

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2659

Appeal MA10-313

Fort Erie Economic Development and Tourism Corporation

October 20, 2011

Summary: The Fort Erie Economic Development and Tourism Corporation (FEEDTC) received a request for records related to procurement, including policies and practices. FEEDTC returned the requester's fee to her and refused to process the request under the *Municipal Freedom of Information and Protection of Privacy Act*, taking the position that it was not an "institution" under the *Act*. FEEDTC is a designated "institution" according to paragraph (c) of the definition in section 2(1) of the *Act*. FEEDTC is ordered to issue an access decision in response to the request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 4(1), 2(1) definition of "institution"; Regulation 372/91, section 1(1)4; *Municipal Act*, 2001, S.O. 2001, c.25.

Orders and Investigation Reports Considered: Orders MO-2418 and MO-2419.

Cases Considered: *City of Toronto Economic Development Corp. v. Ontario (Information and Privacy Commissioner)*, [2008] O.J. No. 1799 (C.A.), reversing 278 D.L.R. (4th) 356 (Div. Ct.)

OVERVIEW:

[1] This order addresses the issue of whether the Fort Erie Economic Development and Tourism Corporation (FEEDTC) is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). Section 4(1) of the *Act* creates a

right of access to records in the custody or under the control of an "institution," as that term is defined in section 2(1). If FEEDTC qualifies as an "institution," its record-holdings are accessible under the *Act*.

[2] The question of whether FEEDTC qualifies as an "institution" under the *Act* arises in the context of a request submitted by an individual for the following information:

1. ... policies and guidelines as they are related to purchasing and contracting work;
2. ... conflict of interest policies and guidelines for employees of the [FEEDTC] and Board members;
3. ... list of the goods and services that were awarded by the [FEEDTC] that exceed \$5,000.00, that were not tendered;
4. ... information regarding the issuance of RFP's and requests for quotes for the procurement of goods and services over \$5,000 for the [FEEDTC] from January 2008 to January 2010 and the name of the person/organization [to whom] the purchase of goods and services was awarded. Please indicate the dollar amount of the goods and services purchased over \$5,000 in the same time period.

[3] Legal counsel for the FEEDTC responded to the appellant, taking the position that FEEDTC was not subject to the *Act* and that it was not required to respond to her access to information request under the *Act*. The appellant's request forms and fee were returned to her.

[4] The appellant disagreed with FEEDTC's position respecting the application of the *Act* and appealed to this office. The appeal was streamed directly to the adjudication stage of the appeals process for an inquiry to determine the issue of whether FEEDTC is an "institution" under the *Act*. During the inquiry, a Notice of Inquiry was sent to FEEDTC and the Town of Fort Erie (the town),¹ inviting representations on the facts and issues. I received representations from FEEDTC², but not from the town.

[5] In the representations provided, FEEDTC suggested that the appellant has already been provided with the information she is seeking. Although this argument was raised in the context of a claim that her request was "frivolous and vexatious," I decided that it raised the possibility that the appeal was moot in the circumstances. Accordingly, I shared certain portions of FEEDTC's representations with the appellant to obtain her response to FEEDTC's position. The appellant then provided representations.

¹ I sought representations from the town as I considered that its interests may be engaged by this appeal. Section 13.01 of the IPC *Code of Procedure* states: "The IPC may notify and invite representations from any individual or organization who may be able to present useful information to aid in the disposition of an appeal."

² FEEDTC is represented by legal counsel and any reference to it in this order may be taken as a reference to its counsel unless otherwise stated.

[6] In this order, I find that FEEDTC is an “institution” under the *Act* according to the definition of the term in section 2(1), and I order it to issue an access decision to the appellant.

ISSUES:

- A. Preliminary issue – Is this appeal moot?
- B. Is the Fort Erie Economic Development and Tourism Corporation an “institution” under the *Act*?

DISCUSSION:

A. PRELIMINARY ISSUE – IS THE APPEAL MOOT?

[7] In responding to the Notice of Inquiry, FEEDTC submitted representations in support of its position that it does not qualify as an “institution” under the *Act*. FEEDTC also raised a new issue that I have decided to address as a preliminary matter in this order.

[8] Specifically, FEEDTC submitted the following:

The information contained in the FOI request has been provided to the [appellant] many times.

