



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-2393**

**Appeal MA07-238**

**Regional Municipality of Durham**



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## NATURE OF THE APPEAL:

The Regional Municipality of Durham (the Regional Municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for records referred to in another document that the requester had received in response to an earlier request. That document was a letter dated January 6, 1992 from the Ministry of Housing to the Durham Region Non-Profit Housing Corporation. The current request states:

I am hereby requesting all of the records referenced in paragraph 2 viii), ix) and records (minutes, etc.) of the meeting or meetings referred to in paragraph 2 x) as well as copies of all change orders anticipated in paragraph 3 i), ii) and iii) of [the letter dated January 6, 1992].

The sections of the January 6, 1992 letter referred to in the request read as follows:

Re: [an identified project]

...

### 2. Plans, specifications and construction

viii) A copy of the construction drawings and specifications which make up part of the construction contract must be provided to the Ministry. This set must be initialed by both the Architect and the Contractor to signify that this is the set that will be followed for construction. This set should incorporate all appropriate addenda. A copy of the construction schedule must also be attached.

ix) The Ministry is to be provided with a copy of the written instructions to the Auditor regarding the Final Capital Cost audit.

x) A preconstruction start meeting shall be arranged with your representative, technical consultant, contractor, and Ministry inspection staff to establish the lines of communication and explain Ministry requirements during construction. The date of the meeting must be set at least a week in advance. ...

### 3. Change Orders

i) All change orders or changes to the project design and specifications must be approved by the Ministry of Housing prior to such work being implemented....

ii) Although your project carries a contingency allowance, it is anticipated that this fund will be used for unexpected changes. It is not a fund to be used to incorporate previously rejected changes.

iii) Arrangements for the processing of change orders should be discussed at the pre-construction meeting.

In response to the request, the Regional Municipality issued a decision in which it states:

[a] search of the records referenced was conducted and we do not have these records in our possession.

Section 18 of the *Act* states that if an institution that receives a request for a record and does not have it in its custody or under its control, shall forward the request to another institution if the head decides that the other institution has custody or control of the record. Your request has been forwarded to... [the] Durham Non-Profit Housing Corporation [the Housing Corporation]...

The requester (now the appellant) appealed the Regional Municipality's decision.

During the mediation stage of the appeal process, the appellant confirmed that while he does not wish to dispute the Regional Municipality's position regarding custody of the records sought, he is appealing the Regional Municipality's position regarding control of the records. The appellant believes that the Regional Municipality still has control of them. In addition, the appellant confirmed that he is appealing the decision of the Regional Municipality to transfer the request to the Housing Corporation.

Mediation did not resolve this appeal, and it was transferred to the adjudication stage of the process for an inquiry.

This office commenced the inquiry by issuing a Notice of Inquiry and seeking representations from the Municipality and the Housing Corporation. As a preliminary matter, this office sought representations on whether the Housing Corporation is an institution as defined under the *Act*, or whether it is part of the Regional Municipality. In the event that the Housing Corporation is not an institution, the Notice of inquiry also invited the Regional Municipality to provide representations on whether the records at issue are "in the custody" or "under the control" of the Regional Municipality under section 4(1) of the *Act*.

The Regional Municipality responded with representations. The Housing Corporation chose to not submit representations. The file was then re-assigned to me to continue the inquiry.

During the course of my inquiry, the Regional Municipality issued a new decision letter, pursuant to which it agreed to disclose a record described as "Document No. 02, File #2, January 1992 – Legal File Received from the Ministry [of Municipal Affairs and Housing]". Upon receipt, the appellant wrote to this office to advise that this record had been disclosed to him previously, pursuant to another request, and that it was not responsive to his current request.

I chose to not seek representations from the appellant. The appellant did, however, write to me to advise that in his view, there was no separation or independence between the Regional Municipality and the Housing Corporation, and further, that the Regional Municipality had full control of the records sought, which he believes are in the hands of the Housing Corporation. The appellant provided copies of contracts between the Regional Municipality and Housing Corporation, which he suggests demonstrate and reinforce the close relationship between these two entities.

I subsequently went back to the Housing Corporation to seek information regarding the appointment of directors and officers. The Housing Corporation provided me with copies of three of its by-laws that deal with the appointment and activities of directors.

## **RECORDS:**

The records at issue are those requested by the appellant as set out in his request referenced above.

Due to the nature of the issues raised in this appeal, this office has not been provided with a copy of the records at issue.

## **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 . . .

The question in this case is whether the appellant has a right of access to responsive records held by the Housing Corporation. This conclusion may be reached in one of three ways:

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

## **IS THE HOUSING CORPORATION AN INSTITUTION UNDER THE ACT?**

### **Background of the Housing Corporation**

The Housing Corporation was incorporated, as a corporation without share capital, under the *Corporations Act*, pursuant Letters Patent issued on January 24, 1985.

