

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-2904-R

Appeal MA10-313

Fort Erie Economic Development and Tourism Corporation

June 24, 2013

**Summary:** The Fort Erie Economic Development and Tourism Corporation (FEEDTC) received a request for records related to procurement, including policies and practices. The 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*. In Order MO-2659, the adjudicator found that the FEEDTC is designated an "institution" under Ontario Regulation 372/91, in conjunction with paragraph (c) of the definition in section 2(1) of the *Act*, and ordered the FEEDTC to issue an access decision. The FEEDTC applied for a judicial review of Order MO-2659. Subsequent to the judicial review application, Regulation 372/91 was repealed. This IPC-initiated reconsideration decision determines that the repeal of Regulation 372/91 (under the *Act*) does not amount to a jurisdictional defect in Order MO-2659 for the purpose of section 18.01(b) of the *IPC Code of Procedure*. The adjudicator also finds, alternately, that the FEEDTC is "deemed" to be an institution, pursuant to Ontario Regulation 599/06, made under the *Municipal Act, 2001*, and confirms her order that the FEEDTC is required to issue an access decision to the appellant.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 2(1) definition of "institution," 41(2); Ontario Regulation 372/91 (under the *Act*), repealed by O. Reg. 48/12, s. 1(2); *Municipal Act, 2001*, S.O. 2001, c.25, section 203; Ontario Regulation 599/06 (*Municipal Act, 2001*), sections 2(3), 4(2), 9(1), 9(4), 20; and *Statutory Powers Procedure Act*, R.S.O. 1990 Chapter S.22, section 21.2(1).

**Orders and Investigation Reports Considered:** Orders MO-2418, MO-2419, MO-2659, PO-2879-R, and BC Order F10-04.

**Cases Considered:** *Chandler v. Alberta Association of Architects*, (1989) 2 S.C.R. 848; *Hayward v. Hayward*, 2011 NSCA 118; *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1. S.C.R. 271; *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario*, [2008] O.J. No. 1799 (C.A.), reversing 278 D.L.R. (4th) 356 (Div. Ct.).

## **OVERVIEW:**

[1] This order addresses the issues raised by the IPC-initiated reconsideration of Order MO-2659, which was issued on October 20, 2011 to conclude Appeal MA10-313. In Order MO-2659, I was required to determine if the Fort Erie Economic Development and Tourism Corporation (FEEDTC) qualifies as an “institution” under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) because the FEEDTC had refused to process a request for records related to its procurement practices on the basis that the *Act* did not apply.

[2] In seeking representations at that time, I asked the parties to address Order MO-2419, in which former Senior Adjudicator John Higgins had summarized four different ways the Sault Ste. Marie Economic Development Corporation could be considered an “institution” according to section 2(1) of the *Act*, as follows:

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*.<sup>1</sup>

[3] In Order MO-2659, I found that the FEEDTC was designated an “institution” according to paragraph (c) of the definition of “institution” in section 2(1) of the *Act*, with reference to section 1(1)4 of Ontario Regulation 372/91 made under the *Act*. I ordered the FEEDTC to issue an access decision in response to the appellant’s request for records related to the FEEDTC’s procurement policies and practices.

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<sup>1</sup> The third and fourth possibilities for considering a body to be an institution under the *Act* are both referable to paragraph (c) of the definition of “institution” in section 2(1) of the *Act*, which states: “any agency, board, commission, corporation or other body designated as an institution in the regulations.”

[4] The FEEDTC subsequently sent three one-page documents to the appellant.<sup>2</sup> As the appellant was not satisfied with this disclosure, she contacted the FEEDTC to discuss the matter. In her December 2, 2011 letter of appeal to this office, she indicated that she was informed by the FEEDTC that the three pages sent represented the full extent of the documentation she could expect to receive in response to Order MO-2659. The appellant's letter resulted in this office opening Appeal MA10-313-2 to review her concerns respecting the adequacy of the FEEDTC's search for responsive records.

[5] However, on December 6, 2011, this office was notified that the FEEDTC had filed a judicial review application respecting Order MO-2659.<sup>3</sup> Accordingly, Appeal MA10-313-2 was put on hold by the Registrar, pending determination of the judicial review application respecting Order MO-2659. The appellant was notified of this development by the Registrar in correspondence dated December 20, 2011.

[6] On January 13, 2012, I granted an interim stay of the order provisions, before seeking the parties' representations on the granting of a final stay pending completion of the judicial review proceedings. Following my review of the FEEDTC's submissions, I sent correspondence to the parties on February 10, 2012, granting the final stay.

[7] Carriage of the judicial review application matter was then assumed by IPC legal counsel. In September 2012, IPC legal counsel wrote to the parties to advise that "section [1(1)(4)] of Regulation 372/91, which designated the 'community development corporation' as a government institution under the *Act*," was repealed in April 2012.