Additionally, some of the information sought is available on the FEEDTC website and has been provided in periodic reports to Council on at least an annual basis. Other information is a matter of public record with public agencies such as the Companies Branch.

[At an information meeting regarding the FEEDTC] ... [the General Manager] attended and represented the FEEDTC, gave a verbal presentation and made written documents available, as well as inviting any questions from those present concerning the FEEDTC. In that session, all of the information requested in the FOI request was made available to all persons present. No party made a request for any information. [The appellant] did attend the session but did not ask any questions about the FOI data.

...

In summary, the FEEDTC submits that the FOI request filed by [the appellant] is frivolous and vexatious and need not be complied with.

[9] The term “frivolous and vexatious” is found at section 4(1)(b) of the *Act* and states:

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 unless,

the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[10] Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the terms “frivolous” and “vexatious,” which further describe the criteria used to evaluate a request respecting whether it: (i) forms part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution and/or (ii) is made in bad faith or for a purpose other than to obtain access.

[11] Importantly, the introductory wording to the provision refers to the preliminary decision that a request is “frivolous or vexatious” as being made by the head of an institution. Accordingly, and as I advised the appellant in seeking her submissions on this issue, reliance on section 4(1)(b) of the *Act* in refusing to respond to the access request is not available to FEEDTC as long as it maintains its position that it is not an institution under the *Act*, or until this office determines that it is an institution under the *Act*.

[12] However, I also considered the possibility that FEEDTC’s representations were, in effect, raising an issue of mootness since the basis of FEEDTC’s position on the frivolous and vexatious issue was that the appellant had previously been provided with copies of all of the records that would be considered responsive to the request under the *Act* through other means.

[13] Accordingly, I decided to invite the appellant to provide representations in response to this argument since her possession of records responsive to the request could render the appeal moot. I provided the appellant with some background information and precedent within which to review and prepare a response on this issue.³ As I noted, in appeals before the Commissioner, the issue to be determined is whether a record should be disclosed to a requester. Where the record has previously been disclosed by the institution, or in another context, the issue of mootness is raised.

[14] The leading Canadian case on the subject of mootness is the Supreme Court of Canada’s decision in *Borowski*, cited above. The court described the doctrine as follows:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or

³ *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; Order MO-2525.

abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot ...

[15] In the *Borowski* case, Sopinka J. devised a two-step analysis for determining whether the principle of mootness ought to apply. First, the court must decide whether “the required tangible and concrete dispute” between the parties has disappeared and the issues have become academic. Second, in the event that such a dispute has disappeared, the court must decide whether it should nonetheless exercise its discretion to hear the case.

[16] In response to my request for representations on the issue of mootness, the appellant argues that she has not been provided with copies of all the records that would be considered responsive to her access request. The appellant identifies (as not provided) records that ought to be considered responsive to the parts of her request dealing with FEEDTC conflict of interest policies and guidelines [part 2], a list of untendered “goods and services” [part 3], and a list of tendered (RFPs, RFQs) procurements, including recipients and dollar figures [part 4]. The appellant notes that more general information about some of these topics has been made available, but more specific and/or itemized information has not.

[17] In my view, the “live controversy” between FEEDTC and the appellant relating to the identification and disclosure of records that would likely be considered responsive to this request is not over. Indeed, a live controversy between FEEDTC and the appellant exists not only with respect to the identification of responsive records, but on an even more basic level, respecting the issue of FEEDTC’s claim that it is not an “institution” under the *Act*. Therefore, notwithstanding the existing disagreement as to whether the appellant has received the records she seeks, the status of FEEDTC under the *Act* remains an ongoing controversy that affects the rights of the parties to this appeal, as well as the rights of other individuals who may wish to seek access to records held by FEEDTC in the future.

[18] Accordingly, I find that the first requirement of the mootness test set out in *Borowski* is not met. In the circumstances, therefore, I will proceed with my review of FEEDTC’s status as an “institution” under the *Act*.

B. IS FEEDTC AN "INSTITUTION" UNDER MFIPPA?

[19] As stated, FEEDTC declined to respond to the appellant's access request because it takes the position that it is not an "institution" under the *Act*.