The objects of the Housing Corporation are set out in section 6 of the “Application for Incorporation of a Corporation Without Share Capital” (the Application for Incorporation), appended to the Letters Patent:

To provide and operate housing accommodation and ancillary activities with or without any public space, recreational facilities and commercial space of buildings appropriate thereto, primarily for persons of low or modest income at rentals below the median current rental market in the area in which the accommodation is located.

The Housing Corporation’s website ([www.durham-housing.com/](http://www.durham-housing.com/)) provides further information regarding its mission and corporate structure.

The Housing Corporation’s “Mission Statement”, as set out on its website, states:

The mission of the Corporation is to help meet the housing needs of the Region's diverse population through the provision of a practical, well-maintained and affordable housing portfolio integrated within the community. The Corporation assists with related services to support residents in their housing.

Under the heading “Corporation Overview” on the Housing Corporation’s website, it states:

Durham Region Non-Profit Housing Corporation is an arm’s length corporation of the Regional Municipality of Durham governed by a Board of Directors appointed by Regional Council.

In addition, section 7 of the Application for Incorporation sets out “special provisions” regarding the Housing Corporation’s governance. In my view, paragraph c) of section 7 is of particular relevance in determining the Housing Corporation’s status under the *Act*. It states:

- c) No person shall be elected or appointed as a Director unless the person is a member of Regional Council.

### **Regional Municipality's representations**

The Regional Municipality submits that the Housing Corporation is a “completely separate entity” and that the Housing Corporation is “subject to [the *Act*] on its own.” The Regional Municipality adds that while members of Council do sit on the Board of Directors of the Housing Corporation, they are “obligated under the [*Corporations Act*] to perform their duties in the best interests of the Housing Corporation and not in the best interests of the Regional Municipality.” The Regional Municipality concludes that the Housing Corporation is “an institution under [the *Act*] and as such would be obligated to respond to the request for documents that are in their custody and control.”

### **Analysis and findings**

The access provisions of the *Act* apply to all municipal “institutions”. 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; (“institution”)

The Housing Corporation clearly does not qualify as a “municipality” under paragraph (a) of the definition. Therefore, it 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.

Neither the Regional Municipality nor the Housing Corporation has provided representations regarding the Housing Corporation's status as an institution under paragraph (b) of section 2(1). I have no evidence before me that would lead me to conclude that the Housing Corporation qualifies as a “board” within the meaning of that paragraph. Accordingly, I find that the Housing Corporation does not fit within one of the terms set out in paragraph (b) of the section 2(1) definition of “institution”.

To determine whether the Housing Corporation is designated as an institution in the regulations requires a review of Ontario Regulation 372/91, which reads as follows:

1. (1) The following bodies are designated as institutions:
  1. Belmont Business Improvement Area Board of Management.
  2. Each board established for transitional purposes under section 5.2 of Ontario Regulation 143/96.
  3. Centre in the Square Inc.
  4. 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.
  5. Joint committees of management established under the Community Recreation Centres Act, all such committees.
  6. Kitchener Housing Inc.
  7. Municipal Property Assessment Corporation.
  8. The Board of Governors of Exhibition Place.
  9. The Board of Management of the Hummingbird Centre.
  10. The Downtown Improvement Area Board of Management.
  11. The Hamilton Entertainment and Convention Facilities Inc.
  12. Toronto Atmospheric Fund. O. Reg. 162/03, s. 1.
- (2) Every local housing corporation incorporated under Part III of the Social Housing Reform Act, 2000 is designated as an institution. O. Reg. 662/00, s. 1.
- (3) Every corporation incorporated under section 142 of the Electricity Act, 1998 is designated as an institution. O. Reg. 420/04, s. 1.

It is clear that the only provision of the regulation that could apply is section 1(2). Neither the Regional Municipality nor the Housing Corporation has provided representations that address the application of this provision in the circumstances of this case.

Section 23 of the *Social Housing Reform Act, 2000 (SHRA)* sets out the powers of the Minister of Municipal Affairs and Housing to incorporate corporations under Part III of the *SHRA*:

The Minister may incorporate corporations with share capital under the *Business Corporations Act* as local housing corporations, to perform the duties and exercise the powers of local housing corporations under this Act. 2000, c. 27, s. 23 (1).

In my view, it is clear on reading section 23 of the *SHRA* that section 1(2) of the regulation does not apply in this case. Section 23 governs *share capital* corporations incorporated under the *Business Corporations Act*. The Letters Patent of the Housing Corporation clearly provide that it is a *non-share capital* corporation incorporated under the *Corporations Act*. In conclusion, I find that the Housing Corporation does not qualify as an “institution” under paragraphs (b) and (c) of the definition in section 2(1).

