

## GOVERNMENT UPDATE

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### Public Peephole into Municipal Affairs is Widening

*The Ontario Court of Appeal has expanded public access to information to include the business activities of a municipally-owned corporation.*

*By George H. Rust-D'Eye*

The last few years have seen significant decisions and actions by both the Ontario Legislature and the Courts in strengthening local government powers, while at the same time bringing the transaction of municipal business under the increasingly brighter light of public scrutiny.

This public scrutiny has widened further with the recent decision of the Ontario Court of Appeal in *City of Toronto Economic Development Corporation ("TEDCO") v. Information and Privacy Commissioner/Ontario et al.*, (May 8, 2008).

In that decision, the Court ruled that the Municipal Freedom of Information and Protection of Privacy Act ("MFIPPA") applies to TEDCO – a business incorporated by the City of Toronto under the Business Corporations Act ("OCA") and wholly-owned by the City of Toronto.

The Divisional Court described the relationship between the City of Toronto and TEDCO in the following terms:

"In its business operations, TEDCO manages and pursues industrial development of its real property in the course of which it may buy, sell, lease and otherwise deal in its real property. Those dealing with TEDCO have a reasonable expectation of confidentiality in their business dealings with respect to those properties.

The transactions of TEDCO are not subject to approval by the City or City Council. TEDCO is not an agent of the City or of City Council...."

At the time of the legal proceedings, TEDCO owned more than 400 acres of real property in the Toronto Port Lands, transferred to TEDCO by the Toronto Harbour Commissioners. Showline Limited, in May, 2004, applied to TEDCO and the City, for access to TEDCO documents relating to its "Mega Studio Project" in the Port Lands.

Showline Limited believed it had a right to this information based on the stated purpose of MFIPPA:

"To provide a right of access to information under the control of [municipalities] in accordance with the principles that information should be available to the public, and necessary exemptions from the right of access should be limited and specific...".

Both TEDCO and the City refused the request, on the basis that TEDCO is not an institution to which MFIPPA applies, and its records were not in the custody or control of the City, nor subject to the Act. Neither statute law nor the Province's Regulation designating agencies of the City to which MFIPPA applies, specifically include TEDCO as subject to MFIPPA.

The Information and Privacy Commissioner adjudicator held that TEDCO is subject to MFIPPA, on the basis of subsection 2(3) of the Act, which deems a corporation to be part of a municipality “if all of its... officers are appointed or chosen by or under the authority of the council of the municipality.” The adjudicator found that the directors of TEDCO fall within the meaning of “officers”.

In TEDCO’s application for judicial review, the Divisional Court overruled the adjudicator’s decision, the majority of the Court holding that “directors” are not “officers” of a corporation in the context of s.s. 2(3) of MFIPPA, on the basis that definitions in the OBCA of “officer” and “director”, apply with respect to a corporation incorporated under that statute.

The Court noted that there was no evidence before the adjudicator or the Court that City Council had exercised any actual “authority” over the appointment of TEDCO officers, nor that it had statutory or judicial authority to do so.

### CITY-OWNER COMPANY CAUGHT BY MFIPPA

In overturning this decision, the Court of Appeal cited the modern approach

to statutory interpretation, the purposes of MFIPPA, and the Interpretation Act, in reinstating, on different grounds, the adjudicator’s conclusion that “all of TEDCO’s officers are ‘appointed or chosen by or under the authority of the Council of the municipality’ within the meaning of Section 2(3) of the Act.”

The Court of Appeal held that in substance, City Council had delegated appointment power to TEDCO’s Board of Directors, and thus the appointment of officers was effected “under the authority” of City Council. The Court held that “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.”

### POTENTIAL FOR GREATER SCRUTINY

Aside from the direct result of its decision, that TEDCO is subject to MFIPPA, the Court has sent a clear signal that it is prepared to give effect to the stated objectives of MFIPPA in providing public access to information involving municipal bodies, even a business corporation created for the purpose of conducting property and

industrial operations in the marketplace. For municipalities and the corporations they own, the TEDCO decision will mean the need for greater awareness of the increased public scrutiny that may apply to their business activities.

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