[20] "Institution" is defined in section 2(1) of the *Act* as:

- (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,
- (c) any agency, board, commission, corporation or other body designated as an institution in the regulations;

[21] In seeking representations, I asked FEEDTC to address Order MO-2419, involving the Sault Ste. Marie Economic Development Corporation (the SSMEDC), where Senior Adjudicator John Higgins provided a thorough review of the issue of "designating" or "deeming" development corporations as institutions for the purpose of the *Act*.⁴

[22] Order MO-2419 provided the following summary of the four different ways the SSMEDC could be considered an institution under the *Act*:

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

[23] For the purposes of paragraph (c) of the definition in section 2(1) of the *Act* (outlined above), section 1(1)4 of Ontario Regulation 372/91 lists certain bodies that are "designated as institutions." FEEDTC does not appear on this list. However, section

⁴ The senior adjudicator also addressed this issue in Order MO-2418, dealing with the Cochrane and Area Community Development Corporation.

1(1)4 designates community development corporations as “institutions” if certain conditions are satisfied. Such a designation requires that the development corporation be:

1. incorporated under section 109 of the *Municipal Act, 2001*; and that,
2. one of the two following considerations apply:
 - 2.1. the corporation receives assistance from a municipality under subsection 109(4) of that Act, or
 - 2.2. 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.

[24] As Senior Adjudicator Higgins pointed out in Orders MO-2418 and MO-2419, section 109 of the *Municipal Act, 2001* has been repealed.⁵ However, I agree with the senior adjudicator that the repeal of this section does not diminish its relevance in the determination of whether Ontario Regulation 372/91 supports a finding that the FEEDTC is an institution.

[25] Section 109 of the *Municipal Act, 2001* 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

⁵ S.O. 2006, c. 32, Schedule A, section 50. Section 109 of the *Municipal Act, 2001* replaced section 112.2 of the former *Municipal Act*, R.S.O. 1990, Chapter M.45, which was itself (the entire statute) repealed on January 1, 2003 [2001, c. 25, ss. 484(1), 485(1)]. Section 109(4) is substantially similar to sections 112.2(4) and (5), while section 109(10) is substantially similar to section 112.2(12)

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.

(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.

Representations

[26] During the inquiry, I asked FEEDTC to provide documentation that had been useful in the review of this issue in the appeal leading to Order MO-2419.⁶ The appellant provided complete representations on the issue of whether FEEDTC qualifies

⁶ The documents requested were as follows: original application for incorporation; original letters patent; articles of incorporation; the corporation's by-laws, if not all, then at least by-laws that govern the composition of and procedures for selecting the corporation's members, directors and officers; any supplementary letters patent filed subsequent to the original letters patent; any applications to amalgamate and articles of amalgamation if any amalgamation or merger has taken place; a list of the current members or shareholders of the development corporation and their affiliation, if any, with the town; a list of the current directors and their affiliation, if any, with the town; and a list of the current officers and their affiliation, if any, with the town.

as an "institution" under the *Act* in her letter of appeal and added some comments in the representations sought from her on the issue of mootness.

[27] As stated, the town declined to submit representations in this appeal. However, the appellant provided me with a copy of a letter she received from the town around the time of her access request to FEEDTC and its subsequent refusal to respond to the request under the *Act*. The town's letter states, in part, "... I explained to you a couple years ago, the Town had taken the position that it appeared the MFIPPA applied to the [FE]EDTC ...".⁷

[28] The appellant submits that FEEDTC is an institution under the *Act* because:

- While it is a separate corporation, FEEDTC is ultimately controlled by and/or dependent on the council of the Town of Fort Erie;
- FEEDTC's annual budget is submitted to the town and must be approved by council, including decisions related to denying, altering or spending funds;
- FEEDTC requires town council approval for changes to their business practices, pursuant to their Memorandum of [Agreement];
- Two town councillors sit on FEEDTC's board, "pursuant to the *Municipal Act, [2001]*";
- FEEDTC was first incorporated on November 26, 1992, followed by a Memorandum of Agreement, signed on September 29, 1994 between FEEDTC and the town, which binds the town to give FEEDTC an annual grant to deliver programs specified in the memorandum relating to economic development and tourism services;
- a name change to FEEDTC (by Supplementary Letters Patent) was approved by the Minister of Consumer and Commercial Affairs on March 28, 2001;
- Town by-law 100-2002 contains a preamble stating "WHEREAS the EDC of Fort Erie was incorporated under Part III of the *Corporations Act, 1992* to provide and promote economic development and tourism related services, and WHEREAS under letter dated June 22, 1994, the Ministry of Municipal Affairs confirmed the EDC of Fort Erie was a community development corporation for the purposes of the *Municipal Act...*"⁸
- A subsequent town by-law "was passed to execute a new Memorandum of Agreement [between the town and FEEDTC] Schedule A which provides, among other matters, that the board of FEEDTC shall be comprised of five individuals, "two (2) of whom shall be elected officials appointed by the Municipal Council of the Town for the term of Council." Currently, the town's mayor and one of its