[8] IPC legal counsel next communicated with the parties in December 2012 to inform them that:

On being advised of the April 2012 changes to Regulation 372/91, Adjudicator Loukidelis has decided to initiate a reconsideration of Order MO-2659 to consider the alternate grounds, which were not adjudicated in light of her finding that the [FEEDTC] was a "community development corporation."

[9] The "alternate grounds" referred to by IPC legal counsel in this correspondence was the issue of whether the FEEDTC also qualified as an "institution" for the purposes of paragraph (c) of the definition of institution in section 2(1) of the *Act*, by virtue of it

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<sup>2</sup> The three records consisted of: a November 2010 letter from a chartered accounting firm to the FEEDTC's general manager, outlining approved spending limits and procurement processes for the FEEDTC; a typewritten statement, titled: "RE: [IPC/O]... Order MO-2659 – Conflict of Interest policies and guidelines for employees of the [FEEDTC] and Board members;" and a table titled [FEEDTC] Expenditures >\$5,000 for the years 2008, 2009 and 2010, under two categories: "EDTC Budget/Business (Funds provided by the Town of Fort Erie Through Annual Budgeting Process)" and "Partnerships."

<sup>3</sup> The FEEDTC's judicial review application was filed on November 30, 2011.

being “deemed” to be an institution pursuant to Ontario Regulation 599/06, made under the *Municipal Act, 2001*. Consideration of this possible finding arose in the context of my having requested representations from the parties to Appeal MA10-313 on the possibility of the FEEDTC being both designated *and* deemed an “institution” under the two different relevant regulations.<sup>4</sup> In Order MO-2659, however, I had simply ended my analysis of the FEEDTC’s status as an “institution” under the *Act* once I reached my conclusion that the FEEDTC was “designated” an institution under Ontario Regulation 372/91. I did not make any finding under Ontario Regulation 599/06, made under the *Municipal Act, 2001*, in Order MO-2659.

[10] Accordingly, by letter dated March 6, 2013, I sought representations from the FEEDTC, the appellant and the Town of Fort Erie with respect to the following two issues: whether I ought to reconsider my decision in Order MO-2659 in light of the repeal of Ontario Regulation 372/91; and whether the FEEDTC is also “deemed” an institution pursuant to Ontario Regulation 599/06, made under the *Municipal Act, 2001*. While the town declined to submit representations in response to my invitation to do so, both the appellant and the FEEDTC submitted representations.

[11] In reaching my decision in this order, I have reviewed the representations submitted by the parties, both initially and during the reconsideration, the additional documents provided with those representations, the complete appeal file for Appeal MA10-313, and the circumstances of the request for reconsideration, including the judicial review proceedings respecting Order MO-2659.

[12] In this order, I conclude that the repeal of Ontario Regulation 372/91 in April 2012 does not result in a jurisdictional defect in Order MO-2659 for the purpose of section 18.01(b) of the *IPC Code of Procedure*. However, in the event that I am wrong in this conclusion, I find that the FEEDTC is also “deemed” to be an institution pursuant to section 20 of Ontario Regulation 599/06 (*Municipal Act, 2001*) and that it must, therefore, issue an access decision in response to the appellant’s request.

## **ISSUES:**

- A. Should Order MO-2659 be reconsidered pursuant to section 18.01 of the *IPC Code of Procedure*?
- B. Is the FEEDTC deemed to be an institution pursuant to Ontario Regulation 599/06, made under the *Municipal Act, 2001*?

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<sup>4</sup> Notice of Inquiry dated November 9, 2010.

## **DISCUSSION:**

### **A. Should Order MO-2659 be reconsidered pursuant to section 18.01 of the IPC Code of Procedure?**

[13] The first question to be answered is whether an IPC-initiated reconsideration of Order MO-2659 is appropriate in light of the subsequent repeal of the regulation under which my finding in the order was made: Ontario Regulation 372/91, made under the *Act*.<sup>5</sup>

[14] In seeking representations during my initial inquiry into the issue of whether the FEEDTC is an "institution" under the *Act*, I asked the parties to comment on the issue of "designating" or "deeming" development corporations as institutions for the purpose of the *Act* as reviewed in Order MO-2419.<sup>6</sup> In that decision, Senior Adjudicator Higgins determined that the Sault Ste. Marie Economic Development Corporation was an "institution" under the *Act*, both as a designated institution under Ontario Regulation 372/91, made under the *Act*, and, alternatively, as a deemed institution pursuant to Ontario Regulation 599/06, made under the *Municipal Act, 2001*. For my determination in Appeal MA10-313, the FEEDTC provided the same types of documentation that had been useful in the review of the issue in Order MO-2419.<sup>7</sup>

[15] Unlike Orders MO-2419 and MO-2418, however, and as indicated above, I made a single finding with respect to the issue of whether the FEEDTC is an "institution"; that is, that the FEEDTC was "designated" an institution under the *Act*, pursuant to section 1(1)(4) of Ontario Regulation 372/91. Although I had received submissions respecting both possible grounds for a finding, I did not adjudicate whether the 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* in Order MO-2659.

