under section 109 of the *Municipal Act, 2001*, SSMEDEC was incorporated in the mid-1980s under the *Corporations Act*.

I have reviewed the objects for which SSMEDEC was incorporated in its original Letters Patent, which were issued under the *Corporations Act* on February 3, 1986. These objects are to:

- Create and promote industrial and commercial development and to create and promote health, research and educational facilities in the City;
- Create and promote tourism;
- Acquire lands to develop them;
- Provide services such as power, water, sewerage, roads in connection with acquired lands;
- Build, for lease or sale, factories, buildings required by industry and commerce, and to rent, sell or mortgage those buildings;
- Acquire, by purchase, donation, lease, exchange or concession, other real estate and to dispose of that real estate, including by way of sale or lease;
- Promote management and consulting services;
- Borrow money, accept grants; and
- Accept payment for work done.

In my view, SSMEDEC meets the requirements for a community development corporation set out in section 109 of the *Municipal Act, 2001*, for the following reasons. First, section 109(1) of the *Municipal Act, 2001* states that a municipality “may incorporate a corporation under Part III of the *Corporations Act* as a community development corporation.” Part III of the *Corporations Act* is the part of that statute that provides for corporations without share capital, and SSMEDEC was incorporated under the *Corporations Act* as such a corporation. In my view, as well, the reference to Part III of the *Corporations Act* in section 109(1) addresses the City’s argument that the incorporation was done under that statute and not “under” the *Municipal Act, 2001*.

The incorporation was authorized by a resolution of City council dated December 17, 1985, approving the City Administrator’s “recommendations on proceeding to set up the new Economic Development Corporation”. The resolution further grants authorization “to proceed as outlined.” I have not been provided with a copy of the recommendations referred to in the resolution. However, pursuant to the resolution, SSMEDEC was then incorporated by the Mayor and the City Solicitor of Sault Ste. Marie, as well as a local businessman.

The involvement of the local businessman is consistent with the reference to incorporation “with one or more persons ...” in section 109(1). In addition, section 109(3) of the *Municipal Act, 2001* states that the municipality “shall appoint one or more persons to apply on the municipality’s behalf for incorporation” under section 109(1). I have not been expressly informed as to whether the incorporators were “appointed by the municipality” as discussed in section 109(3), but given the involvement of the Mayor and City Solicitor as incorporators, and

Council's authorization "to proceed as outlined," I am satisfied that this requirement has been met.

Turning to section 109(2), I do not agree with the City that SSMEDEC's objects are fundamentally different from those of a community development corporation as described in section 109(2)(a). In my view, activities such as acquiring land, building, leasing and selling factories, buildings and industries are consistent with the objectives 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," as outlined in section 109(2)(a) of the *Municipal Act, 2001*. It is difficult to imagine that the objectives of SSMEDEC in pursuing activities such as buying and selling land, factories, buildings or industries would be for any purpose other than the promotion of economic development. Section 109(2)(b) indicates that a "community development corporation" includes corporations with objects "substantially similar" to those described in clause (a), and I find that SSMEDEC is such a corporation, meeting this requirement.

I therefore conclude that SSMEDEC meets all of the substantive requirements enunciated under section 109 of the *Municipal Act, 2001*, including the fact that it qualifies as a "community development corporation."

Having found SSMEDEC to qualify as a "community development corporation," I must now consider the meaning of the phrase, "incorporated *under* section 109 of the *Municipal Act, 2001*" (emphasis added). In the foregoing analysis, I have already concluded that it meets all the substantive requirements imposed by that section, but the meaning of incorporation "under" it needs to be considered further.

As noted above, section 109 has been repealed (although most of the statute remains in force). However, despite the repeal of section 109, Regulation 372/91 remains in force and continues to include this reference. In my view, the continued existence of this provision in the regulation signals a legislative intent that corporations meeting the requirements enunciated in that section, and in the regulation itself, would be considered to be "community development corporations" and would therefore qualify as institutions under the *Act*.

As proven by the existence of SSMEDEC, there clearly are corporations that meet the requirements of section 109 of the *Municipal Act, 2001* in relation to being a "community development corporation," but were not incorporated with any direct reference to that section. This, and the repeal of section 109, raises the question of what is required in order to be incorporated "under" that section. In and of itself, section 109 provides no express power to incorporate; this must still be accomplished under Part III of the *Corporations Act*, as was done in this case. The existence of SSMEDEC also demonstrates that the ability of municipalities to provide for incorporation in the manner contemplated by section 109 clearly predates the enactment of that section. What, then, is the effect of the reference to section 109 in Regulation 372/91?