⁷ Excerpted from a May 28, 2010 letter from the town clerk to the appellant, filed as Appendix A to her representations.

⁸ Most of the documents referred to by the appellant in her letter of appeal to this office were provided to me in their entirety by FEEDTC.

councillors sit on the FEEDTC board, which brings FEEDTC under *MFIPPA*, due to the operation of the relevant provisions of the *Municipal Act, [2001]*.⁹

[29] The appellant submits that Orders MO-2419 and MO-2418 are relevant for the finding that the development corporations under review in those appeals were found to be institutions under the *Act*, pursuant to Ontario Regulation 372/91, made under the *Act*, as well as Ontario Regulation 599/06, made under the *Municipal Act, 2001*.¹⁰

[30] Finally, the appellant also provided audited financial statements for FEEDTC (year ending December 31, 2008). As this document is clearly marked confidential, I will not set out information contained in it. However, it can be said that the Notes to the Financial Statements indicate that FEEDTC "derives a substantial portion of its revenue from the Town of Fort Erie..." and also include reference to the FEEDTC as a "municipal services corporation."

[31] FEEDTC maintains that it is not an institution under the *Act* because, based on the criteria set out therein, the FEEDTC does not receive assistance under s. 109(4) of the *Municipal Act, 2001*. FEEDTC acknowledges that it has received an annual grant from the town since 1993, based on a projected operating budget calculated from the prior year's costs and expenses, but submits that it also obtains significant revenue from federal or provincial grants and fees for services rendered that "far exceed the amount of the municipal grant."

[32] FEEDTC also submits that "one or more of the corporation's directors are not nominated by the council of a municipality," as provided for in subsection 109(10) of the *Municipal Act, 2001*. The FEEDTC explains that the five directors are elected from the members-at-large by a show of hands at the annual meeting. The FEEDTC adds that the by-laws "require that two of the directors be nominated by the town, one of whom is the mayor. The council appointees serve without being elected."¹¹ The representations contain additional information about membership in the FEEDTC and its officers, including the following answer to the question "Does the municipality nominate the members or officers?"

The municipality nominates 2 directors to the board of director, one being the Mayor, the other appointed by Council.

⁹ The appellant appears to be referring to section 109(10) of the *Municipal Act, 2001*.

¹⁰ Ontario Regulation 599/06 governs "municipal services corporations." Section 20 reads: "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]."

¹¹ FEEDTC provided a document that confirms that there are five directors of the FEEDTC; of these, one individual is identified as "Mayor," while another is identified as "Councillor."

[33] FEEDTC takes the position that notwithstanding reference to the application of section 112.2 of the *Municipal Act*¹² in some of the documents provided with its representations, the provision does not apply. FEEDTC acknowledges that the September 29, 1994 Memorandum of Agreement makes reference to a ministry opinion¹³ that the EDC (FEEDTC's predecessor) is a community development corporation for the purposes of the *Municipal Act*.

[34] FEEDTC lists four reasons for distinguishing the circumstances before Senior Adjudicator Higgins in Order MO-2419 from those before me in this appeal. According to FEEDTC,

- FEEDTC was not incorporated pursuant to a by-law of the town, although there was a town council resolution authorizing the formation of an economic development team, which led to the formation of the original economic development corporation;¹⁴
- Unlike the Sault Ste. Marie corporation where the mayor and clerk were incorporators, no municipal officer appears in any capacity on the Letters Patent. FEEDTC acknowledges that one of the incorporators was mayor at the time, but maintains that this individual acted in his capacity of barrister and solicitor, rather than mayor;
- FEEDTC provides services to the town on a contract-by-contract basis and, in this way, "stands on the same footing as any other private contractor. There is no obligation on the town to provide funding or support outside of the provisions of the contract..."; and
- FEEDTC maintains separate offices and employees from the town, and is managed independently by a general manager who reports to the FEEDTC Board of Directors. The board has two municipal representatives as directors out of five, but "neither municipal representative has a second or deciding vote or veto."