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<sup>5</sup> Repealed by O. Reg. 48/12, s. 1 (2).

<sup>6</sup> As noted previously, Order MO-2419 involved the Sault Ste. Marie Economic Development Corporation. In a companion decision, Order MO-2418, the former senior adjudicator determined the same issue, dealing with the Cochrane and Area Community Development Corporation.

<sup>7</sup> 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.

[16] With the repealing of the regulation that formed the basis for my finding in Order MO-2659, however, I concluded that grounds for reconsideration of my decision arguably could exist, and I decided to provide the parties with an opportunity to address this development. The *IPC Code of Procedure* applies to appeals under the *Act* and contains provisions governing the process, and grounds, for reconsideration of decisions. The relevant sections of the *Code* state:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

18.03 The IPC may reconsider a decision at the request of a person who has an interest in the appeal or on the IPC's own initiative.

[17] In requesting submissions on the issues for determination in this order, I asked the parties to consider whether a reconsideration of Order MO-2659 under section 18.01(b) of the *Code* – a jurisdictional defect in the decision – ought to proceed on the basis of the regulatory change. It has not been seriously suggested that the repeal of Ontario Regulation 372/91 could satisfy the requirements for reconsideration under sections 18.01(a) or (c), and I conclude that repeal does not fit within either section. Accordingly, the following review only addresses whether a case for reconsideration under section 18.01(b) of the *Code* exists.

### ***Representations***

[18] The FEEDTC submits that:

Order MO-2659 is based on the law as it stood on October 20, 2011. The intervening repeal of the relevant portions of O. Reg 372/91 mean that ... the fundamental reason for finding that the EDTC is an "institution" within the meaning of the *Act* is now gone.

[19] According to the FEEDTC, therefore, the elimination of the statutory foundation for the finding means that a reconsideration of Order MO-2659 to correct a jurisdictional defect would be appropriate. With reference to excerpts from the reasons in Order MO-2418 relating to legislative intention in Order MO-2659,<sup>8</sup> the FEEDTC submits that the repeal of Ontario Regulation 372/91 signals a change in the intent of the legislature such that economic development corporations are no longer to be considered “institutions” for the purposes of the *Act*. The FEEDTC acknowledges, however, that it cannot rely on the doctrine of retrospectivity for a retrospective application of the current law to an earlier point in time.<sup>9</sup>

[20] Citing *Chandler v. Alberta Association of Architects*,<sup>10</sup> the FEEDTC submits that “justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.” According to the FEEDTC, such relief may include “reconsideration based on repeal of the statutory provision which is the foundation of the order.”

[21] The FEEDTC also submits that review of Order MO-2659 is also justified under section 21.2(1) of the *Statutory Powers Procedure Act* (the *SPPA*),<sup>11</sup> which provides that a tribunal may, “if it considers it advisable ... review all or part of its own decision or order and may confirm, vary, suspend or cancel the decision or order.” Noting that the *Code* provisions do not include a change in the law as one of the reasons for reconsideration, the FEEDTC argues that a change in law that impacts the jurisdiction of the adjudicator may be called a jurisdictional defect or may be permitted under the “wider and more general powers of review” in section 21.2(1) of the *SPPA*.

[22] The appellant’s representations do not specifically address how the circumstances of this appeal may, or may not, fit within the scope of the reconsideration provisions of the *Code*.

### ***Analysis and findings***

[23] To begin, I will address the FEEDTC’s suggestion that review of Order MO-2659 may also be undertaken pursuant to section 21.2(1) of the *SPPA*. Section 41(2) of the *Municipal Freedom of Information and Protection of Privacy Act* expressly provides that the *SPPA* “does not apply to an inquiry under subsection (1).”<sup>12</sup> I conclude that the broader “powers of review” in section 21.2(1) of the *SPPA* relied on by the FEEDTC as

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<sup>8</sup> Paragraphs 48 and 49 of Order MO-2659.

<sup>9</sup> The FEEDTC cites *Hayward v. Hayward*, 2011 NSCA 118, which addresses statutory interpretation in terms of the temporal operation of a provision in that province’s *Wills Act*, pertaining to the effect of a divorce.

<sup>10</sup> (1989) 2 S.C.R. 848 at 862.