In my view, section 1(1)4 of Regulation 372/91 should be taken as an indication of legislative intention that corporations of the nature described in section 109 are institutions under the *Act*, whenever they were incorporated, as long as they meet the requirements of these provisions.

This conclusion is reinforced by the decision of the Ontario Court of Appeal in *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario*, [2008] O.J. No. 1799 (*TEDCO*). In that case, the Court counseled against a technical interpretation of the *Act* in considering whether the City of Toronto Economic Development Corporation (*TEDCO*) was part of the City under section 2(3) of the *Act*. The Court stated (at para. 39) that "... a formal and technical interpretation runs contrary to the purpose of the *Act*," and noted, among other things, that the sole purpose of *TEDCO* was to "advance the economic development of the City." The Court also observed (at para. 32) that:

When one considers that the object or purpose of the *Act* is to provide a right of access to information under the control of municipalities and related municipal institutions, it would appear reasonable to conclude that *TEDCO* should be subject to the *Act*.

In view of the funding sources and objectives of *SSMEDC*, the same sentiments apply here. Accordingly, because it was incorporated under Part III of the *Corporations Act* and meets the substantive requirements set out in section 109 of the *Municipal Act, 2001*, I am satisfied that *SSMEDC* meets requirement 1.

Requirement 2 : Does SSMEDC (a) receive assistance from the City under subsection 109(4) of the Municipal Act, 2001; or (b) are one or more of SSMEDC's directors nominated by City Council as provided for in subsection 109(10) of the Municipal Act, 2001?

The second requirement under section 1(1)4 of Regulation 372/91 sets out two alternative ways it can be met, as noted above. Either *SSMEDC* must "receive assistance" from the City under section 109(4) of the *Municipal Act, 2001*, or at least one of its directors must be nominated by the municipal council. As noted above, the appellant submits that *SSMEDC* receives "a significant percentage of its annual operating budget from the City." The appellant has provided *SSMEDC*'s annual reports from 2002-2006, each of which indicates that the City provided the *SSMEDC* with more than \$1,000,000 in annual funding. Section 109(4) of the *Municipal Act, 2001* refers to, among other things, "giving" money. Regardless of the other funding sources of *SSMEDC*, I find that the "assistance" condition set out in section 1(1)4i is met. As noted in section 1(1)4 of Regulation 372/91, if one of the conditions is met, the other (the "nomination" of a board member by City council under section 1(1)4ii) need not be. On this basis, I find that the second requirement to be considered an "institution" under section 1(1)4 of Regulation 372/91 is met.

Accordingly, *SSMEDC* meets the requirements to be considered an "institution" set out in Regulation 372/91, and I therefore find it to be an institution under the *Act*. On this basis, I will order it to make an access decision in response to the appellant's request. I will, however, also consider whether it meets the requirements to be an institution under Regulation 599/06.

(d) *Is SSMEDC deemed to be an institution pursuant to Ontario Regulation 599/06, made under the Municipal Act, 2001?*

As noted above, section 20 of Regulation 599/06, made under the *Municipal Act, 2001*, indicates that “[a] corporation that is a wholly-owned corporation or a corporation whose business or activities include the provision of administrative services to any municipality, local board, public hospital, university, college or school board” is deemed to be an institution under the *Act*.

With respect to Regulation 599/06, SSMEDC submits that:

Ontario Regulation 599/06 governs municipal services corporations which are a wholly owned corporation or a corporation whose business or activities include the provision of administrative services to any Municipality, local board, public hospital, university, college or school board. The SSMEDC is not owned by the Municipality whatsoever. ...[U]pon dissolution of the SSMEDC the assets are not to go to the City but a charitable organization.

SSMEDC does not provide administrative services to any Municipality, Local Board, Public Hospital, University, College or School Board.

The City’s reply representations also contain argument relating to Regulation 599/06. The City submits that SSMEDC is not wholly owned by it, nor is it a corporation whose business or activities include the provision of administrative services to the City. The City also argues that, although SSMEDC operates out of the same office building as the City, SSMEDC has its own accounting staff, carries out its own human resources functions and, in essence, operates quite separately from the City.

Given that it is a corporation without share capital, I accept the City’s submission to the effect that SSMEDC is not a wholly owned corporation of the City.

However, section 20 of Regulation 599/06 can also lead to a finding that a non-wholly owned corporation is an institution under the *Act* if that corporation provides “administrative services” to the City. Accordingly, I will consider whether SSMEDC provides services of that nature.