### **IS THE HOUSING CORPORATION A PART OF THE REGIONAL MUNICIPALITY UNDER SECTION 2(3) OF THE ACT?**

#### **Section 2(3)**

Although I have found that the Housing Corporation does not qualify as an “institution” under section 2(1), it still may be subject to the *Act* under section 2(3).

This section states:

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.*  
[Emphasis added.]

Neither the Regional Municipality nor the Housing Corporation provides representations that address the application of section 2(3) in this case.

The Court of Appeal recently interpreted the meaning of section 2(3) in *City of Toronto Economic Development Corporation v. Ontario (Information and Privacy Commissioner)* [2008] O.J. No. 1799 (the TEDCO case). The TEDCO case involved an access to information request brought by Showline Limited for records of the City of Toronto Economic Development Corporation (TEDCO) concerning the “Mega Studio Project” in the Port Lands.



The City of Toronto (the City) incorporated TEDCO under the *City of Toronto Act*, 1985, and the *Business Corporations Act*. The City is the sole shareholder of TEDCO. All members of TEDCO's board of directors are appointed by City Council. The directors elect or appoint the officers of TEDCO pursuant to s. 5.01 of TEDCO's By-Law No. 1.

The specific question before the Court of Appeal was whether TEDCO is an institution under the *Act*, or was part of the City under section 2(3) of the *Act*. The Court of Appeal concluded that TEDCO was part of the City under section 2(3) since all of its officers are "appointed or chosen by or under the authority of the council of the municipality" within the meaning of section 2(3). In writing for the Court of Appeal in the TEDCO case, Armstrong J.A. sets out the following reasons for the Court's finding:

First, the ordinary meaning of the word "authority" supports this conclusion. In the *Canadian Oxford Dictionary* (2nd ed., 2004), the main definition of "authority" has two parts: "(a) the power or right to enforce obedience. (b) delegated power." In my view, given the purpose of access to information legislation and the modern approach to statutory interpretation, it is preferable to read s. 2(3) in light of the second part of the definition, rather than imposing a restrictive interpretation that embraces only the first part. A similar point emerges from the *New Shorter Oxford English Dictionary* (1993), which provides as one of its definitions of "authority": "Derived or delegated power".

Counsel for TEDCO cites *R. v. Audet* (1996), 135 D.L.R. (4th) 20 (S.C.C.) at 38 as authority for the restrictive approach to interpreting the word "authority." In *Audet*, the Supreme Court was called upon to interpret the phrase "position of authority" in what was then s. 153(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, which "prohibits every person who is in a position of trust or authority towards a young person ... from engaging in any sexual activity ... with that young person": see *Audet* at para. 1. In examining the "ordinary meaning" of the word "authority", the majority in *Audet* essentially adopted the first part of the definition discussed above.

In my view, *Audet* is distinguishable from the case at bar. It involved the *Criminal Code*, not an access to information statute, and thus the interpretive context was very different. Moreover, in *Audet*, the second part of the *Canadian Oxford Dictionary* definition of "authority" – "delegated power" – had no possible application. Therefore, the court in *Audet* was not called upon to interpret "authority" in a context that has any bearing on the present case.

Second, beyond the ordinary meaning of the word "authority," the language of s. 2(3) is cast in broad terms which suggests that the legislature intended an examination of substance rather than a fixation on formal and technical appointment processes. The provision uses both the words "chosen" and

“appointed” and also contemplates processes that are effected both “by the authority” and “under the authority” of City Council. In the face of this broad language, I question an approach that treats as decisive the mere fact that City Council has delegated direct appointment power to TEDCO’s board of directors.

Third, although City Council does not *directly* choose TEDCO’s officers and does not hold an official veto over that process, the City’s role as TEDCO’s sole shareholder provides a significant nexus between City Council’s authority and the officers of TEDCO. TEDCO’s board of directors, whose members are appointed directly by City Council, is always subject to City Council’s removal power. This power finds expression in s. 3.06 of TEDCO’s bylaw, which provides that City Council may “remove any director from office and ... elect any person in his stead”. Moreover, City Council also has the discretion, as sole shareholder of TEDCO, to unilaterally make “shareholder agreements” that control the powers of the directors. Under s. 3.09 of the bylaw, all the powers of the board of directors are fully subject to shareholder agreements, including its power to appoint officers.