Analysis and findings

[35] Turning to the definition of the term "institution" in section 2(1) of the *Act*, I have concluded that FEEDTC is not "a municipality in its own right" under paragraph (a) and that it is not one of the 15 entities described in paragraph (b) of the definition. In the circumstances, therefore, I find that the FEEDTC does not fit within either of paragraph (a) or (b) of the definition of "institution" in section 2(1) of the *Act*.

¹² As noted, section 112.2 of the repealed *Municipal Act* may be considered the equivalent provision to section 109 of the *Municipal Act, 2001*. See footnote 5, above.

¹³ This opinion was provided by the Community Development Branch of the Ministry of Municipal Affairs, as it was then known.

¹⁴ A copy of the relevant town council resolution, dated April 6, 1992, was included with FEEDTC's representations.

[36] In my view, the determination of whether FEEDTC qualifies as an "institution" rests upon consideration of paragraph (c) respecting "any agency, board, commission, corporation or other body designated as an institution in the regulations."

[37] As noted previously, the relevant regulation in this respect is Ontario Regulation 372/91. Section 1 of the regulation lists bodies that are "institutions" under the *Act*. Since FEEDTC is not listed by name in this section of the regulation, the only way it could be considered an institution is if it falls within the scope of a "community development corporation" under section 1(1)4 of the regulation. As also outlined above, section 1(1)4 of Ontario Regulation 372/91 designates community development corporations as "institutions" if certain conditions are satisfied, including incorporation under section 109 of the *Municipal Act, 2001* and 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.

Community Development Corporation

[38] In deciding whether FEEDTC is a "community development corporation," I reviewed the documents made available to me by FEEDTC. The Economic Development Corporation of Fort Erie (the EDC, as it was initially known) was incorporated under Part III of the *Corporations Act* as a corporation without share capital.

[39] According to the EDC's incorporation application, dated November 26, 1992, the objects of the corporation are listed as:

- i) To promote employment growth.
- ii) To undertake and promote efforts to increase municipal assessment, to improve the community's fiscal health.
- iii) To undertake and promote economic development programs that:
 - .1 Assist in the formation of new business, or in the retention and expansion of existing business.
 - .2 Assist in the implementation of public improvements to enhance the community's infrastructure while will, in turn, stimulate business activity and reduce business development costs.
 - .3 To provide technical assistance, which ranges from the furnishing of information on the community in general, specific sites, technical studies and logistical support.
- iv) To create and promote tourism opportunities within the boundaries of the Town of Fort Erie.

[40] In concluding that the Sault Ste. Marie Economic Development Corporation met the requirements for a community development corporation set out in section 109 of the *Municipal Act, 2001*, Senior Adjudicator Higgins stated (at page 7 of Order MO-2419):

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 SSMEDC 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*.

[41] The senior adjudicator then went on to discuss the impact of evidence related to Sault Ste. Marie city council passing a resolution to set up the economic development corporation. The senior adjudicator was not given a copy of the pertinent document, but noted that:

... pursuant to the resolution, SSMEDC 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.

[42] I am satisfied that a similar finding is appropriate in this appeal, whether or not the town passed a by-law authorizing the application for incorporation of the (former) EDC under Part III of the *Corporations Act*. The name of the then-current mayor appears on the list of the applicants for incorporation for the EDC. Notwithstanding FEEDTC's argument that this individual was acting solely in his capacity as a barrister and solicitor and not as mayor, I am satisfied that for the purposes of the incorporation of the EDC, a municipal officer, the existing mayor, participated in the incorporation process, as contemplated by section 109(3) of the *Municipal Act, 2001*. Individual

signatories to the application were asked to list their full name, residential address and "Calling (occupation) / Profession." In my view, the heading of this latter category would likely have led the mayor to identify his profession, rather than his current role with the municipality. In this context, I am not persuaded that the distinction FEEDTC seeks to establish between this individual's profession and his municipal role is significant enough to affect my finding in this regard.