<sup>11</sup> R.S.O. 1990 Chapter S.22.

<sup>12</sup> Section 41(1) refers to the Commissioner conducting “an inquiry to review the head’s decision.”

providing a basis for varying or canceling Order MO-2659 are not available to me as an adjudicator with this office.

[24] Further, I agree with the FEEDTC that current Canadian jurisprudence on the doctrine of retrospectivity is clear enough that any argument respecting the repeal of Ontario Regulation 372/91 having a retrospective effect cannot succeed.<sup>13</sup>

[25] I have considered the question of whether the repeal of Ontario Regulation 372/91 constitutes a “jurisdictional defect” for the purposes of section 18.01(b) of the *Code of Procedure* in light of past decisions of this office and the unique circumstances of this matter. My analysis draws on the reasons of former Senior Adjudicator John Higgins in Order PO-2879-R, starting at page 11:

As noted in previous orders, the *Code* provisions pertaining to reconsiderations are a summary of the position at common law, which continues to apply to reconsiderations undertaken by this office. The leading case on the ability of a tribunal to reconsider a decision is the Supreme Court of Canada’s decision in *Chandler v. Alberta Assn. Of Architects*, [supra]. The issue in that case was the application of the common law principle of *functus officio* to tribunals. This principle holds that once a matter has been determined by a decision-maker, generally speaking he or she has no jurisdiction to further consider the issue.

In *Chandler*, Sopinka J., writing for the majority, stated:

... As a general rule, once [an administrative] tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal changes its mind, made an error within jurisdiction or because there has been a change in circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. Ross Engineering Corp.*, supra [[1934] S.C.R. 186].

To this extent, the principle of *functus officio* applies. It is based however, on the policy ground which favours finality

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<sup>13</sup> As reviewed in *Hayward*, footnote 9 above, the question of temporal application of a change in the law is “resolved by principles of statutory interpretation – that is, when did the legislature intend the legislation or amendments to take effect” (paragraph 75). Generally speaking, statutes are not to be construed as having a retrospective application, absent clear expression of legislative intent to the contrary: *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1. S.C.R. 271 at p. 279. See also Orders PO-3017, PO-2991 and MO-2876-F; and R. Sullivan, *Sullivan on the Construction of Statutes*, 5<sup>th</sup> ed. (Markham: LexisNexis Canada Inc., 2008) at 669-670.



of proceedings rather than the rule which was developed with respect to formal judgements of a Court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

[26] It is argued that there is effectively a jurisdictional defect in Order MO-2659 as contemplated by section 18.01(b) because the corporation receiving the request is no longer designated an "institution" under the *Act*, due to the repeal of Ontario Regulation 372/91. Based on my review of the representations and my decision in Order MO-2659, however, I conclude that there is no jurisdictional defect in the order within the meaning of section 18.01(b) of the *IPC Code of Procedure*.

[27] The changed circumstances regarding the statutory basis of my finding in Order MO-2659 do not persuade me that a jurisdictional error was committed at the time I issued the order. Order MO-2659 was decided on the basis of the law as it was on October 20, 2011, six months before the repeal of the regulation. *Chandler* speaks to the principle of finality and the circumstances when a tribunal such as this one may re-open a decision or complete its jurisdiction. I have considered whether any of the conditions that can trigger an exception to the principle of finality are present in this appeal, and I conclude that they are not.<sup>14</sup> I find that there is no vitiating error or breach of procedural fairness in Order MO-2659 that would permit the re-opening of the decision to address any failure to make a proper disposition. Further, I am satisfied that my jurisdiction was spent in deciding Order MO-2659. In the circumstances, I conclude that I am *functus officio*, and that Order MO-2659 ought not to be re-opened to consider the new evidence.

[28] In the event that I am wrong in concluding that I am *functus officio*, and unspent jurisdiction in fact remains, I will proceed with a review of the alternate basis for a finding respecting the FEEDTC's status as an institution: Ontario Regulation 599/06, made under the *Municipal Act, 2001*. In doing so, I hope to provide some clarity to the parties as to whether the FEEDTC will continue to be subject to the *Act* outside of the current appeal, which was decided before the repeal of Ontario Regulation 372/91.

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<sup>14</sup> See BC Order F10-04, where Senior Adjudicator Celia Francis reviews the principle of *functus officio* in the context of a concurrent judicial review application (of Order F08-13): British Columbia (Public Safety and Solicitor General) (Re), 2010 BCIPC 16 (CanLII), starting at para. 34; upheld on this issue in [2010] BCSC 1244.