“Administration” means “Management (*of* business); management of public affairs, government; ...,” and “administrative” means “[p]ertaining to management of affairs” (*Concise Oxford Dictionary*, 6th ed., Oxford: Clarendon Press, 1976, at p. 14).

SSMEDC’s representations describe its functions, which include:

- Providing small business consulting services to individuals seeking to start their own business in the region;
- Running Tourism Sault Ste. Marie, which is an arm of SSMEDC;

- Partnering with various entities on projects, including Destiny Sault Ste. Marie, which is a collaborative effort between SSMEDC, the private sector, the City and the Community Development Corporation of Sault Ste. Marie to identify diversification initiatives; and
- Purchasing land and building on it and, in turn, leasing the properties to various private sector industries in the area.

In SSMEDC's December 2008 newsletter, *the pulse: Sault Ste. Marie Economic Development News*, SSMEDC includes the following statement (at p. 2):

The SSMEDC recognizes the financial support it receives from the City of Sault Ste. Marie. As well, it recognizes the strong backing it receives from the Mayor, Council and City staff. The SSMEDC also thanks the federal and provincial governments, and its many other partners, for their continued support.

It goes on to set out the following mission statement (at p. 2):

The Sault Ste. Marie Economic Development Corporation is a non-profit organization, funded by public and private partners, whose goal is to be the community's leader in supporting and promoting an environment that generates sustainable employment in a healthy, growing and diversified economy.

I also note that SSMEDC's website (<http://www.sault-canada.com>) identifies three areas of activity at the top of its home page: "Development Sault Ste. Marie," "Tourism Sault Ste. Marie," and "Enterprise Centre Sault Ste. Marie."

The section of the website devoted to "Development Sault Ste. Marie" describes it as follows:

... a newly created division of the Sault Ste. Marie Economic Development Corporation that provides a continuum of professional development services in support of attracting and realizing new private sector investment and job creation in Sault Ste. Marie.

Its "Strategic Mandate" states that:

Development Sault Ste. Marie will build the brand and fulfill the promise that Sault Ste. Marie is the preferred place to do business offering exceptional value and service.

"Tourism Sault Ste. Marie" is subtitled, "Where to stay, what to do" and links to a separate website.

The section of the website devoted to "Enterprise Sault Ste. Marie" opens with the following description of its services:

Enterprise Centre Sault Ste. Marie . . . Your First Step to Business Success!

Welcome to Enterprise Centre Sault Ste. Marie, your first step in planning and implementing your business ideas! Provided free of charge to clients are a tremendous number of easily accessible business information resources.

Based on SSMEDC's representations, its newsletter and its website, it is evident that it provides the following services to or on behalf of the City:

- it operates Tourism Sault Ste. Marie, which it describes as an "arm" of SSMEDC, which encourages tourism and provides services to visitors;
- it operates Development Sault Ste. Marie to encourage new private sector investment and job creation in Sault Ste. Marie;
- through Development Sault Ste. Marie, it seeks to "brand" the City as the "preferred place to do business"; and
- it seeks to be a leader in generating sustainable employment in a healthy, growing and diversified economy.

In other municipalities, some or all of these services are provided by the municipal government. For example, in the City of Toronto, the municipality provides tourist information directly (see <http://www.toronto.ca/visitors/index.htm>).

In my view, by providing the services that it does, including tourism and business development services, SSMEDC does provide management of public affairs, and in fact provides services to members of the public that the City itself could provide. The City funds SSMEDC's activities, at least in part, and in my view, SSMEDC can therefore be seen to provide public services on the City's behalf. For example, one of its objectives is to "brand" Sault Ste. Marie as the preferred place to do business. In my view, therefore, although it could be said that the services provided by SSMEDC are provided to its clients, in so doing it also provides management of public affairs, which is an administrative service, "to" the City. I therefore find that SSMEDC provides administrative services to the City, meeting the substantive requirement of section 20 of Regulation 599/06.

Before concluding this discussion, it is also necessary to consider the meaning of the word "corporation" as it is used in this section. It is not defined in Regulation 599/06, which is itself entitled, "Municipal Services Corporations". Nor does the *Municipal Act, 2001* define the term "corporation." But section 203(1) of that statute provides municipalities with the power to establish corporations, and section 203(4) refers to the power to make regulations "governing the corporations made under this section." Section 203(5) provides that in the event of conflict, the provisions of the regulation would prevail.

Section 2(3) of Regulation 599/06 limits the application of section 20 of that regulation, which is under consideration here as the possible basis for finding that SSMEDC is “deemed” to be an institution under the *Act*. Section 2(3) of the Regulation states:

Sections 17 to 22 apply to a corporation only if a municipality uses or expects to use a power referred to in section 3 or subsection 4(2), (3) or 5(1) in relation to the corporation.