Fourth, a formal and technical interpretation of s. 2(3) runs contrary to the purpose of the Act. We are dealing with a corporation whose sole shareholder is the City of Toronto, whose sole purpose is to advance the economic development of the City, and whose board of directors – at the time of the proceedings before the adjudicator – was populated by persons directly appointed by City Council, including the Mayor of Toronto (or his/her designate), the Chair of the City’s Economic Development and Parks Committee, two City Councillors, and the Commissioner of Economic Development, Culture and Tourism (or his/her designate). In light of what La Forest J. observed in the above-cited passage from *Dagg*, it seems to me that TEDCO is just another example of a complex bureaucratic structure of public administration. In my view, it is contrary to the purpose of the Act and access to information legislation in general to permit the City to evade its statutory duty to provide its residents with access to its information simply by delegating its powers to a board of directors over which it holds ultimate authority.

I find additional support for this conclusion in the reasons for judgment of the Supreme Court of Canada in *Rizzo*, where the court adopted a purposive interpretation of two sections of the *Employment Standards Act*, R.S.O. 1980, c. 137 (ESA). In *Rizzo*, this court had concluded that employees who were terminated as a result of the bankruptcy of their employer were not entitled to benefits under the ESA because their employment had not been terminated by their employer. Although this approach was consistent with the language and plain meaning of the provisions, Iacobucci J. found it incompatible with the ESA’s wider purpose (paras. 20 and 27):

At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40a of the ESA are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves...

Similarly, in the case at bar, the majority judgment of the Divisional Court is incompatible with the scheme of the Act, the object of the Act and the intention of the legislature as expressed in s. 1 of the Act.

### **Analysis and findings**

In my view, the circumstances in this case are analogous to those in the TEDCO case and, accordingly, I apply the conclusions reached by the Court of Appeal to the facts in this case. The basis for my conclusion is derived from the clear language of the Housing Corporation's Letters Patent and its website and the relevant portions of section 289 of the *Corporations Act*.

As referenced above, the Housing Corporation's website, under the heading "Corporation Overview", confirms that the Housing Corporation is an "arm's length corporation of the [Regional Municipality] governed by a Board of Directors appointed by Regional Council."

The Housing Corporation's Letters Patent is consistent with this statement. Paragraph c) of section 7 of the Housing Corporation's Application for Incorporation, appended to its Letters Patent, provides that "[n]o person shall be elected or appointed as a Director unless the person is a member of Regional Council."

It is clear that the Housing Corporation's directors must be members of the Regional Municipality's Council and that they are appointed by Council. Having reached that conclusion, the issue left to be determined is process by which the Housing Corporation's officers are appointed.

Subsections (1), (2) and (3) of section 289 of the *Corporations Act* are relevant to this discussion. They state:

- (1) The directors shall elect a president from among themselves.

(2) The directors shall appoint a secretary and may appoint one or more vice-presidents and other officers.

(3) Despite subsections (1) and (2), in the case of a corporation without share capital, if the letters patent, supplementary letters patent or by-laws so provide, the officers of the corporation or any of them may be elected or appointed at a general meeting of the members duly called for that purpose.

As stated above, the Housing Corporation is a corporation without share capital that was incorporated by Letters Patent. However, in this case both the Housing Corporation's Letters Patent and its by-laws are silent regarding the appointment of officers. Accordingly, one must look to sections 289(1) and (2) for direction.

Subsection (1) is clear that where subsection (3) does not apply, the directors *shall* elect a president. Similarly, subsection (2) stipulates that the directors *shall* appoint a secretary and *may* appoint "one or more vice-presidents and other officers."

In this case, the Letters Patent do not provide for officers to be elected or appointed at general meeting of the members, and subsection (3) does not apply.

Accordingly, in the context of the Housing Corporation's governance structure, sections 289(1) and (2) make it clear that the Corporation's directors appoint its officers. Applying the TEDCO case analysis, while Regional Council does not *directly* choose the Housing Corporation's officers, Regional Council does appoint the Housing Corporation's Board of Directors and the Board appoints the Housing Corporation's officers. This, in my view, provides a *significant nexus* between the Regional Municipality and the Housing Corporation to establish that the Corporation's officers are appointed "under the authority" of Regional Council within the meaning of section 2(3) of the *Act*.

As a result, I find that the Housing Corporation, while not an institution in its own right, is deemed to be a part of the Regional Municipality under section 2(3) of the *Act*. Therefore, by definition, any responsive records held by Housing Corporation are within the custody or control of the Regional Municipality 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 Regional Municipality otherwise has custody or control of the responsive records held by the Housing Corporation.

## **ORDER:**

1. I order the Regional Municipality to secure either the original, or copies of, records responsive to the appellant's request 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 Regional Council of the Regional Municipality or, alternatively, the Clerk of the Regional Municipality, 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: \_\_\_\_\_  
Bernard Morrow  
Adjudicator

February 17, 2009 \_\_\_\_\_