**B. Is the FEEDTC “deemed” to be an institution pursuant to Ontario Regulation 599/06, made under the *Municipal Act, 2001*?**

[29] As already noted, this appeal arose in the context of the FEEDTC’s position that it was not required to respond to the appellant’s access request because it is not an “institution” under the *Act*. “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;

[30] In Order MO-2659, I reached the following basic conclusions (starting at paragraph 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*.

... 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.”

[31] These reasons remain relevant in the circumstances of this appeal, and I adopt them for the purpose of this decision. However, the designation of the FEEDTC as an institution in Order MO-2659 was reliant on the application of Ontario Regulation 372/91 (under the *Act*), which is now repealed. The alternative “deeming” of the FEEDTC to be an “institution” for the purpose of paragraph (c) of the definition in section 2(1) of the *Act* occurs pursuant to Ontario Regulation 599/06 (*Municipal Act, 2001*), which governs “municipal services corporations.”<sup>15</sup> Section 20 reads:

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<sup>15</sup> As with the analysis of Regulation 372/91 in Order MO-2659, the analysis of Ontario Regulation 599/06 draws on the framework established by Senior Adjudicator Higgins in Orders MO-2418 and MO-2419.

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*] (emphasis added).

[32] The FEEDTC advises, and the documents provided to me show, that the FEEDTC is a corporation without share capital. Further, I am also satisfied that the FEEDTC is not a wholly owned corporation of the Town of Fort Erie. As outlined in Orders MO-2418 and MO-2419, section 20 of Regulation 599/06 can also result in a non-wholly owned corporation being deemed an institution if the corporation provides "administrative services" to any of the entities listed in the section.

[33] Accordingly, my determination rests on consideration of the nature of the services provided by the FEEDTC to the Town of Fort Erie; that is, whether the FEEDTC's business or activities include the provision of administrative services to the town, as contemplated by section 20 of Ontario Regulation 599/06, and several other potentially applicable provisions of the same regulation.

### ***Representations***

[34] According to the FEEDTC, it provides economic and tourism development services to both public and private clients in the town. The FEEDTC advises that, apart from contracts with the town, it obtains revenue from federal and provincial grants, as well as "fees for services rendered to businesses and agencies for economic development and tourism related undertakings."

[35] Regarding the deeming of a corporation as an institution under section 20 of Ontario Regulation 599/06, the FEEDTC submits that if the term "administrative services" is taken in its "normal sense," providing such services to the town is not part of the FEEDTC's mandate. Remarking that "administrative services" is not defined in either the regulation or the *Municipal Act, 2001*, the FEEDTC submits that the term:

... normally means the overall managing of the municipality and it appears that, in the case of the Town of Fort Erie, the administration is done in that way and by municipal administration at the town hall and not by another entity or corporation. In any event, none of that administration is undertaken by the EDTC.

[36] The FEEDTC also argues that there is a qualitative difference between administrative services and economic development services and relies on section 9 of the regulation, which enables a municipality to specifically designate a corporation to deliver "economic development services." According to the FEEDTC, the types of

economic development services listed in section 9(4) of Regulation 599/06 appear "to be exactly the same kind of service" that the FEEDTC provides for the town.

[37] The FEEDTC adds that, in any event, whether or not the FEEDTC is an institution within the meaning of Regulation 599/06 "was not determinative in Order MO-2659." In the summary section of its reconsideration submissions, the FEEDTC provides additional arguments respecting the repeal of Regulation 372/91, including asserting that the "legislative scheme is now exclusive and the chief argument which prevailed for finding the FEEDTC an institution is now gone." The FEEDTC submits that "the legislature does not now intend to have these [economic development] corporations considered 'institutions' for the purposes of the Act."

[38] Regarding the nominating or authorizing of an individual to act as an incorporator, which forms part of the analysis under section 20 of Regulation 599/06,<sup>16</sup> the FEEDTC submits that it:

... was not incorporated pursuant to the provisions of s. 109 of the *Municipal Act*. ... [T]he corporation's directors were not nominated pursuant to the provisions of s. 109(7) of that *Act*.<sup>17</sup> Finally it is respectfully pointed out that the EDTC directors, who have two Council members, are directors by operation of the bylaws of the EDTC and the agreement for services with the Town<sup>18</sup> and not by virtue of any municipal bylaw.

[39] During the initial inquiry, the appellant provided audited financial statements for the FEEDTC (year ending December 31, 2008). In Order MO-2659, I acknowledged that the statements were marked confidential, but set out general information provided in the Notes to the Financial Statements, including reference therein to the FEEDTC as a 'municipal services corporation'.<sup>19</sup>

[40] In her reconsideration representations, the appellant submits that a review of information available from the FEEDTC's 2013 Budget Presentation to Council<sup>20</sup> "clearly show[s] that the FEEDTC provides administrative services to the Town of Fort Erie." She highlights the following information from the budget presentation:

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<sup>16</sup> See Order MO-2419 (pages 13-14) and Order MO-2418 (pages 12-13).