Based on the wording of section 2(3), I conclude that section 20 would apply to deem a corporation an institution under the *Act* if its terms are met, *and* if the municipality uses or expects to use one of the powers enumerated in section 2 in relation to the corporation. I have already found, above, that SSMEDC provides administrative services to the City, and on this basis, the substantive requirement set out in section 20 is met. The remaining question is whether the City has used or expects to use one of the powers enumerated in section 2, and I will now consider that issue.

Section 3 of Regulation 599/06 refers to the power of municipalities to establish corporations under section 203(1) of the *Municipal Act, 2001*. Section 4(2) of Regulation 599/06 refers to the power in section 203(1)2 to nominate or authorize a person to act as an incorporator. Section 4(3) refers to the power in section 203(1)3 to nominate or appoint a person as a member of the corporation, “only if the corporation is established by a public sector entity....” Section 5(1) refers to the powers in sections 203(1)4 and 5 to deal with securities of the corporation “established by a public sector entity.”

In view of its incorporation in 1986, SSMEDC was clearly not incorporated pursuant to the power given in section 203(1) of the *Municipal Act, 2001*, which did not exist at that time. Accordingly, the power in section 203(1)1 of that statute was not used in the incorporation of SSMEDC. The power referred to in section 3 of Regulation 599/06 was therefore not used, nor can its use be expected. As well, section 203(1)3 was not used to nominate or appoint a person as a member of a corporation, and the City does not have that power, as is evident from SSMEDC’s letters patent and amendments to the letters patent, and from its bylaw number 3, and accordingly, section 4(3) of the Regulation was also not used, nor can it be expected to be used. Nor was SSMEDC “established by a public sector entity,” and the section 5(1) of the Regulation was not used, and cannot be expected to be used.

However, only one of the powers listed in section 2(3) need be exercised in order to meet its requirements, and I find that the power referred to in section 203(1)2 to “nominate or authorize a person to act as an incorporator” has been exercised. As noted above in the discussion of Regulation 371/92, one of the incorporators was the Mayor, and the other was the City Solicitor, and as it is inconceivable that they acted without authority, I conclude that they qualify as having been “nominated” by the City to do so, as contemplated in section 203(1)3.

In this regard, it might be objected that this section did not exist when SSMEDC was incorporated in 1986. However, I note that the statute contemplates that corporations which came into being prior to the *Municipal Act, 2001* may be covered. Section 203(3) specifically excludes corporations established under several pre-existing statutes from qualifying.

Accordingly, I conclude that section 2(3) of Regulation 599/06 does not preclude the operation of section 20, which, but for such a preclusion, would deem SSMEDC to be an institution under the *Act* because it provides administrative services to the City. On this basis, I find that SSMEDC is deemed to be an institution under this provision.

In reaching this conclusion, I note that the web of legislative and regulatory provisions that must be considered in making the determination under Regulation 599/06 is confusing, and at times contradictory. For example, the effect of the statement in section 203(3) of the *Municipal Act, 2001* that section 203 does not apply to “any other corporation that a municipality is expressly authorized to establish or control” is not clear. However, the Court of Appeal in *TEDCO* has provided clear guidance in terms of relying on a technicality to exclude such bodies from the scope of the *Act*. In this regard, as noted above, the Court counseled against a technical interpretation of the *Act* in considering whether TEDCO was part of the City under section 2(3) of the *Act*. The Court stated (at para. 39) that “... a formal and technical interpretation runs contrary to the purpose of the *Act*,” and noted, among other things, that the sole purpose of TEDCO was to “advance the economic development of the City.”

For all these reasons, I find SSMEDC is deemed to be an institution under section 20 of Regulation 599/06, and as already noted, I will order it to make an access decision under the *Act*.

CONCLUSION

I have found that SSMEDC is an institution under the *Act* on the basis of section 1(1)4 of Regulation 372/91, and is also deemed to be an institution under section 20 of Regulation 599/06.

As a consequence, it is not necessary for me to consider whether SSMEDC is “part of” the City pursuant to section 2(3) of the *Act*, nor whether its records are in the City’s custody or control.

ORDER:

I find that SSMEDC is an institution under the *Act*, and I order it to respond to the appellant’s request, treating the date of this order as the date of the request, in accordance with sections 19, 21, 22 and/or 23 of the *Act*, as applicable.

Original signed by: _____
John Higgins
Senior Adjudicator

_____ May 15, 2009