[43] In any event, I have also been provided with a copy of town by-law 125-94, which is signed by the mayor (the same individual appearing on the incorporation documents) and the town clerk. This by-law authorizes the formation of an agreement between the EDC and the town for the "provision of community economic development services."

[44] The provisions of the resulting Memorandum of Agreement between the town and the EDC, signed on September 29, 1994 state, in part:

... the Town and the E.D.C. agree as set forth in the following terms and conditions:

1. The E.D.C. shall promote community economic development with the cooperation and participation of the community by encouraging, facilitating and supporting community strategic planning and increasing self-reliance, investment and job creation within the community by providing certain financial, management, research, consulting, technical and professional-related expertise.
2. **The Town may**, except as may be restricted or prohibited by law, statute or regulation, **provide financial or other assistance** at less than fair market value or at not cost to the E.D.C. and such assistance may include:
 - .1 **Giving** or lending **money** and charging interest;
 - .2 Lending or leasing real property;
 - .3 Giving, lending or leasing personal property [emphasis added].
3. The Town shall ... provide to the E.D.C. an annual grant to deliver the programs described in Section "1" of this agreement in an amount to be determined by the Council of the Town, and subject to the following conditions:
 - .1 That the E.D.C. must adhere to its objects for which it was incorporated and any amendments to its object must first be agreed to by the Council of the Town of Fort Erie. ...

4. The Town and E.D.C. agree that the Board of Directors of the E.D.C. shall administer the affairs of the E.D.C. and the Council of the Town may nominate two (2) councillors to the twelve (12) member Board of Directors.

[45] In my view, provisions 2 and 4 of the Memorandum of Agreement reflect the wording of sections 112.2(4) and (7) of the then-existing *Municipal Act*, the former of which is considered to be the equivalent to section 109(4) of the *Municipal Act, 2001*. The parts of the memorandum appearing in bold, above, will be addressed below as they relate to other requirements for a finding that FEEDTC is an institution under the *Act*.

[46] However, first, I find additional support for a finding that FEEDTC is a community development corporation in the June 22, 1994 letter from the Ministry of Municipal Affairs to the EDC. The subject line of the letter reads: "Re: CDCs", (i.e., community development corporation). The first item states:

The incorporating documents, alone, would not indicate that the Economic Development Corporation of Fort Erie is a CDC as defined by the new section 112.2 of the *Municipal Act* (see Part VI, Section 46 of the *Community Economic Development Act*). But, based on our discussion of your by-laws, I understand that the municipality does hold membership in the corporation and the Council does appoint two Councillors to the Board of Directors. Additionally, the municipality is providing financial assistance for the operation of the corporation. **Based on this information, the corporation is a CDC for the purposes of the [Municipal] Act.**

[47] Based on the considerations outlined above, I am satisfied that FEEDTC is a community development corporation for the purpose of section 109 of the *Municipal Act, 2001*.

Incorporated under section 109 of the Municipal Act, 2001

[48] I will now address the requirement that FEEDTC have been incorporated *under* section 109 of the *Municipal Act, 2001*. For this review, I will adopt the approach to analyzing the phrase "incorporated *under* section 109 of the *Municipal Act, 2001*" taken by Senior Adjudicator John Higgins in Order MO-2418.¹⁵ Starting at page 9, the Senior Adjudicator stated:

... In the foregoing analysis, I have already concluded that [the Cochrane and Area Community Development Corporation, or CACDC] meets all the substantive requirements imposed by that section, but the meaning of incorporation "under" it needs to be considered further.

¹⁵ The senior adjudicator followed the same line of analysis in Order MO-2419, starting at page 8.

As noted above, section 109 has now 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 the CACDC, there clearly are corporations that meet the requirements of that section, and of Regulation 372/91, but were not incorporated with any direct reference to section 109. 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 the CACDC 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. As already noted, the CACDC does meet these requirements, and accordingly, I find that it qualifies as an institution under the *Act* in accordance with Regulation 372/91 [emphasis added].

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 (Ont. C.A.) (*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 arrangements and objectives of the CACDC, 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 the CACDC meets requirement 1.