<sup>17</sup> This submission relates to the finding in Order MO-2659 under section 1(1)4 of O. Reg 372/91, now revoked, that reviewed section 109 of the *Municipal Act, 2001* (also not in force; repealed 2006, c. 32, Sched. A, s. 50). See analysis at pages 13-14.

<sup>18</sup> I take this to be a reference to the Memorandum of Agreement between the town and the FEEDTC, which was signed in September 1994.

<sup>19</sup> Reference to these audited statements appears in Order MO-2659 at page 10.

<sup>20</sup> Available online: [www.forterie.ca/WebSite](http://www.forterie.ca/WebSite); accessed June 17, 2013.

- under the heading Tourism Sector Strategy, “continue to manage the finances and administration of the Town funding of the Fort Erie 1812 Bicentennial Planning Coordinator (as required by the Town of Fort Erie) [page 20];”
- regarding the “1812 Bicentennial Planning Coordinator,” the FEEDTC has, since 2009, “at the request of the Town of Fort Erie, ... provided ongoing financial and administrative oversight of the Fort Erie 1812 Bicentennial Planning Coordinator budget,” including the provision of recruitment and hiring services.
- regarding the FEEDTC’s Reserve Replenishment request, the document states in part: “... For the Town of Fort Erie, having an Economic Development ‘Corporation’ is a significant competitive advantage (over maintaining an economic development ‘department’ within the confines of the Municipal structure)...”.
- The FEEDTC’s general manager is a member of the town’s senior management team and attends regular/monthly meetings on town issues and business issues.<sup>21</sup>

[41] The appellant mentions that the FEEDTC has taken over management of the race track by creating a not-for-profit consortium, and notes that the FEEDTC’s general manager has assumed the role of Chief Administrative Officer. According to the appellant, the town has committed to giving the consortium \$500,000/year for three years. With the appellant’s initial representations was an excerpt from the FEEDTC’s 2010 budget submissions (to the town), which refers to the “Save the Fort Erie Race Track” campaign as “yet another example of how the EDTC came to the aid of the Town in our shared vision and common goals.”

[42] The appellant also submits that “as per the municipal act [sic] there are two elected council representatives that sit/were appointed to the [FEEDTC] board” and the *Act* should therefore apply. The appellant summarizes her position by stating that the FEEDTC provides administrative services to the town, cannot provide services to any other entity; works solely for the town and town purposes; and if the FEEDTC is dissolved, its assets revert back to the town as determined by the memorandum of agreement between the town and the FEEDTC, which the latter cannot change.

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<sup>21</sup> “2012: the Year in Review – The EDTC Commitment to Council” from 2013 FEEDTC Budget Presentation to Council, at page 17.

### ***Analysis and findings***

[43] In reaching my decision regarding the “deeming” of the FEEDTC to be an institution under Ontario Regulation 599/06 (*Municipal Act, 2001*), I have considered the FEEDTC’s structure, mandate, objectives and functions, as this information is set out in the documentation and representations provided to me, as well as information that is publicly available.

[44] By-Law No. 125-94 of the Municipal Corporation of the Town of Fort Erie authorized the mayor and town clerk to execute – on the town’s behalf - the Memorandum of Agreement between the town and the FEEDTC, dated September 29, 1994. The 1994 Memorandum of Agreement outlines the terms of the delivery of “community economic development services” by the EDC (the predecessor corporation of the FEEDTC) in exchange for financial assistance from the town. Section 1 of the agreement between the town and the FEEDTC provides that:

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.

[45] According to the website, the FEEDTC’s mandate include: “business development, property acquisition and development, development policies and relevant economic analysis.” Further, the FEEDTC achieves its economic development mandate by, among other things, “acting as advisers to the Town of Fort Erie, the Mayor and Council on important community and business developments.”<sup>22</sup>

[46] The FEEDTC’s website also indicates that it: promotes Fort Erie in the international marketplace, and as a vacation destination; co-ordinates local economic development efforts, and tourism initiatives; advises companies and individuals interested in relocating to Fort Erie; and researches local land availability, market trends and business opportunities.”<sup>23</sup>

[47] Pointing to the absence of a definition of “administrative services” in Ontario Regulation 599/06 and the *Municipal Act, 2001*, the FEEDTC urges me to adopt a plain language meaning of the term, relating to the overall managing of the municipality, and to find accordingly that FEEDTC does not provide these types of services. In Orders MO-2418 and MO-2419, however, Senior Adjudicator Higgins turned to the *Concise Oxford Dictionary* for assistance in settling on the definition of the term, as follows:

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<sup>22</sup> [www.forteriecanada.com/edtc\\_services /staffandboard.shtml](http://www.forteriecanada.com/edtc_services /staffandboard.shtml); retrieved December 6, 2012.

<sup>23</sup> [www.forteriecanada.com/edtc\\_services /index.shtml](http://www.forteriecanada.com/edtc_services /index.shtml); retrieved on June 6, 2013.

"Administration" means "Management (of business); management of public affairs, government; ...," and "administrative" means "[p]ertaining to management of affairs."<sup>24</sup>

[48] Relevant to the finding by the senior adjudicator in both of these orders was the provision of management or promotional services for various local attractions or ventures by the economic development corporations.<sup>25</sup> I adopt this definition, and I agree with the approach taken to its contextual consideration in Orders MO-2418 and MO-2419. The following passage appears in the Tourism Development section of the FEEDTC's website:

While Fort Erie is home to a number of tourism attractors, including the 115 year old Fort Erie Race Track, Safari Niagara, Historic Fort Erie (or "the Olde Fort" as local [sic] call it), Crystal/Bay beach, Downtown Ridgeway and numerous local festivals, it is the job of the Fort Erie Economic Development & Tourism Corporation (EDTC) to encourage the ongoing development of these existing attractors and spur on the development of new and exciting tourism generators in Fort Erie.<sup>26</sup>

[49] Further, the evidence before me is that the FEEDTC is responsible for the management of the race track consortium; in particular, the general manager of the FEEDTC acts as the consortium's Chief Administrative Officer and, as such, is responsible for the administrative management of the race track.

[50] Records provided to the appellant by the FEEDTC consequent to Order MO-2659 (in November 2011) included a table titled [FEEDTC] Expenditures >\$5,000 for the years 2008, 2009 and 2010, under two categories: "EDTC Budget/Business (Funds provided by the Town of Fort Erie Through Annual Budgeting Process)" and "Partnerships." According to the table, the town provided funding to the FEEDTC in each of the three years for the printing and local distribution of the Fort Erie Visitor's Guide, as well as for its provincial distribution. These funds were paid to third party contractors by the FEEDTC. One of the partnerships entered into by the FEEDTC was with the Fort Erie War of 1812 Bicentennial Committee, through which the FEEDTC acted as "administrative and financial facilitation body at the request of the Town of Fort Erie" in relation to, for example, the 1812 Coordinator position.

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<sup>24</sup> *Concise Oxford Dictionary*, 6th ed., Oxford: Clarendon Press, 1976, at p. 14 (page 11 of Order MO-2418 and page 10 of Order MO-2419).

<sup>25</sup> In Order MO-2418, for example, the senior adjudicator noted that the CACDC managed the Polar Bear Habitat and Heritage Village.

<sup>26</sup> <http://www.forteriecanada.com/tourism/tourismdev.shtml>.

[51] With respect to the FEEDTC's attempt to distinguish between administrative and economic development services by reference to section 9(4) of Regulation 599/06, made under the *Municipal Act, 2001*, I note that section 9(1), states by way of introduction, that:

If a municipality establishes a corporation for the sole purpose of providing one or more economic development services, the municipality may also designate the corporation as a designated economic development corporation.

[52] There is no evidence before me that the town established the FEEDTC for the *sole purpose* of economic development; in fact, the evidence in the 1992 incorporation documents and the 1994 Memorandum of Agreement suggests otherwise. The FEEDTC does not contend that the town designated the FEEDTC an "economic development corporation," and I find no evidence that this designation was made. Further, it has not been argued that the effect of section 9 would be to render section 20 (respecting municipal services corporations) inoperable, even if both provisions were found to apply to the FEEDTC. Given the lack of evidence that the FEEDTC was designated under section 9 of Ontario Regulation 599/06 or that its operation precludes the application of section 20, I find that section 9 does not assist the FEEDTC in establishing that it provides economic, rather than administrative, services to the town.

[53] Rather, I am satisfied that the FEEDTC's activities and services, which include tourism promotion, venture coordination and business development services, amount to the management of public affairs by the FEEDTC. I also find that it provides these services to the public on the town's behalf, often with funding provided by the town, and that at least some of these services are ones the town itself could provide. Accordingly, given my finding that the FEEDTC provides administrative services to the town, I find that the substantive requirement of section 20 of Ontario Regulation 599/06 is met.

[54] Section 2(3) of Ontario Regulation 599/06 limits the application of sections 17-22, including section 20, under which the FEEDTC could be "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.

[55] Therefore, section 20 would apply to deem a corporation an institution under the *Act* if its requirements are met (as I have already concluded) and *if* I am also satisfied that the town uses or expects to use one of the powers enumerated in the section in relation to the corporation. In Order MO-2419, Senior Adjudicator Higgins outlined the possibilities as follows (at page 13):



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."