[49] Ontario Regulation 372/91 made under the *Act* remains in force, as it did at the time of Senior Adjudicator John Higgins' consideration of this issue in Orders MO-2418 and MO-2419 in 2009. I agree fully with his conclusion that the continued (intact) existence of this provision represents a legislative intent that corporations meeting the substantive requirements of section 109 of the *Municipal Act, 2001*, and in the regulation, ought to be considered "community development corporations" that would also qualify as institutions under the *Act*, notwithstanding their creation prior to the enactment of section 109.

[50] I find further support for this conclusion in the statement contained in item 4 of the June 22, 1994 letter from the Ministry of Municipal Affairs to the (then) EDC:

Subsection 112.2(12) allows the province to designate CDCs under the *Municipal Freedom of Information and Protection of Privacy Act*. **This has been done** (see attached). Again, your corporation should have regard to these provisions [emphasis added].

[51] Accordingly, because FEEDTC was incorporated under Part III of the *Corporations Act* and by reference to its stated objects, and other outlined evidence, meets the substantive requirements of section 109 of the *Municipal Act, 2001*, I find that it is a community development corporation incorporated under section 109 of the *Municipal Act, 2001*. I find, therefore, that the first requirement for FEEDTC to be designated an "institution" under the *Act* is met.

*Does FEEDTC receive assistance from the town under subsection 109(4) of the Municipal Act, 2001, **or** are one or more of FEEDTC's directors nominated by the town council, as provided for in subsection 109(10) of the Municipal Act, 2001?*

[52] The uncontroverted evidence before me is that FEEDTC receives an annual grant from the town. As pointed out by the appellant, the 1994 Memorandum of Agreement between the parties indicates that the grant is provided to FEEDTC to deliver programs relating to economic development and tourism services. FEEDTC argues that this grant

is not awarded according to the criteria set out in section 109(4) of the *Municipal Act, 2001*, in part because the services FEEDTC provides are carried out on a contract by contract basis. FEEDTC also denies that it receives "assistance" for the purpose of section 109(4) because the funds obtained from other federal or provincial sources "far exceed the amount of the municipal grant."

[53] For emphasis, however, I note the wording of section 109(4) of the *Municipal Act, 2001* which states, in part:

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,

Giving or lending money...

[54] Further, as previously noted, provision 2 of the 1994 Memorandum of Agreement between the town and FEEDTC's predecessor reflects the wording of section 109(4) of the *Municipal Act, 2001*.

The Town may, except as may be restricted or prohibited by law, statute or regulation, provide financial or other assistance at less than fair market value or at not cost to the E.D.C. and such assistance may include:

Giving or lending money...

[55] In my view, therefore, FEEDTC's submissions respecting the other sources of its funding or the basis upon which funds are provided (on a contract-by-contract basis, for example), are not persuasive. The fact is that the money is given to FEEDTC by the town on an annual basis, which is sufficient for me to conclude that FEEDTC receives "assistance" from the town for the purpose of section 109(4) of the *Municipal Act, 2001*. Since the condition set out in section 1(1)4.i is met, and because section 1(1)4 of Regulation 372/91 only requires that one of the conditions be met, the other condition ["nomination" of a board member by town council under section 1(1)4.ii] need not be reviewed, although, in my view, it would be satisfied on the information available. Accordingly, I find that the second requirement for FEEDTC to be considered an "institution" under section 1(1)4 of Ontario Regulation 372/91 is met.

[56] In the circumstances of this appeal, FEEDTC satisfies the criteria for being considered an "institution" pursuant to Ontario Regulation 372/91, made under the *Act*, and I therefore find it to be an institution for the purposes of the *Act*. Based on this finding, it is not necessary for me to review whether FEEDTC would (as a "municipal services corporation") also be "deemed" to be an institution under Ontario Regulation 599/06, made under the *Municipal Act, 2001*.

[57] As an additional comment, I note that a finding that an organization is an institution under the *Act* does not necessarily mean that a requester will be provided access to records in its custody or under its control. A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38).

ORDER:

Given my finding that FEEDTC is an institution under the *Act*, 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, and without recourse to a time extension under section 20 of the *Act*.

Original signed by: _____
Daphne Loukidelis
Adjudicator

October 20, 2011 _____