[56] Given the FEEDTC's incorporation (or that of its predecessor) in 1992, long before the enactment of the *Municipal Act, 2001* and section 203(1) mentioned in section 3 of Ontario Regulation 599/06, I find that the power referred to in section 3 of the regulation was not used nor can its use be expected. Similarly, the power to nominate or appoint members of the corporation for the purpose of section 4(3) of Regulation 599/06 (i.e., under section 203(1)3 of the *Municipal Act, 2001*) does not rest with the town, nor was the FEEDTC established by a "public sector entity" as section 4(3) requires. Given this latter point, the powers in sections 203(1)4 and 5 to deal with securities of the corporation "established by a public sector entity" as contemplated by section 5(1) of the Regulation are also not used or expected to be used.

[57] However, based on the evidence, I am satisfied that the power referred to in section 203(1)2 to "nominate or authorize a person to act as an incorporator" has been used. Regarding the mayor's role in incorporation in 1992, I said this at paragraph 42 of Order MO-2659 (in relation to my finding under Ontario Regulation 372/91):

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*.

[58] On a fresh review of the Resolution of Council passed on April 6, 1992 to establish an Economic Development Implementation Team,<sup>27</sup> I noted that the team consisted of the Mayor (ex-officio), three named municipal councillors, the CAO and Director of Planning and Building. Further, two of the individuals listed on the application for incorporation (November 26, 1992) as first directors for the FEEDTC sat on the Economic Development Implementation Team: not only the mayor, as previously

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<sup>27</sup> This town council resolution was available to me at the time I wrote Order MO-2659, as it had been provided in the initial representations of the FEEDTC in December 2010.

identified, but also one of three councillors. This same councillor's name appears in the 1993 Rules of Procedure By-Law of the FEEDTC.<sup>28</sup>

[59] Remarking on a similar confluence of factors that included the mayor and city solicitor appearing as incorporators of the Sault Ste. Marie EDC, Senior Adjudicator Higgins stated, "it is inconceivable that they acted without authority."<sup>29</sup> I agree. In the present appeal, given the appointment of the mayor and the town councillor to the Economic Development Implementation Team by resolution of the town council and the subsequent appearance of the same individuals on the incorporation application approximately seven months later in 1992, it would be equally inconceivable that the mayor and councillor acted without authority in this situation. I therefore conclude that these two individuals qualify as having been "nominated" by the town to do so as contemplated in section 203(1)2 and, consequently, section 4(2) of Regulation 599/06.

[60] The former senior adjudicator addressed the fact that section 203(1) of the *Municipal Act, 2001* did not exist at the time the economic development corporations in Orders MO-2418 and MO-2419 were incorporated, as is the case here. He stated:

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.

[61] These "pre-existing statutes" were not found to be relevant in the circumstances of those appeals, and I am satisfied that they are not relevant in this appeal. In the circumstances, therefore, I conclude that section 2(3) of Regulation 599/06 does not preclude the operation of section 20. Accordingly, because the FEEDTC provides "administrative services" to the town, I find that it is "deemed" to be an institution under the *Act*.

[62] I acknowledge, as Senior Adjudicator Higgins did in Orders MO-2418 and MO-2419, that the "web of legislative and regulatory provisions that must be considered in making the determination under Regulation 599/06 is confusing." However, I agree with his comments respecting the Ontario Court of Appeal decision in *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario*<sup>30</sup> to the effect that technicalities ought not to be relied upon to exclude corporations of the kind under consideration here from the reach of freedom of information legislation. In the closing section of Order MO-2419, Senior Adjudicator Higgins stated (at page 14):

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<sup>28</sup> Various amendments to the by-law, located at Tab 3 of the FEEDTC's December 2010 representations are recorded as being "Moved by" this individual: see sections 4.01.03, 8.01, 11.01, 12.01.2, and 22.03.

<sup>29</sup> Order MO-2419, at page 13.

<sup>30</sup> [2008] O.J. No. 1799 (Ont. C.A.) (*TEDCO*).

... In [TEDCO], 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." 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*.

[63] In this context, I reject the FEEDTC's argument that the legislative scheme is now exclusive and that the repeal of Ontario Regulation 372/91 signals an intent on the part of the legislature to exclude all such economic development corporations from the reach of the public right of access under the *Act* to information in their custody or control.

**ORDER:**

I confirm my previous order, in Order MO-2659, that the FEEDTC is required to issue an access decision to the appellant in accordance with the *Act*.

Original Signed by: \_\_\_\_\_  
Daphne Loukidelis  
Adjudicator

\_\_\_\_\_ June 24, 2013